Rule 9 DAIG Council

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SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the disability appeal tribunal is erroneous in point of law and accordingly I set it aside; I remit the case for determination to a new disability appeal tribunal who should have regard to what I have said in the course of this decision.

2. I held an oral hearing of this appeal. The claimant was represented by Mr F. Campbell of the Civil and Public Services Association and Miss Susan Spence from the Solicitor's Office in the Department of Social Security was for the Secretary of State.

3. This is a claimant's appeal against the decision of the Exeter disability appeal tribunal given on 27 April 1992 which decided that the claimant was not entitled to mobility allowance.

4. On 21 October 1988 a claim for mobility allowance was received by the Secretary of State and on 22 November 1988 the claimant was examined by a medical practitioner. In the light of his report the adjudication officer decided that the claimant was not unable to walk or virtually unable to do so because of physical disablement. The claimant then appealed to a medical board and on 12 April 1989 he was examined by a medical board who diagnosed his basic disorder as mild degenerative disease of the spine but who decided that the claimant was not unable to walk or virtually unable to do so because of physical disablement. The members of the medical board saw the claimant walk 150 yards in a total time of four minutes. They noted that his pace was at half of the normal speed and that there was distress which appeared emotional rather than physical. Their clinical findings did not show any organic reason or any gross limitation of his walking ability. The claimant appealed against that decision to a medical appeal tribunal.

5. I now turn to the facts. The claimant was involved in a

road accident in 1961. In 1977 he bumped his head on the frame of a fire door and in 1982 he pulled a toilet chain and the cistern fell on his head. I note from the papers that there had been earlier incapacity in respect of a slipped disc and concussion in 1956. The claimant experiences walking difficulties and, while the disability appeal tribunal made no specific findings as to these, they said that they had no reason to doubt that they existed. The claimant was examined by Mr Jameson-Evans, a consultant orthopaedic surgeon, on 19 June 1989. He expressed the view that the claimant's difficulties were not particularly related to any of the accidents which he had sustained but related to a disease process which could be Forrestiere's disease or generalised and fairly marked degenerative disease of the spine.

6. As I have said the claimant appealed to a medical appeal tribunal against the decision of the medical board. His appeal was heard on 23 April 1990 by a medical appeal tribunal who found that he did not satisfy the medical conditions for an award of mobility allowance. However that decision was set aside by a medical appeal tribunal under the provisions of regulation 11 of the Social Security (Adjudication) Regulations 1986 on 2 January 1991. The claimant's appeal was set down thereafter for hearing before a disability appeal tribunal. It is accepted by Mr Campbell that the relevant procedure was followed and that the case was properly before the disability appeal tribunal.

7. At the hearing, on 27 April 1992, the claimant relied on the medical report from Mr Jameson-Evans. There was also placed before the tribunal a report from Dr Gardner-Thorpe, a consultant neurologist, who had treated the claimant since 1983 and who had examined him immediately prior to the hearing. He found that the movement of the whole spine, including the neck, was slow and limited partially by pain and stiffness. He also referred to a functional overlay and dealt with a history of depression. In his opinion the claimant's illness had been investigated very thoroughly and signs of organic disease had not been demonstrated to any great extent although there was evidence of disc disease in the neck. He also dealt with the question of fatigue syndrome, and I set out what he said:

> "I believe Mr Baker has a fatigue syndrome, the cause of which is not clear, and that it is impeding his general everyday activities. The description of his difficulty with mobility and the limits of the activity in which he can engage have been described by him clearly and I do not see any reason to disbelieve these. I do not have separate evidence upon which to base this opinion. For example, I have not seen reports from others who have observed him and I have not seen reports from work.
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> It does appear that Mr Baker has an unexplained fatigue syndrome and since an obvious cause for this has not been demonstrated I cannot exclude the possibility that his mobility will deteriorate further.

He may require further investigation of his problems in due course and it is possible that the immunological problems will require further investigation in the future. The cause of his fatigue syndrome may be demonstrated to be due to an immunological problem, ill-defined and ill-understood at present". (Mr Baker is the claimant).

The tribunal found that the claimant's walking difficulties did not arise from physical disablement. They noted the opinion of Mr Jameson-Evans and the report from Dr Gardner-Thorpe. They then went on to say:

"3. On the basis of these documents Tribunal further find that in relation to the earlier Medical Board's diagnosis that Mr Baker's problem was "mild degenerative disease of the spine", Tribunal in fact preferred the opinion given by Dr Gardner-Thorpe, ie that Mr Baker's problems arose from "fatigue syndrome" these rather than any particular or specific physical disability causing his difficulty in walking. Tribunal reached this finding on the balance of probabilities.

4. Accordingly, Tribunal further find that, in relation to Section 37A(1) of the Social Security Act 1975 Mr Baker is not entitled to Mobility Allowance, following his claim of 21 October 1988, because his difficulties, accepted, with regard to his ability to walk do not in fact arise from any specific physical disablement."

Leave to appeal was granted by the chairman of the tribunal.

8. It is a requirement of section 37A of the Social Security Act 1975 that the inability to walk must result from physical disablement; and the tribunal in the instant case refused the claim on the ground that the claimant's inability to walk, which they appear to have accepted, had a mental cause and not a physical one. The adjudication officer, who made observations on behalf of the Secretary of State on the claimant's appeal to the Commissioner, submitted that it was for the disability appeal tribunal alone to decide the medical question set for their determination. He went on to argue that a disability appeal tribunal is entitled to rely on its own observations and expert judgment in reaching conclusions of fact and is free to decide which, if any, of the medical opinions before them they chose to accept. He relied on R v Medical Appeal Tribunal, ex parte Hubble (1958) 2 All ER 374. Miss Spence resiles from that submission and accepts that the concept of an expert body is not applicable where the case has heard by a disability appeal tribunal. I remind myself of the words of Lord Diplock, then Diplock J, as used in Hubble at 380:

"As an expert investigating body it is the right and duty of the medical board to use their own expertise in deciding the medical questions referred to them, they may, if they think fit, make their own examination of the claimant and consider any other facts material to enable them to reach

> their expert conclusion as doctors do in diagnosis and prognosis of the case of an ordinary patient. Just as it is "the case" of the claimant which is to be referred to the medical board is section 39(1), so also it is "the case of the claimant which is to be referred to the medical appeal tribunal under section 39(2) and (3)."

He went on to say that the medical appeal tribunal was another presumably more highly qualified expert investigating body than the medical board. But all that analysis related to medical boards, which consisted of two medical practitioners, and medical appeal tribunals, where two of the three members were medical men, indeed medical men of consultant status.

9. A disability appeal tribunal is not a specialist tribunal in the sense a medical appeal tribunal is, and the members do not have the expertise which the members of a medical appeal tribunal bring to the cases before them. Section 43 of the Social Security Administration Act 1992 provides for the constitution of disability appeal tribunals. Such a body is to consist of a chairman and two other persons. One of the members is to be appointed from a panel of medical practitioners; the other is to be appointed from a panel of persons who are experienced in dealing with the needs of disabled persons, whether in a professional or voluntary capacity or because they are themselves disabled. The chairman is a lawyer. While disability appeal tribunals adjudicate on medical questions, they do not do so with the medical expertise of a medical appeal tribunal. It is true that one of the members is a medical practitioner, but he is in a minority. Section 55 of the Social Security Administration Act 1992 provides that a disability appeal tribunal is not to carry out a physical examination of a claimant; and further that they cannot require a claimant to undergo a physical test for the purpose of determining whether he satisfies the conditions mentioned in section 73(1)(a) of the Social Security Contributions and Benefits Act 1992, so in mobility component cases they are unable to carry out a walking test in order to ascertain whether he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so. It is clear that the medical member is intended to use his specialist knowledge in interpreting the evidence which the tribunal has heard. He is not there as a substitute for evidence. He is precluded from conducting a walking test or making a medical examination of the claimant. I may put it this way, he is an expert juryman rather than an expert witness. Consequently when a disability appeal tribunal deals with a medical question the members must approach it in the same way as the statutory authorities do and not as the adjudicating medical authorities do. Consequently CI/83/89 and the cases to a like purport, which relates to the giving of reasons, do not in my judgment apply to disability appeal tribunals. The Commissioners in those cases based this reasoning on the expertise of the medical appeal tribunal. With regard to what disability appeal tribunals have to do, I feel I cannot do better than to quote the words of Lord Reed in Jones v The Secretary of State, (1972) 1 All E.R. 150:

" ... statutory tribunals have to consider and determine just as difficult medical questions as those which the respondent maintains are reserved for medical tribunals in disablement cases. They do it as courts of law do it: they receive medical evidence or reports and adjudicate on them."

The disability appeal tribunal has to decide the case on the material presented to the members and they have therefore to decide on the balance of probabilities which of conflicting medical opinions is correct. The members have to evaluate the evidence of the doctors and make up their minds what evidence to accept and what to reject. No doubt their task is made somewhat easier because one of the members has specialised knowledge which assists in interpreting the medical material before them. However, if he adds to the evidence he must do so at the actual hearing, see CS/142/91, so as the parties may comment.

10. That is not the end of the matter. Regulation 26E of the Social Security (Adjudication) Regulations provides that the chairman of a disability appeal tribunal shall record a statement of the reasons for the decision and of the findings on all questions of fact material to the decision. In R(SB) 6/81 and R(SB) 11/82 the general test of the adequacy of reasons given by social security appeal tribunals is set out, those decisions adopted the guidance as to the adequacy of reasons given by the Commissioner in R(A) 1/72 namely " ... the minimum requirement must at least be that the claimant looking at the decision should be able to discern on the face of it reasons why the evidence failed to satisfy the authority". This test has been adopted in respect of other statutory authorities and in my judgment it is equally applicable when considering regulation 26E(5). Where the disability appeal tribunal decides that one of the conflicting medical opinions is to be preferred to the other, then it should say why it prefers such opinion. In the majority of cases it will not place any great burden on the members of the tribunal. In some cases there will be unreliable evidence, in others the medical opinion will be corroborated by the claimant's evidence as to his symptoms. Again the tribunal may prefer the evidence of a general practitioner who has treated the claimant over many years, in others it may prefer the opinion of a specialist who is skilled in the condition from which the claimant suffers. They may attach little weight to a terse certificate from a general practitioner. The reasons which the tribunal are required to record depends on the circumstances of the case. The reasons may be brief. However where the medical evidence submitted on behalf of the claimant has been rejected it is necessary for the tribunal to give some reason for its rejection. In my judgment that requirement is important in order to enable a claimant to understand why it is that the decision has gone against him. The case before me demonstrates the need for a tribunal to say why it preferred one medical report to another. Both reports were prepared by consultants. One expressed the opinion that the claimant's illness arose from a physical disability, the other said that his problems arose from fatigue syndrome. As the tribunal did not say why they preferred the

report of the consultant physician, it is impossible for the claimant to discern on the face of their decision the reasons why the evidence which he advanced failed to satisfy them. In my judgment the chairman of the disability appeal tribunal failed to comply with the provisions of regulation 26E of the Social Security (Adjudication) Regulations.

11. There was a further error. Manifestly the tribunal failed to make a proper evaluation of Dr Gardner-Thorpe's report. The doctor referred to immunological problems and he appears to have stated that there may be a physical basis for such problems.

(Signed) J J Skinner
Commissioner

Date: 7 April 1993