Rate of DATs — Obligation to give reasons — Decision Must Cover Whole Claim Period — CM/361/92 Disapproved

45/94

Commissioner's File: CM/527/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR MOBILITY ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Wolverhampton disability appeal tribunal dated 15 May 1992 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to a differently constituted disability appeal tribunal for determination in accordance with the directions given in paragraph 7 below (Social Security Administration Act 1992, sections 23(7)(b) and 34(4)).

2. This is an appeal, with leave granted by the appeal tribunal chairman, from the decision of the appeal tribunal that the claimant "does not satisfy the medical conditions for Mobility Allowance. He is neither unable to walk nor virtually unable to walk nor is the exertion of walking harmful to him." The appeal tribunal's findings of fact were recorded as follows:

> "The appellant was in receipt of Mobility Allowance from 14.04.89 to 13.04.90. For some 4 years the appellant has had difficulty with walking which produces a feeling of dis-equilibriuum. He suffers from light headedness and nausea. He has to avoid bending and sudden movements and moves around by keeping head and body

still and by moving slowly. He does have a wheelchair. He was able to travel by car, he can as he puts it hobble up steps if he has got to do so and in fact does not walk further than the return trip to the bottom of his garden. He has not suffered from any broken bones and although he has stumbled at home, he has not actually fallen. He does not have treatment for the dizziness. The fear of the dizziness has resulted in the appellant limited his activities."

Its reasons for decision were recorded as follows:

"Although we have taken very careful note of all that the appellant has told us in his evidence, we do have the advantage of having before us the very full report of Dr.Nightingale dated 05.03.92. The contents of that report are really not disputed by the appellant save to say that he did not accept that he was fearful but rather careful in his walking.

We should emphasize that although we have seen reference in the papers to the possibility of a psychiatric condition as the basis of the appellant's problems, this is a suggestion which we totally discard.

The appellant does fear falling as a result of his dis-equilibrium but he has not in fact fallen. His fear of falling does, however, cause him to limit his activities. Although the appellant took issue over the use of the word fearful in Dr.Nightingale's report, we do not feel that there is a great deal to choose between that and the word "careful" in the particular context.

Dr.Nightingale's report is full and helpful. He does indicate that the appellant's condition has shown improvement and expresses the hope that there will be further improvement yet.

Having carefully considered the matter, we have concluded that the appellant is not virtually unable to walk bearing in mind the fact as specified in Regulations 3(1)(b) Social Security Mobility Allowance Regulations. It is not suggested in this case that the exertion of walking would be harmful to the appellant."

3. In the application for leave to appeal the claimant's representative submitted that the appeal tribunal had failed to explain why the evidence in the claimant's favour did not satisfy it, had made no findings on the claimant's walking ability per se, merely stating the conclusion that the claimant was not virtually unable to walk, and had not explained the reasons for its conclusion. The final submission on behalf of the Secretary of State, dated 20 July 1993, was that the appeal tribunal had not related the claimant's walking ability to the findings in Mr. Nightingale's report, had not made findings on the material facts bearing on the claimant's ability to walk

arising under regulation 3 of the Mobility Allowance Regulations 1975, as required by CSM/75/1992, and had not explained why the views of the examining medical practitioner and of the claimant's GP were rejected.

4. I accept those submissions. In addition, the appeal tribunal did not relate its decision to any particular dates. The claim under consideration ran from 14 April 1990. The whole period from that date down to the date of the appeal tribunal's decision was in issue. Its decision set out in box 3 of form DAT28 was expressed in the present tense, and did not deal specifically with any period earlier than the date of its decision. It is not possible to infer from what was recorded in boxes 2 and 4 of form DAT28 that the appeal tribunal found the claimant's condition to have been constant, so that the decision applied to the whole period, because the appeal tribunal made a point of mentioning Mr. Nightingale's opinion that the claimant's walking ability had improved. The reason why the Court of Appeal in Kitchen and others v Secetary of State for Social Security (30 July 1993) found that the medical appeal tribunal decisions on mobility allowance before it were erroneous in point of law was that the decisions did not set out and answer the various questions which the Mobility Allowance Regulations 1975 required them to address. In particular, the decisions did not deal with the dates to which the findings were related. The obligation in that respect on disability appeal tribunals can be no lower.

5. That reason would be sufficient on its own to require me to set the appeal tribunal's decision aside. Therefore I have not gone into the somewhat complicated history of the claim which was before the appeal tribunal or some of the other complaints made by the claimant. Nor shall I go into any detail in relation to the submissions made on behalf of the claimant by his representative and on behalf of the Secretary of State. Suffice it to say that I adopt the approach of the Commissioners in decisions CM/406/1992, to be reported as R(M) 1/93, and CSM/75/1992. I note that in paragraph 10 of CM/406/1992 the Commissioner applies to the obligations of disability appeal tribunals under regulation 26E(5) of the Social Security (Adjudication) Regulations 1986 the test set out in R(A) 1/72, that the minimum requirement as to the adequacy of reasons to be given by an appeal tribunal is "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." The Commissioner goes on to hold that where medical evidence submitted on behalf of the claimant has been rejected it is necessary for the appeal tribunal to give some reason for its rejection, or for preferring one medical report to another. As another Commissioner remarked in paragraph 7 of CSM/75/1992, those observations "were of course made with particular reference to a case involving conflicting medical opinions but a similar approach is in my view required in relation to other conflicts of evidence before disability appeal tribunals." In my view, that must be right, as must the further observation in paragraph 8 of CSM/75/1992 that where "a specific contention is put forward by a claimant ... the tribunal should make clear that is has been taken into account." That is an expression of the principle accepted at least since the decision in R(I) 18/61 (paragraph 13) in relation to medical appeal tribunals that "where some

specific contention addressed to the tribunal has been rejected it would certainly be necessary for the tribunal to give reasons for its rejection." Once again, the obligation on disability appeal tribunals can be no lower. If there is any inconsistency between the approach summarised above and the approach taken in Commissioner's decision CM/361/1992, I prefer not to follow the approach of CM/361/1992.

6. The one reservation I would express about what is said in CM/406/1992 relates to the description of the medical practitioner member of a disability appeal tribunal as "an expert juryman". It is incontrovertible that a disability appeal tribunal is not a specialist or expert tribunal in the same sense as a medical appeal tribunal is. Since disability appeal tribunals are not permitted to carry out their own physical examinations or to require the claimant to undergo a walking test (Social Security Administration Act 1992, section 55(2)), their members may use any specialist knowledge only in assessing the evidence before the appeal tribunal, in the same way as members of social security appeal tribunals, and not as evidence in itself unless it is put forward during the hearing (see CS/142/1991, to be reported as R(S)1/94). However, to describe the medical practitioner member as no more than "an expert juryman" seems to me to be misleading. It ignores the role that the members of an appeal tribunal with an inquisitorial jurisdiction have in drawing out evidence from the claimant and from other witnesses on relevant issues. The taking of a history from a patient is a matter of considerable medical expertise, and the medical practitioner member of a disability appeal tribunal may by skilled questioning be able to elicit valuable evidence from the claimant over and above what is expressed in written medical reports from others. That is going far beyond the role of a juryman. The specialist medical knowledge of the medical practitioner member may then be used by the appeal tribunal as a whole in interpreting the significance or assessing the weight of the evidence given by the claimant. Such evidence may, depending on the circumstances, tend to confirm the opinions expressed in written medical reports, with which the claimant disagrees, or tend to support the claimant's view against the opinions in written medical reports. Where, for instance, the appeal tribunal prefers one element of a claimant's evidence to another, or finds an element of the claimant's evidence inconsistent with the case being put forward in the appeal, or prefers some element of the claimant's evidence to evidence from other sources, it should say why in giving its reasons for decision. The degree of detail needed will depend on the circumstances. Consequently, I disagree with the views expressed in pararaph 4 of CM/361/1992 that where a disability appeal tribunal has "the benefit of medical reports on the claimant's walking capacity, it would ... be very unusual for them to depart from the conclusion of the medical authorities as to the claimant's walking capacity" and that "as the tribunal cannot themselves test the claimant's walking capacity, normally they are in no position to give proper weight to further evidence presented to them by the claimant."

7. I set aside the decision of the disability appeal tribunal dated 15 May 1992 as erroneous in point of law and refer the appeal to a differently constituted disability appeal tribunal for determination. There must be a

complete rehearing at which all issues of fact and judgment will be open on the evidence presented and the submissions made to thhe new appeal tribunal. The new appeal tribunal must take care to deal with the question of whether the claimant satisfies the medical conditions for entitlement to mobility allowance for the whole period in issue. It must also take into account the matters mentioned in paragraphs 3, 5 and 6 above in coming to and recording its decision, but it is not appropriate for me to give any directions on the central question of whether the claimant does satisfy the medical conditions for all or any part of the period in issue. That is entirely a matter for the new appeal tribunal. Depending on the view it takes of the facts, the new appeal tribunal may find R(M) 1/88 and the subsequent decision of the Court of Appeal in Harrison v Secretary of State for Social Services (appendix to R(M) 1/88) helpful on the question of when the limitations on a claimant's walking ability may be said to result from a physical disablement.

J. Mesher
Commissioner

10 May 1994