APPEAL FROM DECISION OF MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

Mobility Allowance—adequacy of tribunal's reasons for decision—capacity to benefit from enhanced facilities for locomotion.

The claimant was an epileptic child who was grossly mentally handicapped, incapable of speech, possessed of poor eyesight and completely oblivious of danger. In consequence she required the constant attendance of an adult. A medical appeal tribunal, on consideration of her claim to a mobility allowance, found her gait, though haphazard, to be satisfactory and concluded that she was neither unable nor virtually unable to walk. In addition the tribunal added that even if the claimant had satisfied the medical conditions as to virtual inability to walk her mental condition was such that she would not be able to benefit from enhanced facilities for locomotion. The claimant appealed to a Commissioner.

Held that the tribunal's decision was erroneous in point of law on two counts:

1. the tribunal had failed to make clear why they considered that the claimant was not virtually unable to walk, and in particular had failed to deal with a specific contention which had been addressed to them by the claimant, but rejected (paragraph 9);

2. there was no evidence before the tribunal to enable them to conclude that the claimant would be unable to benefit from enhanced facilities for locomotion, and they failed to give their reasons for so concluding (paragraph 10).

The Commissioner observed that the requirement that the claimant's condition should enable her from time to time to benefit from enhanced facilities for locomotion merited a liberal interpretation involving mental stimulation from being able to get out and about without the claimant herself necessarily appreciating that she was deriving mental benefit (paragraph 11).

1. My decision is that the decision of the medical appeal tribunal (hereinafter called the MAT) given on 8 December 1981 is wrong in law. Accordingly I set it aside and remit the case for hearing by a differently constituted MAT.

2. This is an appeal by the claimant's parents against the MAT decision of 8 December 1981. The appeal to the Commissioner is with the leave of the MAT granted on 21 June 1982. On 8 November 1982 I made the following directions:—

> "I direct an oral hearing.
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> I desire to hear argument as to the matters which are relevant to the determination by a Medical Appeal Tribunal of the question whether a person's condition as a whole is such as to permit him from time to time to benefit from enhanced facilities for locomotion and in particular where and how a person who is so mentally disturbed as to be a danger to himself could benefit from such facilities".

3. Accordingly I held an oral hearing on 28 March 1983. The claimant was represented by Mr T. Owen, Welfare Rights Officer of Manchester Social Services Department (Longsight District Centre). The Secretary of State was represented by Mr P. Milledge of the Solicitor's Office, Department of Health and Social Security. To both of them I am indebted for their assistance.

4. The history of the case is as follows:

On form MY1, received by the Secretary of State on 9 January 1981, a claim for mobility allowance was made by the claimant's parents. On 2 February 1981 a medical practitioner to whom the insurance officer referred the medical question arising on the claim in accordance with regulation 13(2) of

the Mobility Allowance Regulations 1975 made a report to the insurance officer on form MY22. On 12 March 1981, the claimant appealed to a Medical Board against the insurance officer's decision to disallow her claim. On 13 July 1981, a Medical Board decided that the claimant satisfied the medical conditions for an award of mobility allowance. On 16 September 1981, the Secretary of State exercised his powers under regulation 18(2) and referred the case to the MAT against the Medical Board's decision to allow the claim.

5. The MAT set aside the decision of the Medical Board on 8 December 1981 stating as follows:—

> "The little girl, Amanda Jane J., we are told, in consequence of vaccine damage, is epileptic, grossly mentally handicapped, incapable of speech, possessed of poor eyesight and is completely oblivious to danger. In consequence the constant attendance of an adult is necessary at all times. She is hyperactive and on demonstrating walking within the precinct of the Tribunal, under the control of her step-father, her gait, though a little haphazard, was satisfactory.
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> Mr Owen, in response to the Secretary of State's submission and in support of the Board's decision relies upon three principal arguments i.e.:
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> 1. Her manner of walking and the distance which she could walk was so limited as to justify an award under Regulation 3(1)(b).
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> 2. Her disability arose from physical disablement consequent upon vaccine damage, and,
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> 3. Two Commissioner's cases i.e. 'Edmunds' and C.M. 2/81, in Mr Owen's contention, supported the Medical Board's decision.
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> We are grateful to Mr Owen for his assistance and have great sympathy for Mr and Mrs Mc. We further accept a physical basis for Amanda Jane's disabilities but we are not satisfied that she fulfils the requirements of Regulation 3(1)(b) either as to distance, speed or manner of making progress without severe discomfort.
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> We should add that even were the child to satisfy the requirements of Regulation 3(1)(b), her mental condition is such that, in our view, she would not be able, to benefit from enhanced facilities.
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> We accordingly set aside the decision of the Medical Board".

6. The written grounds of the claimant's appeal to me as given by the claimant's stepfather on 19 April 1982 are as follows:—

> "1. In the 'Findings and Reasons for Decision' the third paragraph suggests that Regulation 3(1)(b) of Mobility Allowance Regulations requires the demonstration of severe discomfort. The inference is that, because Amanda failed to demonstrate 'severe discomfort' the appeal was unsuccessful. This approach is directly contradictory to C.M. 2/81, particularly paragraph 9 of C.M. 2/81.
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> 2. The Tribunal's finding that 'she would not be able to benefit from enhanced facilities' is inconsistent with the finding that she is not virtually unable to walk, and, indeed, supports the argument that she is virtually unable to walk. The inability to benefit from enhanced facilities for locomotion is discussed in booklet N.I. 213 'Mobility Allowance: Notes for Medical Practitioners', on page 6, paragraph 26. This official DHSS guidance says that only 'a few exceptional categories of people' will be excluded from Mobility Allowance by virtue of inability to benefit from enhanced facilities. The example given is of a person in a coma.

If the Tribunal find inability to benefit from enhanced facilities, it is illogical to also find that she can make effective progress on foot.

3. The Tribunal's decision gives no indication of the weight given to document 7B of the Tribunal's papers. That document is a letter by Amanda's stepfather describing her difficulties in making progress on foot out of doors. It was presented to the Tribunal as a crucial part of Amanda's case. It gives a better account of her abilities than the demonstration 'within the precincts of the Tribunal' referred to in the Tribunal's decision.

4. Amanda's case is one which accords with the reasoning in Commissioner's Decisions C.M. 54/1980 and C.S.M. 1/81. Neither Commissioner's decision is referred to in the Tribunal's decision."

7. The relevant statutory provisions are as follows:

Section 22 of the Social Security Pensions Act 1975 interpolated section 37A into the Social Security Act 1975. So far as is material to this appeal section 37A provides as follows:

"37A.—(1) Subject to the provisions of this section, a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled to a mobility allowance for any period throughout which he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so.

(2) Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as suffering from such physical disablement as is mentioned above; but a person qualifies for the allowance only if—

(a) his inability or virtual inability to walk is likely to persist for at least 12 months from the time when a claim for the allowance is received by the Secretary of State; and

(b) during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion."

Regulation 3 of the Mobility Allowance Regulations 1975, [S.I. 1975 No 1573], as amended by S.I. 1979 No 172 as from 21 March 1979 provided:

"3.—(1) A person shall only be treated, for the purpose of section 37A, as suffering from physical disablement such that he is either unable to walk or virtually unable to do so, if his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to place of residence or as to place of, or nature of, employment,—

(a) he is unable to walk; or

(b) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk; or

(c) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health.

(2) A person shall not be treated, for the purposes of section 37A as suffering from physical disablement such that he is either unable to walk or virtually unable to do so if he is not unable or virtually unable to walk with a prosthesis or an artificial aid which

> he habitually wears or uses or if he would not be unable or virtually unable to walk if he habitually wore or used a prosthesis or an artificial aid which is suitable in his case."

The conditions in section 37A(2)(a) and (b) are cumulative.

8. Before me the claimant's representative submitted that the MAT decision of 8 December 1981 contained three errors of law. First, that the MAT decision failed to make clear why the MAT considered that Amanda was not "virtually unable to walk"; secondly, that the MAT decision was not supported by any evidence when it stated that Amanda's "mental condition is such that, in our view, she would not be able to benefit from enhanced facilities". The MAT failed to give reasons in the decision for those findings; and thirdly, that the MAT decision implies that it is necessary to demonstrate "severe discomfort" in order to be "virtually unable to walk". Mr Milledge supported the appeal on the first two grounds but not on the third ground. I find that the MAT has erred in law in respect of the first two grounds. I do not see that the MAT erred in law on the third ground put forward by Mr Owen. As a question of construction of the decision I do not see that one is entitled to dissociate "without severe discomfort" from making progress.

As a question of construction of the MAT's decision I find it clear that the MAT regarded the test as making progress without severe discomfort.

9. I turn therefore to the first and second grounds. As to the first ground that the MAT failed to make clear why the MAT considered that Amanda was not "virtually unable to walk". At paragraph 9 of the Decision of a Tribunal of Commissioners, reported as R(M) 1/83, the Tribunal stated "where some specific contention addressed to the Tribunal has been rejected it would be necessary to give reasons for the rejection. We may add that this would seem to apply equally where in mobility allowance cases there is a specific finding in the formal paragraphs of form MY365 to the contrary of the corresponding answer given by the medical board on form MY30". The MAT had before it a letter from Amanda's stepfather dated 12 March 1981 describing her walking difficulties in detail, and contending that the manner of walking limits her progress on foot so much that she is virtually unable to walk. Further the MAT were considering Amanda's case on referral from a Medical Board decision of 13 July 1981. The Medical Board had decided that Amanda is virtually unable to walk. The MAT's decision gives no reasons for overturning the Medical Board's finding.

10. I turn now to the second error of law, namely that the tribunal decision is not supported by any evidence when it states that Amanda's "mental condition is such that, in our view, she would not be able to benefit from enhanced facilities". The Medical Board of 13 July 1981 had stated that Amanda would benefit from time to time from enhanced facilities for locomotion. The MAT's decision fails to give any reasons for the reversal of the Medical Board's decision. There is no indication of the MAT's thought process behind their statement in that they gave no reasoning as to the way in which Amanda's mental condition detracted from her ability to benefit. The contents of the MAT decision amounts to no more than their assertion that Amanda does not fulfil the statutory requirements. In view of the Decision of the Tribunal of Commissioners R(M) 1/83 that is inadequate.

11. I turn now to the issue raised by my direction dated 8 November 1982 on which I have the following guidance. First the Commissioner in paragraph 8 of the unreported Decision C.M. 1/77 states:—

> "8. It is not necessary for me to decide what cases the restriction of the allowance to those capable of benefiting from enhanced means of

locomotion is intended to exclude from benefit. The Secretary of State in his submission suggested the case of a person whose condition is such that it is unsafe to move him at all, and the medical appeal tribunal in granting leave to appeal suggested the case of one who is virtually a human vegetable mentally incapable of benefiting from enhanced facilities. These instances satisfy me that the restriction is capable of taking effect without its having to be given the wide interpretation attributed to it by the medical appeal tribunal".

The second edition of the Law of Social Security, Ogus and Barendt at page 184 stated:—

> "The allowance is not available to all severely disabled persons. Legislation provides that it is payable only where the invalid's condition is 'such as permits him from time to time to benefit from enhanced facilities for locomotion'. This obviously excludes human vegetables and those whom it is unsafe to move [C.M. 1/77 being the decision referred to immediately above], but it is arguable that of the remainder there will be few who will not receive some benefit from the occasional sortie, and it is not easy to draw a line between the deserving and the undeserving except on some arbitrary basis".

Thirdly N.I. 213/July 1979, being the Department of Health and Social Security "Mobility Allowance Notes for Medical Practitioners" at paragraph 26 states:—

> "WHETHER THE CLAIMANT IS LIKELY TO BENEFIT FROM ENHANCED FACILITIES FOR LOCOMOTION
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> 26. Question 15 of the medical report form asks, 'Is the claimant's condition such as to permit him ... to benefit from time to time from enhanced facilities for locomotion.' Locomotion here means general mobility rather than the act of walking. The key consideration is that even very severely physically disabled people do get out and about though not necessarily very often. In addition, a mental handicap is not necessarily a bar to enjoyment of mobility for people who are also physically disabled. Mobility allowance will continue to be payable even for periods of hospital in-patient treatment. On the other hand, there are a few exceptional categories of people who will be excluded from entitlement to mobility allowance by this criterion. These include those who are actually prevented from being moved for medical reasons and those quite incapable of appreciating a change of surroundings, e.g. those with very severe cerebral damage and in a coma."

I think that the above extract from the current Edition of Ogus and Barendt sets the test out correctly. The word "benefit" is a wide one and in addition the statutory provisions contain the words "from time to time". A person would come within the statutory provisions although he was not capable of benefiting at all times but merely of benefiting "from time to time". However I would add a further category of excluded persons, that is persons so severely mentally deranged that a high degree of supervision and restraint would be required to prevent them either injuring themselves or others. I think it cannot be said to be for such a person's benefit where the risk of death or injury to himself or others is a real and likely one. It is of course a question of fact and degree for the MAT to consider whether in any particular case a person cannot benefit from time to time. Where in such a case the tribunal has set out its findings on the evidence giving its reasons it would not be possible to upset such a tribunal's findings of fact unless no reasonable body acting judicially and properly instructed on the law could have reached the conclusion of which it arrived. The MAT must

of course set out its reasoning which it failed to do here. In coming to their conclusion the tribunal should take into account all aspects of the matter including the claimant's stepfather's letter dated 12 March 1981 where he states "Amanda is a hyperactive, mentally handicapped child, whose handicap has a physical cause, i.e. vaccine damage when 3 months old. I am the only person who can safely take her out walking because I am strong enough to control her usually. Her behaviour is so unpredictable and violent that the local special school (The Mellons) was forced to take her everywhere in a wheelchair. In the end the school refused to allow her to attend in November 1980. She manages to run out of the house and into the street on her own, she is a danger to herself and others because she runs straight into the road, completely unaware of the dangers". Further the tribunal should take into account the claimant's constituency Member's letter dated 11 November 1981 where he states "I have visited the home on a number of occasions. My view is that, while Amanda may have the physical power to walk, her own control is so erratic that she is liable to move in any direction without any warning and needs constant attention and holding when outside".

However as indicated above I think that the word "benefit" particularly in the context of "from time to time" merits a liberal interpretation involving mental stimulation from being able to get out and about without the claimant necessarily appreciating himself that he does derive mental benefit. Locomotion is of course not limited to walking.

12. I would add two matters. First Mr Owen referred in his submission to me to a report by Amanda's Social Worker. I cannot of course take that into account as that was not before the MAT. However the matter will be at large before the tribunal to whom I remit the case. Secondly problems arising in respect of mobility allowance have been subject to recent elucidation in general in the Decision of the Tribunal of Commissioners R(M) 1/83.

13. Accordingly the claimant's appeal is allowed.

(Signed) J. B. Morcom
Commissioner

R(M) 1/84 1.4.82

APPEAL FROM DECISION OF A MEDICAL APPEAL TRIBUNAL ON A QUESTION OF LAW

Mobility Allowance—Factors to be taken into account when determining whether a person is unable or virtually unable to walk.

The claimant was found by a medical appeal tribunal to suffer from retrolental fibroplasia with complete blindness, and hydrocephalus with symptoms including impairment of balance and marked impairment of capacity for spatial orientation. Only with the help of an intelligent adult to pilot her could she walk for reasonable distances at a satisfactory pace. The tribunal concluded that the claimant's need to be accompanied was not something to be taken into account when considering a person's walking ability and they decided that the claimant was neither unable nor virtually unable to walk.