excluded a decision of another of the statutory adjudicating authorities as suggested in paragraph 4(b) of the chief adjudication officer's appeal. In our opinion, he was possibly indicating no more than that the provisions of section 50(1)(a), (b) and (c) of the National Insurance (Industrial Injuries) Act 1946 were not mutually exclusive. In our judgment the decision of the medical appeal tribunal is, like the case of retrospective legislation figured in paragraph 10 of Decision R(G) 3/58, the warrant for a revised decision under section 104(1)(b) having effect from the appropriate earlier date established by that decision, in this case 1 June 1984. It is unnecessary for us in this case to decide whether it would be appropriate to rely on the provisions of section 104(1)(a) in a case where on appeal a medical appeal tribunal has held the medical conditions to have been satisfied from the date of claim.

10. In the result we are satisfied that the social security appeal tribunal reached the correct conclusion in the present case. The appeal of the Chief Adjudication Officer is dismissed.

(Signed) J. S. Watson
Commissioner

(Signed) J. G. Mitchell
Commissioner

(Signed) J. B. Morcom
Commissioner

NOTE: There is no decision R(M) 2/86 as it was decided not to report the decision allocated to that number.

13.3.86

R(M) 3/86
(Tribunal decision)

MOBILITY ALLOWANCE

Relevance of behavioural factors in determining a person's ability to walk—effect of Lees v The Secretary of State as regards R(M) 2/78

A child claiming mobility allowance suffered from brain damage at birth leading to severe mental subnormality. The disability was accepted by the medical appeal tribunal as being physical. While capable of the physical movements of walking his behaviour while doing so was erratic and unpredictable so that at times he needed to be physically restrained while on other occasions he refused to move. The medical appeal tribunal disregarded his behavioural problems in refusing an award. In setting aside the medical appeal tribunal's decision the Tribunal of Commissioners held:—

1. R(M) 2/78, in which a child suffering from Down's Syndrome was found to be virtually unable to walk, remains unaffected by the decision in *Lees v The Secretary of State* [1985] 1 AC 930 (paragraph 7);

2. where a person suffers from behavioural problems which stem from a physical disability affecting the exercise of his walking powers, two tests must be applied to determine whether he is virtually unable to walk:—

i. is his ability to walk out of doors so restricted "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 to be treated as virtually unable to walk, and if so

ii. is his condition attributable to a physical impairment, such as brain damage, so that he cannot walk as distinct from will not walk?

If the child's refusal to walk was a matter of conscious choice there could be no question of his stopping having arisen from a physical condition over which he had no control (paragraph 8);

3. Hyperactivism does not of itself qualify a sufferer for mobility allowance. What is relevant is whether a person suffers from "temporary paralysis" so far as walking is concerned and if so to what extent (paragraph 9).

R(M) 1/83 and the effect of the decision in *Lees* are discussed.

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1. For the reasons hereinafter appearing, the decision of the medical appeal tribunal given on 14 June 1985 is erroneous in point of law and accordingly we set it aside. We direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. On Form MY1, received by the Secretary of State on 10 May 1984, a claim for mobility allowance was made by Mrs H....on behalf of her son, M....The history of that claim is set out in the written submissions of the Secretary of State dated 8 November 1985 and there is no merit in repeating such history here. Suffice it to say that the claimant contends that the tribunal of 14 June 1985 erred in point of law and seeks to have their decision set aside. In view of the uncertainty as to the effect of the House of Lords decision in *Lees v. The Secretary of State for Social Services* [1985] 1 AC 930 on the law as set out in Decision R(M) 2/78, the Chief Commissioner appointed a Tribunal of Commissioners to consider the present case and a further appeal on Commissioner's file CM 39/1984, which involved the same branch of the law. In the event we heard both cases together at an oral hearing at which Mr. R. Drabble of Counsel from the Child Poverty Action Group appeared on behalf of the claimants in both appeals, and Mr. I. B. Glick of Counsel, instructed by the Solicitor's Office of the Department of Health and Social Security, represented the Secretary of State. We are indebted to both of them for their submissions.

3. In brief, Mr. Drabble's contention was that the House of Lords decision had not affected anything that was said in R(M) 2/78 and that the principles of that particular decision still applied. Moreover, he was supported in this by Mr. Glick whose submissions were in all substantial points identical with those of Mr. Drabble. For the reasons set out below we accept their contentions.

4. In R(M) 2/78 the question at issue was whether or not a boy, who suffered from mongolism but was physically capable of walking, might nevertheless bring himself within the terms of regulations 37A of the Social Security Act 1975 as it was then enacted. Section 37A then provided 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.....

At that time the Mobility Allowance Regulations 1975 had been made and regulation 3 provided as follows:—

> "3—(1) A person shall only be treated, for the purposes of section 37A, as 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 or virtually unable to walk; or
>
> (b) 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 unable to walk or virtually unable to do so if he is able to walk with prosthesis or an artificial aid which he habitually wears or uses or if he would be able to walk if he habitually wore or used a prosthesis or an artificial aid which is suitable in his case."

Although the boy concerned was capable of walking in the sense of placing one foot in front of the other, the medical appeal tribunal nevertheless considered that he was virtually unable to walk. They put the matter as follows:—

> "We agree that the boy is suffering from mongolism a condition which is due to faulty genetic inheritance and can therefore be classified as a physical disorder. We accept the evidence that while he walks for some yards he is liable to run, stop, lie down and refuse to go further; this reaction which seriously impairs mobility is directly due to the physical condition of mongolism."

In other words, although the boy was capable of running, let alone walking, nevertheless from time to time by reason of a condition, which was due to a physical disablement, he suffered, as far as walking was concerned, temporary paralysis. The Chief Commissioner upheld the medical tribunal's approach. He observed as follows:—

> "17. The medical appeal tribunal recorded a decision and a finding in terms that Robert was unable to walk or virtually unable to do so because of physical disablement, the condition from which he suffered being a physical disorder. They found that physical condition was directly responsible for 'reaction' which seriously impaired his mobility. No doubt it was open to the medical appeal tribunal to have decided that what effectively prevented Robert from exercising any physical ability to walk was attributable to a mental state, stemming from but operating independently of any disabling physical condition. They did not do so. In so far as there was any mental element which prevented Robert from walking (he has an accepted mental age of 2 years) they attributed his virtual inability, not to conscious volition or mental disability but to "reaction" itself directly due to his physical condition. I read their decision as concluding that a physical factor was present throughout in the causation of his inability to walk."

It is important to note that the Chief Commissioner made a sharp distinction between a refusal to walk which was attributable to a conscious choice on the part of the person concerned and an inability to walk which was attributable to a physical disorder. He went on to observe:—

> ". . . . whether the medical criteria are met in a particular case is for the medical authorities to determine, and clearly there are borderline and difficult cases where the expertise of the medical authorities will be decisive one way or another. For examples, there may be cases of

claimants suffering from a physical disorder such as Down's Syndrome whose legs are capable of the physical movements of walking, but who are prevented by other aspects of their physical condition from making use of them; or cases of the mentally handicapped who 'choose' not to walk, to be compared with the mentally handicapped who have never learned to walk. Undoubtedly there will be hard cases, where the facts will permit of different medical inferences and conclusions."

5. Regulation 3 of the Mobility Allowance Regulations 1975 was subsequently amended. However, prior to a change in the regulation a proposed draft was brought to the attention of the National Insurance Advisory Committee, and that body issued a report dated 24 January 1979. As is clear from that report, the purpose of the proposed amendment was to "clarify the issues" raised by R(M) 2/78. In paragraph 6 of the report the Committee observed as follows:—

"6. The Chief Commissioner in his decision indicated that the weight to be attached to physical and mental disablement where both factors may be present is for the medical adjudicating authorities to decide. The Department have told us that, after taking into account legal and medical advice, they subsequently concluded that the amending regulations should relate to the effect of a disabling condition, rather than its causation.

7. We see no reason to dissent. None of the representations we received took exception to such an approach and one or two positively supported it."

It is clear from these observations and from what was elsewhere said in the report that the principles set out in R(M) 2/78 were not the subject matter of criticism. All that was being attempted was to expand the phrase "virtually unable to walk", so as to enable the adjudicating authorities to have some statutory guidance as to the factors to be taken into account. In the event, the regulation was amended so as to read as follows:—

"3.—(1) A person shall only 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 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."

6. Unfortunately, thereafter certain decisions of Commissioners introduced a gloss on the relevant statutory provisions. In R(M) 2/81 it was held that a claimant who was blind and also suffered from a physical disablement in his balance mechanism and sense of direction, so that it was impossible for him to control the direction in which he wished to move, albeit it was accepted that he was physically capable of walking, could nevertheless be regarded as unable to walk within the meaning of regulation 3. Moreover the ability or inability of the person concerned to control the direction in which he went was also held to be a material con-

sideration in a later decision, this time by a Tribunal of Commissioners, R(M) 1/83. However, this gloss was firmly repudiated by the House of Lords in the *Lees* decision. There the facts were substantially the same as those of R(M) 2/81. The claimant was completely blind and also suffered from some hydrocephalus with symptoms including impairment of balance and impairment of capacity for spatial orientation. Outdoor walking was only possible with the help of an adult guide to pilot her and it had proved impossible to substitute a guide dog to assist her. She could not move from point A to point B by herself. The claim for mobility allowance was rejected by the Commissioner, and later by the Court of Appeal, and their approach was upheld by the house of Lords. Lord Scarman concluded his opinion with the following observations:—

> "The House was referred to a number of decisions given by the Social Security Commissioners on the point of law raised in this appeal, from which it is clear that the question has given rise to differences of opinion. I am satisfied that Mr. Rice, the Commissioner who heard this case, reached the correct conclusion in law and that other decisions which differ from his on the law must be held to be to that extent erroneous. Mr. Rice considered that, had the legislature intended to include in regulation 3(1)(b) the inability to direct one's walking, it would have done so in clear terms and he went on to say:
>
> > [Blindness] is an affliction which is wholly unrelated to the physical power to move one leg in front of another. Of course, it affects drastically the sufferer's scope for walking, in that, outdoors at least, he or she is in need of a guide, or more practically a guide dog. But these are factors which are not directly concerned with the faculty of walking. Now, in the present case, the claimant in addition to suffering from blindness, is inclined to disorientation in open spaces. This, in my judgment, is like blindness, a handicap totally unrelated to her capacity or otherwise to perform the physical act of walking. I appreciate, of course, that the consequence of the claimant's tragic disability is that, although she can walk, she cannot control without assistance the direction in which she walks, she has an ability to walk, but an inability to make proper use of the faculty."

Manifestly, the House of Lords held that the ability of a person to get from point A to point B is wholly irrelevant in construing regulation 3 of the Mobility Allowance Regulations.

7. However, the observations of the House of Lords, which are, of course, binding on all adjudication authorities, have, in our judgment, no bearing on the principles contained in R(M) 2/78. There is nothing in the *Lees* case to indicate that their Lordships were directing their minds to anything that was said in R(M) 2/78. They were only concerned with the issue whether the ability or inability to move from point A to point B was a material consideration in construing regulation 3(1). Accordingly, we are satisfied that the law, as expounded in the then Chief Commissioner's decision, still applies.

8. Mr. Glick in his submissions helpfully propounded 2 tests for determining whether a person who was capable of putting one foot in front of another, and so walking in the accepted sense of the word, was nevertheless to be treated as virtually unable to walk. First, one should ask whether his ability to walk out-of-doors was so restricted "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 had to be treated as virtually unable to walk. All the various elements contained in regulation 3(1)(b) had to be considered separately. Moreover, in

applying that test, it had to be assumed that the claimant was, where appropriate, using a prosthesis or an artificial aid. However if the claimant was unable to walk or virtually unable to walk in accordance with the above criteria, then the next question was whether this condition was attributable to some physical impairment such as damage to the brain. The criterion was whether the claimant *could* not walk, as distinct from *would* not walk. We agree with the importance of that distinction. Manifestly, if a child, who has been walking perfectly satisfactorily decides to stop, but his refusal to continue further can be overcome by the promise of a reward or the threat of punishment there can be no question of his stopping having arisen out of a physical condition over which he has no control. In the case postulated, he was making a conscious choice, and on no footing could his refusal to walk be identified with a physical disablement. It is, of course, for the tribunal as a medical matter to determine whether a child's propensity to cease walking is to be attributed to a deliberate election on his part or to a physical disablement.

9. We are conscious that tribunals may often have very difficult cases. For example, there may be instances where the person concerned, who can otherwise walk perfectly well, is sometimes prevented from so doing by a physical disability, *but only on rare occasions.* It will in those circumstances be a matter of degree as to whether or not that person can be regarded as virtually unable to walk, and it is for the tribunal to make the relevant assessment. Accordingly, they will frequently need to know the relevant history of the walking capacity of the person concerned and they will have to make a judgment as to what evidence they will accept. These issues may prove difficult, but they will have to be resolved by the medical tribunal. In any event, we do not consider that hyperactivism *in itself* qualifies the sufferer for mobility allowance. If a person can run, as hyperactive children normally can, manifestly they can walk. What is relevant is whether or not they suffer from temporary paralysis (as far as walking is concerned) and, if so, to what extent. These are matters for the medical authorities.

10. In the present appeal the tribunal gave the following reasons for their decision that M....did not qualify under regulation 3(1):—

> "We find that the claimant, M.... H...., has from birth suffered from brain damage leading to severe mental subnormality. We are satisfied that the brain damage is physical. The severe mental subnormality is such as to give rise to severe behavioural problems. Whether or not accompanied out-of-doors, he is perfectly capable of carrying out the physical movements of walking and, indeed, running but his behavioural problems are such that for substantial periods of time his behaviour is entirely erratic and unpredictable. Sometimes he will walk or run so that he has to be physically restrained and on other occasions he will simply refuse to move.
>
> It is impossible to say whether on any particular day or particular time he will behave in any one way or another. The unanimous finding of the tribunal is that the claimant is suffering from a physical disability."

It would appear that up to this point these were the findings of all the members of the tribunal. The majority decision was as follows:—

> "The Tribunal by a majority decides that since the claimant is physically capable of the action of walking, one must disregard the behavioural problems, albeit resulting from the physical disability, in so far as they have the effect that the claimant in the circumstances as found above, does not walk."

Manifestly, the majority's decision was erroneous in point of law. It is clear from R(M) 2/78 that once it was established that M....'s behavioural

problems, which included a failure on occasion to exercise his walking powers, stemmed from a physical disability, they were necessarily relevant. In so far as the majority took the view that they should be disregarded, they erred in point of law. It follows that we must set aside their decision, and direct that the appeal be reheard by a differently constituted tribunal. The tribunal will have regard to the extent of M. . . .'s behavioural problems in so far as they impinge on his failure to walk. It may well be that they will be concerned, not merely with his conduct on the day when they examine him, but with the history of his condition in so far as it is relevant and in particular will require to know the frequency of his failure to walk, when required so to do.

11. For completeness, we should refer to the dissenting view of the chairman. He put the matter this way:—

> "Notwithstanding that the claimant does carry out the physical act of walking in the circumstances found by the Tribunal, his behavioural problems which are the consequence of a physical disability and over which he has no control, prevent him from carrying out the physical act of walking and do so with such frequency and so regularly that his ability to walk out of doors is so limited in regard to the distance over which and the length of time in which he can make progress on foot, that he is virtually unable to walk and was so unable at the date the claim for Mobility Allowance was received.
>
> It is the chairman's view that the House of Lord's decision in *Lees* does not affect the decision in R(M) 2/78, or the views of the Tribunal of Commissioners as recorded in paragraph 23 of R(M) 1/83 or CM/125/1983."

Whilst the chairman appears for the most part to have expressed the law accurately (although the Decision in R(M) 1/83 and necessarily also the Decision in CM 125/1983 are not entirely unscathed by the *Lees* decision) and subject to the premise that the facts were as determined by the chairman, to have reached a decision which could properly be arrived at, nevertheless, we are not clear as to what evidence exactly he relied on, and whether it did in fact give rise to the factual position on which he based his decision. In any event, nothing turns on the point, because the matter must be referred to a new tribunal.

12. Accordingly, we allow this appeal.

(Signed) E. R. Bowen
Commissioner

(Signed) D. G. Rice
Commissioner

(Signed) R. F. M. Heggs
Commissioner
