Disablement Benefit — CPAG

Kitchen N/A to Disablement Assessment

WMW/RA **Commissioner's File: CSI/9 & 19/94**
*70/94

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEALS TO THE COMMISSIONER FROM DECISIONS OF MEDICAL APPEAL TRIBUNALS UPON QUESTIONS OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Medical Appeal Tribunals: Glasgow

Case Nos: 570 07935 and 06190

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1. These claimant's appeals fail. I find no evidence error of law in the appeal tribunal decisions dated 25 June 1993 such as to warrant my interference. The appeals are accordingly dismissed.

2. These two cases concerned the assessment of the extent of loss of faculty resulting from two accidents sustained by the claimant in 1984 and 1990. Because the cases on their facts and in their effects are inter-related I have thought it simpler to give one decision in common to both. That will avoid confusion caused by references in one case to the decision on the other and repetition as to the points of inter-relationship.

3. The background can be simply stated. As a result of the 1984 accident the claimant suffered a loss of faculty throughout defined as "impaired spinal function". There was and is no dispute about that. As a result of the 1990 accident she suffered a loss of faculty identified as "impaired spinal function *and locomotion*" [my emphasis]. Again there was and is no dispute about that.

4. In respect of the 1984 accident the claimant sought disablement benefit in April 1992 for the results of it. She had already, in August 1991, claimed disablement benefit for the results of the 1990 accident. Although the claims were thus in time order opposite to the time order of the accidents it is convenient and logical to deal with matters in the latter order. The claims in due course were referred to an adjudication medical authority. That authority, separately for each case, assessed the disablement resulting from the loss of faculty consequent upon the 1984 accident at 10% from 26 April 1984 until 25 April 1985. That assessment was final. The authority assessed the disablement resulting from the loss of faculty consequent upon the 1990 accident at 18% with an offset of 10% for the consequences of the 1984 accident giving a net assessment of 8%. That assessment was determined to run from 14 April 1991 for one year and was final.

5. The appeal tribunal noted the clinical findings of the adjudicating medical authorities, medically examined the claimant and considered all the evidence, written and oral. I should pause to note that the tribunal in each case received a considerable amount of evidence and made detailed findings. These findings were -

"On examination we found straight leg raising normal on left leg. Her gait is normal. There is minimal scoliosis of the dorsal lumbar spine. There is some spasm of the lumbar muscles but flexion of the spine is full. There is limitation of extension and tilting to the right causes discomfort over the sacrum. Straight leg raising is limited to 45% on the right, but she sits up with extended legs without complaint. There is no reflexed loss or motor weakness. Although she has been treated for anxiety and depression for 25 years, her mood today seemed relaxed and normal."

6. The tribunal endorsed the relevant losses of faculty resulting in the disablement from the relevant accidents as set out above. They proceeded in each case to increase the overall assessment of disablement. In respect of the 1984 accident they added a determination of loss of faculty assessed at 5% from 26 April 1985 for life. In respect of the 1990 accident they reduced the offset in respect of the consequences of the accident in 1984 to 5% and, again, added an extension, at 10%, 5% net after offsetting 5% for the 1984 accident, for life from and after 13 April 1992. These assessments, too, were final. The claimant now again appeals, in respect of the 1984 accident, with leave of the chairman, and in respect of the 1990 accident, with my leave. I should at once say that I granted leave primarily so that the two cases might continue to be the subject of consideration together.

7. The grounds of appeal as set out by the claimant, and endorsed and extended in her response to the submissions on behalf of the Secretary of State, dealt entirely with matters of fact. Thus she mentions the tribunal finding that she "seemed relaxed" explaining that she was anything but relaxed. She mentions another accident and explains that she had not raised it before because there was no witness. The remainder of her grounds deal, similarly with issues of fact only. An appeal to the Commissioner is competent only upon an issue of law - that is to say upon some basis that the tribunal has either applied the wrong law, incorrectly applied the law or has proceeded in some way unfairly and prejudicial to the party. I see nothing in these decisions in respect of the last nor is anything in that regard suggested. Had that been all to the matter I would have contented myself with simply rejecting the grounds advanced by the claimant since no issue of law arises and I would have added that I could see no issue of law for myself in either case.

8. Before turning to the Secretary of State's support for both appeals I should mention one other matter. In granting leave the chairman added a proviso that -

".. x-rays dated 12 March 1991 are produced at hearing of appeal."

I confess to some mystification as to why such a proviso should have been made. X-rays are, of course, meaningless to Commissioners and even if they had some meaning they can hardly raise any issue of law. Because the claimant in one appeal makes some mention of the matter herself I should record that it is clear from the bundle, and made clearer by the Secretary of State having lodged the inventory of productions, that the x-rays were available to the tribunal. Whether or not the tribunal took advantage of them is, I accept, not expressly recorded. But since there was no issue raised about it the tribunal would have been entitled not to think it necessary to make special mention thereof. But, in any event, whether or not a tribunal wishes, or thinks it helpful, to look at x-ray plates must be a matter for their medical determination. There can be no obligation in general upon them to consider such. It may be different if there is a particular issue raised but, none such was raised here. Finally, I should add that in response to the Secretary of State's submissions the claimant records how in her view her condition has

deteriorated more recently. That, again, is a matter of fact and is no criticism of the tribunal's decision as a matter of law.

9. Turning, then, to the Secretary of State's submission, largely common to both cases, it is that the tribunal have failed to explain clearly their reasons for a decision in such a way as to satisfy the requirements laid down by the judgment of the Court of Appeal in the case of Kitchen v the Secretary of State, July 1993. In the 1984 case it is submitted that they have not explained why they reduced the assessment from 10% to 5% from 26 April 1985. Nor have they explained why they thought that the claimant's condition had improved from that date so that the claimant has been left guessing about these matters. In respect of the 1990 case the submission is particularised as a failure to explain why they reduced the assessment for 13% net to 5% net from 14 April 1992 and a failure to explain why the claimant's condition had improved from 14 April 1992. These are, in my judgment, not true reflections of what the tribunal did. As already noted they essentially endorsed the AMA's assessments down to, respectively, 1985, and 1991. But they then extended the assessment in each case to run for life. What they were doing, thus clearly, in my view, was instead of the claimant suffering no disability, effectively, as had been found by the AMAs after, respectively April 1985, and April 1991, to find that there was some continuing, but lesser lifelong disability. I consider, moreover, that their findings of fact were sufficient to allow them to come to such a view. They have set out the limitations and problems from which they found the claimant to suffer. How these were to be allocated to one incident rather than another, and how the percentages were precisely determined are matters which I consider were solely for the tribunal. So too, the consequences of overlap in respect of the impaired spinal function although the 1990 accident which then added loss of faculty in respect of locomotion. But, as said, the findings of fact explain in detail what was the position as at the date of the tribunal hearing. The tribunal moreover had noted the findings of the AMAs and it is noteworthy that even the AMA had had to consider matters much in arrears in respect of the 1984 accident. For these reasons I reject the submissions on behalf of the Secretary of State.

10. But since it has been mentioned, I should add that I do not consider the Court of Appeal's judgment in Kitchen and Others against Secretary of State for Social Services to be of help in determining these appeals. As Neill L.J. pointed out in regard to the obligations imposed by the Social Security (Adjudication) Regulations 1986, regulation 31(4), now founded on by the Secretary of State in these regards -

> ".. the medical questions which the medical appeal tribunal are asked to resolve are likely to vary from case to case. In some cases the question will involve the nature of the disability, in other cases the extent of the disability or issues of causation."

He then noted that in two of the appeals there was raised a question about the extent of the disability although other questions also arose. Thereafter he concentrated very much upon issues raised in regard to the mobility allowance problems raised by two of the appeals which, as I understand it, was what he was referring to when he talked about "the extent of the disability" since he then refers to the Moran and Begum appeals which alone involved that benefit. The Evans and Kitchen appeals, as he pointed out, raised questions as to whether certain conditions resulted from certain trauma as to which there were competing medical opinions and the court gave guidance on the extent to which tribunals required to explain their views when dealing with such competing evidence. Since the involvement of the judgment is not further particularised by the Secretary of State I perhaps need say no more about it having demonstrated that it does not in terms relate to cases where the only issues are the degrees of assessment of losses of faculty

which must be very much a matter of opinion akin to issues of "reasonableness" and the like in this and other jurisdictions. But the court also said -

> ".. that as a matter of practice ... the tribunal should set out in their decision the question or questions with which they have been asked to deal."

In these cases, no doubt in part because of the layout of the form which the tribunal were required to complete, as adverted to by Neill L.J., they have, in my judgment, adequately set out the question or questions with which they had to deal and have answered them.

(signed) W M WALKER
Commissioner
Date: 22 July 1994