

Need to make findings on ability to walk out of doors
- whether Downs Syndrome a physical disability

DR/JOB

Commissioner's File: CSM/64/87

SOCIAL SECURITY ACTS 1976 TO 1988

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: George Watson, Social Worker on behalf of
William WATSON

Medical Appeal Tribunal: Edinburgh

Case No: EDIN 12504/86

1. My decision is that the decision of the medical appeal tribunal dated 2 December 1986 is erroneous in point of law and is therefore set aside.

2. The claimant, who was born on 7 September 1958, is a severely handicapped person who suffers from mongolism (Downs Syndrome). In January 1986 a claim for mobility allowance was made on behalf of the claimant by a social worker. Under section 37A of the Social Security Act 1975 (as amended) a person who satisfies prescribed conditions as to residence or presence in Great Britain is entitled to 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. "Physical disablement such that he is unable or virtually unable to walk" is defined in regulation 3(1) of the Mobility Allowance Regulations 1975 (as amended) 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 of 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

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life or would be likely to lead to a serious deterioration in his health."

3. The local adjudication officer referred the medical questions arising on the claim for mobility allowance to a medical practitioner who gave a report dated 18 February 1986. In the course of his report the said medical practitioner stated that the claimant was strongly built, aggressive, grabs attendant and bites his wrists. The said medical practitioner expressed the view in his report "He is physically capable of walking, but resists walking after 10 yards or so and has to be persuaded to continue." The said medical practitioner expressed the view that the claimant was virtually unable to walk. The local adjudication officer decided that he was unable to decide the claimant's claim on the basis of that medical report and the medical questions were referred to a medical board. On 15 May 1986 the claimant was examined by a medical board. The board in the course of the report stated that the claimant was difficult to handle and required constant supervision to even walk across the room. The report also stated that the claimant was liable to throw things about or to sit down and refuse to move. The board further stated that the claimant at the time of their examination would not walk across the room but was persuaded to walk a short distance gripping the nurse's hand. It was further stated that all the claimant's movements were purposeless unless assisted. With regard to the board's assessment of walking it was stated "Slow purposeless and given to tantrums and downright refusal which constitutes virtually unable to walk." In the board's opinion the claimant was virtually unable to walk.

4. The Secretary of State for Social Services notified the adjudication officer that he was of the opinion that the decision of the medical board dated 15 May 1986 ought to be considered by a medical appeal tribunal. It was arranged that a hearing before a medical appeal tribunal should take place on 8 August 1986 in Glasgow. In a letter dated 1 August 1986 a social worker reported "William is severely mentally handicapped and can be very difficult when removed from the ward setting. He is doubly incontinent and has congenital cataracts with resulting poor vision. William has difficulty with stairs, and can be extremely disruptive in a strange setting. For these reasons, his consultant does not feel that he should attend the tribunal." Thereafter it was arranged that a domiciliary visit on the claimant should take place at the hospital in which the claimant is an in-patient. At the hearing which took place in the claimant's ward the claimant was accompanied by a nursing sister. The note by the chairman regarding the evidence was as follows:-

"For claimant: he can walk to the dining-room and back from ward. Sometimes he refuses to walk. Usually responds to encouragement. He could walk 100 yds."

The tribunal did not confirm the decision of the medical board and decided that the claimant should not be regarded as unable to walk or virtually unable to walk. The reasons for the tribunal's decision were as follows:-

"Having considered the evidence and seen the claimant walking, we

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find that he walks with a wide base gait and rocking from side to side, but stable. At times he voluntarily refuses to walk but can usually be persuaded to do so. He can walk a considerable distance with rests. There is no discomfort. He is not virtually unable to walk."

5. An application was made by a social worker on behalf of the claimant for leave to appeal to a Commissioner against the medical appeal tribunal's said decision. In the course of that application it was stated as follows:-

"The medical tribunal observed the claimant walking within a ward situation. This is despite regulation 3(1)(b) of the Mobility Allowance Regulations 1975 which stresses that it is his ability to walk out of doors which should have been under consideration. I feel that this is a breach of natural justice in that the Tribunal's findings should have been based on Mr Watson's walking ability out of doors. The ward is Mr Watson's home and to all intents and purpose his walking severely deteriorates when he is outside.

I would also suggest that the Tribunal failed to make relevant findings of fact in that although they state that Mr Watson "voluntarily refused to walk but can usually be persuaded to do so" under the section findings and reasons for decisions on form MY365A they do not present any findings of fact to justify this statement."

A chairman of a medical appeal tribunal granted the said application for leave to appeal. I am now concerned with the appeal. I directed an oral hearing in connection with the appeal, and at that hearing the claimant was represented by a Senior Welfare Benefits Adviser, and the Secretary of State for Social Services was represented by a solicitor from the Scottish Office.

6. In the course of a brief written submission it is submitted on behalf of the Secretary of State for Social Services as follows:-

"The Secretary of State submits that the medical appeal tribunal (MAT) decision although brief appears to cover all aspects specifically at issue before them in the appeal.

It was not contended that the claimant's walking ability was more severely restricted out of doors. The nearest reference to this was contained in Mr George Watson's letter of 1 August 1986 where he stated the claimant "can be extremely disruptive in a strange setting".

The MAT concluded, as they were fully entitled to do, that the claimant's periodic refusal to walk were voluntarily induced. This was a matter of medical opinion and as such cannot be challenged in an appeal lying only on a point of law.

It follows from the above that, since the claimant's behavioural problems were held by the MAT to be voluntary in origin they are

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thus inadmissible for mobility allowance purposes."

7. I am not prepared to accept the said submissions made on behalf of the Secretary of State. Under section 37A of the 1975 Act a person is entitled to mobility allowance if he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so. Under regulation 3(1) (b) physical disablement such that he is unable or virtually unable to walk is defined as being if a person's physical condition is such that 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. There was in my opinion clear evidence to the effect - particularly in the letter written by the social worker on 1 August 1986 mentioned above - that the claimant was severely mentally handicapped and could be very difficult when removed from the ward setting. It was further stated in that letter that the claimant could be extremely disruptive in a strange setting. In my opinion there was a duty on the said medical appeal tribunal to express their views regarding the claimant's ability to walk out of doors. The claimant was only examined in the hospital ward, and the tribunal have expressed no view regarding the claimant's walking ability out of doors. This issue is dealt with by Commissioner Hoolahan in an unreported decision in Commissioner's File CM/107/1986 dated 16 March 1987. In paragraph 9 of that decision the said Commissioner stated as follows:-

"The Chief Commissioner, in decision on Commissioner's file CM/103/1984, stated at paragraph 4:

"The criterion in regulation 3(1)(b) is as to the ability of a claimant to walk out of doors; the tribunal has made no findings specifically with regard to the capacity of the claimant in this case to walk out of doors notwithstanding that that was the statutory criterion and it was as to that that evidence was before it. This is an error of law and alone would require me to allow the appeal."

That decision has not been understood to mean that there must in law be an out of doors test to assess ability to walk out of doors. That ability can be assessed by inference from performance in an indoors test, but such inference has to be reflected in the decision of the tribunal with proper and adequate reasons to support the inference. It is true that the claimant in that case suffered from left hemiplegia - a different disability from that of the claimant's son in the present case. Nevertheless, in my judgment, the words of the Chief Commissioner are of general application, and should be applied in the present case."

I agree with what was stated by the said Commissioner. I therefore consider that having regard to the said medical appeal tribunal's failure to deal adequately with the claimant's ability to walk out of doors their decision falls to be regarded as erroneous in point of law.

8. I would also add the following in regard to the said decision by the

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medical appeal tribunal. It is maintained on behalf of the Secretary of State for Social Services that since the tribunal appear to have considered that the claimant's behavioural problems were voluntary in origin they were thus inadmissible for mobility allowance purposes. Although the matter is not entirely clear to me it would appear that it is being maintained that the claimant's behavioural problems were not due in the tribunal's view to physical disablement. In the cases which have come before me regarding persons who are suffering from mongolism or Downs Syndrome or severe mental handicap it has been accepted that the behavioural problems of the claimants in question were due to a physical disability. The question whether a person's behaviour is due to a physical disablement or a mental disablement is of course a matter for a medical appeal tribunal. If the medical appeal tribunal in the present case were intending to suggest that the clear behavioural problems from which the present claimant suffered were not due to a physical disablement - and I am not suggesting that the tribunal were necessarily adopting that attitude - the tribunal would have had to give much clearer and adequate reasons in my opinion for reaching that conclusion. The question whether the behavioural problems of a person suffering from Downs Syndrome even if due to a physical disablement warrant a conclusion that the person in question is virtually unable to walk under said regulation 3(1)(b) is of course a medical issue. The present case must clearly be reconsidered by another medical appeal tribunal who should consider this issue as well as the above issue regarding the claimant's ability to walk out of doors.

9. The appeal brought on the claimant's behalf is allowed.

(signed) Douglas Reith
Commissioner
Date: 20 January 1989