Effect of review "on any ground" by DMP pending appeal - original determination lapses – appeal must be against review

COMMISSIONERS FILE NO: CA/108/1987

APPELLANTS NAME:

This deals with the well known question of lapse in relation to attendance allowance appeals. We decided that a DMP's determination is superseded by another DMP's review thereof "on any ground" - whether or not the reviewing DMP also revises.

TOC/SH/5

Commissioner's File: CA/108/1987
DHSS File: SD 450/2398

SOCIAL SECURITY ACTS 1975 TO 1986
APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD
ON A QUESTION OF LAW
DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: [redacted]

[ORAL HEARING]

1. We grant leave to appeal and pursuant to regulation 5(3) of the Social Security Commissioners Procedure Regulations 1987 we treat the application as the appeal. The determination (see paragraph 13 below) of the Attendance Allowance Board by its delegated medical practitioner (DMP) dated 9 October 1986 was superseded by the determination of the DMP dated 11 May 1987 and ceased to be effective from that date. The appeal against the determination dated 9 October 1986 has, therefore, lapsed, and we have no jurisdiction to entertain this appeal on the merits.

2. The claimant was born in 1920. In 1973 she strained her back. On 19 November 1982 she completed a form for a claim for attendance allowance (which was received on 26 November 1982); the effective date of the claim was 23 November 1982: see form DS7 (at page 14 of the case papers). She was medically examined and by a decision dated 3 February 1983 her claim was rejected: see Form DS 7 (at page 14 of the case papers). The claimant applied for a review and on 14 April 1983 she was examined by another examining doctor and on 26 April 1983 a DMP determined that the claimant required prolonged or repeated attention during the night in connection with her bodily functions (the "night condition") and certified that she was entitled to attendance allowance at the lower rate for life from 23 November 1982. By a letter dated 2 July 1984 the claimant stated that her condition had worsened and that letter was accepted as a request for review. Thereafter there ensued a series of reviews but it is sufficient for the purposes of the present appeal to summarise the history as follows:

(1) On 26 April 1983 (as stated above) a DMP on review determined that one of the night conditions was satisfied and issued a certificate at the lower rate for the period commencing 23 November 1982 for life (page 23 of the case papers).

(2) On 12 December 1984 a DMP reviewed the determination in (1) above on any ground and determined that the claimant satisfied one of the day conditions and revised the existing certificate by substituting the day for the night condition with effect from 30 July 1984 (pages 36 to 38 of the case papers).

(3) On 9 October 1986 a DMP reviewed and revised the determination in (2) above and revoked the lower rate certificate from 28 April 1985 (pages 94 to 97 of the case papers).

(4) On 4 May 1987 the claimant signed an application form for leave to appeal to the Commissioner against the determination in (3) above.

(5) On (or before) 11 May 1987 a DMP reviewed the determination in (3) above, determined that the claimant satisfied one of the day conditions and on 11 May 1987 he issued a certificate at the lower rate for the period commencing on 25 April 1987 for life (page 128 of the case papers).

(6) On 25 July 1988 the DMP who made the determination and issued the certificate in (5) above gave his reasons (page 192 of the case papers).

In the result, the lower rate certificate having been revoked from 28 April 1985 and a fresh lower rate certificate having been issued as from 25 April 1987, the period from 28 April 1985 to 24 April 1987 was not covered by any certificate.

3. When the claimant's application for leave to appeal against the determination of 9 October 1986 was placed before a Commissioner, it was accompanied by a Memorandum dated 18 June 1987 from the Norcross appeals branch of the DHSS stating that as the determination of 9 October 1986 had been reviewed (on any ground) and revised, the Secretary of State's representative was of the view that the application for leave to appeal had lapsed in accordance with the guidance in paragraph 13(3) of Commissioner's unreported decisions CA/108/81, CA/125/84, and CA/146/84. In the light of this Memorandum, the C nissioner on 8 July 1987 made a direction asking the claimant whether or not, in view of t. ew certificate of 11 May 1987 referred to in the Memorandum (a copy of which was enclosed) she wished to withdraw her appeal. Her reply was to the effect that she wished to continue with her appeal.

4. A similar situation had arisen in the associated case, CA/20/87. In that case the claimant had been granted leave to appeal against a determination of a DMP and, after leave to appeal had been granted, another DMP, on review, revised the determination appealed against. In other words, the same (or a similar) question arose in both cases, namely: What happens to an appeal (or an application for leave to appeal) against a determination of a DMP when that determination has, before the hearing of the appeal, been reviewed and revised by another DMP? The Chief Commissioner appointed us as a Tribunal of Commissioners to hear and decide both cases.

5. On 16 January 1989 we held an oral hearing (which was not concluded on that day). The claimant was not present, and was not represented. The Secretary of State was represented by Mr Latter of Counsel, instructed by the Solicitor's Office, Departments of Health and Social Security. At the oral hearing on 16 January, it was clear from the argument of Mr Latter that there was an arguable case on behalf of the claimant and we ordingly granted leave to appeal. The claimant had previously indicated, in the course of a telephone conversation, that she would consent, if she were granted leave, to her application being treated as the appeal, and at that hearing Mr Latter gave a similar consent. We therefore treated the application as the appeal pursuant to regulation 5(3) of the Social Security Commissioners Procedure Regulations 1987. The hearing was adjourned until 16 March 1989 when it was concluded. Mr Mark Rowland of Counsel who was instructed to appear in the associated case, CA/20/87, acted as amicus curiae at the adjourned hearing of the present case. Mr. Latter again appeared for the Secretary of State. We are grateful to them for their assistance.

6. Lapse

The word "lapse" has been used by Commissioners in a number of decisions. It is not a word which has as yet (but see paragraph 26 below) appeared in the relevant legislation. It has not received any statutory or judicial interpretation. In ordinary usage something "lapses" when it ceases to have effect.

7. The Issue

The essential question is: Has the appeal (for which we have granted leave) against the review determination of 9 October 1986 "lapsed"? If it has, we have no jurisdiction to

consider the merits of the appeal. As we have already indicated, on 9 October 1986 a DMP reviewed and revised an earlier determination, made on 12 December 1984, and revoked the lower rate certificate from 28 April 1985. The claimant seeks to appeal against that determination. However, that determination dated 9 October 1986 was reviewed and revised by the determination dated 11 May 1987. The certificate issued on that date (at page 128 of the case papers) shows that the claimant satisfied one of the day conditions and was entitled to attendance allowance at the lower rate from 25 April 1987 for life. The DMP's reasons were not apparently formulated until 25 July 1988 (at page 192 of the case papers). The question that we have to determine, therefore, is the effect upon the appeal of the revised determination dated 11 May 1987 (the reasons being dated 25 July 1988). Has the determination dated 11 May 1987 replaced the previous determination of 9 October 1986? If so, has it replaced that determination wholly or in part? In the light of the determination dated 11 May 1987 can the present appeal against the determination dated 9 October 1986 continue? Or has it automatically and inevitably lapsed?

8. Commissioners' Decisions

In the associated case, CA/20/87, a number of decisions of Commissioners on the question of lapse were cited to us. We shall refer to them, so far as possible, in chronological order.

CU/42/1954.

In this case the claimant made a claim for unemployment benefit. On 27 January 1954 the local insurance officer decided that the claimant was disqualified for receiving unemployment benefit from 15 January 1954 to 25 February 1954 "on the ground that he has voluntarily left his employment without just cause". The claimant appealed and on 2 March 1954 the local tribunal dismissed his appeal having found as a fact that the claimant had left his employment voluntarily and that no just cause had been established. On 2 April 1954 the claimant gave notice of appeal to the Commissioner. On 13 April 1954 the insurance officer gave a decision that unemployment benefit was not payable from and including 20 January 1954 because sufficient contributions had not been paid or credited. On the next day, 14 April 1954, the insurance officer reviewed the decision of the local tribunal of 2 March 1954 and appears to have decided that "unemployment benefit is payable from 15 January 1954 at the weekly rate of 69s. 6d." It is not clear why he reached that decision but the Commissioner stated:

> "The insurance officer now concerned draws attention to the fact that the claimant had apparently made no claim for unemployment benefit for the period from 15 to 19 January 1954 and points out that if so he was not entitled on any view to benefit for that period."

However, be that as it may, the Commissioner continued:

> "I have however no power to vary the decision of a local insurance officer reviewing in favour of a claimant the decision of a local tribunal. In consequence of this review the decision of the local tribunal of 2 March 1954 from which this appeal to the Commissioner has been brought has been annulled. It follows that I have no jurisdiction to entertain the claimant's appeal from that decision but that unemployment benefit is payable from 15 January 1954 at the weekly rate of 69s. 6d. even if the claimant is not in fact entitled to it by reason of insufficiency of contribution or (as regards the period from 15 to 19 January 1954) failure to claim."

The important point is, of course, that the Commissioner decided that the decision of the local tribunal of 2 March 1954 had been annulled by the review decision on 14 April 1954. That case was referred to in CA/108/81 in paragraph 2(1) in the following terms:

> "2. (1) In 1954 a decision - CU4/54 (not reported) [a slip for CU42/54] - was given by a Commissioner under the - then - national insurance jurisdiction that the effect of the reviewing, (or, more accurately reviewing and revising) a subsisting decision is to annul that original decision and thereby to lapse

the appellate jurisdiction to determine a pending appeal from such original decision even though such an appeal had been instituted prior to the exercise of the power to review and revise and was pending for determination when that exercise took place."

CA/108/1981.

In this case the claim was for an attendance allowance. By a determination dated 7 October 1980 the claimant was awarded attendance allowance at the lower rate until 7 October 1981. On 9 July 1981 a DMP refused to revise that determination and the claimant appealed (i.e. against the determination dated 9 July 1981). On 7 December 1981, on a renewal claim, the claimant was again awarded the allowance at the lower rate from 8 October 1981 to 7 December 1982. It appears that the DMP who gave the determination of 7 December 1981 was willing to review it (see paragraph 5(5) of the Commissioners decision) and that "the DMP" (it is not clear which DMP) "is or might be willing now to review also the decision of 9 July 1981 -which is the subject of the pending appeal to the Commissioner": paragraph 7(1) of the decision. In his decision, which the Commissioner himself described as an interlocutory decision, the Commissioner proposed to proceed with the hearing of the appeal against the decision dated 9 July 1981 at the expiration of a further 28 days to give an opportunity for further representations to be made. The important passage in the Commissioner's decision is at paragraph 13(3) where he stated:

"(3) Where (whether on the Board's own initiative or upon the claimant's due application) a review takes place and the original decision is in any respect revised; that will in my view destroy the substratum upon which any appeal against the original decision is founded - for the new decision is by operation of law then substituted for the old as from the inception of the latter - and the appeal against the old will be lapsed."

That passage was referred to in the decision of the Chief Commisioner in CA/125/84.

CA/125/1984.

This was also a claim for attendance allowance. By a determination dated 25 July 1983 the claimant's claim for higher rate attendance allowance in respect of her son was refused. On 27 March 1984 the DMP reviewed but did not revise that determination. On 20 April 1984 the claimant requested a review of the determination dated 27 March 1984. On 10 September 1984 the Chief Commissioner gave leave to appeal against the determination dated 27 March 1984. On 17 October 1984 a DMP reviewed and revised that determination dated 27 March 1984, and an allowance at the higher rate was awarded as from 24 June 1984 - a date which was, therefore, later than a possible earlier starting date if the appeal had been allowed. As the Chief Commissioner stated:

"4. Under the revision, attendance allowance in fact became payable from a later date than could have been the relevant starting date, if the appeal had been allowed and the matter subsequently re-determined. However, the jurisdiction under section 106(1)(b) [of the Social Security Act 1975] was within the 3 months to review the determination appealed against 'on any ground', and it appears to me that once the revision of the decision appealed against was made then that decision lapsed because it was replaced by the revision itself. There is thus I consider no appeal before me."

The Chief Commissioner then stated that he had followed the view of the Commissioner in CA/108/81 at paragraph 13(3) in so far as it related to the circumstances of the case before him, the Chief Commissioner, and continued:

"... it is not necessary for me to consider whether the learned Commissioner's view there expressed applies in all circumstances and I do not therefore do so. I note however that at least in certain circumstances the Secretary of State has a reservation as to the universal application of the opinion of the learned Commissioner that where a review takes place and the original decision is in any respect revised that will destroy the substratum upon which any appeal against the original decision is

founded; this reservation is made in the Secretary of State's submission before me."

CA/31/1984.

In this case attendance allowance had been awarded at the higher rate on 21 April 1981. On 16 October 1983 a DMP reviewed that determination and revised it by replacing the higher rate allowance with a lower rate allowance from 10 April 1983. The claimant applied for leave to appeal and also requested a review. It was submitted that the review should take place before the hearing of the appeal and that leave to appeal should not therefore be granted. However, the ground of the appeal was that the Attendance Allowance Board on 16 October 1983 had no jurisdiction to revise the determination of 21 April 1981. The Commissioner described that as "a most unusual factor". He stated:

> "4. ... It is undesirable in the extreme for there to be currently both an appeal, or an application for leave to appeal, and a request for a review which cannot be refused. Moreover, when this does happen, I think that normally the proper course would be to suspend the hearing of the application for leave to appeal until the review had been carried out."

But, because of the "most unusual factor" the Commissioner gave leave to appeal, heard the appeal and dismissed it.

CA/146/1984.

In this case the Commissioner referred to CA/108/81 and CA/125/84 and said:

> "4. ...Both those decisions hold that if a decision of a DMP which is under appeal to the Commissioner is in the meantime reviewed and revised, then the revised decision ceases to exist and is replaced by the new decision on review, with the result that the appeal against the original DMP's decision must have lapsed ..."

The Commissioner then referred to the decision of the Chief Commissioner in CA/125/1984 and continued:

> "6. ... I note that the Chief Commissioner in his decision took account of the fact that the subsequent revision on review was made under section 106(1)(b) of the 1975 Act, i.e. the power of the Attendance Allowance Board or its delegate to 'review such a determination on any ground', which is in itself akin to an appeal (R(S) 2/81, paragraph 7 and 21). That is also the situation here because, although there is rather more than the prescribed period of 3 months (see regulation 63 of the Social Security (Adjudication) Regulations 1984 -S.I. 1984 No. 451) between the two DMP's decisions ..., nevertheless regulation 63(1) merely requires that the application for the review shall have been made within 3 months of the date of the decision of which review is sought. I have no doubt that that is what has occurred in the present case. Consequently I would not wish to express any opinion on the situation where there was a review which was not 'on any ground', i.e. where more than the prescribed period of 3 months had elapsed and the review had to be on a specific ground eg. ignorance or a mistake of a material fact (see section 106(1)(a) of the 1975 Act). I note that the Chief Commissioner was careful to limit his decision in paragraph 4 on Commissioner's file CA/125/1984."

CSA/33/1985.

In this case the Commissioner refused leave to appeal because -

> "The revised decision of 3 June 1985 supersedes the decision of 18 January 1985 against which the claimant has sought leave to appeal. His application accordingly cannot be entertained by me and lapses. The revised decision of 3 June 1985 carries its own right of appeal, subject to leave, on a question of law."

CSA/43/1985.

In this case the Commissioner granted leave to appeal reserving for the appeal "the question relating to the possible lapsing of intermediate claims for review".

CA/157/1986.

In this case the Commissioner allowed an appeal against a review determination of a DMP. However, it was subsequently ascertained that that determination had been reviewed and revised by a DMP before the date of decision on the appeal and the consequence was, as the Commissioner said in paragraph 3 -

> "... the claimant has now obtained everything which she could have obtained through the proceedings before the Commissioner. It goes without saying that, had I been in possession of the relevant information, I should not have given the decision which I did give. I should have held that the claimant's appeal to the Commissioner had lapsed because its substratum ... had been revised out of existence."

Accordingly the Commissioner set aside his earlier decision and declared "the claimant's appeal to the Commissioner to have lapsed".

CA/40/1987.

This was a decision on a preliminary issue. An application for the review of the determination under appeal had been received and a DMP was in the course of considering that application and the Commissioner was asked to say whether it was more appropriate that the matter should be suspended until the application for review had been considered. The Commissioner stated:

> "3. It does undoubtedly raise problems when an application for review is received and the decision intended to be reviewed is already under appeal; and the converse case can also arise. If the decisions relating to cases that go on appeal to a social security appeal tribunal are any guide, the effect of the revision ab initio on review of a determination must be to bring the appeal against the decision so revised to an end (see Decision R(SB) 1/82), though where the revision is partial only the appeal against the unrevised parts still remains on foot (see Decision R(P) 1/82 at paragraph 3). It would seem that conversely if a decision or determination is set aside on appeal any application for review must lapse."

The Commissioner decided to continue with the appeal because, as he said in paragraph 5, "it does not follow that on review the matter will be revised ab initio, so that the appeal will not necessarily lapse as a result of revision of the existing determination.". In that citation the Commissioner referred to R/SB) 1/82 and R(P) 1/82, to which we now refer.

R(SB) 1/82.

In paragraph 12 of this decision the Commissioner referred to CU/42/54 and to CI/202/77 -

> "... where it was stated that after the earlier decision a practice had grown up, which had the approval of the Commissioners, of not reviewing (or perhaps of not revising on review) decisions from which there was a pending appeal unless the revised decision would give the claimant all that he could get on the appeal. I would commend this practice for application in supplementary benefit cases. It is calculated to minimise delay."

That decision does not, therefore, carry the present question any further.

R(P) 1/82.

In paragraph 3 of this decision the Commissioner referred to CU/42/54 and to R(SB) 1/82 and said:

> "...It was held in Decision CU/42/54 (not reported), a decision recently approved in Decision R(SB) 1/82 that if a decision was reviewed (meaning I think, revised on

review) there was nothing left to appeal from and the appeal was at an end. That case concerned a decision which was wholly set aside when revised on review. In the present case the revision on review has left a part at least of the original decision standing; and I see no reason why the appeal should not continue. I may add that in Decision R(SB) 1/82 above referred to I alluded to the practice of not reviewing any decision against which an appeal was pending on the ground that such a review, unless it offered all that was being claimed in the appeal, might gratuitously delay the assertion of a claimant's rights. That objection is not relevant here and may well not be relevant in other cases where a continuing decision is revised as from a date after it first became operative; and it was in my judgment perfectly proper to review and revise the decision in the way that it was done in this case, if indeed review was necessary."

There was thus a distinction drawn by the Commissioner between what might be described as a total revision and a partial revision of an earlier decision.

9. Comment on those decisions

It is interesting to note that in those decisions the word "lapse" has been used to describe two different situations or events: (i) an appeal, or application for leave to appeal, lapses if the determination of the DMP which is the subject of the appeal is reviewed and revised; (ii) a decision (or determination as we call it; see paragraph 13 below) by a DMP lapses if that determination is reviewed and revised. However, it is possible to extract from those decisions of the Commissioners the following propositions:

(1) Where a determination is reviewed "on any ground" and revised ab initio, the revised determination supersedes or replaces the original determination, and any appeal brought against the revised determination will lapse.

(2) Where an appeal is brought against a determination and the appeal is successful and the determination is set aside, any pending review of that determination must lapse.

(3) The question as to what happens to a pending appeal against a determination which is reviewed under section 106(1)(a) of the Act of 1975, outside the prescribed period of 3 months, has been left open. Unfortunately it does not appear from the decision in CA/157/1986 whether or not the review in that case was "on any ground" but the Commissioner did state that "the claimant has now obtained everything which she could have obtained through the proceedings before the Commissioner", and that suggests that the review was "on any ground".

In order to understand the situation we think it necessary to consider the relevant legislation.

10. The Legislation

We now consider the relevant statutory provisions and regulations. Prior to 15 March 1988 (when there was a minor amendment) section 35(1) of the Social Security Act 1975 provided that a person "shall be entitled to an attendance allowance" if he satisfies prescribed conditions as to residence or presence in Great Britain and either -

"(a) he is so severely disabled physically or mentally that, by day ["the day conditions"], he requires from another person either -

(i) frequent attention throughout the day in connection with his bodily functions, or

(ii) continual supervision throughout the day in order to avoid substantial

danger to himself or others; or

(b) he is so severely disabled physically or mentally, that at night ["the night conditions"], he requires from another person either -

(i) prolonged or repeated attention during the night in connection with his bodily functions, or

(ii) continual supervision throughout the night in order to avoid substantial danger to himself or others."

Sub-paragraph (b) was amended from 15 March 1988 but nothing turns on that for the purposes of the present case. Section 35(2) provided and still provides that the period for which an attendance allowance is payable to any person "shall be that specified in a certificate issued in respect of him by the Attendance Allowance Board", and is in the following terms:

"(2) Subject to the following provisions of this section, the period for which an attendance allowance is payable to any person shall be that specified in a certificate issued in respect of him by the Attendance Allowance Board as being -

(a) a period throughout which he has satisfied or is likely to satisfy the condition mentioned in subsection (1)(a) above or that mentioned in (1)(b), or both; and

(b) a period preceded immediately, or within such period as may be prescribed, by one of not less than 6 months throughout which he satisfied, or is likely to satisfy, one or both of those conditions."

Thus, to qualify for attendance allowance a claimant must satisfy the prescribed conditions and a certificate will then specify the period for which the allowance is payable.

11. We turn now to sections 105 and 106 of the Act of 1975. Section 105 provides in subsection (1) that the Attendance Allowance Board constituted under section 5 of the National Insurance Act 1970 "shall continue in being by that name". Part 1 of Schedule 11 to the Act relates to the Board's membership and the method by which their functions are to be performed. Part 11 of that Schedule relates to the Board's personnel, administration and expenses. Subsection 2 then concludes "but regulations may make further provision as to the constitution and procedure of the Board." We refer below to the relevant regulations but for the present it is necessary to refer only to paragraph 5 of Part 1 of Schedule 11, which provides for delegation of the Board's functions to one or more Delegated Medical Practitioners (DMP). Paragraph 5 reads:

"The Board may delegate any of their functions in respect of any individual case to one or more medical practitioners and any functions so delegated shall be exercised by the practitioners in accordance with any directions by the Board".

Section 105(3) is important for present purposes. It reads:

"Subject to section 106 below, any question whether a person satisfies or has satisfied, or is likely to satisfy, for any period the conditions set out in paragraph (a) or (b) of section 35(1) of this Act shall be determined by the Board."

We emphasise the word "determined" - "shall be determined by the Board" or, of course, by a DMP.

Section 106(1) is also important for present purposes. It provides:

"106. (1) The Attendance Allowance Board may -

(a) at any time review a determination of theirs under section 105(3) above, or under this paragraph or paragraph (b) below, if they are satisfied that there has been a relevant change of circumstances since the determination was made, or that the determination was made in ignorance of a material fact or was based on a mistake as to a material fact;

(b) on an application made within the prescribed period review such a determination on any ground;

(bb) without an application review such a determination on any ground within the prescribed period;

(c) issue a certificate under section 35(2), or revoke or alter a certificate so issued, if they consider it appropriate to do so in consequence of a review in pursance of this subsection."

Paragraph (bb) above was inserted by the Social Security Act 1986, Schedule 5 paragraph 11(2) with effect from 6 April 1987. We draw attention to the side - words or side - notes to section 106 which read;

"Review of, and appeal from, Board's decision".

Section 106(2) then provides:

"Provision shall be made by regulations for enabling appeals to be brought to a Commissioner, with his leave or that of another Commissioner, against a determination by the Board of any question of law arising on a review under subsection (1) above or arising in connection with a refusal by the Board to review a determination made by them under section 105(3) of this section".

In other words, regulations may make provision for an appeal to a Commissioner either against a determination on review or against a refusal to review a determination but not for an appeal to a Commissioner against an original determination by the Board or a DMP of a claim for attendance allowance.

12. Regulations

The regulations relating to the Attendance Allowance Board are set out in Section E of the Social Security (Adjudication) Regulations 1986, in regulations 37,38 and 39. Regulation 38(1) provides that "the prescribed period" for making an application to review a determination "on any ground" within section 106(1)(b) of the Act (see above) is -

"the period of 3 months from the date on which notice of the determination which it is sought to have reviewed was given or sent to the claimant".

Regulation 38(2) provides:

"Subject to the provisions of paragraph (3) [not relevant for present purposes], an application, in pursuance of section 106 (1)(a) or (b) of the 1975 Act, for a review of a determination may be made by the claimant or the Secretary of State and shall be

made in writing to the Board".

We note in passing that if within 12 months of an application for review, a further review is sought, leave of the Board must be obtained: regulation 38(4). Section 106(1)(bb), as has been seen above, enables the Board or DMP of its own motion to review a determination within the prescribed period of 3 months even though no application for review has been made by the claimant or by the Secretary of State; and regulation 39(1) provides that the prescribed period for such a review is "3 months from the date of that determination". Regulation 39(2) to (5) set out the circumstances in which reasons for a determination shall be given. We think it desirable to set out those provisions in full:

> "(2) Where the Board, having where appropriate given leave under regulation 38(4), have reviewed a determination or have refused to review a determination, the claimant and the Secretary of State shall be notified in writing of the determination on the review of that refusal, as the case may be, and, subject to the provisions of paragraph (3), of the reasons for it, and of the conditions governing an appeal to a Commissioner.
>
> (3) If he consents to forego it, a claimant or the Secretary of State need not be notified of the reasons for a determination on review when it takes place.
>
> (4) Where notification of a determination on review is given to the claimant without a statement of the reasons for it, he shall at the same time be notified of the conditions governing an appeal to a Commissioner and of his right under paragraph (5) to be provided with such a statement.
>
> (5) Where a statement of reasons was not sent with the determination on review the claimant or the Secretary of State may, within 3 months from the date on which a notification of the determination was sent to the claimant or within such further time as the Board may for special reasons allow, make a request in writing for notification of the reasons for the determination whereupon the claimant and the Secretary of State shall be notified in writing of those reasons and the claimant shall again be notified of the conditions governing an appeal to a Commissioner."

From those paragraphs it will be clear that a statement of reasons for a determination can only be required, or given, in the case of a determination on review. In the case of an original determination of the claim there is no provision or requirement for the Board or DMP to give reasons. Finally, before leaving the regulations, we draw attention to regulation 39(6) which provides that where the Commissioner decides that a determination of the Board or DMP was erroneous in law -

> "the Board shall review their determination for the purpose of confirming or revising it".

The Commissioner cannot himself decide any medical question.

13. Determination

It will be seen, therefore,

(i) that the Board or DMP determines whether or not the conditions set out in section 35(1) of the Act are satisfied: section 105(3) of the Act;

(ii) that within 3 months of the date of notification of the determination the claimant may apply for a review: regulation 38(1) of the Adjudication

Regulations;

(iii) that, alternatively, the Board or DMP may of its own motion review a determination within 3 months of the date of the determination: regulation 39(1) of the Adjudication Regulations;

(iv) that an appeal may be brought to a Commissioner, with leave, against a determination on review or against a refusal by the Board to review a determination: section 106(2) of the Act.

We have noted that the reasons given by the Board or by a DMP are always referred to as "the decision" of the Board or DMP. Nowhere in the statute or regulations, however, does the word "decision" appear in relation to the functions of the Board or DMP except in the side - words or side - notes or marginal notes (however described) to section 106 - "Review of, and appeal from Board's decision". The side-words or side-notes or marginal notes do not, however, form part of the statute: Chandler v Director of Public Prosecutions [1984] A.C. 763 per Lord Reid at page 789; see also Cross: Statutory Interpretation (2nd Edn) page 129-130; Craies on Statute Law (7th Edn) page 197. We accordingly, have referred to the Board's or DMP's "decision" as a determination.

14. Certificate

The period for which attendance allowance is payable "shall be that specified in a certificate issued in respect of [the claimant] by the Attendance Allowance Board" - or more usually by the DMP. This certificate is in Form DS7. Part 1 of that form identifies the claimant. Part 2 is headed "Certificate" and provides boxes for completion by the Board or DMP as to which of the day or night conditions is or are satisfied, and the period throughout which the condition(s) is or are satisfied or likely to be satisfied. Part 3 is headed "Reject" and is completed by the Board or DMP if none of the conditions in section 35(1) is satisfied. (It will be recalled that in the present case, the claim was rejected on 3 February 1983 and the Form DS7 shows that rejection: page 14 of the case papers.) On review the Board or DMP may issue a certificate, or alter or revoke an issued certificate, if it is "appropriate to do so in consequence of the review": section 106 (1)(c) of the Act. The certificate is issued to the claimant. And it is upon the issue of that certificate (as we understand it) that the adjudication officer issues his decision as to the payment of attendance allowance.

15. Consequences

What are the consequences of the legislation? It is clear that an appeal against, and a review of, a determination by the Board or a DMP, may arise simultaneously. That is an unusual situation which, so far as we know, does not arise in any other jurisdiction. As the Commissioner said in CA/146/1984 at paragraph 6 (cited above) a review "on any ground" is "akin to an appeal". But it is clear that it is not identical to an appeal. A review is carried out by another DMP - who is not an appellate body. He has the same status as the DMP who made the determination which is being reviewed. Each DMP decides medical questions in the light of his or her own medical expertise.

16. Estoppel

At the first oral hearing we raised the question of estoppel. It seemed to us that if we allowed an appeal against the DMP's determination of 9 October 1986, notwithstanding the determination on review on 11 May 1987, the result of the appeal would be that the Board or a DMP would be required to review that determination of 9 October 1986 "for the purpose of confirming or revising it": regulation 39(6) of the Adjudication Regulations (see above).

Would objection then be taken to that review on the ground that the issue had been determined by the review determination on 11 May 1987? In other words, would an estoppel arise? There is no doubt that the doctrine of estoppel has been extended to decisions of tribunals: 16 Halsbury's Laws (4th Edn.) paragraphs 1503, 1565. Mr. Latter submitted that estoppel did not play any part in decisions of DMPs. Mr. Rowland, however, referred to section 117(1) of the Social Security Act 1975 which provides that decisions shall be final, and to section 117(2) which provides that any finding of fact in a decision shall not be conclusive for the purpose of any other decision. We also considered R(I)9/63 at paragraphs 18 and 24 and in particular the passage in paragraph 18 -

> "...it is not legally possible to have 2 decisions by different boards or tribunals on an identical question relating to the same period."

That passage is, we think, particularly apposite to the present case. We have, therefore, sought to analyse what occurs when a review takes place and in view of the clear conclusion we have reached it has become unnecessary to consider further the question of estoppel.

17. Analysis

We think it will be helpful to consider a hypothetical claim and a hypothetical claimant.

1 January 1988	Claim for attendance allowance.
1 February 1988	First medical examination and report.
1 April 1988	First DMP's determination. He may reject the claim or he may issue a certificate, certifying that the claimant is entitled to attendance allowance at the lower or at the higher rate. (If he certifies that the claimant is entitled to the higher rate, the case will in all probability stop there).
1 May 1988.	On the assumption that the claim was rejected or that a lower rate certificate was issued, a review may be instituted (either on the application of the claimant or by the Board on its own initiative).
1 June 1988.	Second medical examination and report (for the purpose of the review).
1 September 1988.	Second DMP's determination. This is a determination on review. The review is within the prescribed time and he may review "on any ground". A number of options are available to him - more than we can here enumerate; but we give some examples:

(1) If the first DMP's determination was to reject the claim and if, having reviewed that determination, the second DMP determines not to revise it, no certificate will be issued by either DMP. As the first DMP's determination was an original determination, no reasons for his determination will be given (see paragraph 12 above). Any appeal will be brought against the second DMP's determination, in respect of which reasons will be given.

(2) If the first DMP's determination was that the claimant satisfied, let us say, a day condition and he issued a certificate at the lower rate, the second DMP having reviewed, may confirm that determination but also go on to determine that from the date of the second medical report, the claimant satisfied both a day and a night condition and he will then issue a certificate at the higher rate for the period commencing 1 June 1988. If the first certificate remains in existence, it

will continue unaltered but will only have effect up to the day before 1 June 1988. A new certificate will be issued for the period commencing 1 June 1988.

(3) If the first DMP determined that a day condition was satisfied and issued a lower rate certificate for the period commencing 1 January 1988, the second DMP having reviewed the determination, may determine that the claimant did not satisfy either a day or a night condition at any time since the date of the claim. He will then revoke the certificate of 1 April 1988 and not issue any new certificate.

(4) If the first DMP determined that a day condition was satisfied and issued a lower rate certificate for the period commencing 1 January 1988 (as in example (3) above), the second DMP may, having reviewed, determine that the claimant satisfied both a day and a night condition at all times since the date of claim. He will (we assume) either alter the certificate dated 1 April 1988 so as to provide for a higher rate allowance for the period commencing 1 January 1988, and issue a new certificate at the higher rate for the period commencing 1 June 1988, or revoke the first certificate and issue a new certificate at the higher rate for the whole period commencing 1 January 1988.

18. From the above examples in paragraph 17 it will be seen

(i) that on each occasion the period from 1 January 1988 (date of claim) to 1 April 1988 (date of first DMP's determination) has been considered twice - by both the first DMP and the second DMP on review;

(ii) that any appeal in example (1) will be against the second DMP's determination (i.e. the determination on review);

(iii) that in examples (3) and (4) the second DMP has made a determination which is inconsistent with the determination of the first DMP (in relation to the period commencing with the date of claim). Two inconsistent decisions cannot stand together: R(1)9/63 at paragraph 18. What in fact has happened is that the first determination has ceased to have effect from the date of the second, reviewing determination. From that date the second determination will be the effective and operative determination.

19. From those examples, we draw the following conclusions:

(1) When a determination of a DMP is reviewed on any ground, the determination of the reviewing DMP becomes the effective, operative, enforceable determination (however one describes it) and the reviewed determination ceases to have effect. If there is a further review on any ground, exactly the same result will follow. The determination of the reviewing DMP will become the effective determination.

(2) If a claimant wishes to appeal in any of the above examples, the appeal must be brought against the second DMP's determination (the determination on review) - or, in the event of further reviews, against the latest reviewing determination.

20. We have considered the argument that the claimant should be allowed to appeal against the first determination if he or she has not received under the second, reviewing, determination the attendance allowance to which he or she might conceivably be entitled. If by that is meant, that the claimant should have a right and be allowed to appeal against the first determination unless the second, reviewing, determination resulted in the issue of a certificate at the higher rate for the period commencing with the date of the claim, we do

not agree. Under each of the above examples the period covered by the first determination has been twice considered: the second determination is the effective determination. If the claimant wishes the Commissioner to consider the period from the date of claim up to the date of the first determination, or up to the date of the second medical report, he or she can have those periods considered by the Commissioner by an appeal against the second, reviewing determination. It must be emphasised that the Commissioner can never decide any medical question and can only set aside the determination which is the subject of the appeal, and, as already pointed out, the Board or DMP must then confirm or revise that determination.

21. We have also considered the position of a claimant whose claim is rejected by the first DMP on 1 April 1988, but who, on review on 1 September 1988, obtains from the reviewing DMP a certificate (at the lower or higher rate) for the period commencing 1 June 1988 (the date of the second medical report). It could be argued that if the claimant wished to appeal against the rejection of her claim by the first DMP on 1 April 1988, and were permitted to appeal against that determination, he or she would not put at risk the certificate issued on 1 September 1988. Whereas, if the claimant were allowed to appeal only against the determination of 1 September 1988 he or she would put at risk the certificate issued on that date - the risk being that if the appeal succeeded and the matter was reviewed again as at 1 September 1988 by another DMP he might take a different view and revoke the certificate issued on 1 September 1988. We recognise the possibility of that risk. Nevertheless, any such DMP who revoked the certificate of 1 September 1988 would have to provide cogent reasons for so doing in his determination - and failure to do so would be likely to result in a further appeal.

22. Conclusion

Those considerations in paragraphs 20 and 21 do not outweigh the firm conclusions that we have reached. In our judgment a determination on a review "on any ground" will replace the determination which was the subject of the review, and any appeal must be brought against the reviewing determination and not against the revised determination. The determination which has been reviewed on any ground will cease to have effect by reason of the latter determination (the review determination) covering the entire period at issue. This is so even if after review, the reviewing DMP decides not to revise the earlier determination. Whether or not it is correct to say that the review determination has been "annulled" (CU/42/1954) is not, we think, of importance. What is clear, in our judgment, is that it will cease to take effect. In other words, it will lapse. It will cease to take effect because of the review and not because it has been reviewed and revised as suggested by the Commissioner in CA/108/81 in paragraphs 2(1) and 13(3).

23. Section 106(1)(a)

We wish to emphasise that we have not considered the effect of a review under section 106(1)(a). It will be recalled that under that sub-section a review may take place at any time but only upon the specified grounds - "that there has been a relevant change of circumstances since the determination was made, or that the determination was made in ignorance of a material fact or was based on a mistake as to a material fact". As we have made clear our decision relates to a review "on any ground". We think it right to emphasise this point since in the present case the DMP in his reasons dated 25 July 1988 (page 192 of the case papers) expressly stated in paragraph 2 that he "could review the decision dated 9 October 1986 on any ground". He then stated that he agreed with the DMP in his reasons in his decision of 9 October 1986 "that when the medical report was completed on 28 June 1986 [the claimant] did not satisfy the day or night conditions". (We think that must be an error for the medical report dated 28 April 1986 (see pages 65-70 of the case papers) since the DMP on 9 October 1986 based his determination upon the medical report dated 28 April 1985 and he revoked the lower rate certificate from that date). The DMP

concluded in paragraph 4 of his reasons that the latest medical report dated 25 April 1987 indicated that the claimant required frequent attention throughout the day and he issued a lower rate certificate from that date (see page 128 of the case papers). It would appear from that conclusion that the DMP was reviewing the determination of 9 October 1986 on the ground that there had been a relevant change of circumstances since that determination was made. Nevertheless, the DMP did in his reasons dated 25 July 1988 make clear that he had reviewed the period covered by the determination of 9 October 1986.

24. Where a letter of appeal is treated as a request for review

We have pointed out above that the claimant's letter dated 21 January 1987 (erroneously dated 1986) was not, in our view, a request for review. Nevertheless, the letter was treated by the DMP as a request for review. We have also drawn attention to the fact that in CA/31/84, where the claimant did apply for leave to appeal and did, apparently, request a review, the Commissioner decided to hear the appeal notwithstanding the request for review - the ground of appeal raising a "most unusual factor". See also CA/40/1987. Clearly, if a claimant wishes to appeal and if the Board or a DMP purports to treat the letter of appeal as, in addition, a request for review, the claimant should bear in mind that in an appropriate case it may be necessary to apply for a stay of the review.

25. Whether or not in the present case an appeal can be successfully brought against the decision dated 11 May 1987 raises, of course, different questions. If in the light of our decision, the claimant wishes now for leave to appeal against the determination dated 11 May 1987, we would consider any application if it were made promptly. We note that section 1(1) of the Social Security Act 1988 has substituted a new section 35(1)(b) of the Social Security Act 1975 but that substitution is to have effect only for the purposes of a claim or a review after the passing of the Act of 1988: section 1(2).

26. The Bill

The conclusion as to lapse of appeals where the decision in issue has been reviewed by a DMP differs from the result that will be achieved by the proposed amendment to section 104 of the Social Security Act 1975 in the Bill now before Parliament. Under subsection (3)(B) of the proposed amendment, where a claimant has appealed against a decision of an adjudication officer, and the decision is reviewed under section 104 by an adjudication officer then -

> "(a) if the adjudication officer considers that the decision which he has made on the review is the same as the decision that would have been made on the appeal had every ground of the claimant's appeal succeeded, then the appeal shall lapse, but
>
> (b) in any other case, the review shall be of no effect and the appeal shall proceed accordingly."

These amendments do not apply to reviews by a delegated medical practitioner (or, for that matter, to reviews under section 104 by a social security appeal tribunal).

28. Our decision is set out in paragraph 1 above.

(Signed)
V.G.H. Hallett
Commissioner

(Signed)
J.N.B. Penny
Commissioner

(Signed) A.T. Hoolahan
Commissioner

Date: 17 April 1989