ToC/SH/6

Commissioner's File: CA/130/1988
DHSS File: SD450/2646

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: (Mrs) ~~Rose Marina Ghoosoman~~

[ORAL HEARING)

1. This is a claimant's appeal, brought by leave of a Commissioner, against a determination dated 3 November 1987 and made for and on behalf of the Attendance Allowance Board ("the Board") by its delegated medical practitioner ("DMP"). Our decision is that the said determination is erroneous in law and we set it aside. But we make clear immediately that it is in the specific content of the determination and not in the manner of its preparation that we find vitiating error of law.

2. We held an oral hearing of this appeal. The claimant was represented by Mr Richard Drabble, of counsel, instructed by Mr Nicholas Warren, solicitor, of the Birkenhead Resource Unit. The Secretary of State was represented by Mr Ian Ashford-Thom, of counsel, instructed by the Solicitor's Office of the Departments of Health and Social Security. We are indebted to Mr Drabble and to Mr Ashford-Thom for the care and thoroughness with which they presented the arguments in respect of an aspect of the adjudication of attendance allowance cases which - although of fundamental importance - has not, so far as we are aware, ever previously been raised before the Commissioner.

3. At the same time as we heard this appeal we heard the appeal of another claimant in the case on Commissioner's file No CA/187/1988. The fundamental issue to which we have just referred was also canvassed in respect of that latter case. The relevant arguments are equally applicable to each case. It would be pointlessly tedious for us to deal with them twice. Accordingly, a copy of this decision is annexed to the decision which we have today signed in respect of the appeal in CA/187/1988. Paragraphs 4 to 33 of this decision are to be read as incorporated into and forming part of our decision in CA/187/1988.

4. We come straight to the fundamental issue. It involves nothing less than a full frontal assault upon the manner in which the determinations of DMPs (and, doubtless, of the Board) are - and for many years have been - prepared and produced. Mr Drabble did not shrink from submitting that if - as he contended - that manner is inconsistent with the relevant legislation and the relevant principles of English law, then, not only the two decisions which are presently before us, but every decision given by the Board or by one of its DMPs is and (until that manner is substantially altered) will be fundamentally erroneous in law.

5. Before we pass to the details of the procedure by which the determination of a DMP is

produced, it seems desirable that we should make certain general observations in respect of the scheme which Parliament has established for the adjudication of claims for attendance allowance. In its relevant essentials that scheme has not changed since sections 4 to 6 of the National Insurance (Old persons' and widows' pension and attendance allowance) Act 1970 (renamed the National Insurance Act 1970) introduced attendance allowance; established the Attendance Allowance Board; and made certain basic provisions (including regulation-making powers) in respect of claims, awards, reviews and the like. Of all the types of appeal which come before the Commissioner attendance allowance appeals are unique in that the Commissioner is the first lawyer to be involved in any way in the adjudication process. The DMP is, of course, a qualified doctor and is in duty bound to bring his medical expertise to bear upon the (often complex) medical issues involved. Moreover, the DMP is the final arbiter of purely medical issues - for the Commissioner has no jurisdiction to entertain or to pronounce upon such issues. The Commissioner is confined to considering issues of law. And the wording by which that jurisdiction is conferred upon him by Parliament is not without interest. We quote section 106(2) of the Social Security Act 1975:

> "(2) 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 [our emphasis] 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) or this section.
>
> In this subsection references to the Board include a delegate appointed in pursuance of paragraph 5 of Schedule 11 to this Act."

The words which we have emphasised are a verbatim repetition of what was originally set out in section 6(4) of the National Insurance Act 1970. They are to be contrasted with the words "on the ground that the decision of the tribunal was erroneous in point of law" which underlie the Commissioner's jurisdiction in respect of appeals from social security appeal tribunals and medical appeal tribunals (see section 101(1) and section 112(1) of the 1975 Act).

6. The distinctive wording of the primary legislation in respect of attendance allowance appeals to the Commissioner has, from the outset, been reflected in the relevant subsidiary legislation. We quote regulation 16(1) of the National Insurance (Attendance Allowance) Regulations 1971 [SI 1971 No 621]:

> "16. (1) Subject to the following provisions of this regulation, the claimant or the Secretary of State may appeal to the Commissioner, with the leave of the Commissioner, against a determination by the Board of any question of law arising on a review by the Board in pursuance of subsection (3) of section 6 of the Act of 1970 (which relates to determinations by the Board whether certain conditions for attendance allowance are satisfied) or arising in connection with a refusal by the Board to review a determination made in pursuance of subsection (2) of that section."

Similar wording appeared in regulation 10(1) of the Social Security (Attendance Allowance) (No 2) Regulations 1975 [SI 1975 No 598] and in regulation 64(1) of the Social Security (Adjudication) Regulations 1984 [SI 1984 No 451]. And the distinctive form of words survives to this day. The adjudication and procedural regulations which came into operation on 6 April 1987 broke new ground in that, for the first time, the exercise by the Commissioners of their jurisdiction was made the subject of separate regulations. Regulation 3(4) of the Social Security Commissioners Procedure Regulations 1987 [SI 1987 No 214] provides as follows:

"(4) An application to a Commissioner for leave to appeal against a determination by the Attendance Allowance Board of any question of law arising

(i) on a review by the Board in pursuance of section 106(1) of the Act; or

(ii) in connection with a refusal by the Board to review a determination made in pursuance of section 105(3) of the Act,

must be made within 3 months from the date on which notice in writing of the determination was given to the applicant."

7. What - if any - significance falls to be attributed to the distinction between "against a determination ..... of any question of law arising" and "erroneous in point of law"? It may be that Parliament took account of the apparent anomaly of subjecting the determinations of medical men to the scrutiny of experienced lawyers for the exclusive purpose of deciding whether those determinations were erroneous in law. The chairmen of social security appeal tribunals and of medical appeal tribunals are lawyers of a prescribed number of years' standing. As such, they can reasonably be expected to be acquainted with such elusive concepts as the rules of natural justice. It may be that Parliament did not expect the DMPs to be so acquainted; and wished to limit their vulnerability to legal attack to cases in which they (the DMPs) had expressly or by irrefutable implication committed themselves to the determination of a point of law. In the course of the hearing before us brief reference was made to the case of R v. National Insurance Commissioner, ex parte Secretary of State for Social Services (the Packer case) [1981] 2 AER 738, in which the Court of Appeal gave authoritative guidance as to the meaning to be attached - in the context of attendance allowance - to the phrase "bodily functions". So a DMP who directed himself that hearing, for example, was not a "bodily function" would clearly have wrongly determined a question of law arising before him; and it may be that that was the type of situation which Parliament had in mind when it provided for appeals to the Commissioner. But whether all this is or is not well founded, the fact is that the Commissioners have, certainly in recent years, applied to the determinations of the Board and of its DMPs criteria identical to those which they have always applied to decisions of the medical appeal tribunal (and, since 6 April 1987, to decisions of the social security appeal tribunal). We understand that in recent years the number of determinations given by the Board and by its DMPs has risen substantially. From our own experience, we know that attendance allowance applications and appeals to the Commissioner, which 8 years ago represented a very small fraction of the Commissioners' overall work, have increased in number to the point where they call for more judicial time from the Commissioners than is called for by any other benefit. It is our view that the basic system as established by Parliament is not without its shortcomings. It is no light matter to expect of a man or woman whose expertise lies in medicine the facility to give a reasoned determination which will not only be sound in its construction and application of the law but will also comply with the multifarious facets of the rules of natural justice. Those shortcomings of the system are by no means of recent recognition. Appendix B to the Annual Report of the Council on Tribunals for 1969-70 is a copy of a letter dated 27 February 1970 sent to the then Lord Chancellor by the then Chairman of the Council on Tribunals. We quote therefrom:

"The adjudicatory functions proposed for the new Attendance Allowance Board (Clause 97) also cause us concern. Here again our object is to avoid unnecessary multiplicity of tribunals, and to avoid an objectionable mixture of administrative and judicial functions. One suggestion was that the adjudicatory functions of the Board would more properly be given to existing tribunals such as the Medical Appeal Tribunals. Our latest discussions with the Department suggest, however, that the Board will in reality review claims in an administrative rather than in a judicial manner. We understand that a right of appeal to the National Insurance Commissioner is under consideration, and this may prove an acceptable solution.

So far as we know, the National Insurance Commissioners have not been asked to comment on the proposals in the Bill. They have a large fund of expert experience and we would attach great weight to their collective opinion, which we think ought to be obtained. We believe also that they would support the points of principle which we have ourselves raised."

8. We are not ourselves aware that the Commissioners ever were asked to comment on the lines suggested by the Council on Tribunals. We are not alone among the present Commissioners, however, in considering that many of the problems arising out of the existing system of adjudication in attendance allowance cases would disappear if such cases came before the medical appeal tribunal prior to their reaching the Commissioner. We believe that our view is reinforced by the analysis - to which we now turn - of Mr Drabble's attack upon the manner in which the DMPs' determinations are currently prepared and produced.

9. That attack was, in fact, something of an afterthought. It did not feature in the grounds upon which Mr Warren sought and obtained for the claimant leave to appeal to the Commissioner. Those grounds stood as the original grounds of appeal - and it was to them that the Secretary of State's original submission was directed. An oral hearing of the appeal was requested on behalf of the claimant. That request was granted; and 2 February 1989 was fixed (the case to be heard in Liverpool). But by letter of 18 January 1989 Mr Warren asked for a postponement so that both sides might have time to prepare argument in respect of a further - and fundamentally important - ground of appeal which was to be urged on behalf of the claimant. Indeed, Mr Warren respectfully suggested that consideration of that fresh point might well merit a hearing by a Tribunal of Commissioners. In his letter the point was summarised thus:

> "The new ground of appeal relates to the way in which the DMP's written reasons are compiled. It appears that the DMP's original reasons for a decision are not those produced to the claimant or the Commissioner. The reasons are written up in a special section within DHSS. If the decision is taken at the point when the original reasons are written, these should be disclosed. If the decision is not taken until after the Secretary of State has written the reasons, there is a breach of the rules of natural justice for the Secretary of State to be involved in the judicial process.
>
> By letter dated 21 December the DHSS refused to disclose the original reasons to me on the ground that 'the DMP's preliminary working notes are regarded as internal Departmental documents'."

Notice was given that the same point would be canvassed in case on Commissioner's file CA/187/1988. The originally fixed hearing date was vacated. The Commissioner directed a further written submission from the claimant's representative and made provision for a response thereto from the Secretary of State. Those submissions were duly prepared and forwarded to this Office. We need not here summarise their contents. Those contents were rehearsed and amplified in the course of the oral arguments which we heard - and with those arguments we shall, of course, deal in detail. On 8 May 1989 the Chief Commissioner directed that this appeal and the appeal in CA/187/1988 should be heard together by a Tribunal of Commissioners. The Secretary of State had refused Mr Warren's request for disclosure of the Departmental documents involved. With a view to reducing the risk of an adjournment of the hearing, the chairman of this Tribunal of Commissioners - on 19 May 1989 - directed that the relevant documents should be brought to the hearing. The intention was to allow the members of the Tribunal of Commissioners to examine and determine the precise nature of the documents of which the discoverability was to be argued before them. We are happy to record that, in the event, the Secretary of State, at the outset of the hearing before us, furnished not only the Tribunal but also the claimant's representative with copies of all the documents involved. In consequence, the discoverability of those documents ceased to be a live issue in the two appeals which we

heard. But - with future appeals in mind - we shall express our view on that issue when we have dealt with the documents which were before us (see paragraph 33 below).

10. In the light of the documents so produced and of helpful amplification from Mr Ashford-Thom we can reconstruct the course of events in the case the subject of this decision. On 11 July 1986 the claimant signed her claim for a renewal of attendance allowance. The layout of the relevant claim form does not encourage - and is obviously not intended to encourage - expensive particularisation. In answer to the question "What are the main needs for attention from other people?", the claimant wrote -

> "Because of my bowel trouble, my husband helps me when I go to the toilet, and bathes me or washes me during the night and day."

But she also submitted a short letter which read as follows:

> "Since my last examination by your Doctor, I have suffered two heart attacks, and this increases my dependency on my husband, as I can't walk very far without getting severe pains in my legs, so he takes me everywhere in a wheelchair."

11. On 22 September 1986 the claimant was visited and examined by an examining medical officer ("EMO") of the Department. On that day the EMO completed and signed two medical reports. One was on the standard form used in all attendance allowance cases. The other was supplementary and made upon a form specially designed for cases where a claimant's mental or psychological condition (whether permanent or intermittent) may entail its own need for supervision. We quote from the report on the standard form:

> "Anxiety state - iatrogenic I.B.S."
>
> "Diabetes mellitus recently diagnosed, not yet investigated fully. Dyspepsia. History of mild myocardial ischaemic attacks."
>
> "She gets confused, she states: not surprising as appears overmedicated."
>
> "Could use bedside commode if needed, even with colic. The need would diminish without self prescribed Senokot in large dose."
>
> "Has appointment to attend diabetic clinic shortly, for further investigation and treatment."

On the supplementary report was entered "petit mal, atypical". But it seems clear that the EMO considered that that condition did not call for any special supervision from another person.

12. On 30 September 1986 a DMP expressed the view that the claimant did not satisfy either of the two day conditions or either of the two night conditions. The claimant was duly informed. She applied for a review - and at that stage Mr Warren came upon the scene on her behalf.

13. Of the small bundle of documents which the Secretary of State produced at the hearing before us the earliest chronologically is a form bearing the number DS202E. It is in the nature of an action sheet and sections of it were completed by different people at different dates. The first page was initialled by someone (presumably a civil servant acting as an officer or servant of the Board) on 19 November 1986. The few entries on that page reflect certain basic particulars of the requested review. At the top of page 2 the DMP who gave the determination the subject of this appeal comes upon the scene for the first time. On 4 December 1986 he requested a domestic visit - ie by an EMO to the claimant. That visit took place on 24 January 1987 and - in accordance with the normal practice - copies of

the resultant report and supplementary report are in the main bundle of papers. The claimant is recorded as having told the EMO -

> "I cannot be left alone due to my agoraphobia. I won't stay by myself due to indefinable fear."

As his diagnoses of the main diseases causing the need for attendance the relevant EMO entered -

> "Epileptic person - Personality disorder and bowel fixation."

As a later point in the form he entered -

> "Steady progressive behaviour pattern has developed over several years."

But the overall tenor of the report indicates that the EMO did not consider that the claimant required such attention or such supervision as would entitle her to attendance allowance even at the lower rate. The supplementary report expressed the view that the claimant could safely be left unsupervised all day and all night.

14. Form DS202E shows that the EMO's reports of 24 January 1987 were, along with another document or documents, sent to the DMP on 6 February 1987. The last entry on that pro-forma was initialled by the DMP on 11 February 1987 and shows that he had given a provisional opinion.

15. That provisional opinion appears from form DS 345, which was also initialled by the DMP on 11 February 1987 and is in the small bundle produced by the Secretary of State at the hearing before us. That was the first occasion upon which any of the members of the Tribunal had seen such a form - and we found it of considerable interest. It is a mixture of manuscript entries and of ticks placed in various boxes. It indicates that the determination dated 30 September 1986 is not to be revised. It bears the entry:

> "I agree with above decision. In spite of protestations about 10A/B, 19A/B does not give evidence of degree of attention/supervision for an award." (In the course of this matter the numbering of many of the documents now before us has been altered more than once. But it seems to us to be clear that by 10A/B the DMP was referring to the two medical reports which were completed by the EMO who visited the claimant on 22 September 1986; and that by 19A/B he was referring to the two medical reports completed by the EMO who visited the claimant on 24 January 1987.)

The DMP then made on the form various entries specifically directed to each of the day conditions and to each of the night conditions. Those entries are highly condensed. They set out page and paragraph numbers from the relevant EMOs' reports, with telegram-style comments against each. By way of example we reproduce what was written in respect of the frequent attention day condition:

> "10A - 5a Can do all.
>
> 19A - 5a All bar bath."

Then a tick appears in the "No" box in a column headed "Provisional opinion". Examples of other comments (against appropriate page and paragraph numbers) are "Mentally alert", "Rational, orientated" and "Fear of agoraphobia, but no indication she would be in substantial danger". In respect of the night attention condition he wrote:

> "Previous DMP in error as could use bedside commode and reduced dose of aperients would facilitate less frequent bowel action."

It is our view that form DS 345 indicates clearly that the DMP - in forming his provisional opinion - gave his mind to the relevant evidence and to the relevant issues; and made certain brief comments by way of explaining the conclusions to which he had come.

16. The next document in the small bundle produced to us at the hearing is a short letter from an officer or servant of the Board. She explains that the documents have been augmented and, accordingly, renumbered "as we now have to include previous award docs when L/R or H/R was awarded on 276 action". (That, presumably, reflects certain then recent decisions of the Commissioner to the effect that a DMP will not normally be able adequately to explain why he has declined to renew an existing award if he does not have before him the medical evidence upon which that award was made.) On 17 February 1987 the DMP initialled a brief comment in respect of the rearranged documents. The small bundle produced to us at the hearing contains only two further memoranda - both brief. But they are both dated in September 1987 and we shall return to them when we reach that stage in the narrative.

17. By a letter dated 2 March 1987 the claimant was notified of the DMP's provisional opinion. The letter was in standard form and contained this paragraph:

> "At present this is his opinion only, NOT HIS FINAL DECISION. This letter gives you the opportunity to look at the evidence he has considered and if you wish, to comment on it."

Mr Drabble stressed to us the fact that when, on 11 February 1987, the DMP formed his provisional opinion he did not have before him the evidence upon which the previous award had been founded. That fact, of course, is demonstrably true. But the provisional opinion was not notified to the claimant until 2 March 1987; and no suggestion was made to us that, in the interim, the DMP could not or would not - if so minded - have recalled and altered the expression of his provisional opinion as recorded on form DS 345.

18. Thereafter the claimant, on 19 March 1987 and 24 June 1987, wrote letters seeking to further her case. (In his determination dated 3 November 1987 the DMP said that he had considered those letters.) It is obvious that by September 1987 work was in hand upon the preparation of the DMP's reasoned determination. In the small bundle produced to us at the hearing is a short memorandum dated 1 September 1987 and signed (it is to be presumed) by a civil servant working in what - for want of more authoritative terminology - Mr Drabble referred to as the "reasons section" of the Board's staff. The memo is addressed to the DMP and reads as follows:

> "Do you wish to defend epilepsy as having no complicating conditions or special features please?"

The DMP's reply is dated 10 September 1987:

> "Last fit 1984. Now only 3 dizzy spells per month - all during day. Rational and orientated."

And we have now dealt with every document which the Secretary of State produced for us at the hearing.

19. Mr Drabble's argument is bold. Its essence can be shortly stated. Parliament plainly intended that the relevant determinations should be given by the Board or by one of its DMPs. But - in practice - that is not what happens. The form of any given determination is an "elaborate charade". It purports to bring medical expertise to bear upon the various issues involved. But in reality the determinations are compiled by civil servants in the "reasons section" who have no medical qualifications and, indeed, no legal qualifications. Accordingly, the so-called determinations have no adequate standing in law. Every one of

them - and not merely those in the two appeals before us - falls to be set aside. The cases should be sent back by the Commissioners with a clear instruction that they should be determined in the manner prescribed by Parliament. And - to be fair to Mr Drabble - he deployed careful arguments in support of those radical contentions. To those arguments we now turn.

20. Attendance allowance is currently the subject of section 35 of the Social Security Act 1975. That section sets out the basic conditions of entitlement to the allowance - and contains regulation-making powers in respect of various ancillary issues. But adjudication in relation to attendance allowance is the subject of sections 105 and 106. Section 105(1) continues "in being by that name" the Attendance Allowance Board constituted under section 5 of the National Insurance Act 1970. Section 105(2) applies 'to the Board and their affairs' Schedule 11 to the Act. Three paragraphs of Part I of that Schedule are relevant for present purposes:

> "1. - (1) Subject to the following sub-paragraph, the Board shall consist of a chairman appointed by the Secretary of State and not less than 4 nor more than 9 other members so appointed; and all except 2 of the members appointed in pursuance of this sub-paragraph must be, a those 2 or either of them may be, medical practitioners.
>
> (2) The Secretary of State may appoint such persons as he considers are specially qualified for the purpose, whether medical practitioners or not, to be additional members of the Board; but such a member shall not be entitled to act as a member of the Board in relation to any functions conferred on the Board otherwise than under section 140 of this Act. [Section 140 is directed to the advisory functions of the Board.]
>
> 2. [Revoked]
>
> 3. .....
>
> 4. The Board may refer any individual case for investigation and report to one or more persons specially qualified in the Board's opinion to investigate that case.
>
> 5. 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 of the Board."

And section 105(3) of the 1975 Act provides as follows:

> "(3) 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."

Section 106 deals with reviews of and appeals from decisions of the Board - cf our quotation of subsection (2) in paragraph 5 above. And Mr Drabble also referred us to regulation 39(2) of the Social Security (Adjudication) Regulations 1986 [SI 1986 No 2218]:

> "(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 or 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."

(Paragraph 3 provides that, if he consents to forego it, a claimant or the Secretary of State need not be notified of such reasons.)

21. So - urged Mr Drabble - it is perfectly plain that Parliament intended that -

(a) the relevant determinations should be made either by the Board or by one of the Board's delegates;

(b) the individual persons or person making such a determination should be medically qualified; and

(c) the reasons should reveal to a claimant the reasoning processes of (in Mr Drabble's phrase) "the medical mind actually brought to bear upon the relevant case".

But - submitted Mr Drabble - the system by which determinations are in fact made fundamentally frustrates those intentions of Parliament. He submitted that the "reasons section" regularly carries out at least the following functions:

(i) suggesting matters which the DMP may accept as matters of medical opinion;

(ii) suggesting to and drafting for the DMP appropriate findings of fact; and

(iii) suggesting and formulating the expression of appropriate legal tests.

And so - contended Mr Drabble - the "reasons section" participates in and/or advises in respect of a DMP's determination. A line falls to be drawn between the legitimate furnishing of assistance where the DMP remains firmly in control of the decision-making process, and the illegitimate function of formulating an argument in support of a conclusion suggested by the DMP or, worse still, a conclusion postulated by the "reasons section" without reference to the DMP. The present system - urged Mr Drabble - plainly falls on the wrong side of that line.

22. From the documents which we have seen and from what Mr Ashford-Thom candidly told us, it is clear that the actual drafting of a determination is effected by a civil servant in the "reasons section" of the staff of the Board. But does that put the determination on the wrong side of the line which was identified by Mr Drabble? Mr Drabble referred us to a number of authorities - and with those we shall briefly deal.

23. From our own jurisdiction comes R(SB) 13/83. The case concerned the amount of supplementary benefit payable to a claimant who was a boarder. With that aspect of the case we are not - of course - here concerned. But at the end of his decision the Commissioner made certain comments in respect of the proper function of the clerk to a supplementary benefit appeal tribunal. He quoted with approval a passage from decision on Commissioner's file CSSB/1/1982:

> "It was a matter of complaint on behalf of the claimant that the record of the tribunal's decision showed that it was not written by the chairman of the tribunal although signed by him. In my opinion a chairman of a supplementary benefit appeal tribunal makes himself responsible for the contents of the record of the tribunal decision by signing that record. The record of the tribunal's decision, findings and reasons should however be made by the chairman himself or at least under his specific direction, it being his responsibility also to ensure that the record represents the corporate views of the members."

And in R(SB) 13/83 itself the Commissioner said this in paragraph 15:

> "15. It is no part of the function of the clerk to participate in the decision making process, and he and the tribunal should be careful to avoid doing anything that would suggest to the claimant that he is doing so. His position is in this respect somewhat analogous to that of a clerk to magistrates (as to whom see Halsbury's Laws of England (4th Edition) Vol 29 paragraph 381). His position however differs from that of magistrates' clerks in that, not having any legal qualification, he should not tender any advice on the law. As the passage cited from Halsbury's Laws shows, it will in general only be in the case of serious departure from these principles (and there was not such departure in the present case) that a decision will on this account be regarded as erroneous in point of law."

With reference to the quotation from CSSB/1/1982 we comment that the record of a supplementary benefit (or social security) appeal tribunal's proceedings is, at its base, a record of oral proceedings. The findings of fact, the decision itself and the reasons therefor are the outcome of deliberations between the chairman and his two lay members. It is well established that the clerk should not be present at such deliberations. It would, accordingly, be wholly wrong for the clerk to complete the relevant Form AT3 upon the basis of h' speculation as to what was decided by such deliberation. The chairman is in the be position to know and to record such outcome. But - as we understand what was said in CSSB/1/1982 - there will be nothing objectionable if the chairman specifically directs the clerk as to how to complete the relevant Form AT3 prior to that form's signature by the chairman.

24. Mr Drabble then referred us to pps 357-360 of the 6th Edition of Wade's "Administrative Law". We quote from pps 357-358:

> "An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, sub-committees, or delegates, however expressly authorised by the authority endowed with the power.
>
> One aspect of this principle is the rule that the participation of non-members in the deliberations or decisions of a collective body may invalidate its acts. The decision of a disciplinary committee, for example, is likely to be invalid if any non-member of the committee has taken part in its proceedings. It is not clear that the mere presence of a non-member will be fatal, although in one case Lord Wright MR said:
>
> > 'It would be most improper on general principles of law that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision.'
>
> A recognised exception is the right of magistrates to have the assistance of their clerk on questions of law."

On pps 359-360 Wade sets out examples where action was held ultra vires because the effective decision was taken by a person or body to whom the power did not properly belong. On p 360 this comment is appended:

> "From these typical cases it might be supposed that the question was primarily one of form. Convenience and necessity often demand that a public authority should work through committees, executive officers, and other such agencies. The law makes little

difficulty over this provided that the subordinate agencies merely recommend, leaving the legal act of decision to the body specifically empowered. It is obvious that in many such situations the real discretion will be exercised by the agency that recommends, and that in substance the law allows this function to be delegated. Nevertheless it is more than a matter of observing legal forms. The valid exercise of a discretion requires a genuine application of the mind and a conscious choice by the correct authority."

25. One of the cases referred to by Wade on the aforesaid pages is Leary v. National Union of Vehicle Builders [1971] 1 Ch 34. The case involved a close consideration of the rules of natural justice in the context of expulsion from a trade union. The judgment was given by Megarry J (as he then was). We quote from pps 53-54:

"It is a commonplace for persons who are not members of a committee to be in attendance at a meeting, or present for some limited purpose, and yet nobody would suggest that this invalidates the meeting. Participation in the deliberations and the decisions of the committee is another matter; if one or more of those who do this are not members of the committee, then in my judgment this would invalidate the proceedings ..... no doubt there may be cases in which it is not easy to draw the line between mere attendance on the one hand and participation on the other; but I do not think that this difficulty can affect the principle."

26. Departure from the foregoing principles - submitted Mr Drabble - will frustrate the purposes underlying the requirement that reasons should be given for any particular determination. He quoted from the judgment of Sir John Donaldson (as he then was) in Alexander Machinery Ltd v. Crabtree [1974] ICR 120:

"We have already said that it is unsatisfactory and amounts to an error of law for a tribunal simply to state the amount of compensation which is to be awarded without showing how that figure has been arrived at: see Norton Tool Co Ltd v. Tewson [1972] ICR 501. The basis of this proposition is that in the absence of reasons it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and is itself an error of law.

In the present case it is clear that the whole argument which the employers wish to address to us depends upon the tribunal's evaluation of the evidence relating to the reasons for the employee's dismissal and the reasonableness of the employers' conduct in all the circumstances in dismissing him on the basis of those reasons. The tribunal said that they were not satisfied with the reasons set out but gave no detailed explanation of why they were not satisfied.

Whilst there can be no appeal from findings of fact, the absence of evidence to support a particular finding is an error of law. Similarly a finding of fact or a refusal to find a fact will involve an error of law if the finding or refusal is a conclusion which no tribunal, properly directing itself, could reach on the basis of the evidence which has been given and accepted by it. I stress the word 'accepted' because it is important that tribunals, in reaching findings of fact, should set out in substance what evidence they do or do not accept." (At p122)

And in an interjection during argument in the Court of Appeal in Iveagh v. The Minister of Housing and Local Government [1964] 1 QB 395, Russell LJ (as he then was) adverted to the same principle:

"But the purpose of requiring the Minister to give the reasons for his decision under the Tribunals and Inquiries Act, 1958, is to enable anyone interested to see whether there is in law a fault in his process of reasoning, so that they may attack the decision." (At p405)

And - submitted Mr Drabble - it follows axiomatically that the relevant process of reasoning must be that of the person or body of persons to whom Parliament has assigned the making of the relevant decision.

27. From the determination now before us Mr Drabble selected certain passages which - he submitted - amply justified his fundamental criticism of the current system. In fairness to Mr Drabble, we think it proper fully to set out those passages:

> "I note that in her signed statement of 24 January 1987 [the claimant] says that she gets cramp when she gets dressed. I also note that she says that she can get to the toilet but needs help to clean herself up. In my medical opinion this help is not reasonably required because the medical report shows that help is not needed with wiping when at the toilet and the medical report shows that all her limbs are normal in co-ordination, tone and power and that although she has some lumbar stiffness on forward flexion she has full movement." (From paragraph 2)
>
> "I accept that she needs help to bathe and to use her wheelchair when outdoors but I find that she can manage the majority of bodily functions listed in the medical reports." (From paragraph 2)
>
> "In my clinical judgment the risk of substantial danger from a minor epileptic fit occurring in the claimant's case is so remote a possibility that it ought reasonably to be disregarded. In view of her dizzy spells I accept that supervision is required when she is in potentially dangerous but predictable situations. However, she is described as being alert and I am satisfied that she is fully aware of her disablement. I would therefore expect her to avoid placing herself at risk without first ensuring that she is adequately supervised. Any occasional supervision thus required does not, in my view, amount to continual supervision throughout the day. I note that in her signed statement of 24 January 1987 [the claimant] says that she cannot be left alone due to her agoraphobia and will not stay by herself due to indefinable fear. However, the statutory test is not whether continual supervision is essential for the claimant's wellbeing or peace of mind but whether it is required to avoid substantial danger. There is nothing in the evidence before me to suggest that she has any disturbances of behaviour or that she or anyone else would be in substantial danger as a result of her disablement if she were not under continual supervision throughout the day." (From paragraph 3)
>
> "I note that a delegated medical practitioner certified that [the claimant] satisfied the night attention condition when he made his decision on an earlier claim for a different period. I consider that the delegate was in error in accepting that this condition was satisfied because in my view the evidence in the medical report of 5 November 1984 does not support that conclusion. That report shows that attention was required 4-5 times every night taking 10 minutes at a time for help with wiping piles, cleaning up posterior and reassurance with bowel motions and lower abdominal pain. In my medical opinion this help was not reasonably required because the medical report shows that she could have used a bedside commode unaided and in my view reduced dosage of aperients would have facilitated less frequent bowel action." (Paragraph 6)

28. We are quite satisfied - and no attempt was made to persuade us to the contrary - that the foregoing passages were drafted by a civil servant in the "reasons section" of the Board's staff. At the very least - submits Mr Drabble - that civil servant was participating in the determination. It was that civil servant - and not the DMP - who identified and evaluated the relevant medical evidence. Moreover, although lacking any medical qualifications, the draftsman purported to bring medical expertise to bear upon such evaluation. Not only did he use such phrases as "in my medical opinion", the whole tenor of his reasoning imports medical expertise. Mr Drabble did not shrink from submitting that - on final analysis - the reasoning process "is one of invention of reasons" by the relevant civil servant who then puts

those reasons into the mouth of the DMP. That is a process which the DMP cannot lawfully delegate to a civil servant any more than a bench of magistrates can lawfully delegate to its clerk the making of the decision in a case which that bench has heard. The passages which we have cited in paragraph 27 above - submitted Mr Drabble - by themselves demonstrate that the "reasons section" carries out the functions which we have listed under [illegible] in paragraph 21 above.

29. Neither Mr Drabble nor Mr Ashford-Thom could tell us how long the present system of preparing determinations has been in operation. Our own experience suggests that it - or something very like it - has been in operation for at least a dozen years. But Mr Drabble submitted to us that if the system is fundamentally flawed in law, the length of time for which it has subsisted is irrelevant. With that we certainly agree.

30. Is the system flawed in law? Unsurprisingly, Mr Drabble expressly disclaimed any suggestion that the DMP does not read the relevant determination before he puts his signature to it. Equally unsurprisingly, Mr Drabble conceded that he had no grounds for suggesting that the DMP could not or would not, if so minded, delete or amend any part of the draft determination which the "reasons section" laid before him. Of course, in consequence of the increase in recent years of the overall number of attendance allowance cases, there is ordinarily a considerable delay between the time when the DMP gives his provisional opinion and the time when he signs his reasoned determination. (In the case before us the interval was almost 9 months.) In the meantime - suggested Mr Drabble - the DMP may well have forgotten the detailed evidence in the light of which he arrived at his provisional opinion, and he may, in consequence, take upon trust what is set out in the draft determination which is laid before him. Very properly, Mr Drabble put that possibility as no more than a suggestion. He made no pretence to having any evidence to support it - and we ourselves have seen no evidence either way. But we find ourselves quite unable to conclude that a DMP signs any given determination without in any way refreshing his memory in respect of the relevant documentary evidence. Indeed, the two brief memoranda of September 1987 (see paragraph 20 above) strongly indicate that the DMP retains - or, at the least, has ready access to - the documentary evidence relevant to any given case. We must confess that we should find it surprising - as well as disturbing - if a DMP were, many months after having expressed a provisional opinion, to sign a reasoned determination without making any reference back to the relevant documentary evidence.

31. As we see it, both the final determination and the reasoning set out in support thereof are those of the relevant DMP and of no one else. There has been no suggestion that anyone other than he is involved in the reaching of the provisional opinion. Moreover, our examination of the form DS 345 in this case (see paragraph 17 above) makes it clear that the DMP carefully brings his medical expertise to bear upon the multifarious and complex medical issues involved. On form DS 345 the DMP by no means confines his entries to the placing of ticks in different boxes. The manuscript entries are in a highly concensed -even telegraphic - form; but to anyone acquainted with the relevant legislation and case law they are readily susceptible of expansion into fluent sentences. After careful consideration we do not consider that such expansion - the work of the staff of the "reasons section" -fails to be regarded as unjustifiable intervention by a party other than the party to whom Parliament has entrusted the relevant determination and the reasoned explanation thereof. The DMP is a medical practitioner. He reaches conclusions in the light of his medical expertise. But he is not a lawyer. Were he - without any form of assistance -to compile his own reasoned determinations, the subsequent intervention of the Commissioner would, we apprehend, be much more frequent than it currently is. Of course, the staff of the "reasons section" are not lawyers either. But that will not, of itself, prevent them from acquiring a considerable and valuable knowledge of the legislation and case law relevant to this single benefit. Mr Drabble suggested to us that some of the views and expressions in the draft determination might not have occurred to the relevant DMP had they not been formulated by the "reasons section". That is not impossible. But we do not consider that it vitiates the system as it operates in practice. All judicial and quasi-judicial authorities are susceptible

to external influences. They are human beings - not electronic computers. Judges - indeed, Commissioners - discuss their individual cases with one another, often quite informally, as over lunch. In the course of such discussion a point of view or a turn of phrase may be expressed. The judicial authority whose case is under discussion may well say to himself:

> "I like that. I'll put it in my judgment (or decision, as the case may be)."

But he will not, of course, so do unless the point of view or turn of phrase accords with his own overall conclusions in respect of the relevant case. If he adopts such point of view or turn of phrase, he alone will carry responsibility for it. And an appellate court will hold him alone responsible. It is our view that such a situation is closely analogous to that in which the "reasons section" puts into fluent and carefully considered sentences the expert medical conclusions recorded by the DMP on form DS 345. It is the DMP - and no one else - who carries responsibility for the reasoned determination. As we have sought to demonstrate, the medical conclusions are entirely his own. If the reasoning in support thereof reveals error of law, recourse can be had to the Commissioner - and the case will be sent back for reconsideration. We say without reservation that the system is less than perfect. But it seems to us that it is an almost inevitable consequence of the scheme which Parliament has imposed for the adjudication of attendance allowance claims.

32. In the light of submissions made to us by both Mr Drabble and Mr Ashford-Thom we must say a few words about the staff of the "reasons section". They were, of course, basically in the service of the Department of Health and Social Security and are now basically in the service of the Department of Social Security. But paragraph 9 of Schedule 11 to the Social Security Act 1975 provides as follows:

> "9. The Secretary of State shall make arrangements for securing that such of his officers and servants as he considers to be required for the exercise of the Board's functions are available to act as officers and servants of the Board."

Until 1984 the Office of the Social Security Commissioners was staffed entirely (and that included the legal assistants) by personnel who were in the service of the Department of Health and Social Security. (Since that date, of course, the staff of the Office have been in the service of the Lord Chancellor's Department.) The Department of Health and Social Security was a party to the majority of appeals which came before the Commissioner. But from our personal experience we can confirm that the staff, without fail, sought to further the purposes and the work of this Office. There was no bias - either overt or covert - towards the Department of Health and Social Security in so far as that Department was a party to the proceedings with which this Office dealt. We are quite satisfied that like considerations apply to those who are made available to act as officers and servants of the Board. The officers and servants contemplated by paragraph 9 of Schedule 11 are not limited to filing clerks, postal clerks, typists and the like. They can properly assist the DMP in the expression - as opposed to the reaching - of his conclusions. Mr Ashford-Thom drew an analogy with the magistrates' clerk who is asked by his bench to draw up a draft order in matrimonial proceedings. (In Mr Ashford-Thom's words, to "flesh out" the intended order.) The magistrates will then look at the draft and adopt it provided that it reflects their intentions. But that does not mean that the clerk is "participating" in their decision in any way which affronts the law of the land.

33. Since, as we have already observed, the Secretary of State, through Mr Ashford-Thom, readily made available to the claimant's representatives the small bundle of documents underlying the form in which the DMP gave his reasoned determination, we have felt free to quote from and to comment upon those additional documents. The issue of their discoverability was not, accordingly, a live issue in this particular appeal. We wish to make clear, however, that it is our firm view that neither a claimant nor his representative is entitled to the discovery of such documents, any more than is a claimant or his representative entitled to discovery of notes or drafts which may have been made by or on

behalf of a judge or a Commissioner in the course of the preparation of the judgment or the decision which is finally given by him.

34. So much for the general - and important - issue canvassed in this appeal. We turn now to the issues particular to this individual claimant's case. And we can do so with relative brevity, for we have already adverted to much of the evidence and to substantial passages from the relevant determination.

35. The claimant was born on 8 November 1934. The papers give the impression that many of the disabilities from which she suffers (or claims to suffer) are founded in a psychiatric condition of long-standing. We quote from statements which she is recorded as having made, over the years, to various of the Department's EMOs:

> "I ..... have been treated by psychiatrists for 26 years." (12 November 1982).
>
> "I have been treated by various psychiatrists for the past 28 years for agoraphobia and depression." (5 November 1984)
>
> "I cannot be left alone due to my agoraphobia. I won't stay by myself due to indefinable fear." (24 January 1987 - cf paragraph 13 above.)

In 1982 the relevant EMO specified anxiety state as the main disabling condition affecting the claimant's need for attendance. In 1984 anxiety and agoraphobia were amongst the four such conditions specified by the relevant EMO. In 1987 the relevant EMO entered "Epileptic person - Personality disorder and bowel fixation" as his diagnoses of the main diseases causing the need for attendance.

36. In the context of entitlement to attendance allowance it is the "bowel fixation" which seems to lie at the core of this case. For it is common ground that the claimant habitually doses herself with quite inordinate quantities of laxatives and that such dosing is contrary to -indeed, in defiance of - all expert medical opinion which has been expressed to her. We quote again from the statement which on 24 January 1987 she made to the EMO:

> "Since 18 years old I have taken laxatives and I have loose bowels. I go at least 3 times a day to the lavatory. I now go once between 4 and 5am at night."

That does - at least - seem to reflect some improvement on the situations which she described, respectively, on 12 November 1982 and 5 November 1984. She was then taking 50 grams of Senokot granules at about 10 pm each night. In consequence, she passed loose motions four or five times in the course of the night. Unsurprisingly, the doctors have attributed some of the claimant's ancillary ailments (eg colic and confusion) to this gross over-medication. In consequence of two certificates of a DMP attendance allowance was awarded to the claimant at the lower rate for the inclusive period 16 September 1982 to 7 December 1984 and 8 December 1984 to 19 November 1986. By the determination which is the direct subject of this appeal the DMP found that neither of the day and neither of the night conditions was (with effect from 20 November 1986) satisfied in respect of the claimant.

37. Mr Drabble's criticism centres upon his contention that the DMP who gave the determination dated 3 November 1987 erred in law by misdirecting himself in respect of the claimant's psychiatric condition. That DMP had misunderstood the bases of the diagnoses recorded by the EMO's who had, respectively, examined the claimant prior to the issue of the certificates which resulted in payment of the allowance at the lower rate from 16 September 1982 to 7 December 1984 and from 8 December 1984 to 19 November 1986. The diagnoses recorded in the report of 12 November 1982 were: "Anxiety state, irritable colon (excessive aperients), haemorrhoids." That EMO considered that attention was required during the night by reason of the claimant's bowel motions. He described the

nature of the attention as: "Wiping piles, reassuring as she gets hysterical." Later in the report he wrote: "Seems to need husband's reassurance unduly." Still later he wrote: "Seems unlikely that her bowel fixation will improve after 16 yrs." In the medical report completed on 12 November 1984 the diagnoses were given as: "Anxiety state, irritable colon (excessive aperients), haemorrhoids, agoraphobia." And, of course, the diagnoses recorded in the medical report dated 24 January 1987 were: "Epileptic person - personality disorder and bowel fixation."

38. Did the DMP who gave the determination dated 3 November 1987 err in law in the manner in which he directed himself as to and dealt with the claimant's psychiatric condition? Not without some hesitation, we have decided that he did. In paragraph 2 of his determination the DMP referred to the fact that the EMO who completed the report of 22 September 1986, having stated that the claimant needed help to dress and undress if her colic was severe, had added "but colic iatrogenic". ("Iatrogenic" literally means "induced by a physician" - but that meaning can now be expanded to include "induced by self-medication".) But in this case the self-medication is obviously a result of the bowel fixation. It is, of course, difficult for a non-medical man to feel much sympathy for a person who brings trouble upon herself by inordinate self-dosages of laxatives. But - as Mr Drabble submitted to us - the psychiatric position may be such that the claimant no longer has any effective control over that aspect of her life. It is by no means clear that the DMP bore that consideration in mind. We repeat the final clause of paragraph 6 of the determination:

> "..... and in my view reduced dosage of aperients would have facilitated less frequent bowel action."

And we are inclined to accept Mr Drabble's submission that the DMP has been altogether too brusque in his discussion of the attention and/or supervision required by reason of the claimant's anxiety state and agoraphobia.

39. As we have indicated, it is not without hesitation that we have reached our conclusion in respect of this aspect of the case. But no serious injustice is likely to result from the claimant's case being looked at again. We do not wish to trespass in any way upon the proper ground of the Board or of its DMP, but we should have thought that the report of a consultant psychiatrist would be an important contribution to the expert evidence in this case.

40. The claimant's appeal is allowed.

(Signed) D G Rice
Commissioner

(Signed) J Mitchell
Commissioner

(Signed) A T Hoolahan
Commissioner

Date: 28 July 1989