CA 18/74

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HM/MV

NATIONAL INSURANCE ACTS 1965 TO 1973

APPLICATION FOR LEAVE TO APPEAL AND APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE COMMISSIONER

[redacted]

[ORAL HEARING]

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1. The claimant applies for leave to appeal from the decision of the Attendance Allowance Board given on 4th December 1973. By this decision the Board declined to revise two earlier decisions given on its behalf on 2nd November 1971 and 3rd January 1972 respectively. The Board held that since June 1971 James Martin had satisfied none of the statutory conditions for an award of an Attendance Allowance.

2. I held an oral hearing of the application, at which the Secretary of State for Social Services was represented by Mr. Canlin of the solicitor's office of the Department of Health and Social Security, and the claimant by Mr. Greville Janner, Q.C. The latter was acting in his capacity as the claimant's Member of Parliament, but to my advantage his argument reflected his professional expertise. The application raised arguable points of law, and I have therefore, conformably with the statutory provisions, and with the consent of Mr. Canlin and Mr. Janner, treated the application as though it were the appeal.

I find no error of law in the Board's decision, and the appeal therefore fails.

3. This case has a long history which is succinctly and accurately summarised in paragraph 1 of the Board's decision. The statutory conditions governing an award of attendance allowance, as they affect this case, are set out in paragraph 3 of the decision, and James' physical condition is described in paragraph 4. It would add unnecessarily to the paper in the case if I reproduced or paraphrased these paragraphs.

4. Mr. Janner's main attack on the Board's decision was directed to their refusal to accede to his request for an oral hearing. He contended that this refusal was inconsistent with the principles of natural justice. He accepted that there was no statutory duty on the Board to hold an oral hearing, and pointed out that by paragraph 8 of Schedule 1 to the National Insurance Act 1970 the Board are made masters of their own procedure. His case was that their procedure in exercise of their total discretion must be fair, and that what was fair in any case depended on the particular circumstances. He complained that for a number of reasons their refusal of an oral hearing was unfair.

5. Mr. Janner submitted that the fairness of the Board's procedure had to be judged in the light of two particular considerations. First, that the Board are the final judges of fact; second, that the facts

and law in this case are complicated. He complained that against this background the Board's refusal of a hearing was unjust in four respects. First, he had not been allowed to lead oral evidence; second, he had not been allowed to cross-examine Professor R. W. Smithells on his report dated 7th June 1973 and on his answers bearing the same date to 27 questions drawn up by Mr. Janner in consultation with Dr. J. A. Young (to whom I refer below); third, that he was not allowed to address the Board on fact; and fourth, that he was not allowed to address them on law.

6. In my judgment the Board's refusal of an oral hearing involved no unfairness. I am satisfied that following the Chief Commissioner's decision of 12th December 1972 (whereby an earlier decision of 31st May 1972 was set aside for error of law) the Board acted throughout their enquiry with impeccable fairness, and adopted procedures well suited and properly calculated to enable the claimant to present her case completely and fully. Mr. Janner did not in fact take full advantage of the opportunities presented to him by these procedures. Notwithstanding this, I am satisfied that when they came to make their decision the Board were fully apprised of all the considerations, both of fact and law, relevant to their adjudication. If however there were relevant considerations which were not before them - and I am not persuaded that there were - it would seem to me that this was due to Mr. Janner's failure to take advantage of the opportunities offered him, and not to the refusal of an oral hearing.

7. As regards Professor Smithells' report, there is no doubt that the Board's decision was mainly influenced by his views. Mr. Janner complained that he was given no opportunity to cross-examine the Professor, and in particular that he was not allowed to interrogate him on his answers to certain of the 27 questions which he caused to be put to him. In considering this complaint, it is relevant to have in mind the nature of the Board's proceedings. They are inquisitorial and not adversarial. It is for comment that Professor Smithells was not a compellable witness, nor was he called on behalf of the Board or of the Department of Health and Social Security. His views were sought and obtained in his capacity as an independent paediatrician of great distinction under section 5(5) of the National Insurance Act 1970. It is also for comment that Dr. J. A. Young, a paediatrician attached to the Leicester Royal Infirmary, who was nominated by the claimant, was present throughout the Professor's examination. Notwithstanding the Board's invitation (see their letter to Mr. Janner dated 13th June 1973), Dr. Young has submitted no report on James; nor, despite having assisted in formulating the 27 questions put to Professor Smithells, has Dr. Young offered any comments on the Professor's answers to them. Finally, Dr. Young has not commented on Professor Smithells' report.

8. At this stage it would be appropriate to detail certain letters included in the record which have influenced me in this case. They seem to me to speak for themselves, and I will not reproduce or summarise them.

3rd May 1973	Attendance Allowance Board to Mr. Janner
13th June 1973	Attendance Allowance Board to Mr. Janner

18th June 1973	Mr. Janner to Attendance Allowance Board
1st August 1973	Attendance Allowance Board to the claimant
ditto	Attendance Allowance Board to Mr. Janner
7th August 1973	Mr. Janner to Attendance Allowance Board
9th August 1973	Attendance Allowance Board to Mr. Janner
18th September 1973	Mr. Janner to Attendance Allowance Board
25th September 1973	Mr. Janner to Attendance Allowance Board
29th October 1973	Attendance Allowance Board to Mr. Janner

9. In the light of these letters I am satisfied that the Board were at all times astute to give both Mr. Janner and the claimant every possible opportunity to make written submissions on law and fact, to comment in writing on all the evidence before them, and to provide additional written evidence in so far as it was considered that the evidence was incomplete or in any way defective or inaccurate. I do not accept Mr. Janner's submission that the complications of this case were such that it was impossible to do justice on the basis of written evidence and submissions. It is I suppose possible, though I think unlikely, that I might have been led to a different view if Mr. Janner had availed himself of the Board's invitation to submit further written evidence and make additional written submissions after Professor Smithells' report had been considered by him. But the correspondence makes it clear that Mr. Janner deliberately refrained from doing this (save only that he forwarded certain comments within a narrow compass from Mrs. Martin). As regards the complaint that the Professor was not available for cross-examination, this seems to me based on a misapprehension of the nature of the proceedings, and of the Professor's position in relation thereto. In any case, I see no reason to suppose that the Professor would have been unwilling, if asked, to expand or explain his report, or to deal with critical comments, had they been submitted, on his replies to Mr. Janner's questions. I note that it was due to the good sense and good offices of the Professor that Dr. Young was present at James' examination.

10. Before leaving this part of the case I should deal with two other points. Mr. Janner placed considerable reliance on paragraph 31 of the Chief Commissioner's Decision of 12th December 1972. Having held that the Board had erred in law by failing to give adequate reasons for their earlier decision given on 31st May 1972, the Chief Commissioner said "If I had taken a different view on this I should have thought it right to raise the question whether this decision and the procedure leading to it comply with the rules of natural justice. In paragraph 9 of Decision C.A. 8/72 (not reported)

I drew attention to the immense difficulty facing the Board in deciding a case of this type without a hearing of any sort on the facts; to which one might add also without any form of oral legal argument."

At the end of paragraph 31 the Chief Commissioner commented: "I think that there is a good deal to be said for the contention that the letter of 11th April ought to have told the claimant the view which the Board had provisionally formed and given her an opportunity of producing further evidence from the hospital or elsewhere."

11. I do not accept that the Chief Commissioner was expressing a concluded opinion to the effect that the complications of this case were such that an adjudication without an oral hearing was necessarily and inherently unjust. And in particular it will be noted that the Board told the claimant and Mr. Janner that they had provisionally formed a view adverse to the claimant (see their letters of 1st August 1973), and specifically invited comment and further evidence before proceeding to their final adjudication.

12. I have not overlooked the fact that the Board's refusal of an oral hearing (see their letter of 19th January 1973) appears to have been dictated by administrative considerations. In that letter they pointed out that it would be administratively impossble to grant an oral hearing in all cases, and that it would be unfair to the general body of claimants to grant one exceptionally in a particular case. While appreciating the force of the Board's view, I would not necessarily regard it as a conclusive ground for refusing a hearing. I am inclined to agree with Mr. Janner's submission that if the Board is given total control of its procedures, its duty in each case is to adopt that procedure best calculated to ensure a fair adjudication in the particular circumstances. But even assuming the Board's reasons for refusing an oral hearing are open to criticism, I am nevertheless satisfied that no unfairness in this case resulted from such refusal.

13. In addition to complaining of the refusal of an oral hearing, Mr. Janner submitted that the Board erred in law in concluding that James did not satisfy the statutory conditions for an award of an attendance allowance. His particular complaint was of the Board's conclusions that James required neither attention nor supervision in terms of the Statute. He challenged these conclusions, submitting that the Board erred in law in reaching them.

14. No one who reads the record of this case can have any doubt that James' integration into the society of his fellows - his capacity, despite his very great disabilities, to take his place and play his part in ordinary life, is due to the loving care, devotion, attention and encouragement he had received from his parents. In particular it is clear that his parents, especially his mother, have taught him to use his prosthetic aids, and to perform most of the functions of normal life; and it is also clear that they have given him the confidence to go about among his fellows holding his head high, and lead a life whose normality seems to a layman very wonderful. (I might add in passing that Professor Smithells' report might be thought to be somewhat clinical and

detached on this aspect of the case; but that cannot of itself be a ground for submitting that the Board ought not to have placed reliance on his views).

15. Mr. Janner rightly and properly emphasised this aspect of the case. He contended that in the light of (a) Mrs. Martin's evidence as to what she does for James (which by hypothesis is indicative of what she has done in the past) and (b) of the medical reports dated 29th October and 12th December 1971 (see paragraph 19 of the Board's decision), it was not open to the Board to determine that James does not, by reason of his disabilities, require attention and/or supervision in terms of the Statute. In particular he submitted that the Board relied too heavily on Professor Smithells' purely clinical assessment of James' physical capacities, and that the question whether, and how much attention and supervision were required, should not be decided merely on such considerations, but on a consideration of the reliance which James has come to place on his mother's help and supervision, and on the help and supervision which she in fact provides and exercises.

16. In support of this submission Mr. Janner referred me to paragraph 15 of the Chief Commissioner's decision of 12th December 1972 in which he remarked "the Board would probably agree that evidence that supervision (or attention) was in fact provided is strong evidence that it was required; mothers would be unlikely to exhaust themselves by providing it unnecessarily for years".

17. In the light of the above I have carefully considered paragraphs 7 to 16 of the Board's decision, and have reached the clear conclusion that they did not err in law in concluding that at the date thereof James did not satisfy the statutory conditions for an award of an attendance allowance. In my judgment the Board carefully and deliberately analysed the statutory provisions, together with the medical evidence before them. I am unable to accept - particularly bearing in mind that the Board possessed medical expertise which they were entitled to use (see R. v. Medical Appeal Tribunal, Ex parte Hubble [1958] 2 Q.B. 228 per Diplock J. at page 240) - that their conclusion involved an error of law. In particular I cannot agree that they were not entitled to reach a conclusion in agreement with, and as they frankly say in paragraph 15 of their decision, largely based on Professor Smithells' report. I do not accept that the Board erred in law in agreeing with the Professor (see, for example, paragraphs 13, 14 and 15 of their decision) that Mrs. Martin is unduly solicitous about her son, and is providing attention and supervision beyond what is necessary, or indeed, desirable.

18. The only part of the Board's decision which has caused me real anxiety is paragraph 19. The Board there recognise that they are concerned with James' need for attention and supervision from June 1971 - that is from a date six months before the earliest date from which an allowance could be payable. Having pointed out that James was two years younger in June 1971 than at the date of Professor Smithells' report (he was born in December 1963, and was thus aged 7½ in June 1971) they say: "However, we consider that any additional attention or supervision he required at that time would have been by reason of his age rather than his disability."

This sentence troubles me, for it might be thought to be almost self-evident that at the tender age of 7½ James would still be in the process of learning from his parents to cope with and overcome his disabilities, and that his need for attention and supervision at that time would thus be in part dictated by that consideration. In June 1971 he would surely have been less experienced in using his aids than he was two years later, and for that reason, and not merely because he was two years younger, less able to cope with his problems and thus more in need of attention and supervision. I should add that on the assumption that in June 1971 James required attention or supervision in terms of the Statute, it might be thought to follow (see regulation 7(4) of S.I. 1971 No. 621) that his requirement was substantially in excess of the normal requirement of a child of his age and sex.

19. I am not entitled to substitute my own views for those of the Board. I am concerned only to determine whether they misdirected themselves in law. Although the sentence I have quoted seems to me open to criticism, the remainder of paragraph 19 satisfies me that the Board properly addressed their minds to the question of James' needs from June 1971 onwards, that they understood the meaning of the relevant statutory provisions, and that they took all relevant factors into consideration in reaching their conclusion. I am unable to hold that they misdirected themselves in law.

20. My decision is that the decision of the Attendance Allowance Board given on 4th December 1973 is not erroneous in law.

(Signed) Hilary Magnus
Commissioner

Date: 26th April 1974

Commissioner's File: C.A.18/74
D.H.S.S. File: B.2360/719