MJG/SH/6

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SOCIAL SECURITY ACTS 1975 TO 1986

APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted] **(Mrs)**

1. I allow the claimant's appeal against the decision of the Delegated Medical Practitioner ("DMP") for an on behalf of the Attendance Allowance Board ("the Board"), on review and dated 27 September 1990 as that decision is erroneous in law and I set it aside. I remit the case to the Board for redetermination by the Board or by a different DMP: Social Security Act 1975, section 106 (as amended).

2. This is an appeal to the Commissioner by the claimant, a woman born on 30 August 1963. She suffers from Down's syndrome and is mentally retarded. The appeal is in fact brought on her behalf by her mother. It is against the review decision of a DMP dated 27 September 1990, in which the DMP refused on review to revise an earlier DMP's decision (dated 15 October 1979) which had granted to the claimant the lower rate of attendance allowance based on satisfaction of the day supervision condition (see Social Security Act 1975, section 35(1)(a). The DMP refused to revise that decision so as to issue a higher rate certificate.

3. The appeal was the subject of an oral hearing before me on 11 September 1991 at which neither the claimant nor her mother were present but the claimant was represented by Mr R Drabble of Counsel. The Secretary of State was represented by Mr M Jenkin-Rees of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Drabble and to Mr Jenkin-Rees for their assistance to me at the hearing.

4. I deal first with a jurisdictional point that was raised in a written submission by the Secretary of State dated 17 April 1991 in the following terms,

> "It is submitted on behalf of the Secretary of State that the delegated medical practitioner's (DMP's) decision dated 27 September 1990 is erroneous in law. The DMP, at paragraph 1 of his decision, in accordance with

[section] 106(1)(a) of the 1975 Social Security Act stated that he has reviewed the decision dated 15 October 1979 because there had been a relevant change of circumstances namely that [the claimant] was not now unusually incontinent at night. Whilst it is submitted that when making his decision on review the DMP was not bound by the decision made by another DMP on 15 October 1979, but was under a duty to reach an independent decision based on the medical evidence, nevertheless in [the claimant's] case it is submitted that the relevancy of the change of circumstances used as grounds for review by the DMP to look at the earlier award is open to question. The previous award was for day supervision; however the DMP was indicating a reduction in [the claimant's] night attention needs. In Decision R(A) 2/90 similar questions were raised as to what constitutes a relevant change of circumstances and whether the change is likely to effect entitlement to benefit, and that 'relevant' meant relevant to the award of benefit. In the light of this decision, and also recent Decision CA/138/90, the Secretary of State's representative should like to submit the DMP's decision was given without authority because the grounds for review were in fact not open for the DMP to use. Furthermore paragraph 5 of the [DMP's] decision dated 27 September 1990 shows that [the claimant] previously required attention during the night hours for incontinence occasionally - when she was not well or during her periods. The current evidence clearly shows she still suffers incontinence when she has a period. Therefore it is submitted that although the claimant's need for attention with incontinence during the night may be infrequent there has been no reduction in her needs in relation to this particular aspect of night attention needs."

5. At the hearing before me Mr Drabble contended that this submission was incorrect in that there were in fact true grounds for review available to the DMP (see below). Mr Jenkin-Rees, after some discussion, made what I think it fair to describe as an open submission on this point.

6. The first thing that should be borne in mind, in my view, is that we are not concerned here, as were the Commissioners in R(A) 2/90 and CA/138/1990 with an attempted revocation of an existing award. Where that is the position, it is clear that strict consideration must be given to whether or not there was any ground for the review, under sections 104 or 106 of the Social Security Act 1975 or otherwise, and whether the determining authority, eg the DMP, has reasonably identified such ground for review. In R(I) 1/71 at paragraph 16, the then Chief Commissioner said,

> "I think that this case illustrates how important it is that at all levels the fundamental difference between a decision on a claim and a decision on an application for review, and the nature of the grounds for review should be understood. The difference depends on a simple principle. A claimant

must in general prove his title to a benefit. Once he has done so and has been awarded, and perhaps paid, the benefit, he can fairly insist that those who contend that the award should be cancelled or varied on review must shew that there are valid grounds for review."

7. I follow that statement of the law, which of course continues to apply to cases where it is sought to detract from an existing award whether by complete revocation or by some adverse variation. However, the present appeal is not such a case. This is a case of an application for a review being made on behalf of the claimant. It is not sought to cancel the award or vary it detrimentally to the claimant. On the contrary what is sought is an increase of benefit payable to the claimant. The application for review was made by the claimant's mother in a letter dated 16 March 1987 to the Department reading as follows,

> "In view of the Court of Appeal Judgment on March 13 (MORAN V. D.H.S.S.) I wish to claim the Higher Rate of Attendance Allowance in respect of my Mongoloid Daughter [naming the claimant]."

8. The normal procedures on review were then initiated. In due course the DMP gave his decision now appealed against. An earlier DMP's decision on the point (dated 19 December 1987) had been set aside by another Commissioner in a decision on file CA/191/1988. The DMP in his review decision of 27 September 1990 states (paragraph 1), "I can review [the DMP's original decision of 15 October 1979] because there has been a relevant change of circumstances since it was made, namely, [the claimant] is now not usually incontinent at night". The so-called ground for review was not one which had been adduced by the claimant or those representing her and was it appears 'conjured up' by the DMP of his own accord. He was aware of the fact that, as more than three months had elapsed since the original decision, there had to be a ground for review under section 106(1)(a) of the Social Security Act 1975, which provides as follows,

> "106. (1) ... the Attendance Allowance Board may -
>
> (a) at any time review a determination of theirs ... 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;"

9. So far as it goes, the Secretary of State's submission of 17 April 1991 (see paragraph 4 above) is correct, in that the ground for the decision given by the DMP could not be said to constitute a relevant change of circumstances (see R(A) 2/90). However, I have already explained above that, with this type of review, that is not the end of the matter. The further question

must be asked whether there in fact existed a valid ground for review, even though not referred to by the DMP in his decision (cf para.13 of 'starred' decision on file CSSB/540/89).

10. The ground for application for review in the claimant's mother's letter (see paragraph 7 above) was the decision of the Court of Appeal in Moran v. Secretary of State for Social Services, reported as an Appendix to R(A) 1/88. That decision is certainly relevant in that it relates to the meaning of supervision in section 35(1) of the Social Security Act 1975. Although in theory a decision of an appellate court does no more than declare what the law has always been, nevertheless I consider that a ruling of the Court of Appeal on a directly relevant topic does constitute a relevant change of circumstances. (Compare R(I) 25/63 and R(P) 2/84). Consequently, in my judgment there was a valid ground of review revealed in the claimant's own letter. The fact that the DMP did not refer to that ground in his determination of 27 September 1990 does not in the circumstances matter.

11. There was also another alternative ground for review available in this case as was pointed out by Mr Drabble at the hearing before me. That was that the original DMP's decision awarding attendance allowance only at the lower rate was, it appears, given in ignorance of a material fact, namely the correct mental age of the claimant. When that decision was given on 15 October 1979, the DMP had before him a statement given to the examining medical officer (on form DS4) that the claimant had a "mental age about 10-11 years (very approximately)". That statement was given by the claimant's elder sister, because the claimant's mother had had to go out on an emergency. However, it subsequently appeared that the true mental age of the claimant was younger than that (see letter from her mother dated 3 August 1987 stating her age to be 4 - 5 years and compare the examining medical practitioner's report of 19 August 1989 which describes the claimant as "mental age of 6 years child"). I accept Mr. Drabble's submission that that meant that the DMP's decision was given in ignorance of a material fact. That was also a valid ground for review. Again it does not matter that the DMP in his review decision of 27 September 1990 did not advert to this particular matter, for the reasons given above.

12. Consequently, I hold that the DMP's review decision of 27 September 1990 was validly made in that there were two valid grounds for review even though the DMP did not refer to either of them and stated a ground that was erroneous. I now proceed to consider the appeal against the DMP's decision as a substantive appeal. At the hearing before me Mr Drabble confined himself to criticism of paragraphs 11 and 13 of the DMP's decision reading as follows,

> " 11. I accept that [the claimant] should not be left alone in the house at night as she sometimes requires attention, but the medical conditions laid down in the 1975 Social Security Act are more stringent than this and I must be satisfied that there is a need for continual supervision

which is related to the avoidance of substantial danger.

.....

13. I note from the letter dated 2 February 1990 from [the claimant's representative] that [the claimant] is unaware of danger and if she were left on her own at night, she would be unable to cope with a fire. In view of your concern it is, in my view, reasonable to expect sensible precautions to be taken, including the provision of normal household security measures and a smoke alarm which would alert someone in the household to a fire. Someone being available to respond in these circumstances cannot be regarded as fulfilling the requirements of the Attendance Allowance Rules. The law specifies that the disabled person must require continual supervision related to the avoidance of substantial danger. I do not consider that the risk of substantial danger arising as a result of a fire at night is such that another person is reasonably required to provide continual supervision throughout the night."

13. In support of his contention to me that those excerpts from the DMP's decision were erroneous in law, Mr Drabble cited extensively to me from the above-cited Court of Appeal decision in Moran v. Secretary of State for Social Services (Appendix to R(A) 1/88) and also from the decision of the Court of Appeal in R v. Secretary of State for Social Services ex parte Connolly [1986] 1 W.L.R. 421. In particular Mr Drabble pointed out that, at page 424 of the report of the Connolly case, Slade L.J. (delivering the judgment of the Court) approved the decision of a Commissioner in earlier proceedings in the Connolly case (on file CSA/8/81), including the citation by the Commissioner in that decision (at paragraph 13) of the following passage from an earlier decision on file CA/26/1979 (paragraph 7), reading as follows,

> "Furthermore in my judgment the words 'requires' should be interpreted as meaning 'reasonably required'. For example, it is generally regarded as unwise to leave young children alone in a house (not of course on account of their physical or mental disablement but on account of their immaturity). If, as sometimes happens, children are left alone in a house and a relatively small chance of the house catching on fire and the children being killed materialises, those who leave them alone in the house are justifiably criticised, and I think that it would be proper to say of the children that they required supervision to avoid danger to them, even though it is well known that they do not always get such supervision."

14. Moreover, at page 433 of the report of the Connolly case, Slade L.J. said,

> "A little later in the course of his persuasive argument, Mr Drabble [on behalf of the claimant] came to what I regard as by far his strongest point. He submitted that the Board

had misdirected themselves in their decision, on the grounds that they proceeded on the assumption that able adults were present in the house throughout the night, and failed to consider what would be the applicant's position if no such adults were present. He submitted that the application of the correct test necessarily involves posing this last question. In his submission, the only possible answer to it, on the undisputed evidence before the Board, was that the applicant could not be left alone in the house at night without substantial danger to himself. Mr Drabble identified two particular sources of suggested potential danger, namely, the intrinsic risk of an unforeseen household emergency and the risk that the applicant's distress, if a call for help during the night remained unanswered, might cause him to leave his bedroom and do something unpredictable, like a small child might in similar circumstances."

It is clear from the whole of the decision that the Court of Appeal accepted Mr Drabble's submission on that particular point.

15. I have come to the conclusion, despite able arguments by Mr Jenkin-Rees to the contrary, that paragraph 13 of the DMP's review decision dated 27 September 1990 in this case fails to reflect a correct application of the law as laid down by the Court of Appeal in the Connolly and Moran cases. In particular, to state categorically, the DMP did, "I do not consider that the risk of substantial danger arising as a result of a fire at night is such that another person is reasonably required to provide continual supervision throughout the night" does not appear to take into account the principle in the decision CA/26/1979 (paragraph 7) which was approved by the Court of Appeal (see above).

16. It all depends on the facts of course and appeal to the Commissioner in this jurisdiction lies only on questions of law. On issues of fact, medical opinion etc., the decision of the Board or DMP is final. Those issues are not subject to appeal. Nevertheless in my judgment it is clear that in paragraph 13 of his review decision the DMP did not consider all the issues to which the Court of Appeal in the Connolly case attached importance. Moreover, the decision of the Court of Appeal in the Moran case (particularly at pages 11 and 12 of the Appendix to R(A) 1/88) is to the same effect.

17. It should be noted that this case is not affected by the amendment made, as from 15 March 1988, by substitution of section 35(1)(b) of the Social Security Act 1975 by section 1(1) of the Social Security Act 1988. The new section 35(1)(b) stipulates that the claimant should require "another person to be awake for a prolonged period or at frequent intervals for the purpose of

watching over him". No amendment has, however, been made to the day supervision condition.

(Signed) M.J. Goodman
Commissioner

(Date) 26 September 1991