

SOCIAL SECURITY ACTS 1975-1990

APPEAL TO THE COMMISSIONER FROM DETERMINATION ON REVIEW OF AN ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

1. My decision is that the determination on review dated 13 September 1990 given by a delegated medical practitioner (DMP) for and on behalf of the Attendance Allowance Board (the Board) is erroneous in law. I set that decision aside. Accordingly the certificate dated 26 January 1987 of another DMP, not having been validly reviewed and revoked, remains in force.

2. This is an appeal by the claimant with leave on a question of law against the above-mentioned determination on review of 13 September 1990 in which a DMP purported to review and revoke as from 18 January 1989 the certificate dated 26 January 1987 finding that the claimant satisfied the day condition of attention needs for an award of attendance allowance under section 35 of the Social Security Act 1975 at the lower rate.

3. The claimant, who was born on 13 May 1964, suffers from spina bifida and congenital hip dislocation and has an artificial right leg. She also suffers from incontinence. She has been in receipt of attendance allowance at the lower rate in respect of a need for attention by day for most of her life since the age of 9. On 26 January 1987 a DMP gave a further certificate of satisfaction of the day condition of attention for a period of ten years from 5 May 1987.

4. On 8 December 1988 intimation was given by the Secretary of State that he was applying for a review of the claimant's award on the ground that there might have been a change in the claimant's condition. What was relied upon was the fact that the claimant had succeeded in obtaining part-time work as a supply teacher. A further medical examination of the claimant was arranged and in the accompanying report the examining doctor expressed the following view in paragraph 6 of his report dated 18 January 1989 on Form DS4 in answer to the question: "If different degrees of help were needed before the above dates when, and in what respect, did needs change":-

"Dependency more or less same now as when young except able to leave on own now for periods due to age;"

On 21 April 1989 a DMP reviewed and revised the award and held it should be revoked from 18 January 1989. He stated:-

"I can review the decision dated 26 January 1987 because there has been a relevant change of circumstances since that decision was made, namely, that [the claimant] no longer needs help with clothes whilst at the toilet."

5. I observe in passing that in fact there was no reference to a need by the claimant for such help in the details given on the renewal claim dated 12 January 1987 on the basis of which the certificate was granted so that that ground of review could hardly be valid. The DMP's determination on review of 21 April 1989 was however set aside by the Board in any event on procedural grounds on 20 December 1989.

6. Paragraph 1 of the determination on review dated 13 September 1990 which is now under appeal is in the following terms:-

"1. I accept your letter dated 13 June 1989 as a request for review of the claim for Attendance Allowance. The decision of 21 April 1989 is set aside (Social Security (Correction and Setting Aside of Decisions) Regulations 1975) as your letters of 10 March 1989 and 2 April 1989 were not seen by the delegated medical practitioner before he made his decision. I can review the decision dated 26 January 1987 because there has been a relevant change of circumstances since that decision was made, namely, [the claimant] began work as a part-time supply teacher on 5 September 1988."

7. The first sentence quoted above is inaccurate since the claimant's letter of 13 June 1989 was not a request for review but a request to have the previous determination on review set aside, as duly happened as above mentioned. The remainder of the paragraph attributes authority for the DMP's review to the occurrence of a relevant change of circumstances, a ground available under section 106(1)(a) of the Social Security Act 1975. I accept the submission of the claimant, which is now supported by the Secretary of State's representative that the ground stated by the DMP was not in fact a relevant change of circumstances for the purposes of attendance allowance.

8. A similar question was considered in the case on Commissioner's file CA/90/1987 (now reported as R(A)2/90) in which the Commissioner made reference to the Court of Appeal decision in Saker v. the Secretary of State for Social Services, dated 15 January 1988. That case was of course concerned with the question of what amounted to a "material fact" for the purposes of review, but applying the reasoning of the judges of the Court of Appeal the Commissioner in paragraph 4 of his decision in R(A)2/90 concluded that to be a relevant change of circumstances the change must be relevant to the issue to which it is directed and be such as to raise a serious question as to continuing entitlement, but that it does not need to produce a different outcome from that of the original decision before it can be said to be relevant. I am in broad agreement with that approach. Earlier in the same paragraph the Commissioner dealt with the consequences of finding that the change of circumstances relied on is not capable, as a matter of law, of constituting a relevant change of circumstances. Referring to the submission made to him by counsel for the Secretary of State in that case the Commissioner stated:-

"He also submitted and I accept that if the Board purport to carry out a review on the ground of "relevant change of circumstances" and the circumstances relied on are not capable of coming within whatever meaning is as a matter of law to be given to "relevant change of circumstances" that is an error of law and the decision on review falls to be set aside."

I also accept that proposition.

9. In the present case the sole ground of review stated by the delegated medical practitioner is that the claimant "began work as a part-time supply teacher on 5 September 1988." But that event was not in my judgment a relevant change of circumstances and did not give rise to a serious question regarding the claimant's continuing entitlement to attendance allowance which is not, of course, a means-tested benefit. The claimant had attended school and, no doubt, college whilst accepted as qualifying for the allowance and had subsequently been in receipt of unemployment benefit which implied capacity for some work and indeed required the claimant actively to look for work. To her immense credit the claimant managed to secure some part-time work but that of itself had no implications regarding her continued qualification for attendance allowance on the day condition of attention need.

10. As the sole ground of review relied upon by the DMP was irrelevant it follows that the determination on review was not validly made under any statutory authority. It is erroneous in law and must be set aside. In the normal case where a determination on review given by or on behalf of the Board is held by a Commissioner to be erroneous in law the case under review is for reconsideration by the Board. In this case however the proper course for the Board would appear to be to reject the Secretary of State's request for review as having been based upon a ground which, as all including the Secretary of State are now agreed, was irrelevant.

11. The appeal of the claimant is allowed.

(signed) J G Mitchell
Commissioner
Date: 3 July 1991