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

**Jurisdiction of the Commissioner in regard to decisions of the Attendance Allowance Board; grounds on which an appeal to the Commissioner may lie; Board's decision erroneous in law because of want of compliance with requirement to give reasons**

Attendance Allowance was claimed in respect of a child (i.e. for attendance allowance purposes a person under the age of 16 (see section 4(5) of the National Insurance Act 1970)) and on 2.11.71 a delegate of the Attendance Allowance Board (see section 5(6) of the said Act of 1970) decided that neither of the conditions for entitlement to an allowance under section 4(2) of the 1970 Act (as modified in the case of children by regulation 7(1) and (4) of the National Insurance (Attendance Allowance) Regulations 1971 ("the 1971 Regulations")) was satisfied by the child. The child's mother applied for a review of this decision and on 3.1.72 another delegate of the Board reviewed (ie reconsidered) the decision of 2.11.71, but decided that it should not be revised (ie altered). On 17.3.72 the Secretary of State applied for a review of the decisions of 2.11.71 and 3.1.72 and on 31.5.72 the Board itself decided that while the conditions for review of the decisions of 2.11.71 and 3.1.72 were satisfied (see section 6(3) of the 1970 Act and regulation 14(1) of the National Insurance (Attendance Allowance) Regulations 1971 S.I. 1971 No. 621 as amended by regulation 2 of S.I. 1971 No. 1854) those decisions should not be revised. The claimant applied for leave to appeal to the Commissioner, the Secretary of State and the claimant consenting to the determination of the application for leave to appeal being treated as the determination of the appeal (see paragraphs 2-6 of the Chief Commissioner's decision).

*Held* that the decision of the Board (see paragraph 10 of the Chief Commissioner's decision) was erroneous in law and should be set aside on the ground that it did not comply with the requirement in regulation 14(2) of the 1971 Regulations to give reasons for a decision on review (see paragraphs 1 and 24-30 of the decision).

When in the course of his decision considering other issues raised on the appeal the Chief Commissioner:—

(a) indicates what are the functions of the Commissioners in relation to decisions of the Board and its delegates (see paragraphs 13 and 14 of the decision);

(b) considers the meaning of the words "continual", "supervision" and "substantial danger" in section 4(2)(b) of the 1970 Act (see paragraphs 15-17 of the decision);

(c) decides that this was not a case where it had been established by the claimant that there was no evidence to support the Board's decision that the condition in section 4(2)(b) of the 1970 Act was not satisfied, observing, *inter alia*, that the Board or its delegates, drawing on their expert experience, are entitled not merely to supplement but also to contradict opinion evidence of other persons (see paragraphs 19-27 of the decision);

(d) decides that the claimant had not established that the facts found by the Board were such that, acting judicially and properly instructed as to the law, they could not have come to their decision (see paragraph 23 of the decision);

(e) refers to the principles of natural justice in the context of the procedures of the Board and its delegates, indicating that in the circumstances of this case there was a good deal to be said in favour of the contention that the Board should have told the claimant of the view they had provisionally formed on the evidence and have given her an opportunity of providing further evidence before arriving at their decision (see paragraph 31 of the decision);

(f) refers to the words "day" and "night" in section 4(2)(a) of the 1970 Act and to decisions of Great Britain and Northern Ireland Commissioners in which the meaning of these words had been considered (see paragraph 32 of the decision).

*Note*

The provisions of the 1970 Act relating to attendance allowance have been amended by the National Insurance Act 1972 (see section 2 and Part II of Schedule 4 to the 1972 Act) and the provisions of the 1971 Regulations have been further amended by S.I. 1972 No. 1232 (see paragraph 7 of the decision). However, the Chief Commissioner's findings and observations remain valid under the amended provisions.

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1. My decision is that the claimant's application for leave to appeal against the Attendance Allowance Board's decision dated 31st May 1972 ("the Board's decision") is granted, and that the Board's decision is erroneous in point of law and is set aside.

2. In December 1963 the claimant gave birth to a son, to whom I will refer simply as James, who unfortunately was and is seriously deformed in three of his four limbs. Paragraph 5 of the Board's decision (paragraph 10 below) contains their findings of fact as to his condition. His left arm is normal. He is mentally normal. He can read, and he can write with his left hand. He goes to an ordinary school and not a special one.

3. Down to a point this case took the course with which we have become familiar in many other cases. The claimant made a claim for an attendance allowance on form DS 2C after reading leaflet NI 182 as directed by that form. A report dated 29th October 1971 on form DS 4C was obtained from the family doctor. On 2nd November 1971 a delegate of the Board decided that neither of the medical conditions in section 4(2) of the 1970 Act (below) was satisfied. The claimant wrote two letters objecting to the decision. A further medical report on form DS 4C(R) dated 12th December 1971 was obtained from another medical practitioner a member of the medical boarding panel. On 28th December 1971 the controller of the Attendance Allowance Unit at Blackpool wrote telling the claimant that the decision made by the Attendance Allowance Board was to be put before the Board with certain documents and inviting observations. The claimant submitted her observations in a letter dated 30th December 1971. On 3rd January 1972 another delegate decided that the decision of 2nd November 1971 was not to be revised. Down to this point the procedure was the same as in many other cases.

4. The claimant was and is a constituent of the Honourable Greville Janner, Q.C., M.P., who was good enough to take an interest in her case, and arranged for the claimant, her husband, James and Mr. Janner himself to call upon the Secretary of State for Social Services in London. The visit took place on 14th March 1972. On 17th March 1972 the Secretary of State personally wrote to the chairman of the Board requesting the Board to review the decisions of 2nd November 1971 and 3rd January 1972 under section 6(3)(a) and 6(3)(b) of the 1970 Act respectively. On 11th April a letter was written on behalf of the Board informing the claimant that the papers had been considered by the Board on 22nd March, that they noted that there had been two previous medical reports, and that they did not as matters stood themselves wish to obtain a further report. If, however, the claimant had any additional information she was invited to submit it. A copy of the letter was sent to Mr. Janner, who replied on 17th April 1972.

5. On 31st May 1972 the Board of nine members presided over by the chairman decided that the determinations of 3rd January 1972 and 2nd November 1971 were not to be revised. The result of course was that all that the claimant got was the same decision but with differently expressed reasons. The claimant applied for leave to appeal to the Commissioner on two grounds: that the Board's decision was erroneous in point of law in that

they had failed to hold that on the proper interpretation of section 4(2) as modified by regulation 7(4) (below) James required (a) prolonged or repeated attention during the night or (b) continual supervision from another person in order to avoid substantial danger to himself.

At the hearing before me Mr. Janner, who represented the claimant in his capacity as an M.P., was without objection granted leave to add a third ground, namely that the review decision did not contain reasons sufficient to comply with regulation 14(2) (below).

6. The application clearly raises arguable points of law and I therefore grant it. The necessary consents having been given, I proceed now to deal with it as an appeal.

7. The claimant's rights depend on the statute which when passed was entitled the National Insurance (Old persons' and widows' pensions and attendance allowance) Act 1970 but may now be cited as the National Insurance Act 1970 (see the National Insurance Act 1972, section 8(4)). I will refer to them simply as the 1970 and 1972 Acts. The 1972 Act and the regulations under it make a number of important alterations in the 1970 Act and its regulations, but it is common ground that the claimant's rights in this appeal fall to be decided under the 1970 Act without the 1972 amendments. I need not therefore refer further to the latter, though at a later stage they may well affect the claimant's rights in important respects when the case goes back to the Board or its delegate.

8. The most important provisions for the purposes of this appeal are the 1970 Act, sections 4(1), (2), (3) and (5), 5, 6 especially subsections (2) and (3), 8(1) and (2) and Schedule 1 paragraph 8. The relevant regulations are the National Insurance (Attendance Allowance) Regulations 1971 [S.I. 1971 No. 621], of which the most important parts are regulations 7(4), 14(1) and 14(2), 16 and 17 especially paragraph (5).

9. Briefly the effect of these provisions is as follows. Although an attendance allowance is an additional benefit under the National Insurance Act 1965 ("the 1965 Act"), any question whether a person satisfies either of the two conditions, to which I will refer as "the medical conditions", under section 4(2)(a) and 4(2)(b) respectively, is for decision not by the insurance officer or the local tribunal with an appeal on fact as well as law to a National Insurance Commissioner ("the statutory authorities") under sections 67 to 70 of the 1965 Act, but by the Board, who have power to delegate any of their functions in respect of a case to one or more medical practitioners (section 5(6) of the 1970 Act) referred to as delegates (section 6(5)). The Board or a delegate have power to review their decisions (section 6(3)). The claimant and the Secretary of State must be notified in writing of a review decision and the reasons for it (regulation 14(2)). The only right of appeal to a Commissioner is, with leave, against a review decision and only on any question of law arising on such a decision (section 6(4) and regulation 16). Where the disabled person in respect of whom a claim is made is a child under 16 each of the two medical conditions in section 4(2)(a) and 4(2)(b) has additional words added to it by the regulations (regulation 7(4)). The terms of the two medical conditions are accurately set out in paragraph 4 of the Board's decision (paragraph 10 below). The words added by regulation 7(4) are in each case those which I have put in square brackets. The Board have conveniently described these two conditions as the attention and supervision conditions respectively and I will do the same.

10. The Board's decision of 31st May 1972 referred briefly to the various forms, the correspondence and the decisions of their two delegates dated 2nd November 1971 and 3rd January 1972. They went on to explain the legal

position about review; they decided that there were grounds for review, and there is no dispute about this. The decision continued as follows:—

"4. If we are to revise the determinations made on 3.1.72 and 2.11.71 we have to be satisfied that one or other of the two alternative conditions in section 4(2) of the 1970 Act as modified by regulation 7(4) of the said Regulations is satisfied, that is to say that James is—

(a) so severely disabled physically or mentally that he requires from another person, in connection with his bodily functions, frequent attention throughout the day and prolonged or repeated attention during the night [and requires attention and supervision substantially in excess of that normally required by a child of the same age and sex] (the attention condition);

or (b) so severely disabled physically or mentally that he requires continual supervision from another person in order to avoid substantial danger to himself or others [and requires attention and supervision substantially in excess of that normally required by a child of the same age and sex] (the supervision condition).

5. From the medical evidence before us we note, in particular, that James' right forearm is absent from two inches below the elbow with a rudimentary digit attached to the stump; that the muscular power of the right upper arm is said to be poor; that he wears an artificial arm; that both legs are shortened below the knee; and that he has small deformed feet. We further note that James wears artificial legs but is also able to walk on his knees. Having regard to James' clinical condition we accept that he requires attention and supervision substantially in excess of that normally required by a boy of eight.

6. With regard to the attention condition, whether or not James requires frequent attention throughout the day, we cannot issue a certificate unless we are satisfied that he also requires prolonged or repeated attention during the night. As respects the night, we note from the first medical report dated 29.10.71, that James is said occasionally to require attention at night, but only if he needs to use the toilet. From the second medical report dated 12.12.71, we note that it is said that James needs attention once a night for urination and that [the claimant] says that sometimes he shouts for a drink of water. We note also that Mr. Greville Janner says in his letter dated 17.4.72, that at night James' artificial limbs are removed and while he can get out of bed, and manages to move about the house, he can neither get on to the toilet nor can he get back into bed. We accept that when during the night James requires a drink or to micturate he needs assistance, but in view of the clinical evidence as a whole we accept the statement in the first medical report that he only occasionally requires attention at night. Even if, however, James did require to micturate each night and sometimes required a drink of water, we would not accept that he requires attention during the night which is ordinarily either prolonged or repeated.

7. With regard to the supervision condition, we note that it is said in the first medical report that James cannot be left for longer than a few hours, while we note that it is said in the second medical report that he cannot be safely left on his own at all as he may fall or need to go to the toilet and could not extricate himself from any danger. We also note the contents of Mr. Janner's letter dated 17.4.72 regarding James' never in fact being left unattended. In the context of the

supervision condition, we ask ourselves, in the light of all the evidence now before us, are we satisfied that James requires continual supervision from another person in order to avoid substantial danger to himself? We are not. We have carefully considered the question of him falling which he apparently often does, but we find that although he may damage his artificial limbs and his clothes, and may indeed cause himself some hurt, he is not in substantial danger and he does not require continual supervision in order to avoid such danger. We should add that we do not accept that James requires continual supervision in order to avoid substantial danger to others and, indeed, it is not suggested that he does.

8. The facts of this case are clear. James . . . is a severely disabled boy who we accept requires attention and supervision substantially in excess of that normally required by a boy of his age: we can readily appreciate that the heavy wear and tear on James' clothes causes extra expense to [the claimant and her husband]. We do not accept, however, that James satisfies the attention condition, nor do we accept that he satisfies the supervision condition. While James . . . and his parents must command our sympathy and our admiration for the way in which they are coping with the problems arising from James' disablement, for the reasons set out above, our determination on review is that the determinations of 3.1.72 and 2.11.71 be not revised.

31st May 1972."

11. It will be convenient to deal first with the second ground of appeal: that the decision that the supervision condition was not satisfied is erroneous in point of law.

12. Although the Secretary of State applied for a review of the two decisions, the claimant is now the appellant and in my judgment it is clearly for her to show that the Board's decision is erroneous in point of law.

13. In considering this it is important to remember that the Commissioner's functions are limited. An attendance allowance being a benefit under the National Insurance Act 1965, the actual award or refusal to award the allowance is made by the statutory authorities; there is a right of appeal against such a decision on any ground to a Commissioner. But the question whether either of the medical conditions is satisfied is for decision by the Board or their delegate, whose decision is binding on the statutory authorities. And an appeal against a decision of the Board or its delegate on the medical conditions lies only against a determination on review on any question of law; there is no appeal on the facts. Parliament has entrusted the decision of the medical questions to a single central medical authority, whose delegates for the purposes of determination under section 5(6) must be medical practitioners and must act in accordance with any directions of the Board (*ibid*). Obviously one of the purposes is to secure so far as possible uniformity and fairness of treatment as between the extremely numerous claimants throughout Great Britain. Against this background it would be most unfortunate if the Commissioner, in the guise of deciding questions of law, were in truth substituting his own layman's opinion on the facts or the medical inferences to be drawn from them. This makes it particularly important to recognize both the limits beyond which the Commissioner has no power to act and the tests to be applied in deciding whether a decision of a question is erroneous in point of law.

14. The test was stated by a Commissioner, Mr. Temple, in Decision C.A. 1/72 (to be reported as R(A) 1/72). His statement is based on the

judgment of Lord Widgery C.J. in *Global Plant Ltd. v. Secretary of State for Social Services* [1972] 1 Q.B. 139. In that judgment reference was made to an earlier judgment of Diplock J. (as he then was) in an unreported case, which in turn referred to Lord Radcliffe's statement of the matter in a tax case *Edwards* (*Inspector of Taxes*) *v. Bairstow* [1956] A.C. 14. Briefly stated, the five grounds listed by the Commissioner are:—

(a) error of law on the face of the decision;
(b) no evidence to support the decision;
(c) that the decision was one which no person acting judicially and properly instructed as to the relevant law could have given;
(d) that it was contrary to natural justice; and
(e) insufficient statement of the reasons.

15. The first question arising on the supervision condition is what is meant by "continual" and "supervision". In Decision C.A. 5/72 (not reported) another Commissioner, Mr. Neligan, drew attention to the fact that the word is "continual" and not "continuous" and that the former is wider than the latter. In Decision C.A. 8/72 (not reported) I ventured some further comments on the meaning of supervision. I thought then and still think that there is a close link between attention and supervision. If a person is liable to require attention at unpredictable intervals it may be necessary for someone to be continually available to provide attention when it is needed. In such a case the requirement of continual supervision could properly be found. I think too that there is a danger of not starting the enquiry at an early enough point. If one starts with the fact that the disabled person is living with relatives who are looking after him, and then asks oneself to what extent he requires supervision, that is beginning at the wrong point. It might indeed be helpful to ask also whether without substantial danger the disabled person could be by himself in a house at any rate for periods long enough to make any supervision that there was not continual. In the end there was little dispute on this point. Mr. Parke, a member of the solicitor's office of the Department of Health and Social Security, accepted on behalf of the Secretary of State that James' parents were supervising him within the meaning of the condition whilst he and they were in the house, even though in different rooms, provided that they were up and about and not asleep in bed. In my judgment this last qualification is too narrow. If the situation was that one or other of the parents would have woken up if he had called to them and would have given him any attention necessary, in my judgment the Board would certainly be justified in holding that supervision was in fact being provided. Moreover the claimant was clearly supervising James when she escorted him to school, whether or not what she was doing amounted also to attention. Attention and supervision in my judgment can clearly overlap and be provided simultaneously. The question of course is whether supervision was required, not whether it was in fact provided. But 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.*

16. This still leaves the question whether the supervision was required "to avoid substantial danger to himself". (There is no question in this case of danger to others.) On this point paragraph 12 of Mr. Neligan's Decision C.A. 5/72 was referred to. That paragraph, however, referred to the particular mongol child concerned in that case and was not intended to apply to every case. In some cases supervision may be required for reasons other than danger but not to avoid danger. The question whether continual supervi-

sion from another person in order to avoid substantial danger is required is one to be determined in the light of the circumstances of each individual case.

17. My attention was not drawn to any Commissioner's decisions in which the meaning of the phrase "substantial danger" has been discussed. The phrase should not be too narrowly construed. Substantial danger can result not only from a fall but from exposure, neglect, and a good many other things. Mr. Parke for the Secretary of State submitted that it meant a real risk of serious harm. Mr. Janner quoted dictionary definitions and relied on one contrasting substantial with imaginary, unreal or apparent only. It is clear, however, from dictionaries, including Stroud's Judicial Dictionary, that the word has many meanings in different contexts, and it probably would not be helpful for me to suggest a paraphrase. I may, perhaps, however, quote what was said by Viscount Simon L.C. in *Palser v. Grinling* [1948] A.C. 291 when considering in a Rent Act case the phrase "a substantial portion of the whole rent". His Lordship said at page 317: " 'Substantial' in this connexion is not the same as 'not unsubstantial,' i.e., just enough to avoid the 'de minimis' principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case . . ."

18. Dealing with the five grounds mentioned in paragraph 14, it was not argued that there was error of law on the face of the decision in the sense of an explicit incorrect proposition of law.

19. The second ground was that there was no evidence to support the decision. In his argument on this point Mr. Janner contended that the Board were actually bound by the second doctor's answer to question 10 in the form DS 4C(R); as Mr. Janner put it, they were not in law entitled "to go behind the finding of their doctor". This makes it necessary to examine closely the questions which were and were not asked as to supervision in the various forms. In the claim form DS 2C the claimant was asked what special attention or supervision does the child need because of his disablement. There was no question about danger. The only question specifically relating to supervision appeared in both forms as question 10 and was: "For about how long at a time could the child quite safely be left alone? (If there is any reason other than age why he can rarely if ever be left alone, for example, his mental state, fits, please give details.)" In neither of the two report forms did the word "supervision", or "substantial" (danger) occur. The first doctor's answer to question 10 was "No longer than a few hours". The second doctor's answer was "Not any time at all. He may fall, or he may need to go to the toilet. He could not extricate himself from any danger." There was other evidence of matters of fact bearing on supervision from the claimant herself in her letters, to which I shall have to refer below.

20. Having carefully considered Mr. Janner's submission that the Board were bound to accept the second doctor's answer to question 10, I cannot accept it on a number of grounds. It seems to me to be completely inconsistent with the scheme of adjudication laid down by the Act and to confuse reports under section 5(5), if that is what these documents were, with determinations under section 6(2) or by a delegate under section 5(6). It could be most unfortunate if it were correct, since if the answer to the question were adverse to the claimant but the Board were convinced that the answer was

wrong, they might have difficulty in doing justice to the claimant. For various reasons I am satisfied that the Board are not bound by the answer only if it is favourable to the claimant as an admission.

21. On the more general question whether the Board's decision that the supervision condition was not satisfied is erroneous in point of law because there was no evidence to support it, the matter seems to me to stand thus. There was no actual statement before the Board by anyone that James did not require continual supervision to avoid substantial danger. The burden of proof, however, was on those who asserted that the earlier decisions should be reviewed. Moreover in my judgment it is important here to distinguish between evidence of primary facts and inferences drawn from them. I express no opinion on the question whether the Board or their delegates, who have not clinically examined the disabled person, are entitled to record a finding of primary fact which is contrary to all the evidence and supported by none. The supervision condition contains phrases which include relative terms such as *severely* disabled, *continual* supervision and *substantial* danger. In deciding on these, which are largely matters of opinion, in my judgment the Board or delegates, drawing on their expert experience, are entitled not merely to supplement but even to contradict any evidence of opinions put before them. Here, as in many other contexts, there may be a fairly large area of neutral ground, where the matter is one for the medical judgment of the Board or the delegates, and it may not be possible to say that their decision is erroneous in point of law whichever way they decide.

22. In the present case I am not prepared to hold the Board's decision to be erroneous in point of law on the ground that there was no evidence to support it.

23. The next question is whether the facts found were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question. Here again the burden of proof is on the claimant. My conclusion can be stated briefly. In my judgment the claimant has not succeeded in showing that the decision is erroneous in point of law on this ground. The main reason is that it is not clear to me what facts the Board did find or what their reasons were. They did find as a fact that James fell "often". It was for them to weigh the consequences if this happened on the highway on his way to school, or at school, or if the "hurt" which "may" be caused consisted of an injury to his one good limb. But I do not feel justified in holding that this is sufficient to enable the claimant to succeed on this ground.

24. This brings us to the claimant's third ground: insufficient compliance with regulation 14(2). The Board mentioned damage to James' artificial limbs and clothes, but there was evidence from the claimant both in the forms and in her letters of far greater moment, some, though bearing directly on attention, indirectly affecting supervision for the reason already explained. It included the following. James had periodically to attend a limb-fitting centre. He was never left alone. He became very tired after walking 150 yards, and the claimant had to escort him to school (400 yards) and back. She felt that it was a great risk to let him move far from the house (unescorted). She had to dress and undress him and fit him with his artificial limbs. He required help with the toilet. His food had to be cut up. He could not without help get into or out of the bath or bath himself or go up or down stairs. At night he generally shouted out once to be helped to the toilet and sometimes for a drink of water. Being very short, he could not reach any light switch

or any door handle. When he tried to get into bed, she had to be at the back of him, as he slipped off a number of times before he managed to get on the top.

25. Both doctors, however, reported that he could unaided get into and out of bed. One reported that he could get into and out of the bath and the other that he could not. There was therefore a conflict of evidence; on these points they disagreed with each other or with the claimant.

26. The importance of the claimant's own evidence is apparent if one asks oneself what would have happened if after dark James had been left unsupervised with nobody in the house. If he woke up or half woke up and wanted to use the toilet and got no answer when he shouted, he might well try to get there himself and get stranded out of bed in the dark unable to turn on a light, unable to open the door and unable to get back safely into bed. It is no answer to say that there is no evidence that this had ever happened. If it had not, was not the reason that supervision had always been provided?

27. The Board have recorded hardly any findings on the evidence referred to in paragraphs 24 and 25 or indeed on the opinions expressed by the doctors. To write "We note that it is said" is a record of an item of evidence; it is not a finding whether the evidence is accepted.

28. The Board's duty in this jurisdiction to record reasons is important. An unsuccessful claimant may have a choice of rights to exercise. One is to appeal to the Commissioner on any question of law. Another is to seek further evidence and apply again, subject to the limitations now imposed by the National Insurance (Attendance Allowance) Amendment Regulations 1972 [S.I. 1972 No. 1232], for a further review.

29. What constitutes sufficient reasons in any particular case varies infinitely. They must be adequate so as not to leave the claimant guessing as to why she lost. Where there is a conflict of evidence it may be impossible to give reasons sufficiently without indicating directly or indirectly which evidence is accepted. This need not be a lengthy process. It can often easily be done by referring to statements in identified documents and indicating that they are accepted with or without qualifications or additions.

30. Having fully considered the matter my conclusion is that the reasons given by the Board are seriously inadequate and do not comply with regulation 14(2). The claimant and Mr. Janner cannot tell from them whether the Board accepted or rejected her evidence in whole or in part nor indeed whether they accepted all the opinions of either and if so which of the two doctors. She cannot tell what further evidence she needs to obtain if she wishes to seek a further review. On this ground the decision must be held to be erroneous in point of law and set aside.

31. 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. (Mr. Parke suggested that the 1970 Act, Schedule 1, paragraph 8, which empowers the Board to regulate their procedure, empowers them to hold a hearing, though in fact neither they nor any delegate had ever done so. I need express no opinion on the correctness of this.) At the outset of this

case the claimant was directed to read leaflet NI 182 which instructed her how to claim and continued: "What happens next. Once the claim has been made there is nothing more to do. The claim will be acknowledged, and the Department will arrange for any necessary medical examination to be carried out." This helpful approach to the matter by the Department must be of the utmost value to many claimants, some of whom are barely able to claim and many of whom are completely unable to produce evidence. It must, however, place a heavy responsibility on the Department or the Board to see that the relevant evidence is produced and particularly to include in the forms the appropriate questions. As we have seen, the relevant question in both forms is not the statutory question. If Mr. Parke is right, there is a big difference between "quite safely" (i.e. without any danger at all) and without "substantial danger". Both doctors in fact answered question 10 favourably to the claimant. In a letter she had explained that her own doctor had seen James only when he had a cough or cold and she had complained of the way in which that doctor had completed the form; she had suggested getting in contact with the infirmary who had dealt with James all his life. The letter of 11th April told her that the Board were not obtaining any further report. In these circumstances it seems to me to have been asking a lot of the claimant and Mr. Janner to have expected them to foresee that either the Board would without saying anything to them reject the uncontradicted opinions of both doctors supported by her own evidence or they would decide the case against her on the narrow ground that James, whom they held to require supervision substantially in excess of that normally required by a boy of his age, could not be left alone quite safely either at all or for more than a few hours but did not require supervision to avoid substantial danger, about which neither of the doctors nor the claimant had been asked any question. 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. On this point reference may be made to the judgment of Lord Denning M.R. in *R. v. Industrial Injuries Commissioner, Ex parte Howarth* (1968) 4 K.I.R. 621, C.A. and printed as an appendix to Decision R(I) 14/68 ("Fourth: Natural Justice").

32. I think it right to add the following comments about the attention condition. There was discussion at the hearing before me on the meaning of "day" and "night". There is no relevant statutory definition of either word. It was generally accepted that between them the two words cover the whole twenty-four hours and there is not a third period of evening. Mr. Janner referred to dictionaries and submitted that "day" meant the period from sunrise or dawn to sunset or dusk. In a Commissioner's decision published since the oral hearing in this case Mr. Watson has accepted that construction (see Decision C.A. 9/72 (not reported)). Mr. Parke did not argue in favour of any precise interpretation of night, e.g. from 6 p.m. to 6 a.m.; he suggested that it might reasonably be understood, as in a hospital ward, to mean the period of "lights out". The problem has been considered in Northern Ireland, where the Chief Commissioner for Northern Ireland in the decision on Appeal No. 1/72 (AA), paragraph 21, expressed the view that Parliament (in the corresponding statutory provision) had left the words deliberately vague. He added: "It may be that they would be interpreted differently in relation to different seasons of the year, in relation to different ages of disabled persons, or in relation to the times spent in bed and possibly even in relation to different household customs." All that I wish to say on this point is that if Mr. Parke's suggestions were accepted,

that night means the period when often the most grievously disabled persons (sometimes with the help of drugs) do not require attention, this would result in depriving many deserving claimants of the benefit; whereas if an indefinite or fluctuating interpretation were accepted there would in many cases be the greatest confusion, since the Board might not know in what sense the words were used in the evidence, and the Commissioner might not know in what sense they were used by anyone. The question whether there should be a statutory definition seems well worthy of consideration. The problem is even more acute in cases to which the amending provisions of the 1972 Act apply, where day and night are mentioned in both the medical conditions.

33. In the special circumstances of this case I express no opinion on the question by whom and in what manner the claimant's case should be considered afresh, by or on behalf of the Board, who under section 5(6) have power to delegate their functions to one or more medical practitioners. The claimant and Mr. Janner should, however, be given every opportunity of submitting further evidence. The claimant's statement on form DS 4C(R) has been written out by the doctor so illegibly that a typed copy of it ought to be put before whoever reconsiders her case.

34. The claimant's appeal is allowed.

(Signed) R. G. Micklethwait,
Chief Commissioner.

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**20.2.73** **R(A) 2/73**

## ATTENDANCE ALLOWANCE

**Whether or not a child is living in scheduled accommodation—Health Services and Public Health Act 1968**

Before 21.8.72 regulation 8(1) (b) of the National Insurance (Attendance Allowance) Regulations 1971 [SI 1971 No 621] made an attendance allowance not payable for any period during which a child was living in accommodation provided in pursuance of any of the enactments mentioned in the Schedule to the regulations and was not living with his mother or father. With effect from 21.8.72 for this provision was substituted, by regulation 5(5) (b) of the National Insurance (Attendance Allowance) Amendment Regulations 1972 [SI 1972 No 1232], a provision that the allowance is not payable if the child is a person living in accommodation provided for him in pursuance of, or provided for him in circumstances in which the cost of the accommodation is or may be borne wholly or partly out of public or local funds in pursuance of, any of the enactments mentioned in the Schedule. Both the former and the substituted Schedules include section 12 of the Health Services and Public Health Service Act 1968.

A foster-mother having claimed an attendance allowance for a child, a certificate was issued to the effect that the child satisfied the statutory medical conditions for the allowance as from 6.12.71. The child was one placed in her care by the local authority under section 12 of the Health Services and Public Health Act 1968, which, inter alia, enables a local health authority to make arrangements generally for the care of persons suffering from illness and in particular for the provision, equipment and maintenance of residential accommodation for such persons. The local authority paid the claimant an allowance for the child, with occasional grants for clothing.