

ATTENDANCE ALLOWANCE

Attendance Allowance—renewal claim—appropriate documents.

The claimant who was born on 28 August 1970 suffered from cystic fibrosis. Certificates in respect of attendance allowance at the lower rate were issued from 8 May 1979 to 4 March 1982 and 5 March 1982 to the claimant's 16th birthday on 28 August 1986. The claimant was seen in connection with his renewal claim by an examining medical practitioner who reported on 30 July 1986. The DMP expressed himself unable to certify that the claimant was likely to satisfy any of the conditions set out in section 35(1) of the Social Security Act 1975 on the basis of that report. The claimant requested a review. Another DMP reviewed the determination on 21 January 1987 but did not revise it. Detailed grounds and supporting documentary evidence were submitted in support of the claimant.

In holding that the DMP determination was erroneous in law the Commissioner held that wherever there is a renewal claim before the DMP there should be in the documents before him the medical evidence which was before the maker of the last favourable certificate and where those documents are not present the DMP should defer his decision until he has seen the evidence (R(A) 2/83, R(A) 1/84 and CA 96/1984 cited).

1. This is a claimant's appeal, brought by leave of the Commissioner, against a review determination made on 21 January 1987 by the delegated medical practitioner ("DMP") acting for and on behalf of the Attendance Allowance Board. My decision is that the said determination is erroneous in law. Accordingly, I set it aside. The case will now go back for redetermination by the Board or by another of its DMP's.

2. The claimant was born on 28 August 1970 and has the misfortune to suffer from cystic fibrosis. Terse—but helpful—particulars in the papers show that a claim for the allowance was rejected on 18 September 1979 but that subsequently thereto certificates for consideration of payment at the lower rate were issued in respect of the period from 8 May 1979 to 4 March 1982 and 5 March 1982 to "age 16" (i.e. to 28 August 1986).

3. On 30 July 1986 an examining medical officer completed form DS4 in respect of an examination of the claimant. Having considered that report, a DMP—on 6 August 1986—expressed himself as unable to accept that the claimant was likely to satisfy, in the period commencing 28 August 1986, any of the medical conditions prescribed in section 35(1) of the Social Security Act 1975. The claimant—by his mother—requested a review. It is the determination made upon that review which is the subject of this appeal.

4. Detailed grounds—and supporting documentary evidence—were submitted in support of the claimant's contention that the rejection dated 6 August 1986 fell to be revised. I quote therefrom:

"All of the people approached for evidence were concerned that withdrawal of the Attendance Allowance would be unjustified—in their view, Stephen's need for attention is no less than when he was under 16."

The contention in the final clause of that passage fell for consideration in the light of certain well established principles. I refer to three of the precedents—and could have referred to as many more again.

5. In decision R(A) 2/83 the Commissioner said this:

"I commented, when granting leave to the claimant to appeal, that her condition would not appear to have changed for the better since she was awarded a higher rate certificate in May 1977 for 4 years. It is submitted on behalf of the Secretary of State that the DMP was not

bound to follow the earlier decision, dated 13 May 1977, which awarded a higher rate of certificate. I have not even suggested that the DMP was so bound. Plainly, a person's condition might change for the better or for the worse and, even so, the DMP must consider the matter in the light of the prevailing evidence. Such determinations depend, however, largely upon individual medical opinion and, in my view, it is desirable that, when there has been a previous certification in respect of a condition relating to attendance allowance, in the absence of material change, careful consideration should be given to whether subsequent evidence warrants a different conclusion. It may be that the previous determination was plainly wrong. If possible, a situation should be avoided in which medical practitioners, who hold different personal opinions on similar medical circumstances, give contrary decisions, which the general public, and particularly those afflicted by disabling conditions and those associated with them and who care for them, do not understand, and is apt to produce a feeling of injustice." (Paragraph 5).

6. In decision R(A) 1/84 the Commissioner said this:

"In my opinion when the Attendance Allowance Board or a delegated medical practitioner thereof proposes to remove an existing award of attendance allowance, it is imperative that the claimant in question should be given clear and adequate reasons why that is being done." (Paragraph 9).

7. And in decision on Commissioner's file CA 96/1984 this was said;

"The second matter is that Emma had immediately previously been awarded the allowance by reference among other things to enuresis. And in Decision R(A) 2/83 at paragraph 5 (endorsed in decision R(A) 1/84) it was pointed out that it was desirable, where there had been a previous certification in respect of a condition in relation to attendance allowance, in the absence of material change, that consideration should be given to whether subsequent evidence warrants a different conclusion. And the case papers in fact contain copies of a number of Commissioner's decisions bearing on the question how far it is necessary for a DMP to look into the evidence that was before previous DMP's. . . .

I do not propose to generalise on this matter. It is a well known principle enunciated in relation to medical appeal tribunals in Decision R(I) 18/61 at paragraph 13, that in cases where some specific contention is put to the tribunal it is certainly essential for the tribunal to give reasons for its rejection. In my judgment this applies equally to the Attendance Allowance Board. If there has been a previous award in a period running down to the commencement of the period under consideration, the view that the conditions for the award are not satisfied can be sustained either on the ground that the previous certification was mistaken or on the ground that there has been a change of circumstances. If a claimant (as did this claimant in her letter of 11 April 1983) makes the point that there has been no change since the previous award, I do not see how the Board or its DMP can meet that specific point except by expressing disagreement with the previous certification or by pointing out that there has been a change. All the evidence that was before the maker of the previous certificate is available; as these certificates are not given as a result of any views formed as the result of personal examination, I do not in that case see how the Board or its DMP can deal with the submission without looking at the previous evidence. It may well be different if no

submission has been made by reference to the previous award.”
(Paragraphs 8 and 9—my emphasis.)

8. In the determination the subject of this appeal the DMP did not overlook the earlier favourable certifications. He dealt with them thus:

“7. I note that the Delegated Medical Practitioner certified that [the claimant] satisfied a day condition when he made his decision on the earlier claim for a different period. With this in mind, I have carefully considered all the evidence, but my decision on the current claim must be that [the claimant] does not satisfy any of the attendance allowance conditions.”

9. With characteristic objectivity, the Secretary of State submits that the DMP's treatment of the earlier favourable certification does not adequately comply with the principles which I have exemplified in paragraphs 5 to 7 above. That submission is clearly well founded. The determination is—accordingly—erroneous in law. (The technical analysis is that it fails to comply with the then current regulation 63(2) of the Social Security (Adjudication) Regulations 1984.)

10. But is it possible to have some sympathy for the DMP. He was to some extent a victim of what appears to be the prevailing practice in the compilation of the documents which are laid before DMP's in circumstances such as those in this case. In spite of the words which I have emphasised in my quotation from CA 96/1984, there was not before him any medical evidence prior to the examining medical officer's report of 30 July 1986. Accordingly, his explanation of why he had come to a determination different from that of his predecessors had to be restricted to the (inadequate) ground that he was concerned with a different period. The error of law which I have identified in this appeal quite regularly presents itself to the Commissioner. I cannot see that it will cease so doing unless and until there is laid before the DMP the medical evidence upon which has been based a previous award “in a period running down to the commencement of the period under the consideration”. (Those words from CA 96/1984 are important. I have very recently—in decision on Commissioner's file CA 168/1986—expressed the view that the principles exemplified in paragraphs 5 to 7 above do *not* apply where the DMP is considering a claim made after a break in entitlement.) Accordingly, wherever a “renewal” claim is before the DMP there should be in the documents before him the medical evidence which was before the maker of the last favourable certificate. Where—

- (a) that evidence is not in the documents, and
- (b) the DMP is minded to make a determination less favourable to the claimant,

he should defer his determination until he has seen that evidence. If that is not done, error of law will be virtually inevitable.

11. The point with which I have just dealt at some length was adverted to by the Commissioner who granted to the claimant leave to appeal. That Commissioner referred also to the Court of Appeal judgment in *Moran v. Secretary of State for Social Services*. That judgment had not, of course, been given at the date of the determination now before me. In paragraphs 9 and 10 of his submission to the Commissioner the Secretary of State deals with the application of *Moran* to the facts as they stood before the DMP. Since I have already identified such error of law as justifies the setting aside of the DMP's determination, I do not intend to go into the *Moran* aspect in any detail. Suffice it to say that I do not myself consider that anything in the Court of Appeal judgment indicates that the DMP in this case fell

R(A) 1/89

into error of law in his construction and application of the phrase "continual supervision". I do, however, quote the following brief passage from the judgment of Nicholls L J:

"Of course, if the sufferer has adequate warning of an impending attack, so that he or she can take steps to summon help, the position may be different. A person who is in the same room or another room in the same house or in a nearby property and who keeps himself available to be called by such a sufferer, in person or by bell or by telephone, may not be exercising 'supervision' over the sufferer. *It will all depend upon the particular facts of the case.*" (At page 8 of the transcript.)

The evidence before the next DMP will not necessarily be substantially the same as the evidence which was before the DMP who gave the determination the subject of this appeal. So the words which I have emphasised in my quotation from *Moran* are crucial.

12. The claimant's appeal is allowed.

Commissioner's File No: CA 80/87

(Signed) J. Mitchell
Commissioner

R(A) 2/89

3.3.88

ATTENDANCE ALLOWANCE

Attendance allowance—need to give reasons in renewal claims—continual supervision—exposure to risk.

The claimant, a tetraplegic, made a renewal claim for attendance allowance which had been awarded at the higher rate until January 1986. On his renewal claim the DMP issued a determination to the effect that the claimant satisfied one of the day conditions but neither of the night conditions for an award of the allowance. The claimant applied for a review but another DMP declined to revise the determination.

On appeal the Commissioner *held*:

1. where one DMP disagrees with the conclusion of a previous DMP he should give reasons for it, to avoid uncertainty. Paragraph 5 of R(A) 2/83 followed;

2. *Moran v. Secretary of State for Social Services* (reported as an appendix to R(A) 1/88) was a decision about the circumstances in which a need for a person to be on hand was a need for supervision and is not confined to cases where the claimant is an epileptic and in looking at the need for supervision regard should be had as to whether there was a relevant risk in the claimant being left alone at night and whether it is a risk which he could reasonably be expected to guard against.

1. My decision is that the determination of the delegated medical practitioner of the Attendance Allowance Board (DMP) dated 12 August 1986 was erroneous in point of law and it is set aside. The matter must be referred back to the Board or to another DMP.

2. The claimant is a tetraplegic (i.e. he suffers from paralysis of both arms and legs). He had, prior to his present renewal claim, been awarded