

ATTENDANCE ALLOWANCE

Review—relevant change of circumstances—whether permitted to review daytime condition when night time condition only in issue.

The claimant, Mark, was mentally retarded. A renewal claim was made on his behalf on 20 August 1985 and a medical practitioner on behalf of the Attendance Allowance Board (the DMP) accepted that Mark continued to satisfy the day supervision condition. He therefore issued a certificate for Attendance Allowance at the lower rate from 19 December 1985 to age 25. Mark's mother then applied on 30 May 1986 for the higher rate Attendance Allowance. The DMP concluded that he could review the 1985 certificate on the basis that there had been a relevant change of circumstances, that is, an increase in the night time attendance. Upon review under section 106(1)(a) of the Social Security Act 1975 the DMP concluded that Mark no longer satisfied any of the conditions for an award of Attendance Allowance. He therefore revoked the certificate issued on 16 September 1985 as from 30 January 1986.

Held:

1. the decision of the DMP was erroneous in law in two minor respects: there had been evidence before the DMP as to Mark's dangerous activities and the DMP was therefore wrong to say that there was no such evidence. Secondly, the DMP had placed the wrong interpretation on Mark's tendency to wander;
2. where a review is carried out on the basis of relevant change of circumstances, the Board is entitled to review a determination on those grounds notwithstanding that a close consideration of the circumstances show that they do not amount to the satisfaction of which ever condition is in question; and, to qualify as a "relevant change of circumstances" the circumstances must be such that the Board giving the decision on review would need to give them serious consideration to the extent that they might well affect the Board's decision. (R(I) 1/71 and R(I) 56/64 considered, *Saker v the Secretary of State for Social Services* (unreported) applied);
3. as to whether the DMP was entitled to revoke the lower rate certificate on a review carried out on grounds that related to the night attention condition, once there are grounds for review the whole determination of any question whether a person satisfies conditions set out in paragraph (a) or (b) of section 35(1) of the Social Security Act 1975. However, the DMP's decision was erroneous because he had failed to make clear what the grounds for review were.

1. My decision is that the decision on behalf of the Attendance Allowance Board given on review on 3 February 1987 is erroneous in law and I set it aside. The case must be reconsidered by the Board or a medical practitioner on their behalf.

2. Following a renewal claim for attendance allowance made on 20 August 1985 a medical practitioner on behalf of the Attendance Allowance Board ("DMP") accepted that Mark who is mentally retarded continued to satisfy the day supervision condition and on 16 September 1985 issued a certificate for attendance allowance at the lower rate from 19 December 1985 to age 25. On 30 May 1986 a letter was received from Mark's mother applying, on her son's behalf, for the higher rate attendance allowance. She said that "... we are having to attend to Mark many times during the night as he is having disturbing bouts of screaming etc." A medical examination was carried out on 30 June 1986. And in connection with that examination Mark's mother stated that "... He shouts and screams in the night and my husband has to get up in the night and has to put him into bed, usually once, two—three nights in a week". A DMP then decided he could review the decision of 16 September 1985 "because there has been a relevant change of circumstances since that decision was made, namely an increase in night attendance needs from once per month to two to three nights per week".

Having reviewed the decision the DMP then decided that Mark no longer satisfied any of the conditions for the award of attendance allowance and he revoked the certificate issued on 16 September 1985 as from 30 June 1986, the date of the medical examination to which I have referred. Mark now appeals to the Commissioner against that decision on review. I held an oral hearing of the appeal. Neither Mark nor his mother attended but they were represented by Mr. P. J. Hill of the Leigh and District Welfare Rights Group. The Secretary of State was represented by Mr. J. Latter of counsel instructed by the Solicitor, Department of Social Security.

3. Before I come to what became the principal issues in this case I should say that the DMP's decision is erroneous in law, as Mr. Latter agreed, in two respects. In dealing with day supervision—the basis for the existing certificate—the DMP said that "There is nothing in the up to date evidence to suggest that [Mark] in any way presents a danger to himself or others...". Now Mark's mother in her letter of 9 October 1986 responding to the letter informing her that the DMP was provisionally of the view that neither a day or night condition was satisfied had said that "Mark doesn't know danger. Many times he has pushed me when I have been holding a kettle of boiling water. Also electricity fiddling with the lights etc.. All these things are funny to Mark...". So the DMP was simply wrong as to the up to date evidence of danger to Mark or to others. Again, in relation to day supervision, the DMP said, in the course of concluding that the day supervision condition was not satisfied, that the report of 30 June 1986 showed that Mark "has no tendency to wander and there is no suggestion he has any disturbances of behaviour. This report shows that his need for supervision by day is in between meals...". But that, as Mr. Latter agreed, misreads and fails to grasp the significance of the evidence. In fact the examining doctor qualified his answer to the question asking whether Mark had a tendency to wander by saying "To play and cycling". And of course a need for supervision "in between meals" should indicate, at least if taken literally, a very considerable need for supervision. In the respects to which I have referred the DMP did not do justice to the evidence before him and his decision is erroneous in law on that account. There are however some more fundamental points. Was the DMP justified in carrying out a review at all? If a review was requested in relation to night attention was he then justified in dealing with and revoking the certificate relating to the day supervision condition?

4. Provision for the review of a determination by the Attendance Allowance Board or their delegate is in section 106(1) of the Social Security Act 1975 which provides that—

"106(1) The Attendance Allowance Board may—

- (a) at any time review a determination of theirs under section 105(3) above, or under this paragraph or paragraph (b) below, 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;
- (b) on an application made within the prescribed period review such a determination on any ground;
- (bb) without an application review such a determination on any ground within the prescribed period;
- (c) issue a certificate under section 35(2), or revoke or alter a certificate so issued, if they consider it appropriate to do so in consequence of a review in pursuance of this subsection."

The DMP as I have indicated purported to carry out his review pursuant to section 106(1)(a) on the ground that there had been a relevant change of circumstances since the previous determination had been made. And the "relevant change of circumstances" was said to be "an increase in night attention needs from once per month to two to three nights per week". Having identified that change as the relevant change of circumstances the DMP when considering what it amounted to said no more than that "I accept that he sometimes requires a measure of reassurance but I do not accept that this would normally amount to prolonged attention and I consider that the frequency with which it is required is insufficient to satisfy the night attention condition". So he was not impressed by the evidence even though he had concluded that it justified his carrying out a review on the ground of a relevant change of circumstances. It is I think clear and Mr. Latter asserted that the Board are entitled to review a determination on the ground of relevant change of circumstances notwithstanding that a closer consideration of those circumstances shows that they do not amount to the satisfaction of whichever condition is in question. Mr. Latter submitted that for a change of circumstances to justify a review under section 106(1)(a) the change must be such as is likely to affect entitlement to benefit and that "relevant" meant relevant to the award of benefit. And he referred to R(I) 11/59, R(I) 1/71 and R(I) 3/75. He also submitted and I accept that if the Board purport to carrying 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. What meaning is to be given to "relevant change of circumstances"? The cases to which Mr. Latter referred did not, as he agreed, provide a great deal of assistance. R(I) 1/71, paragraph 8, shows how the words "any relevant change of circumstances" were first encountered in the National Insurance (Industrial Injuries) Act 1946 and found their way into the 1965 Act and its amendments. And in that paragraph the Commissioner said "The difficulty of describing the limits of 'relevant change of circumstances' is illustrated by many Commissioners' decisions, and I must not be taken as seeking to lay down any principle beyond what is necessary for the decision of this particular appeal". He went on to confirm that the onus was on the insurance officer to show on the balance of probabilities that there had been a relevant change of circumstances. The Commissioner in that case did not refer to R(I) 56/54 where the Commissioner had said (paragraph 28) "A relevant change of circumstances postulates that the decision has ceased to be correct" and I take the Commissioner in that case to mean that unless the change of circumstances in question showed that the original decision was wrong in the light of those new circumstances those circumstances could not amount to a "relevant change of circumstances" and there could be no review. This point, but in relation to review by an adjudicating medical authority under section 110(1) of the Social Security Act 1975 and in respect of the words in that provision "... if satisfied that the decision was given in ignorance of a material fact or was based on a mistake as to a material fact" was recently before the Court of Appeal in *Saker v The Secretary of State for Social Services*, unreported 15 January 1988. In that case Lord Justice Lloyd said (pages 8 to 9 of the transcript)—

"Prompted by a question from Lord Justice Staughton, Mr. Ouseley, who appears for the Secretary of State, submitted that a fact could only be a material fact for the purpose of Section 110 if it would have made a difference to the result. Since the view taken by the medical appeal tribunal was that the fresh evidence made no difference to the result, Mr. Ouseley submitted that the fact of which the medical board was

ignorant could not have been material. It is not enough, he said, that the fact of which the medical board was ignorant might have made a difference to the result or affected the decision in some way. I cannot accept Mr. Ouseley's submission. In my judgment a fact is a material fact for the purpose of section 110 if it is a fact which would have influenced the judgment of the medical board. That corresponds to the definition of "material fact" which applies throughout the law of insurance, and which is enshrined in section 18(2) of the Marine Insurance Act 1906. I notice that it also corresponds to the meaning given to "material fact" in the current edition of Halsbury's Statutes, Vol. 45, at page 1209."

And Lord Justice Nicholls (page 16 of the transcript) said—

"Mr. Ouseley submitted that, even if this evidence were fresh evidence, it did not establish that the decision of the 4th February, 1981 was given in ignorance of a fact which was material. He submitted that to be material a fact had to be one which would have altered the medical board's decision. It is not enough that the fact could or might have affected the decision. I think that this is too stringent a test. The Act contains no definition of "material", but the context is of a threshold which the claimant must surmount before a decision can be reviewed. In this context, in my view a material fact is a fact which would have been material to the determination of the medical board which is sought to be reviewed. In general a fact will satisfy this test if it is one which, had it been known to the medical board, would have called for serious consideration by the board and might well have affected its decision."

Now I would see no reason for taking the view that the approach to the meaning of "relevant change of circumstances" should be different from that taken by the Court of Appeal in *Saker* to the meaning of "material fact" in section 110 and in the other sections of the 1975 Act, including section 106, in which those words appear. It seems to me that the test of whether a change of circumstances is a relevant change of circumstances has no reason to be different in principle from the test of whether, for the purpose of a review, a fact is a material fact. Accordingly I would apply what Lord Justice Nicholls said in the passage to which I have referred (which it seems to me is to more or less the same effect as the passage which I have quoted from the judgment of Lord Justice Lloyd) and say that in general, to be relevant, for the purpose of section 106(1), a change of circumstances must be such that the board giving the decision on review would need to give those circumstances serious consideration to the extent that they might well affect the board's decision. In my view the new circumstances must not only be in their substance in the area of what is relevant but there must also be sufficiency with regard to quantity. It is thus not enough that the new circumstances relate to night attention. They must also be such as to raise a serious question as to whether the requirement for night attention can be said to be a requirement for prolonged or repeated attention. And it follows that the Commissioner in R(I) 56/54 in the passage to which I have referred formulated and applied too stringent a test; the change of circumstances does not have to produce a different outcome from that of the original decision before it can be said to be relevant.

5. In the present case, as I have said, the change of circumstances was an increase of night attention (putting Mark back to bed after a screaming attack) from once a month to two or three nights a week. And as to that the DMP simply said that that could not amount to prolonged or repeated attention during the night. And, while of course accepting that whether there has been a change of circumstances is a pure question of fact, I take

the view that had the DMP applied the test to which I have referred to see whether the change of circumstances was a *relevant* change he would have concluded that it was not. The new circumstances are not within sight of suggesting that the night attention condition might be satisfied. And that is no doubt why the DMP in the event gave those new circumstances so little consideration. He was in my view right to do that but not right in deciding that he had grounds for review on the basis of a relevant change of circumstances.

6. Mark's mother in her letter of 30 May 1986 put in issue the question whether Mark satisfied the night attention condition. The outcome was that he did not and that he no longer satisfied the day supervision condition. Was the DMP entitled to revoke the lower rate certificate on a review carried out on grounds that related to the night attention condition? Mr Hill submitted that it was not only unfair but would deter claimants who already had a lower rate certificate from asking about their entitlement to the higher rate if that meant that their continued entitlement to the lower rate was to be put in question. I can see that that may be so although of course a claimant who had been turned down in relation to say the day attention condition and then asked for a review of the night supervision condition might not want to be told that the Board could not then reconsider day attention even if the grounds were there to do so. In fact I have no doubt that once there are grounds for a review the whole determination of the Board is open to reconsideration. The Board it seems to me does not make a series of determinations in relation to the various conditions in respect of any one case. They make a determination of any question whether a person satisfies the conditions set out in paragraph (a) or (b) of section 35(1) of the Act. That I think is made clear by section 105(3); and, of course, under section 106(1) the Board's power is a power to review their determination.

7. In the present case the DMP was satisfied on the basis of the information contained in the medical report of 30 June 1986 that the claimant no longer satisfied the day supervision condition. But he did not, at least in terms, rely on that information as a ground for his review. So he finished up in the position that the grounds for review on which he explicitly relied were, for the reasons I have explained, not open to him and he relied on no other grounds. Regulation 39(2) of the Social Security (Adjudication) Regulations 1986 requires (subject to paragraph (3)) that the Board should give reasons to the claimant and the Secretary of State for reviewing or refusing to review a determination and in my view it is as essential for the claimant and the Secretary of State to be told the grounds on which a review is carried out as it is to know the reasons for the outcome. Indeed it seems to me that if in a determination on review the Board fails to do that then what should be the separate stages of review and revision are simply muddled up together and the wrong tests are likely to be applied. A failure to make clear what the grounds are for a review is in my view just as much an error of law as a reliance on wrong grounds. So the DMP's determination on review in this case is erroneous in law on both counts. When this case is reconsidered by the Board or their delegate they must decide whether, having regard to the considerations set out above, there has been a relevant change of circumstances and the relevant change or changes relied on for the review must be made clear. I have mentioned that the medical report of 30 June 1986 seems to be ambiguous or unclear as to whether or not Mark has a tendency to wander and I have also mentioned that the DMP did not appear to have taken account of his mother's evidence concerning awareness of danger. There is a further point. In paragraph 3 of his determination the DMP refers to a report dated 19 November 1986 from Wigan Social Services Department which he says

shows that Mark rides his bicycle to his youth club. His mother says that that is not so. Plainly these several matters will need to be dealt with and resolved before the Board or their delegate complete their reconsideration of this case.

Commissioner's File No: CA 90/87

(Signed) R. A. Sanders
Commissioner

6.9.89

R(A) 3/90
(Tribunal decision)
(Scottish Case)

ATTENDANCE ALLOWANCE

DMP's decision—failure to consider relevant evidence—practical suggestions for alternative lifestyle—whether reasonable—claimant with epilepsy—application of *Moran*—interpretation of DMP's Handbook.

The claimant was born on 18 September 1933. She suffered from grand mal epilepsy. In her original claim for an attendance allowance she said that fits occurred without warning. A delegate of the Attendance Allowance Board (a DMP) awarded her attendance allowance at the lower rate from 22 January 1985 on the grounds that she needed continual supervision throughout the day in order to avoid danger to herself or others. On 11 September 1986 she made a renewal claim. This was rejected on 24 November 1986. The claimant applied for a review. A DMP provisionally considered that she satisfied none of the day or night conditions for an attendance allowance. The claimant submitted a number of letters and further medical evidence was obtained. On 12 May 1988 the DMP determined on review that none of the day or night conditions for an attendance allowance was satisfied. The DMP did not in his determination consider the additional evidence. He also in his reasons stated (i) that the claimant's house door or other house outer doors should be locked to prevent any possible wandering; (ii) that unless there were complicating medical conditions or special features relating to the fits, the risk of substantial danger was so remote a possibility that it ought reasonably to be disregarded; and (iii) that in the light of *Moran v. Secretary of State for Social Services* the DMP was in error when he made his decision on 28 January 1985. The claimant appealed.

Held by a Tribunal of Commissioners (Mr. Reith, Mr. Mitchell and Mr. Hoolahan):

1. the DMP's failure to consider the additional evidence supplied in support of the claimant's request for review amounted to a breach of natural justice (Para 8);
2. the DMP's proposal to avoid danger arising from the claimant's habit of wandering after fits—to lock the house door or other outer doors—was unreasonable (Para 12);
3. the DMP appeared to have applied a statement in the Handbook for DMPs that in relation to epilepsy cases claimants would not be entitled to attendance allowance unless there were complicating medical conditions or special features. The proper test was that set out in section 35 of the Social Security Act 1975 and that could not be allowed to be subverted in relation to sufferers from epilepsy by an expression of medical opinion which stated a presumption against entitlement in their case (Para 13);
4. adopting para 22 of CA 139/1988 (reported as R(A) 6/89), where a previous medical approach of the Board is departed from, the DMP must explain and support the altered attitude (Para 14);