CA 25/1981

MJG/EFM

SOCIAL SECURITY ACTS 1975 TO 1981

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.A. 1/82

1. I give leave to the claimant to appeal against the decision of the Attendance Allowance Board dated 28 October 1980 and I allow the claimant's appeal from that decision. I set aside the said decision of the Board and remit the matter to the Board (or its delegate) for redetermination: Social Security Act 1975 section 106 and the Social Security (Attendance Allowance) (Number 2) Regulations 1975, [S.I. 1975 No. 598], regulation 12.

2. The claimant is a married woman, now aged 58, who until 29 February 1980 was in receipt of attendance allowance at the higher rate, a delegated medical practitioner ("DMP") having decided on 31 August 1979 that the claimant continued to satisfy the conditions set out in section 35(1)(a)(i) and (b)(i) of the Social Security Act 1975. The certificate issued by the DMP in connection with that decision enabled higher rate attendance allowance to be awarded to the claimant from 29 November 1979 to 29 February 1980 inclusive (she had been in receipt of attendance allowance at the higher rate for an immediately preceeding earlier period, as from 21 July 1977).

3. However, in October 1979 the Secretary of State had received information from one of the local offices of the Department, which suggested that there might have been an improvement in the claimant's condition. The claimant was at the instance of the Department subsequently medically examined, and the Department also obtained a report from a hospital where the claimant had previously had treatment. The Secretary of State then made application (dated 18 March 1980) to the Attendance Allowance Board for a review of the DMP's decision of 31 August 1979. The application for review (a copy of which was sent to the claimant in compliance with regulation 8(1) of the Regulations) was on the ground that there had been a relevant change of circumstances since the determination of the DMP on 31 August 1979 (Social Security Act 1975 section 106(1)(a)).

4. As well as the medical evidence, there were put by the Secretary of State before the Attendance Allowance Board two reports from investigating officers of the Department. These officers are of course "laymen" in the medical sense. The reports were dated 4 February 1980 (by a fraud officer of the Department) and 29 April 1980 (by a special investigator of the Department). The first report (dated 4 February 1980) contains detailed statements of observations by the fraud officer on the claimant and her husband, and gives details of when the claimant was said to have walked unaided without assistance and of her general independence of action. The second report (dated 29 April 1980) is a detailed lengthy report by the investigating officer of an interview with the claimant in the presence of her husband and of a Departmental visiting officer. A considerable number of questions and answers are recorded. The purport of the questions put to the claimant was that she was able to walk unaided and that her disabilities were not such as to entitle her to attendance allowance, not even at the lower rate. I am satisfied from perusal of that report that, although the interview was distressing to the claimant and was ultimately terminated for that reason, the claimant was given an adequate opportunity by the officers of the Department to answer the case that was in fact being made against her. The results of the earlier investigations by the fraud officer were put to her in detail.

5. In accordance with their usual practice (adopted as the result of criticisms of the Board's procedure by the Chief Commissioner in Reported Decision R(A) 1/73), the Board wrote to the claimant on 9 July 1980 as follows:

> "I am writing about your award of attendance allowance.
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> As you know your case is now being considered by the Attendance Allowance Board at the request of the Secretary of State, Department of Health and Social Security. At present the Board are of the opinion that neither a day condition nor a night condition is satisfied. This means that on the information before them they would revoke the existing certificate so that attendance allowance would no longer be payable from 16 January 1980 [this date was taken by the Board as being the date from which observations by the Department's officers in connection with attendance allowance had become 'effective' - see below]. The conditions that must be satisfied by day or at night before they can issue a certificate are laid down by law and are set out in the enclosed copy of the 'Conditions relating to the need for attendance'.
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> The documents on which the Board have based their opinion are listed overleaf. Copies of these documents, all of which you may keep, are enclosed with this letter [among the documents thus listed and copies of which were sent to the claimant were the two officers' reports dated 4 February 1980 and 29 April 1980].

The Board have asked me to write to you before they make their decision, to ask you if you accept their opinion about the need for attendance. If you do, will you please let me know as soon as possible, so that action on the case may proceed.

The Board have also asked me to explain that, if you do not accept their opinion about the need for attendance, you may comment in writing on the information considered by them. You may also send in any further evidence. If you do decide to comment please write as full a statement as you can.

If you wish to comment or send further evidence, please write to me within the next 14 days. If you need more time please let me know. If no reply is received within 14 days time, a decision based on the present information will be made and notified to you.

An addressed envelope is enclosed for your reply".

6. The claimant replied in a letter received by the Board on 14 July 1980. In that letter the claimant made detailed observations on the officers' reports. The claimant's husband also wrote on behalf of the claimant to the Board in a letter received by the Board on 2 September 1980. That letter did not make any representations about the Departmental officers' reports.

7. On 28 October 1980 the Attendance Allowance Board in a careful decision decided that neither a day nor a night condition had been satisfied by the claimant throughout the period from 16 January 1980 (for the significance of this date see paragraph 5 above) and they consequently reviewed the decision of the DMP dated 31 August 1979 on the ground that there had been a relevant change of circumstances since it was made. As a result they revised and revoked as from 16 January 1980 the higher rate certificate issued on 31 August 1979. The Board dealt in detail with the medical evidence before them and my decision in no way reflects on the conclusions reached by the Board on that medical evidence.

8. However, the Board also considered the non-medical evidence from the two officers of the Department and, in paragraph 9 of their decision, the Board dealt with it in the following manner:

"The evidence before us comes from both medical and non medical sources, the non medical sources being letters from [the claimant and her husband] and reports of observations of, and an interview with, [the claimant], by 2 officers employed by the Department of Health and Social Security. Despite the reservations on the accuracy of the non medical reports made by [the claimant] in her letter received on 14 July 1980, we accept the reports as containing reliable evidence on material questions of fact. We therefore give due weight to the non medical evidence supplied by the Department when coming to our decision. What the non medical reports have effectively done is to make us take a more critical look at the latest medical evidence. In doing so we have decided to

> give [the claimant] the full benefit of any doubt relating to past periods. When arriving at a decision on 31 August 1979 it is clear from the then existing evidence that our delegate concluded that [the claimant] was both normally confined to a wheelchair and a considerable invalid. Since that date she has been observed on several occasions as being fully mobile without the need of wheelchair or physical assistance from another person. This fact, in our medical opinion and taking into account the nature of the disablement indicates an improvement in her condition both as regards to mobility and also her general needs relating to attention. The evidence shows no clear date on which the improvement took place, or to be more precise had taken place over a period. We have therefore decided that the improvement and therefore review be considered effective from 16 January 1980. That is the first date of the second series of observations made by the Department of Health and Social Security officers, the first series of observations being on 31 August, 1 September and 30 October 1979".

9. On 16 December 1980 the claimant made application to the Commissioner for leave to appeal from the decision of the Attendance Allowance Board and on 3 June 1981, Solicitors acting for the claimant, in a letter to the Commissioner's Office, referred to a report of a consultant, which was not before the Board when it made its decision but which, in view of its stringent terms, they may now wish to peruse. The Solicitors added:

> "Our client would like the opportunity of an oral hearing in this matter in respect of ... the claim for attendance allowance ... particularly in view of the conflicting evidence contained in [the consultant neurologist's] report and the evidence given by Mr D and Mr M [the fraud officer and special investigator of the Department]. We believe that our Client ought to have the right to cross-examine Mr D and Mr M on their evidence".

10. On 20 August 1981 the Commissioner granted the request for an oral hearing of the application for leave to appeal and gave the following further special direction:

> "The Commissioner wishes to have submissions on the question of how far non-medical evidence (eg that of Departmental investigators) is admissible and probative before the Attendance Allowance Board".

11. The oral hearing (which by consent of the parties was treated also as a hearing of the appeal itself) took place on 6 October 1981. The Secretary of State was represented by Mr Aitken of the Solicitor's Office of the Department of Health and Social Security, and the claimant was represented by her husband. I am indebted to Mr Aitken, to the claimant and to her husband for the considerable assistance they gave to me at the oral hearing. As an appeal to

a Commissioner from the decision of the Attendance Allowance Board lies only on a question of law (Social Security Act 1975, section 106) it was not of course possible for questions of fact to be controverted. In particular it was not possible to accede to the request of the applicants' solicitors to have Mr D and Mr M the Departmental fraud and investigating officers present for cross-examination. This is of particular significance in that it bears on the question of at what stage, if any, a claimant whose continued entitlement to attendance allowance is challenged by reports of Departmental investigators shall have the opportunity to give evidence in rebuttal of those reports, or indeed to cross-examine those officers (see below).

12. At the hearing Mr Aitken referred to a written submission on behalf of the Secretary of State dated 29 September 1981. I set that submission out and indicate my decision upon it. The submission reads,

> "In response to the Commissioner's direction dated 20 August 1981, section 35 of the Social Security Act 1975 does not lay down what specific method the Board will use in seeking or accepting evidence on which to decide whether a person's requirements or attention and/or supervision satisfy the conditions laid down in section 35(1). Nor does it stipulate that the evidence should be obtained wholly from those who are medically qualified. It has generally been accepted by the Attendance Allowance Board that evidence from a lay person as well as a medically qualified person can be valuable in their determination.
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> The Board also have the power under section 106 of the Act to review a determination of theirs if they are satisfied that there has been a relevant change 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.
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> Paragraph 4 of Schedule II of the Social Security Act 1975 provides that:
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> > 'The Board may refer any individual case for investigation and report to one or more persons specially qualified in the Board's opinion to investigate that case'.
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> In view of the foregoing it is submitted that the Board has the power to decide how best they can determine whether the medical conditions are satisfied or alternatively whether there has been a relevant change or ignorance or mistake of material fact since their determination was made. They must decide what weight they will give to both lay and medical evidence which is placed before them or alternatively which they themselves seek in the process of their consideration.

> Using their expertise they will arrive at their conclusion based on the evidence they consider gives them the most accurate picture of the disabled person's requirements for frequent attention or continual supervision.
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> The Board are not restricted in their consideration of claims and questions by the rules of evidence applicable to a Court of Law and may consider evidence of all types and from all sources, although the weight which can be given to different items must be carefully considered. It is submitted that in paragraph 9 of their decision dated 28 October 1980 the Board were appreciative of the distinction they must draw between the medical and non-medical evidence but gave adequate reasons for concluding that the lay reports gave reliable evidence on a material question of fact".

13. I accept that submission in its entirety as being a correct statement of the law and procedure applicable to decisions of the Attendance Allowance Board, but with one reservation. That is as to the question, which was canvassed at the oral hearing before me, whether in this type of case involving in effect an imputation on the honesty of a claimant, it is sufficient for the Attendance Allowance Board to pursue its normal procedure of sending copies of documents to a claimant giving the claimant opportunity to reply in writing only, or whether the Board should have given the claimant an opportunity of an oral hearing before the Board so that the claimant could try, if she wished, orally to refute the evidence impugning the claimant's honesty or accuracy of representations of fact. If an opportunity of a hearing is required and if the Departmental investigating officers are called before such a hearing, the claimant would have a change to cross-examine such officers. No such opportunity of a hearing before the Board was given to the claimant in this case and the claimant's Solicitor's request to have the Department's fraud officer and special investigator present at a hearing before the Commissioner was misconceived, for the reasons set out in paragraph 11 above.

14. Neither the Social Security Act 1975 nor relevant procedure regulations, i.e. the Attendance Allowance Regulations and the Social Security (Determination of Claims and Questions) Regulations 1975, [S.I. 1975 No. 558] contain any provision on this point. The procedure by which the Board gives a claimant an opportunity to make written observations on documentation before the Board (see paragraph 5 above) is not the result of any provision, either by the Act or Regulations, but was adopted by the Board as an administrative procedure following Commissioner's Decision R(A) 1/73. However, paragraph 12 of Schedule 11 to the Social Security Act 1975, dealing with the Attendance Allowance Board, provides,

> "12. Subject to any direction given to them by the Secretary of State, the Board may -
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> (a) .....
>
> (b) regulate their own procedure ..." (my underlining).

15. In response to a further direction by me dated 14 October 1981, the Secretary of State in a written submission dated 9 November 1981 states:

> "It is submitted on behalf of the Secretary of State that a search of both the Board's and the Department's papers has revealed that the Secretary of State has not given any such direction [ie as to procedure] to the Board.
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> The Board's policy which has been reviewed on several occasions is not to hold oral hearings either by its delegates or by the Board itself. As a result of criticism by the Commissioner (Decisions CA/8/72 and R(A) 1/73) that as oral hearings were not held it was incumbent upon the Board in some other way to afford a claimant the opportunity to comment on the evidence and the Board's likely determination based on that evidence before reaching a firm decision, the Board introduced its present practice of notifying the claimant of their provisional opinion and at the same time giving them [sic] copies of the evidence on which that opinion was reached, so that he can comment or submit further evidence as necessary.
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> It is submitted that this practice meets the demands of natural justice. It is confirmed that the Secretary of State does not intend to issue a direction to the Board under paragraph 12 of Part 2 of schedule 11 to the Social Security Act 1975 with regard to the holding of oral hearings".

16. I accept that in all categories of cases, except the present one, i.e. one where the honesty of a claimant or the accuracy of a claimant's representations of fact are directly in issue, the existing procedures of the Board and its delegates (as set out in the Secretary of State's submission) adequately meet the demands of natural justice. Indeed, I so held in reported Decision R(A) 1/81. However, I conclude that in the present exceptional type of case the Board was in breach of natural justice by not offering to the claimant an opportunity of an oral hearing before the Board to give her the opportunity to refute the serious imputations against the accuracy of factual representations by her and indeed her honesty, which had been made by the Departmental officers in their written reports. In so saying, I do not consider that the Board or indeed the Department were under any duty to procure the attendance at such a hearing of the Departmental fraud and special investigating officers for cross-examination (compare Commissioner's Decision R(SB) 1/81). Of course, if those officers were in fact called by the Department, the claimant should be given at the hearing an opportunity to cross-examine them. Nevertheless, the claimant was in my view entitled to a hearing before the Board in order to give orally her own version of the events and facts on which the Departmental investigators had made their reports.

17. I appreciate that this may give rise to administrative problems for the Attendance Allowance Board. Nevertheless I consider that the imperative and over-riding requirement of natural justice does require the opportunity of a hearing being given to a claimant in the special circumstances of this type of case. In the case of other benefits under the Social Security Act 1975 (e.g. invalidity or disablement benefit or mobility allowance) the claimant does have an opportunity of an oral hearing before e.g. a local national insurance tribunal or a medical appeal tribunal and in my view natural justice requires the opportunity of a hearing before the Attendance Allowance Board or its delegate in this special type of case.

18. I reach the conclusion that the Board was in breach of natural justice in this case in not offering to the claimant an oral hearing by a consideration by me of the general case law on hearings before tribunals (such as the Attendance Allowance Board) which have a judicial or quasi-judicial function. I note, for example, that in Breen v Amalgamated Engineering Union [1971] 1 All ER 1148, at 1153, Lord Denning MR said:

> "It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard". (My underlining).

19. The learned Master of the Rolls does not indicate, other than by reference to certain reported cases (which do not have any particular bearing on this present case), what is "a proper case" where a party must be given a chance to be heard as distinct from merely a right to make written representations. However, in a monograph on "Natural Justice" (Second Edition, 1979), Professor Jackson, after reviewing the cases, states (p. 68),

> "In so far as any general principle can be laid down it is suggested that there is no right to an oral hearing unless the refusal of an oral hearing would prejudice the applicant - and even in such a case statute may take away the right. Normally, for example, written submissions in a case where the truthfulness of the applicant is not in issue are sufficient. But there are situations where the applicant does not wish to bring new facts to the tribunal's attention but to convince them that his version of a disputed story is true. In Rose v Humbles [1970] 1 WLR 1061 a taxpayer successfully appealed on this ground against the refusal of the Inland Revenue Commissioners to postpone the hearing of his appeal against assessment until he was sufficiently well to appear in person". (My underlining).

20. I accept that statement by Professor Jackson as a correct statement of the law and, in my view, statute not having taken away any right in this present case to an oral hearing, the claimant, because her truthfulness was in issue, was entitled to be offered an oral hearing by the Attendance Allowance Board. As no such offer was made their decision dated 20 October 1980 was in breach of the rules of natural justice. It is true that in Local Government Board v Arlidge [1915] AC 120, the House of Lords held that there was no right to insist on an oral hearing by a householder whose property had been condemned as unfit for human habitation and who had appealed to the Local Government Board against the local authority's decision to condemn the property. However, the report of that decision shows that the householder in question had had the opportunity (of which he had availed himself) of an oral hearing before the inspector who made a report to the local authority. But in this case unless the Attendance Allowance Board (or its delegate) gives the claimant an opportunity of an oral hearing, she will have no opportunity at any stage to give her own oral evidence on the question of the truthfulness of her statements about her disability.

21. As to the redetermination of this case by the Board (or its delegate), the Board is of course the final arbiter on all medical and factual questions but it must observe the requirements of natural justice. It therefore follows from my decision that in order to comply with those requirements the Board (or its delegate) should in my judgment offer the claimant an oral hearing so that the claimant may have the opportunity personally to tell the members of the Attendance Allowance Board her side of the story. Whether the Department chooses to call the investigating and fraud officers before the Board is entirely of course a question for them and I have already indicated that neither the Board nor the Department is obliged to call them. If however they are called to give evidence, then of course the claimant or her representative should be given an opportunity to cross-examine them.

(Signed) M J Goodman
Commissioner

Date: 1 February 1982

Commissioner's File: C.A. 25/1981
DHSS File: S.D. 450/1229