CA/35/1984

RFMH/BC

SOCIAL SECURITY ACTS 1975 TO 1984

APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD
ON A QUESTION OF LAW

Name: Kevin John Towner

1. My decision is that the determination on review of the Attendance Allowance Board by a delegated medical practitioner ('the DMP') on their behalf dated 12 September 1983 is erroneous in law and is accordingly set aside.

2. The claimant was born on 16 September 1962 suffering from spina bifida, hydrocephalus and bilateral congenital dislocated hips. He was awarded a lower rate certificate from 6 December 1971 until he attained the age of 16 years on 16 September 1978 and again from that date to 14 August 1982. On 7 July 1982 he was awarded a lower rate certificate from 15 August 1982 to 7 July 1987.

3. In a letter received on 18 May 1983 the claimant notified the Department of Health and Social Security that he had commenced part-time employment on 3 May 1983 but had not received payment of attendance allowance since 23 April 1983. He concluded his letter by saying "I would appreciate your dealing with this matter with some urgency". This letter was construed to be a request for a review of the claimant's attendance allowance claim so that the claimant was medically examined again on 22 June 1983. On 4 July 1983 the DMP completed in error internal form DS202 (OTR) which was only applicable in cases where an explanation was not required. The form shows that the DMP revised and revoked the award of a lower rate certificate on 22 June 1983 because he considered that the claimant's attention needs were less. The evidence indicates that this form was not forwarded to the claimant and was never treated nor considered to be a formal decision. On 12 July 1983 the claimant was advised that the DMP was of the opinion that as neither a day condition nor a night condition was satisfied the decision should be revised. The letter concluded "the doctor has asked me to explain that if you do not accept his opinion about the need for attendance you may comment in writing on the information considered by him..". A letter dated 17 July 1983 from the claimant's mother noted that the attendance allowance certificate was "likely to be revoked" and stated that the claimant's physical condition had not changed and made the salient point that if he had remained unemployed attendance allowance would have remained in payment. In a further letter received on 16 August 1983 the claimant pointed out that he was then unemployed.

4. On 12 September 1983 the DMP acting on behalf of the Attendance Allowance Board accepted that the claimant's letter dated 18 May 1983 was a request for a review of the claim for attendance allowance. He further decided that the conditions for review of the decision dated 7 July 1982 were satisfied because there had been a relevant change of circumstances since that decision was made, namely that the claimant had obtained a part-time job. He referred to the medical report dated 22 June 1983 and to the letters dated 17 July 1983 and 16 August 1983 from the claimant's mother and the claimant respectively. However, in the light of the evidence he decided that the claimant did not

satisfy either the day or the night conditions in section 35 (1) of the Social Security Act 1975 and that as a result he could not issue a higher or a lower rate certificate. Accordingly the lower rate certificate issued on 7 July 1982 was revoked from 22 June 1983. The claimant sought leave to appeal on the grounds that the DMP's decision was erroneous in point of law and such leave was given.

5. It is not now in dispute that the claimant's letter received on 13 May 1983 was not a request to review the attendance allowance claim. However under section 106 (4) of the Social Security Act 1975 an Attendance Allowance Board or the DMP acting on their behalf are empowered, once the papers are before them, to review a case even if no application has been made. In my view the misinterpretation of the claimant's letter was venial and did not render the whole of the review decision erroneous in law.

6. Section 106(1)(a) of the Social Security Act 1975 provides that a decision of the Attendance Allowance Board may be reviewed at any time if they are satisfied that there has been a relevant change of circumstances since the determination was made. It is argued on behalf of the claimant that the DMP erred in considering that the commencement of a part-time job constituted a relevant change of circumstances. I reject this argument. The claimant was awarded a lower rate certificate on 7 July 1982 on the basis that he required continual supervision throughout the day in order to avoid substantial danger to himself and others. The fact that the claimant obtained part-time employment cast a doubt as to the amount of supervision required and was relevant in determining whether the claimant continued to satisfy the test for continual supervision under the Social Security Act 1975. In my view the DMP was entitled to review and revise the claim in accordance with the evidence. Accordingly his decision was not erroneous in law on this ground.

7. It is contended on behalf of the claimant that the completion of form DS202 (OTR), albeit an error, constituted a formal decision and the fact that the claimant was invited to submit his comments after the decision had been made constituted a breach of the rules of national justice. Form DS202 was clearly inappropriate in the present case and the evidence indicates that it was treated as no more than an opinion and that the claimant and his mother accepted it as such. The DMP's decision on review dated 12 September 1983 made no reference to it and it was not included in the papers and it only became known to the claimant after 12 September 1983. In my view, although the error is regrettable, it did not influence any of the parties to the appeal and I am satisfied that the error did not result in the breach of the rules of national justice. As a result of the DMP's decision on 12 September 1983 was not erroneous in law on that ground.

8. It is also submitted on behalf of the claimant that the DMP failed to satisfy the requirements to give clear and adequate reasons for his decision (regulation 9(2) of the Social Security (Attendance Allowance) (No 2) Regulations 1975, as amended). Further it is contended that the claimant satisfies the day condition contained in section 35(1)(a)(ii) of the Social Security Act 1975 and that the DMP's decision was not supported by the facts. The claimant appears to concede that neither the night conditions specified in section 35(1)(b) nor the day condition specified in section 35(1)(a)(i) are satisfied. Accordingly the appeal concerns the day condition specified in section 35(1)(a)(ii) which provides that a person will not be entitled to attendance allowance unless -

"(a) he is so severely disabled physically or mentally that, by day, he requires from another person either -

(i) .., or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; ..."

9. Whether or not a person satisfies the aforesaid conditions is a matter for the exclusive determination of the Attendance Allowance Board or, where their functions have been delegated to a medical practitioner, of that medical practitioner. Such determination cannot be upset unless it is erroneous in point of law. It is, of course, a fundamental principle that if inadequate reasons are given for the decision that is an error of law whether or not the actual decision is correct (Decision R(A) 1/72, paragraph 8). In my judgement, the DMP in this case did not fully comply with the statutory requirements and I must set aside the decision.

10. As a result of the medical report dated 14 June 1982 the claimant was awarded a lower rate certificate from 7 July 1982 for a further period of five years. The DMP on 12 September 1983 reviewed the decision as he was entitled to, because the claimant was employed five hours per day. Accordingly, it was crucial to the decision that all parties should understand the reasons why the DMP considered that the claimant's need for supervision was less and the award revoked in consequence. The DMP referred to the claimant's letter received on 16 August 1983 but made no reference to the fact that the claimant was no longer employed and he gives no indication that he considered this point. The DMP based his decision on the fact that the claimant, in his opinion, was more self-reliant but failed to give reasons why he reached this conclusion. The DMP failed to compare the latest evidence with the earlier evidence on which the need for day supervision was accepted. In Decision R(A) 1/84 which was decided approximately two months after the decision under review, the Commissioner stated that where DMP proposed to remove an existing award of attendance allowance he was obliged to give a clear and adequate reason for doing so.

11. In order to satisfy the conditions contained in section 35(1)(a)(ii) it has to be shown that the claimant required continual supervision in order to avoid substantial danger to himself or others. In Decision R(A) 1/83 a Tribunal of Commissioners set out the four elements that must be satisfied to comply with the "continual supervision" test. First the claimant's medical condition must be such that it may give rise to a substantial danger either to himself or to someone else. A substantial danger will, of course, depend upon the facts of each individual case. The second element that must be present is that the substantial danger must not be too remote a possibility. The relevant question is whether or not the relevant danger is likely to occur. If it is, then its frequency is immaterial. The third element is the need for supervision on the part of some other person to ensure that the claimant avoids the substantial danger referred to. Sometimes a claimant is fully capable of taking the appropriate precautions himself against the relevant dangers occurred by his condition. The final element is that the supervision must be continual. In this context, a Tribunal of Commissioners approved the opening words in paragraph 9 of Decision R(A)2/75 -

"In my opinion the characteristic nature of 'continual supervision' is overseeing or watching over considered with reference to its frequency or regularity of recurrence (see Decision C.A. 3/72 (not reported) paragraph 8)."

12. The medical reports dated 14 June 1982 and 22 June 1983 differ substantially at Part 2 in their assessment of the claimant's condition in that the latter records that the claimant is able to go to work, sit throughout the period of his work and that someone is around if he gets into trouble. The DMP failed to indicate whether he considered that both medical reports supported the conclusion that the claimant failed to satisfy the condition for an award or whether he considered that it was a border-line case and the fact that he was capable of part-time work supported the view that he did not satisfy the "continual supervision" test. Whatever his view it was incumbent upon him to make it absolutely clear why the claimant's claim was rejected after it had been accepted for the past 11 years.

13. The claimant's appeal is allowed. He should ensure that all the documents and written submissions now before me are included in the evidence before the Attendance Allowance Board considering the review.

(Signed) R F M Heggs
Commissioner

Date: 12 February 1985

Commissioner's File: CA/35/1984
DHSS File: SD 450/1713