

Emphasises the importance of putting in contention when a previous award has not been continued the point that there has been no change/improvement. c/f Braithwaite v Sec of State for Social Services 3/7/86 unreported.

JGM/SB

Commissioner's File: CA/037/1986

DHSS File: SD 450/2111

SOCIAL SECURITY ACTS 1975 TO 1985

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

Name:

1. My decision is that the determination of the delegated medical practitioner (DMP) of the attendance allowance board dated 26 November 1985 was erroneous in point of law and it is set aside. The matter must be referred to another DMP.

2. The claimant is a woman born in the year 1950 and had been awarded attendance allowance at the lower rate for periods from 1 June 1982 to 20 May 1985, on the strength of determinations by DMP's that she satisfied one of the "day conditions" for the award of the allowance. On her renewal claim dated 20 March 1985 a DMP certified, in a determination dated 27 March 1985, that the claimant did not satisfy either of the day conditions or either of the night conditions for an award.

3. The claimant applied for a review of this determination in a letter dated 17 April 1985 (received on 22 April 1985) stating that she had been receiving the allowance since 1982 and that her needs had not altered since then. She subsequently received a letter from the North Fylde Central Office of the Department of Health and Social Security dated 20 August 1985 to the effect that the DMP concerned with reviewing the decision was provisionally of the view that she did not satisfy either a day or a night condition and inviting her to comment in writing. In response to this the claimant's adviser at her Citizens' Advice Bureau wrote a letter making comments which included the following:

"Our client states that her condition has deteriorated since 1982 when she first received attendance allowance, not improved as the refusal would appear to indicate."

On 26 November 1985 the reviewing DMP gave a determination refusing either a day certificate and a night certificate. It is against this determination that the claimant with the leave of the Chief Commissioner now appeals.

4. *4/96/1984 attached* The Secretary of State supports the appeal by reference to a decision of mine on file CA/96/1984, where I referred to a well-known passage in the decision of a Tribunal of Commissioners, R(I) 18/61 at paragraph 13, in which it was said that in cases where some specific contention is put to a medical appeal tribunal it was certainly essential to give reasons for its rejection, and applied that to the Attendance Allowance Board and their DMP's. The specific contention in the case on file CA/98/1984 as in this was that the claimant had been previously held to satisfy relevant medical conditions and that there had been no change for the better.

5. Such a contention can only be met by holding that the previous decision was given on different evidence (which perhaps should have been considered by the DMP) or that it was, though based on the same or virtually the same evidence, one which the second DMP disagreed with, or that the claimant's condition had materially improved in some relevant respect. And it could well involve consideration of the evidence on which the previous determination was based. In

the present case the only reference to the point made by the DMP was in the following terms:

"I have noted that a previous delegate accepted that [the claimant] satisfied one of the day conditions but neither of the night conditions when he made his decision on an earlier claim for a different period. With this in mind I have carefully studied all the evidence before me but for the reasons I have given in the foregoing paragraphs, my decision on the current claim must be that [the claimant] does not now satisfy either of the day or night conditions relating to attendance allowance."

6. It is clear from the foregoing that the DMP did not consider the evidence upon which the previous DMP to whom he refers reached his conclusion; and that he must have reached his own different conclusion either because he disagreed or because he thought, contrary to what the claimant was alleging, that she had improved. But he does not indicate which; and he has done nothing to counter the unease that is likely to arise where different medical practitioners without explanation reach opposite conclusions on the same state of facts (as to which see Decisions R(A) 2/83 at paragraph 5 and R(A) 1/84 at paragraph 9). I accept the submission of the Secretary of State that the determination of the DMP is erroneous on this ground.

7. I would emphasise however that it is because the point has been specifically made that the decision falls to be set aside. It does not follow that in every case where a positive certificate is refused where there has been a previous award of attendance allowance it is necessary to give a full explanation of the change. In Braithwaite v Secretary of State for Social Services (3 July 1986 unreported) counsel for the claimant appellant had criticised the DMP for his failure to indicate the changes that had occurred in the development of the disabled child in question since the previous certificate had been granted. And Balcome LJ said:

"But in my judgment there was no legal obligation upon [the DMP] to do so, and he deals with the case, in the manner which I have stated, perfectly adequately."

So far as appears from the decision it was no part of the case put to the DMP that there was no difference between the child's condition when previously an award had been made. Furthermore it was a case of a child severely disabled by being profoundly deaf whose ability to cope with such a handicap might in the nature of things be expected to change as she grew older. I do not regard the passage quoted above, therefore, as otherwise affecting the conclusion that I should reach on this appeal, which I allow.

(Signed): J G Monroe
Commissioner

Date: 29 August 1986

APPEAL TO THE SOCIAL SECURITY COMMISSIONER ON A QUESTION OF LAW FROM THE DECISION ON REVIEW DATED 26 NOVEMBER 1985 MADE ON BEHALF OF THE ATTENDANCE ALLOWANCE BOARD

APPEAL BY Miss Kathleen Florence B

SECRETARY OF STATE'S SUBMISSION

1. On 10 March 1986 the Chief Commissioner granted leave to appeal (DOC 47).
2. The appeal on form DS 219 was received in the Department on 10 April 1986 (DOCS 48-49).
3. The grounds for appeal are given on sheets accompanying form DS 213 dated 14 February 1986 (DOCS 43-46). They amount to an assertion the delegated medical practitioner (DMP) erred in law in failing to give clear and adequate reasons why he considered attendance allowance was not appropriate when it had previously been awarded and there had been no change in her circumstances. It is also asserted the DMP applied the wrong test in law when considering her attendance needs.

The Secretary of State's observations follow.

4. On 17 January 1985 Miss B made a renewal claim for attendance allowance for the period 21 May 1985 onwards (DOC 1), previous DMP's having certified she satisfied the day attention condition governing entitlement to the allowance for the periods from 1 June 1982 to 23 June 1983 and 24 June 1983 to 20 May 1985. The DMP dealing with the renewal claim was, however, unable to accept any of the conditions were satisfied and rejected the claim on 27 March 1985 (DOC 8). Miss B asked for a review of the decision (DOC 9) but the DMP dealing with the request for review was still unable to find that any of the conditions for the allowance were satisfied, giving his reasons for this in his decision dated 26 November 1985 (DOCS 31-33).
5. The Social Security Act 1975 makes it clear, qualification for attendance allowance is dependant on the amount of attention and supervision required because of a person's disablement rather than the extent of the disability itself, or because he or she suffers from a particular type of disabling condition, it is submitted the question whether any or all of the conditions is satisfied is for the DMP to determine (Section 105 (3) of the Act).

When the DMP made his decision on 26 November 1985 it is submitted in view of the authorities in Commissioners Decisions R(A)1/84 and R(A)4/78, paragraph 13, there was no requirement for the DMP to give reasons for the previous certificate but merely to give reasons why he considered Miss Bolton did not satisfy any of the conditions for attendance allowance and why the decision of 27 March 1985 should not be revised. However, in an unreported decision dated 16 December 1985 CA 96/1984 (copy attached) the Commissioner has stated: "It is a well known principal 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 judgement this applies equally to the Attendance Allowance Board". He then went on to say that if a claimant makes the point that there has been no change since the previous award, he did not see how the Board or its DMP could meet that specific point except by expressing disagreement with the previous certification or by pointing out that there had been a change.

6. It is agreed in future DMP's will have to bear in mind the guidelines laid down in CA/96/84 when determining cases of a similar nature. It is submitted that the failure of the DMP to deal with the specific contention made by the claimant in her statement to the examining medical officer (DOC 2), in her letter dated 17 April 1985 (DOC 9) and in the letter of her representative dated 23 October 1985 (DOC 16) that her disability had remained unchanged and giving reasons for its rejection has rendered his decision of 26 November 1985 erroneous in law.

7. In view of the submission in the preceding paragraph, subject to any direction by the Commissioner, it is not proposed to make a detailed submission on the claimant's other grounds for appeal.

8. Copies of CA 96/84 are being sent to the appellant and her representative.

P. McQuillan

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Mrs P McQUILLAN
for SECRETARY OF STATE FOR SOCIAL SERVICES