CA 108/1981

Decision C.A. 108/1981

This decision is 'starred' because it considers questions - and expresses my own conclusions - as to the propriety or otherwise of an Attendance Allowance Board (or DMP) reviewing and revising a decision on Attendance Allowance upon which an appeal (on a point of law) to a Commissioner is pending and distinguishes (since such an appeal is not, as they were contemplating, an appeal "by way of rehearing", in which updated information can be given effect) the views as to not reviewing decisions the subject of pending appeals which are expressed in C.U. 4/54 (unreported) and R(SB) 1/82.

I Edwards-Jones

IEJ/BOS

SOCIAL SECURITY ACTS 1975 TO 1981

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an "interlocutory" decision in respect of certain procedural questions which have arisen in regard to what stands substantively as a claimant's appeal to the Commissioner on a point of law from a decision in respect of Attendance Allowance given by the Attendance Allowance Board (acting by a Delegated Medical Practitioner).

It is not a substantive decision on the appeal itself. That will (as matters stand) fall to be given at a later date.

The procedural questions which have been raised and require my present decision concern the propriety or otherwise of the Board reviewing (and potentially, revising) a decision which is currently the subject of an appeal to the Commissioner whilst that appeal remains undecided, and as to whether - if proper at all - such a course requires the prior consent of the appellant claimant.

2. (1) In 1954 a decision - C.U. 4/54 (not reported) - was given by a Commissioner under the - then - national insurance jurisdiction that the effect of reviewing, (or, more accurately, reviewing and revising) a subsisting decision is to annul that original decision and thereby to lapse the appellate jurisdiction to determine a pending appeal from such original decision even though such an appeal had been instituted prior to the exercise of the power to review and revise and was pending for determination when that exercise took place.

(2) That decision has been consistently followed ever since - in my respectful view rightly. But (as recently recorded and explained in Decision R(SB) 1/82) the practice has since grown up (and been followed with the approval of the Commissioners) of the authorities in whom the powers of review and revision are vested not revising on review decisions from which appeals were pending unless the revised decision would give the claimant all that he could get on the appeal.

As explained in R(SB) 1/82, that practice was calculated to minimise delay.

(3) It was, in my view, calculated also to avoid potential injustice to claimants, in that unless a revised decision gives the claimant all that he can get on appeal the claimant (whose benefit position may have been only partially improved - or, indeed, wholly worsened - by the revised decision if it is other than one giving him all he could get on the appeal) must institute a fresh appeal against the revised decision in order to regain the position in which he stood (before his appeal against the original decision was lapsed by the revised decision), as regards any benefit which was in issue upon that appeal and has not been awarded by the revised decision - and "justice delayed is justice denied".

(4) Whilst the convenience of adjudicators is clearly not a relevant factor of weight in a jurisdiction in which the welfare and convenience of claimants are the paramount factors, it is perhaps worth mention that if, contrary to the effect of Decision C.U. 4/54, the intervention of a revised decision whilst an appeal was pending did not lapse the whole appeal, but was taken to lapse it only so far as it operated in a claimant's favour as regards issues arising in the appeal, whilst in simple cases there might be no doubt as to what this properly left in issue on the appeal, others can readily be envisaged in which there would have to be a "trial within a trial" of considerable complexity in order to decide that.

3. (1) However, Decision C.U. 4/54, and the resultant practice, arose in the context of a branch of the jurisdiction of the statutory authorities in which the relevant pending appeal was one "by way of re-hearing" so that if - as is also conveniently explained in R(SB) 1/82 - that appeal proceeded, the adjudicating authority would be entitled when determining the appeal to take into consideration the circumstances, and the state of evidence, as those stood at the time of deciding the appeal; and the appeal decision could thus reflect changes since the date of the original decision appealed from no less they could a decision given by way of revision on review.

(2) The "all or nothing" approach did however involve some potential disadvantage to a proportion of claimants, in that:

(a) a revised decision awarding a claimant even a part of what he can, if he succeeds in his appeal, get on the appeal removes (to that extent) the burden on him of having to fight the appeal to obtain that part; and

(b) if and so far as a revised decision can be made and implemented at an earlier date than would attend the determination and implementation of a successful appeal, the benefit of even a

partial gain to the claimant embodied in a review decision would the sooner acrrue to him.

But no doubt the "working practice" so adopted was regarded as on balance preferable to the alternative.

Indeed it is in that sense that I read the recent commendation of it for application in supplementary benefit cases in paragraph 12 of R(SB) 1/82 - in which case, it is I think important to note, the learned Commissioner was concerned with the jurisdiction of a Supplementary Benefit Appeal Tribunal ("SBAT") to consider the effect of events supervening since the original benefit officer's decision was given.

4. That is of particular materiality because an SBAT has, as has also a National Insurance Local Tribunal, and as also do Commissioners in certain - but not all - aspects of their jurisdiction, appellate jurisdiction "by way of re-hearing"; and it is on that account that they are then enabled to give decisions which, as in cases of revised decision given on review, can take account of material changes which have occurred since the original decision the subject of appeal (or of review and revision, as the case may be).

5. (1) However, in other branches of - materially - a Commissioner's jurisdiction the appellate jurisdiction exercised is of a different character - it is what is conveniently described in R(SB) 1/82 as "an appeal in the strict sense". The Commissioner may - as with appeals from decisions of an Attendance Allowance Board or a Medical Appeal Tribunal - have jurisdiction only to set aside the decision appealed from on the ground that it is erroneous in point of law, or he may - as in the case of Supplementary Benefit appeals under the law as amended in 1981 - have jurisdiction both to set aside on that ground and then to substitute the decision which the SBAT from whose decision the appeal before him has been brought should have given.

But in none of these branches of his jurisdiction can the Commissioner's decision on appeal cover the same ground as can a revised decision given on review, and take into contemplation changes of circumstance which have occurred since the date of the decision under appeal in order to reach an up-to-date decision "on the merits of the case".

(2) And, with the limited exception above noted, the course of events which follows from a claimant's successful appeal under this branch of the jurisdiction is that the decision appealed from is set aside and the case goes back for a fresh determination at the level of adjudication from which it has been brought.

6. (1) The present case is of an appeal at present pending determination from a decision on attendance allowance given by the Attendance Allowance Board, acting by a Delegated Medical Practitioner ("DMP") on 9 July 1981.

(2) That decision was by way of review of an earlier decision dated 7.10.80, awarding a "lower-rate" certificate for a period commencing from 11.9.80 and ending at 7.10.81 and was by way of a refusal to revise that earlier decision. (There is a typing error in the concluding paragraph of the decision of 9 July 1981 - it in terms refers to "2 February 1981" which was in fact the date of the examining doctor's report given pursuant to the application for review; but I do not regard that as impeaching the validity of the decision of 9 July 1981 since its true effect is apparent on reading it as a whole).

(3) From that decision the claimant (by his wife) has appealed to the Commissioner on a point of law, pursuant to leave granted by me, and it is that appeal which is now pending for determination. Whilst there is an arguable point of law to be decided if the appeal is pursued, it would be quite unrealistic to regard a favourable decision on that, as the true goal of the claimant's appeal - it is plainly sought only as a hoped-for stepping stone towards the subsequent award, upon the fresh determination by the Board (or a DMP) which would then be required, of a "higher-rate" certificate for the period the subject of the award of 7.10.80, in place of the "lower-rate" certificate originally awarded.

(4) In the interim the period of award from 11.9.80 has expired at 7.10.81 and the claimant has made a renewal claim upon which a further DMP's decision dated 7.12.81 has awarded a "lower-rate" certificate for a fresh period (8.10.81 to 7.12.82).

That award is <u>not</u> in any way in issue on the present appeal.

(5) In the light of information provided to him since the date of that decision (and in fact deriving from material submitted on the claimant's behalf in the intended context of the present appeal) the DMP who gave the decision of 7.12.81, has, I am given to understand, expressed his willingness to review it.

It is submitted on behalf of the Secretary of State that the subsistence of the pending appeal on the decision of 9.7.81 is no impediment to that course now ensuing.

And I wholly concur in that view. Whatever be the proper view as to review of a decision whilst an appeal against it is pending it can have no bearing on the propriety of reviewing whilst an appeal remains pending a <u>later</u> decision, <u>not</u> the subject matter of such appeal, even though given in respect of the same claimant and (as I infer to be so) given by the same DMP as gave the decision as to which the appeal already on foot is pending.

7. (1) However, it appears that, in the light of the same information, the DMP is or might be willing now to review also the decision of 9 July 1981 - which is the subject of the pending appeal to the Commissioner.

(2) As to that, it was originally submitted on behalf of the Secretary of State - I infer in conceived reliance upon the "working practice" to which I have above referred - that "no review of the decision dated 9 July 1981 can be undertaken whilst it is the subject of an outstanding appeal, although a further review could be undertaken once the Commissioner makes his decision known".

Leaving over, for consideration below, the substantive question as to whether that practice is or is not in point and to be followed, I should here indicate that the position arising once the appeal is decided would not be precisely as indicated in the submission. If the appeal should be decided against the claimant, the decision of 9 July 1981 will stand and be open to review. But if it is decided in the claimant's favour, the decision of 9 July 1981 will be set aside (and cease to exist) and it will be for the Attendance Allowance Board (or its DMP) to decide afresh upon the claimant's application for review of the decision of 7 10.80 upon which application the decision of 9 July 1981 was given.

8. The Disability Alliance ("the DA") have, on the claimant's behalf, since put in counter-submissions in regard to the contention on behalf of the Secretary of State to which I have referred to in paragraph 7, in response to which a further submission has now been made on the Secretary of State's behalf which materially submits as follows:

"4. It is submitted that a new determination by the Attendance Allowance Board following a review under the provisions of section 106(1) Social Security Act 1975 would stand in the place of the original determination granting a lower rate certificate from 7 October 1980 for a period of one year. If the Board find, on the basis of the further evidence presented in this case, that the claimant satisfied one of the night time conditions under section 35(1) from a date falling within the period covered by the original determination then, if the claimant consents, it is submitted that the Board can review the original determination and issue a higher rate certificate from any day after the date of claim. The new certificate and determination would stand in place of the existing one and no decision on the appeal would be needed. - as agreed

5. If, on review, the Board refused to alter the original determination, or they agree to grant a higher rate certificate for only part of the period covered by the determination then it is submitted that a final decision cannot be made on the review without the claimant's consent until after the Commissioner has issued his decision on the present appeal."

9. (1) As the DA have rightly pointed out in their submissions, section 106(1)(a) of the Social Security Act 1975 ("the Act") empowers the Attendance Allowance Board to review a determination of theirs "at any time" - "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"

- and I should make clear at once that in my judgment that statutory power has not been and cannot be taken away or fettered by any case-law decision or "working practice"

Such power is, moreover, additional to:

(i) their power under section 106(1)(b) to review a determination of theirs on <u>any</u> ground within the "prescribed time" (3 months); and

(ii) the right of a claimant to apply for review (on any ground within the "prescribed time" or on the above cited grounds at any time), coupled with the duty cast on the Board by regulation 8(3) of the Social Security (Attendance Allowance) (No 2) Regulations 1975 to proceed to determine any such application duly made.

(2) The DA, for whose helpful observations I am indebted, rightly point out in their observations the disadvantage and delay to claimants if a change in circumstances which may well give rise to an award on review of benefit at a higher rate than is in payment under a current award (or an award of benefit where none is in current payment) must wait, before it can be reflected by a revised decision on review, upon the determination of an outstanding appeal against the currently subsisting decision to a Commissioner (on a question of law), which appeal may take many months from its inception to its determination. Whilst pursuant to an established principle of law the Board cannot fetter the discretions conferred on them by section 106 of the Act by any "blanket decision" as to the circumstances in which they will or will not exercise it, they are entitled to consider and take account of the probable consequences of exercising or not exercising it in an individual case in deciding whether or not to do so - and may be expected <u>not</u> to do so if an exercise appears to them prospectively disadvantageous to a claimant in respects other than by reason of, for example, his recovery or his failure to disclose earlier a material fact.

10. (1) Thus, in my view, there may well be cases in which, by parity of reasoning with that from which the "working practice" above cited derives, the Board may properly decide <u>not</u> to exercise its powers of review and revision

in a particular case, on its own initiative, whilst an appeal from a subsisting decision is pending, but to allow the appeal to take its course first - though they cannot decline to deal with a properly founded application by the claimant for review.

(2) Equally, however, the Board may, in my judgment, exercise their power of review and revision on their own initiative in respect of a decision currently the subject of a pending appeal, that circumstance notwithstanding.

(3) It is not for a Commissioner to prescribe to the Board rules to act by in this respect, but one may readily recognise that different considerations may obtain as between, for example, a case in which the appeal raises a point of legal construction which will arise as well in regard to a revised decision as in regard to an original, but necessarily be the subject of delay in decision if the current appeal is lapsed (as in my view it would be) by a review decision - and, on the other hand, a case where although an appeal is on foot it can be foreseen that a revised decision on review could and would remove the grievance on a claimant's part which has led the claimant to appeal as a first step towards obtaining a re-hearing "on the merits".

(4) And, as the DA have in effect also observed (though the wording here is my own), many claimants appeal to a Commissioner on grounds which do raise a question of law, so that leave to appeal is granted - but in their later submissions in regard to it provide information relevant to the merits of their claims which could properly be recognised and given effect by review and a revised decision, but which cannot be given effect by appeal decision on their appeal.

11. (1) For the reasons above indicated I see - with one exception - no objection to the formulation numbered 4 cited in paragraph 8 above, though a minor technical correction to the final sentence is also needed: for in the course of events so canvassed it would be less a case that "no decision on the appeal would be needed" than that there would remain extant no appeal capable of being decided - for the appeal would have lapsed.

(2) The one exception above foreshadowed relates to the inclusion in the formulation of the words "if the claimant consents".

It is no less a correct formulation if the claimant does consent to the postulated course of events - but I do not myself consider that the claimant's consent is a necessary element; and since there may be meritorious cases in which for one reason or another such consent could not be obtained, I think it right so to indicate - notwithstanding

that I see nothing wrong in such consent being sought, and appreciate that it may be considered preferable to seek it where it can be obtained, lest the claimant considers he has been deprived of some advantage by his appeal becoming lapsed.

Happily, in the case of Attendance Allowance the general practice of communicating the Board's provisional views can be easily adapted to "sounding out" this aspect also.

12. (1) All that, however, covers only the postulated case where - as it has been put in regard to the "working practice" above referred to - the revised decision "would give the claimant all he could get on the appeal" (though in the case of an appeal on a point of law this, as regards <u>direct</u> consequences, can be read as "more than he would get on the appeal", since a successful appeal will itself result only in a setting aside of the decision appealed from, which will in turn take the claimant only to the threshold of a re-hearing on the merits - and not so far as a favourable result from that - in Attendance Allowance cases, at least).

(2) However, as formulation 5 quoted in paragraph 8 above goes on to canvass, more difficult situations can arise.

13. (1) The simplest of those is, I think, where fresh information has come to light (whether in the course of the appeal or otherwise) whilst an appeal is pending and the Board are "in principle" prepared to review on that account but no review has been requested by the claimant.

It may be thought convenient in those circumstances for the Board to evaluate the fresh information informally in the first instance, and to refrain from embarking upon a formal review upon their own initiative if it is concluded that no revision of the original determination will ensue - leaving the appeal to take its uninterrupted course. But in my view that will be the position also if the original decision <u>is</u> "reviewed" but is <u>not</u> "revised" upon review. For it is to my mind the promulgation of a revised decision and not the review of the original decision which operates to remove the substratum of the appeal and so occasion it to lapse.

(2) The next simplest is perhaps where the claimant duly requests review whilst an appeal is pending. Here, it seems to me, the Board has no option but to review even though no revision may eventuate; though here again, if none does, the original decision - and with it the appeal from it - will in my view still stand.

(3) Where (whether on the Board's own initiative or upon the claimant's due application) a review takes place and the original decision is in <u>any</u> respect revised, that will in my view destroy the substratum upon which any appeal

against the original decision is founded - for the new decision is by operation of law then substituted for the old as from the inception of the latter - and the appeal against the old will be lapsed.

It will be open to the claimant, if dissatisfied with the revised decision, to seek leave to appeal from the revised (but appeal will be only on a question of law arising from the revised decision).

In some cases - e.g. where a point of law common to both original and revised decisions exists - the claimant may be said to be prejudiced by the consequential delay in getting that decided upon the fresh appeal. Though - as against this - he will have had the advantage of a fresh determination of the claim "on the merits". In others - as where the point of law the subject of the first appeal is of a tenor which does not recur in regard to the second (e.g. an allegation of breach of natural justice in respect of the processes by which the earlier decision was reached which does not call for re-assertion in respect of the later) the claimant will indeed be deprived of the opportunity of succeeding on the appeal - but, since the only product of a successful appeal in this particular branch of the statutory jurisdiction would be the setting aside of the original decision as a preliminary to a fresh determination of the claim on its merits, there would, I stress, be no loss of opportunity to have the claim decided afresh on its merits; for that will have been afforded by the review itself.

14. However, I do not myself consider that there is in any circumstances any requirement for a claimant's consent to be obtained before a - valid and "final" - revised decision is on review substituted for an original decision still the subject of a pending appeal to the Commissioner.

The legislation certainly imposes no such requirement expressly. Nor does it in my judgment do so by implication; nor is it in my judgment on grounds of breach of natural justice or otherwise ultra vires in failing to do so.

15. That is not, I should add, preclusive in any way of the Board following the course outlined in formulation 5 in any case in which they may be minded to do so - and I can readily envisage circumstances in which they might regard it as a just course to adopt.

16. The current position on the present appeal is as follows:

(1) I am subject as below mentioned at the stage of being ready to determine the pending appeal.

(2) I have granted the claimant an extension of time within which to obtain and submit additional and up to date medical evidence, at her request, whilst pointing out that it appeared unlikely that additional medical evidence of the nature she described when seeking the extension could affect the outcome of her appeal, confined as it is to a point of law.

(3) That extension of time has in fact now run without the receipt of any additional evidence on the claimant's behalf.

(4) Concurrently with my present decision - which does not itself either determine the appeal or bear on how it may be decided substantively, being wholly interlocutory in content - I am notifying the claimant and the Secretary of State's representative that I propose to proceed to determine the appeal at the expiration of a further 28 days.

(5) Subject to any further representations I may earlier receive I shall follow that course unless notified before my decision is given that the appeal has been lapsed.

(Signed) I Edwards-Jones
Commissioner

Date: 19 July 1982

Commissioner's File: C.A. 108/1981
DHSS File: S.D. 450/1336