JJS/12/LM

Commissioner's File: CA/188/1987
DHSS File: SD 450/2422

SOCIAL SECURITY ACTS 1975 TO 1986
APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the attendance allowance board is not erroneous in point of law and accordingly this appeal fails.

2. This is an appeal by the claimant brought with leave of the Commissioner to the Commissioner on a question of law from a decision on review made by the attendance allowance board on 19 February 1987.

3. I have had the benefit of written argument prepared by Messrs Rex Makin and Company, the claimant's solicitors, and also that submitted by the Secretary of State's representative.

4. On or about 22 March 1981 the claimant was involved in a road traffic accident when she was a front seat passenger. She struck her head and was unconscious for a number of days. As a result of the accident she suffered a paralysis of the left third nerve which caused double vision and dropping of the left eyelid. She has lost a considerable amount of vision to the left hand side. She claimed attendance allowance. She was medically examined on 10 June 1983; and her claim was rejected on 1 July 1983, a medical practitioner acting on behalf of the board decided that she did not satisfy any of the conditions for attendance allowance as specified in section 35(1) of the Social Security Act 1975. On 22 August 1984, following a request for review and a further medical examination, another delegated medical practitioner acting on behalf of the board decided that the decision of 1 July 1983 should not be revised. The claimant appealed to the Commissioner. On 25 September 1985 the Commissioner decided that the decision of 22 August 1984 was erroneous in point of law, and set it aside because in his judgment the delegated medical practitioner breached the rules of natural justice proceeding by determining the case without advising the claimant's brother, who had made representations on her behalf, and giving him an opportunity to obtain and/or forward further medical evidence. The breach came about because the claimant's brother was not advised that it was up to him to obtain further medical reports and forward them, he had assumed such reports would be obtained and put before the delegated medical practitioner. The Commissioner remitted the case for redetermination by the board or another of its delegates.

5. On 19 February 1987 the attendance allowance board itself reviewed the decision of 1 July 1983. Prior to the review a letter dated 28 April 1986 was sent to the claimant advising her of the opinion which the board had formed regarding her case. The documents upon which the members of the board had formed their opinion were listed and copies of such documents as had not already been sent to the claimant were enclosed with the letter. She was invited to comment on the evidence and told that she could produce further evidence. Messrs Makin and Company in letters dated 21 May, 28 May and 2 June 1986 replied on behalf of the claimant and forwarded supporting evidence from her medical advisors, including a report dated 23 May 1986 from Mr Trimble, a consulting orthopaedic surgeon, and a explanatory letter from him dated 30 May 1986. The board also had before

them letters from the solicitors dated 2 February 1986 and 2 January 1987. In addition Mr Trimble had confirmed that an earlier report, of 30 January 1984, was his and that the signature thereon was his. It is to be noted that as a result of the letter sent on 28 April 1986 the claimant's solicitors forwarded additional medical evidence and in their letters referred to their client's condition. As a result of the letters and medical reports the attendance allowance board sent a further standard letter in which they stated that they remained of the opinion that neither a day condition nor a night condition was satisfied, and gave the claimant's solicitors a further opportunity to make representations and to supply additional evidence and it was as a result of this that the solicitors letter of 2 September 1986, dealing with the requirement for continual supervision, was written.

6. When the attendance allowance board gave its decision it had before it all the medical reports forwarded on behalf of the claimant and the letters from her solicitors supporting her case. And they expressly stated that account had been taken of these. The members found that none of the day or night conditions specified in section 35(1) of the Social Security Act 1975 were satisfied.

7. The first point taken by the claimant's solicitors in the written argument before me is that the method by which the decision of the attendance allowance board was arrived at was contrary to the general principles of natural justice. It was contended that the decision was made by three members of the board who had never seen the claimant and all the evidence was considered in her absence. It was submitted that justice must be seen to be done, and that this cannot be so when evidence is considered in the absence of the applicant. In the circumstances of the instant case I do not see any merit in this argument. It is not a denial of natural justice for the attendance allowance board to receive and rely upon written representations and evidence in written form. There are exceptional cases where it seems to me that a claimant is entitled to an oral hearing before the board, such as where the evidence relates primarily to his honesty and integrity, circumstances such as those which were present in CA/94/88. But apart from these exceptional cases it seems to me open to the board to receive written evidence and representations rather than conducting an oral hearing. The essential criteria is that a claimant is given a fair and adequate opportunity to present his case and that he knows the case he has to answer and can submit relevant evidence to answer it. All this can be done in written form. I am satisfied that the claimant in the instant case had an opportunity to submit the evidence which she and her solicitors considered relevant to the issues arising under section 35(1) of the Social Security Act 1975 and to rebut the evidence against her. She was legally represented from start to finish and the medical evidence which she relied upon was forwarded by her solicitors to the board. There is no question of her being ignorant of the issues. The procedures before the board are not adversarial but inquisitorial and the conclusions are reached as a matter of expert medical opinion, not alone on the medical reports before the members but also in the light of their own expertise. Paragraph 12 of Schedule 11 to the Social Security Act 1975 empowers the board to regulate their own procedure and clearly that would allow them to hold an oral hearing if the interests of justice required. Equally well it allows them to deal with cases before them by way of written representation. It is necessary for the members of the board before forming an opinion to consider all the evidence and papers in the case and clearly they did so in the instant case. I am satisfied that they acted fairly and I find no merit in the grounds of appeal.

8. I required the parties to deal with the issue of whether the decision was erroneous in law in view of what was said by the Court of Appeal in Moran v The Secretary of State for Social Services (to be published as an appendix to R(A) 1/88). Prior to the decision of the Court of Appeal the law was thought to be that a person who might have to intervene in the event of an attack should not be regarded as exercising supervision between attacks by reason only that he might have to intervene in the event of such an attack. The Court of Appeal said that this view was wrong. The case before them concerned a person subject to epileptic fits and having noted that it had been accepted that there was a risk of substantial danger upon every fit accompanied by unconsciousness, it was held by the Court that, where

it is accepted a person requires supervision during the attack, precautionary and anticipatory supervision between attacks, in case intervention during an attack is required, may, depending upon the facts of each individual case amount to continual supervision for the purpose of section 35. The Court stated general principles and the guidance given does not relate to epilepsy only. In CA/66/86 the Commissioner when distinguishing the case before him from Moran said as follows:

> "In my judgment, in order to come within the ambit of Moran, the risk of danger to a severely disabled claimant (or to others) must arise involuntarily and unpredictably from his medical condition - in other words the danger must be beyond his control."

I accept that passage as a correct statement of the law. I, of course, have to look to the facts of this case as before the board. Looking at them and the decision of the board I am satisfied that in deciding that the claimant did not meet the conditions for attendance allowance the board did not err in law on the question of supervision. The members had regard to the medical report of 17 March 1986 and indicated that the claimant was aware of common dangers and did not put herself at risk. They were satisfied that she was an intelligent, cooperative person and would not undertake any predictable, potentially dangerous situation without adequate supervision. The question was dealt with in paragraph 8 of their decision and I do not find fault with it.

9. In the further observations made on behalf of the claimant I am asked to consider whether sufficient regard was paid to the evidence that the claimant needs help with dressing and undressing, using the stairs and getting out of the bath. This was part of the evidence referred to by the board and they stated as follows

> "Viewing all the evidence, we accept that [the claimant] requires some attention by day in connection with her bodily functions, but in our medical expertise, such attention does not amount to frequent attention throughout the day in connection with her bodily functions, and has not so amounted throughout the relevant period of six months."

That conclusion as a matter of expert medical opinion was for the members of the board to reach and not for me; I am in no way entitled to substitute my view of the evidence for theirs. They considered this evidence and reached a conclusion upon it. I do not find it perverse.

(Signed) J J Skinner
Commissioner

Date: 5 September 1988