RFMH/SH/5

Commissioner's File: CA/757/1989

DSS File: SD450/3811

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

Name: Reginald J Crabb

1. My decision is that the determination on review made on 2 August 1989 by the delegated medical practitioner (DMP) on behalf of the Attendance Allowance Board (the Board) is erroneous in point of law. Accordingly I set it aside and remit the matter to the Board for rehearing either by the Board or by a DMP to be appointed by them.

2. The claimant, now aged 58, suffers from ischaemic heart disease, chronic bronchitis, epilepsy, intermittent claudication and vertigo. He initially claimed attendance allowance on 23 November 1987, but that claim was rejected by a DMP on 11 January 1988. Following an application for review on behalf of the claimant on 17 June 1988, another DMP decided on 4 October 1988 that the application disclosed no grounds on which the earlier decision of 11 January 1988 could be reviewed and treated the application as a fresh claim to attendance allowance. The DMP proceeded to give her decision but she was unable to accept that the claimant satisfied any of the conditions in section 35(1) of the Social Security Act 1975 (the Act). A request for review of that decision was made on behalf of the claimant on 27 October 1988.

3. On 2 August 1989 the DMP acting on behalf of the Board reviewed the claimant's claim for attendance allowance, and decided in the light of the evidence that the claimant satisfied the conditions of entitlement contained in section 35(1)(a)(i) of the Act. As a result he issued a lower rate certificate for life from 1 June 1989 (the day following the end of the 6 months qualifying period). He revised the original decision dated 4 October 1988 accordingly.

4. The claimant sought leave to appeal on the ground that the DMP's decision was erroneous in law and such leave was granted by a Commissioner. The grounds of appeal read as follows:-

"The decision failed to correctly apply Moran v. Secretary of State (HL) in respect of both the Day and Night time conditions - since the claim was made before the change of Regulations, I should be entitled to both Day and Night-time rates.

Also the statement at para 8 of the Board's Decision which says that the remote danger of fits can reasonably be disregarded. The correct test should be whether the risk is relevant not remote (R(A) 2/89)."

5. Whether a person satisfies the conditions contained in section 35(1) of the Act is a matter for the exclusive determination of the Board or, where their function has been delegated to a medical practitioner, of that medical practitioner. Such determination cannot be upset unless it is erroneous in law.

6. In his written submission dated 5 March 1990 the Secretary of State's representative supports the appeal and states so far as relevant:-

" 4. In paragraph 3 of his determination the DMP discussed [the claimant's] day supervision requirements as reflected at the time of the medical examination on 8 August 1988. In his consideration of the claimant's epileptic attacks the DMP concluded "in my medical opinion, unless there are complicating medical conditions or special features relating to the fits, the risk of substantial danger was so remote that it ought reasonably to be disregarded". This approach was however, found to be erroneous in paragraph 13 of the Tribunal of Commissioners starred decision CSA/66/89 - to be reported as R(A) 3/90. In that decision it was held that the DMP had applied a test particularly applicable to epileptics which is not included in the statutory test within section 35(1) of the Social Security Act 1975. It is thus submitted the DMP's decision of 2 August 1989 failed on this point.

5. Furthermore, the DMP went on to state that he considered [the claimant] to have been capable of refraining from any action which he believed could be dangerous until someone was present or had been summoned. In CA/222/88 - paragraph 6 [to be reported as R(A) 5/90] it was held that a DMP's determination should identify "the activities to be refrained from". By the same token it is for consideration as to whether the DMP's determination in this particular case also falls by virtue of his failure to identify amplify "any dangerous action".

6. In the light of the foregoing submission it is not proposed to make detailed observations on the cited grounds of appeal."

I accept the submission, subject to my comments on paragraph 6

set out below.

7. The claimant's representative made the following observations in reply:-

> "I welcome the observations of the Secretary of State. But note that he/she does not make any comment on the first paragraph of the grounds of appeal dated 3.11.89. In particular, whether the criteria that existed after the decision in Moran, but before the change in the Regulations which followed that case, should be applied to [the claimant]."

8. As regards the night condition of supervision, section 35(1)(b)(ii) of the Act was amended by section 12 of the Social Security Act 1988 in relation to claims made or reviews requested or resolved to be carried out after 15 March 1988. Section 35(1)(b)(ii) now provides:-

> ".. (b) he is so severely disabled physically or mentally that, at night,
>
> (i) ... or
>
> (ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him."

9. The amendment of the terms of the night-time supervision test, which was made in the light of the observations of the Court of Appeal in Moran upon the meaning of the old test, must be regarded as applying a more stringent test to the question of a claimant's need for night-time supervision. It was argued on behalf of the claimant that so far as his epilepsy and other medical conditions were concerned, the claimants's need for continual supervision of a precautionary nature at night fell within the unamended provisions of section 35(1)(b)(ii). As a result it was important to determine whether the amended or unamended form of section 35(1)(b)(ii) should be applied.

10. As a result the Secretary of State's representative was directed to submit further written observations on the effect of the Court of Appeal judgment in Moran v. The Secretary of State for Social Services (appendix to R(A) 1/88) and on whether the amended or unamended form of 535(1)(b)(ii) was applicable on the facts of the present case.

11. In his further written submission dated 4 June 1991 the Secretary of State submitted that having identified two errors of law in the DMP's determination, it was considered unnecessary to discuss the grounds of appeal relied on by the claimant's representative or to enquire further into the adequacy of the remainder of the DMP's determination. He found support for this

"well established principle" in paragraph 2 of Decision CA/93/1988 in which the Commissioner stated, "... the identification of just <u>one</u> error of law in the relevant DMP's determination suffices to afford to a claimant the maximum relief that a claimant can obtain from the Commissioner; i.e. the setting aside of the relevant determination and the reconsideration of the case by the Board or another of its DMPs." I do not agree. The quotation is taken out of context and is misinterpreted. It is of course correct that if a Commissioner is satisfied that there has been just one error of law in a determination, that determination is set aside. However that it not the same as saying that a claimant is not entitled to observations on his own grounds of appeal and that they should be left unanswered. In this case it could be argued that it was crucial to the claimant as to which form of section 35(1)b)(ii) applied on the facts of his case. In my view it was incumbent on the Secretary of State's representative to comment on this issue. It was particularly important, because having conceded that the determination was erroneous in law, it was probable that the claimant's representative would mount the same argument before the determining authority to whom the matter was remitted. I should add for completeness that the Secretary of State's representative nevertheless complied with the direction and submitted that the amended statutory test of night-time supervision needs applied. That was because on 2 August 1988 the DMP revised the original decision dated 4 October 1988, both dates falling after 15 March 1988, when the amended form came into effect. I agree and find support for this conclusion in Decision R(A) 5/90.

12. The claimant's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs
Commissioner

(Date) 2 July 1991