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Commissioner's File: CSA/15/91

SOCIAL SECURITY ACTS 1975-1990

APPEAL TO THE COMMISSIONER FROM DETERMINATION ON REVIEW OF
ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: MRS MARY TONER ON BEHALF OF JAMES TONER (DECEASED)

[ORAL HEARING]

1. My decision is that the review decision given by a delegated medical practitioner for and on behalf of the Attendance Allowance Board (DMP) dated 21 December 1990 is erroneous in law and is therefore set aside.
2. The claimant, who was born on 17 July 1919, suffered from lung cancer, and he died on 17 April 1989. He is hereinafter referred to as "the deceased". This case is concerned with claims made by the deceased or on his behalf for attendance allowance.
3. Before the deceased could be found entitled to attendance allowance he had to be so severely disabled physically or mentally that:-

"By day - he required from another person, frequent attention throughout the day in connection with his bodily functions;

or

he required from another person continual supervision throughout the day in order to avoid substantial danger to himself or others;

At night - he required from another person prolonged or repeated attention in connection with his bodily functions;

or

in order to avoid substantial danger to himself or others he required another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him."

There were two rates of attendance allowance. The lower rate was payable if the claimant in question needed a lot of help during the day or the night. The higher rate was payable if the claimant required a lot of help during the day and the night or if he satisfied the special rules.

4. The deceased first claimed attendance allowance on 7 October 1986, but that claim was rejected on 30 October 1986. That decision was subsequently reviewed on 29 May 1987, but the rejection was maintained. A further claim for attendance allowance was received on 3 September 1987 and that claim was rejected on 23 October 1987. Another claim form was received on 3 March 1989. After considering the report by a medical practitioner which was completed on

3 April 1989 a DMP decided on 12 April 1989 that the deceased was entitled to attendance allowance at the lower rate from 1 May 1989 on the basis that the deceased satisfied the day attention condition. As already stated, however, the deceased died on 17 April 1989. After considering correspondence which was received from the deceased's widow and a report from the deceased's own doctor the said decision dated 12 April 1989 was looked at again, and it was decided that a higher rate certificate should be awarded with effect from 3 March 1989 i.e. the date when the above-mentioned claim form was received.

5. It was later decided that a letter which was received from the deceased's widow on 26 July 1989 should be accepted as a request for review of the decision made by a DMP on 23 October 1987. A DMP thereafter gave the said review decision dated 21 December 1990 mentioned in paragraph 1 above in which he refused to review the said decision made on 23 October 1987. An application was then made for leave to appeal to a Commissioner against the said review decision dated 21 December 1990. On 16 April 1991 I granted the said application for leave to appeal. A copy of my decision dealing with that application is contained in an Appendix to this present decision. It will be seen from what is stated in that decision given by me that in his review decision dated 21 December 1990 the DMP took the view that he could only review a decision made on 23 October 1987 if he was satisfied that:-

- a. The decision was made in ignorance of a material fact; or
- b. the decision was based on a mistake as to a material fact.

In my decision on the application which had been made by the deceased's widow I pointed out that under section 106(1)(a) the Attendance Allowance Board was entitled at any time to review a determination of theirs if they were satisfied that there had been a relevant change of circumstances since the determination was made. I stated that in connection with the appeal I wished to have a submission from the Secretary of State for Social Security regarding whether the Attendance Allowance Board could review the said decision dated 23 October 1987 on the ground that, if such existed, there had been a relevant change of circumstances since the decision was made. In the course of a written submission dated 7 May 1991 which was made on behalf of the Secretary of State for Social Security it was stated as follows:-

"3. It is submitted that a claimant's best course in cases such as that of Mr Toner, having had a claim to attendance allowance disallowed is to submit a fresh claim when he feels that a change of circumstances such as an increase in his attendance needs would give rise to an award of the allowance.

4. A decision on a fresh claim would then give such a claimant the right to ask for a review "on any ground" within three months of that decision if he was not satisfied with it. (Section 106(1)(b) of the 1975 Social Security Act (Act). If a claimant is dissatisfied with a decision given on a review of a claim he may ask for a further review but that request is subject to the provisions of regulation 38(4) of the 1986 Social Security Adjudication Regulations.

5. In practice if, when dealing with a request for review of a rejection under Section 106(1)(a) of the Act a delegated medical practitioner (DMP) can find no ignorance or mistake as to a material fact on the part of the DMP who disallowed the original claim but does

consider that there may have been a deterioration in the claimant's condition, then the second DMP will accept that request for review as a fresh claim. Provision is made for this on form DS202 (specimen enclosed).

6. In the present case Mr Toner did submit a fresh claim (doc 13) following the decision dated 23 October 1987 (doc 12A). The letter dated 1 March 1989 (doc 11) submitted with that claim shows that the application was made because he had deteriorated and that it was made as a result of information given by the Department. As a result of that claim Mr Toner was awarded attendance allowance at the lower rate from 1 May 1989 being six months after the date given at part 6 of the \medical report dated 3 April 1989 (doc 20) as that on which his daytime needs, as shown in that report, began.

7. Mr Toner, unfortunately died on 17 April 1989 and his widow wrote with more information about his care needs prior to that date. The decision dated 12 April 1989 (doc 21) was, therefore, reviewed and a higher rate certificate issued from 3 March 1989 (doc 30) being the date of receipt of Mr Toner's claim (doc 13). After further letters from Mrs Toner expressing her dissatisfaction a review of the decision dated 23 October 1987 was considered as that was the only way payment from a date earlier than the date of receipt of the claim could be considered. Unfortunately the DMP could find no grounds to review under Section 106(1)(a) of the Act bearing in mind the principles of R(A)2/81."

It will be noted that in the said submission reliance is made on statements made by Commissioner Monroe in paragraph 15 of decision R(A)2/81. In the course of that paragraph the Commissioner stated:-

"Furthermore I have difficulty in envisaging any instance where a change of circumstances subsequent to a determination can be relevant to the question whether a determination leading to a negative certificate (which is not of a continuing nature) should be reviewed. In this context the term "relevant change of circumstances" postulates that the determination reviewed has ceased to be correct (cf decision R(I)56/54 at paragraph 28). If a person's condition deteriorates after a decision has been given that at a particular date he did not satisfy the conditions for an award the validity of that determination is unaffected by the deterioration, which is relevant only to the question whether a fresh claim should be made. It is different of course with lower rate and higher rate certificates, which represent determinations of a continuing nature, which may cease to be valid as the result of either the deterioration or amelioration of the conditions of a claimant."

It will be noted that the said Commissioner did not lay down or decide that a claimant cannot ever found on a "relevant change of circumstances" subsequent to a decision refusing attendance allowance at either the higher or the lower rate.

6. I decided to have an oral hearing in this case. A hearing thereafter took place before me. The deceased's widow did not attend the hearing, but she was represented by a Welfare Rights Officer. The Secretary of State was represented by a solicitor from the Scottish Office.

7. At the time under consideration section 105(3) of the Social Security Act 1975 provided as follows:-

"(3) Subject to section 106 below, any question whether a person satisfies or has satisfied or is likely to satisfy, for any period the conditions set out in paragraph (a) or (b) of section 35(1) of this Act shall be determined by the Board."

Section 106(1) of the said 1975 Act provided as follows:-

(1) The Attendance Allowance Board may -

(a) at any time review a determination of theirs under section 105(3) above, or under this paragraph or paragraph (b) below 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;"

The relevant statutory provisions nowhere lay down in my opinion that a claimant is not entitled to seek a review of a decision refusing attendance allowance on the basis that a relevant change of circumstances has taken place. Neither the Secretary of State in the written submissions which have been made on his behalf nor his representative at the hearing which took place before me has produced any cogent submission to the effect that such a procedure was not open to a claimant who had previously been denied attendance allowance.

8. As above explained a fresh claim for attendance allowance was made on behalf of the deceased on 3 March 1989. At the time in question attendance allowance was not payable to the deceased in respect of any period preceding the date on which a claim was made. I would mention that as from 1 October 1990 statutory provisions were introduced dealing with claims for persons who were terminally ill. The position therefore was that the deceased could only be found entitled to attendance allowance in respect of any period prior to 3 March 1989 if he could successfully review the decision refusing him attendance allowance on 23 October 1987. Doubtless neither the deceased nor his wife agreed with the said decision made on 23 October 1987 by a DMP, but no steps were taken to appeal against that decision. In my view the said decision of 23 October 1987 could not be reviewed on the basis that the said decision was made in ignorance of a material fact or that the decision was based on a mistake as to a material fact. In those circumstances the deceased could only be found entitled to attendance allowance in respect of any period prior to 3 March 1989 if his widow could show that there was a relevant change of circumstances since the said decision of 23 October 1987 was made. The deceased's widow maintains that the deceased satisfied the attention conditions during a period well before 3 March 1989. The deceased's own doctor stated in a letter dated 25 July 1989 that for the last six or seven months of his life the deceased was unwell and required attendance by his wife. The deceased widow maintains that in fact the deceased required attention such as warranted payment of attendance allowance for a much longer period than six months.

9. A DMP decided on 21 December 1990 that he could not review the decision of 23 October 1987, and as already explained above he took the view that it

could not be maintained on behalf of the deceased that a relevant change of circumstances warranted a review of the said decision. In a written submission dated 7 May 1991 made on behalf of the Secretary of State for Social Security that decision of the DMP was supported. The DMP's said decision dated 21 December 1990 is in my view erroneous in law in that no consideration was given regarding whether the decision of 23 October 1987 could be reviewed on a relevant change of circumstances. If it is accepted that there was a deterioration in the deceased's health prior to 3 March 1989, that in my opinion warranted a review of the decision of 23 October 1987 on the basis that there had been a relevant change of circumstances. The case must in my opinion now be reconsidered on the basis whether attendance allowance was payable to the deceased in respect of a period prior to 3 March 1989 due to a deterioration in the deceased's health. The DMP's said decision dated 21 December 1990 is therefore set aside. Under the new statutory provisions which are presently in operation the case must now be referred to an adjudication officer.

10. The appeal is allowed.

(signed) Douglas Reith
Commissioner
Date: 18 May 1992

APPENDIX/

DR/JOB

Commissioner's File: CSA/15/91

SOCIAL SECURITY ACTS 1975 - 1990

APPLICATION FOR LEAVE TO APPEAL ON A QUESTION OF LAW FROM A
DECISION OF AN ATTENDANCE ALLOWANCE BOARD

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: MARY TONER (Mrs) on behalf of JAMES TONER (DECEASED)

1. This is an application by the claimant for leave to appeal on a question of law against the decision of the Attendance Allowance Board dated 21 December 1990.

2. Leave to appeal is granted.

3. The claimant claimed attendance allowance on 2 September 1987. In a decision dated 23 October 1987 a medical practitioner for and on behalf of the Attendance Allowance Board (DMP) decided that the claimant was not entitled to attendance allowance at either the higher or the lower rate. The claimant died on 17 April 1989. After sundry procedure set forth in the papers relating to this application for leave to appeal a review decision dated 14 December 1989 awarded the deceased claimant attendance allowance at the higher rate from 3 March 1989 to the date of his death.

4. It was later accepted that a letter written by the widow of the deceased claimant which was received on 26 July 1989 contained a request for a review of the said decision dated 23 October 1987 which refused the claimant an award of attendance allowance. In the course of the said decision dated 21 December 1990 given by a DMP it is stated as follows:-

"However, as more than 3 months have elapsed between the date of notification of the decision and your letter, I can only review the earlier decision if I am satisfied that:-

a. the decision was made in ignorance of a material fact; or

b. the decision was based on a mistake as to a material fact.

[Social Security Act 1975 Section 106(1)(a) refers].

The medical conditions which must be satisfied before a certificate can be issued are set out overleaf. I have considered all the documents mentioned in form DS 452A and copies of these are enclosed.

2. When making his decision on 23 October 1987 the delegated medical practitioner had before him all the evidence collected in connection with the claim for Attendance Allowance which was made in September 1987. After consideration of the evidence he did not accept that your husband satisfied either of the day or night conditions at this time and therefore was unable to issue a certificate.

3. I have carefully studied all the evidence and I am satisfied that when that decision was made on 23 October 1987 the delegated medical practitioner had before him sufficient evidence on which to reach this conclusion. After careful consideration my decision is that the decision was not made in ignorance of a material fact nor was it based on a mistake as to a material fact. Consequently, I must refuse to review it."

5. Under section 106(1)(a) the Attendance Allowance Board may at any time review a determination of theirs 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. In the said decision dated 21 December 1990 there is no mention of the fact that a decision of the Attendance Allowance Board can be reviewed if there has been a relevant change of circumstances since the said decision dated 23 October 1987 was made. I should like in connection with the appeal to have a submission from the Secretary of State for Social Security whether the Board could review the said decision dated 23 October 1987 on the ground that, if such existed, that there had been a relevant change of circumstances since the decision was made. Is there any statutory authority for the view that the claimant's widow was not entitled to maintain that there had been a relevant change of circumstances since the said decision of 23 October 1987 had been made? In this whole connection I would explain that I am aware of the observations by Commissioner Monroe in paragraph 15 of decision R(A)2/81 and of the views expressed by Commissioner Sanders in decision on Commissioner's File CA/112/1988.

6. Doubtless steps should be taken to authorise the widow of the deceased claimant to continue with these proceedings.

(signed) Douglas Reith
Commissioner
Date: 16 April 1991

DR/JOB

Commissioner's File: CSA/15/91

SOCIAL SECURITY ACTS 1975 - 1990

APPLICATION FOR LEAVE TO APPEAL ON A QUESTION OF LAW FROM A
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DECISION OF SOCIAL SECURITY COMMISSIONER

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2. Leave to appeal is granted.

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6. Doubtless steps should be taken to authorise the widow of the deceased claimant to continue with these proceedings.

(signed) Douglas Reith
Commissioner
Date: 16 April 1991