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Commissioner's File: CSA/68/88
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SOCIAL SECURITY ACTS 1975 TO 1988

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: —

1. We allow this appeal by the claimant. The determination of the delegated medical practitioner ("the DMP") for and on behalf of the Attendance Allowance Board ("the Board") dated 12 May 1988 was erroneous in law. We refer the Board to regulation 39(6) of the Social Security (Adjudication) Regulations 1986.

2. The claimant was born on 18 September 1933. She suffers from grand mal epilepsy. On 22 January 1985 she signed a claim form for attendance allowance. On 29 January 1985 she was medically examined by an examining medical practitioner. A DMP awarded her attendance allowance at the lower rate from 22 January 1985 for two years on the ground that the claimant needed continual supervision throughout the day in order to avoid substantial danger to herself or others. (The examining medical practitioner had stated in his report that the need for attendance was likely to continue for three years but nothing turns on that.) On 11 September 1986 the claimant made a renewal claim. On 17 November 1986 the claimant was again medically examined by another examining medical practitioner, who in his supplementary medical report stated that in his opinion the claimant needed supervision by day and by night. On 24 November 1986 another DMP rejected her claim. By a letter dated 9 January 1987 the claimant stated that her condition was "still the same and sometimes a bit worse" and that she did not understand this latest decision and she applied for a review of her case. By form DS276A dated 12 February 1987 from the Board's Unit at North Fylde, the claimant was informed that the doctor appointed by the Board to consider her application for review was provisionally of the opinion that neither a day rule nor a night rule was satisfied and that the decision should not be changed. The claimant thereupon submitted a number of letters and further medical evidence was obtained. On 12 May 1988 another DMP determined that he could review the decision dated 24 November 1986 on any ground, that none of the day or night conditions was satisfied and that he was unable to issue a higher or lower rate certificate and that his decision on review was that the decision of 24 November 1986 be not revised. On 30 June 1988 the claimant gave notice of application for leave to appeal to a Commissioner on a question of law and on 20 October 1988 she was granted leave to appeal. On 30 June 1989 we were appointed by the Chief Commissioner as a Tribunal of Commissioners to hear and decide the case.

3. On 7 August 1989 we held an oral hearing. The claimant who did not attend was represented by Mr Kelly, a Welfare Rights Officer with the

Social/

Social Work Department, Clydebank. The Secretary of State was represented by Mr C N R Stein, Advocate, instructed by the Office of the Solicitor to the Secretary of State for Scotland. Mr N F Davidson, Advocate, appeared as amicus curiae. We are grateful to them for their attendance and helpful arguments.

4. The Law

Section 35(1) of the Social Security Act 1975 provides that a person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain and then goes on to provide (in the words extant at the date of the claim in the present case) -

> "(a) he is so severely disabled physically or mentally that, by day, he requires from another person either -
>
> (i) frequent attention throughout the day in connection with his bodily functions, or
>
> (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others;
>
> (b) he is so severely disabled physically or mentally that, at night, he requires from another person either -
>
> (i) prolonged or repeated attention during the night in connection with his bodily functions, or
>
> (ii) continual supervision throughout the night in order to avoid substantial danger to himself or others." (Paragraph (b) has been amended as from 15 March 1988.

Section 105(3) provides that -

> "any question whether a person satisfies or has satisifed, 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."

The Board may delegate their function "to one or more medical practitioners": paragraph 5 of Part I of Schedule 11 to the Act. The Board or its DMP makes a "determination" (not a "decision"): see CA/108/1987 at paragraphs 11 and 12.

5. Medical Evidence

In her original claim form the claimant stated that she had grand mal epilepsy "and can go into a fit any time without a warning. Someone has to be with me at all times to see I do not hurt myself or choke with my dentures while seizure is on." The first examining medical practitioner, in his medical report on 29 January 1985, stated that her dentures should be removed on going to bed at night and that she could not be safely left unsupervised by day at any time and gave as the reason: "If she takes a fit she needs someone to remove her dentures in

case she chokes." But he was of the opinion that she could be safely left unsupervised all night. In his supplementary report he stated that she had no warning of an impending attack and that she suffered injury during an attack, namely "bruising of arms or legs" about two or three times a month. It was on that evidence that she was awarded attendance allowance at the lower rate for two years. After she made her renewal claim, her GP was asked to make a report and his report was to the effect that she sometimes had warning of an attack, that there was no status epilepticus, that she had no post-fit disturbance and that she had suffered no serious injuries but had strained her back as a result of a seizure. He did not forsee any change in the pattern of the epilepsy. The second examining medical practitioner in his report of 17 November 1986 recorded that she suffered from sudden grand mal seizures "which give no warning and can last for as long as 10 to 15 minutes" and that those fits came on about 18 to 20 times per month "and may occur either by day or night"; and he added, "Her husband has heart trouble and no longer goes out to work so he is able to watch her all the time." He referred to the claimant's arthritis and continued: "Apart from constant supervision she requires help using stairs and needs help with bathing" and he gave as his opinion that she needed supervision because -

> "She can wander after a fit. She may have a fit without any warning. She is not allowed to use the cooker in case she has a fit and gets burned."

In his supplementary medical report, dealing with the need for supervision, the examining medical practitioner stated that the claimant had a tendency to wander from home and he stated:-

> "She tends to wander after a fit, either by night or by day. This happens 12 to 18 times per month. Her husband has to supervise her all the time."

He stated that she needed supervision by day in that someone had to be there all the time "lest she fits" and that at night "her husband sleeps with her and is quickly awake if she fits". In answer to the question how long she could be safely left unsupervised, he said:

> "by day 'She is not left alone at all in case she fits - she may fall or wander out of the house'; by night: 'Her husband has to be constantly at her side in case she has a fit.'"

He stated that she had no aura or warning of an impending attack, that there was an instance of status epilepticus "6 weeks ago"; that an attack was followed by confusion or automatic behaviour; and that she injured herself two or three times yearly - "Generally bruised limbs and head".

That summarises, we hope fairly, the medical evidence on which her claim was rejected by the DMP on 24 November 1986.

6. After her application for a review, the claimant and her husband wrote letters, and they submitted letters from friends and neighbours recounting their experiences when the claimant had had a fit when

visiting/

visiting their homes. The claimant's husband in a letter dated 17 February 1987 said that he had to remove the claimant's dentures when she had a seizure; that she had fallen downstairs after a seizure and had injured herself and he added:-

> "She is also frightened to go near the cooker since she knocked over a pot of potatoes. She had just put on the gas and the water had put out the gas (She was very lucky on this occasion the water was not boiling or she would have been scalded and that somebody was there to turn off the gas) or there would have been a fatality not only to herself but to the rest of the tenants in the building."

A social worker wrote a letter saying that the claimant told her she had a tendency to wander and related some incidents in which the claimant had told her she had injured herself. There were also added to the case papers a hospital chart of the fit frequencies, a notice of appointment for a brain scan at hospital, and a further report from her GP dated 14 December 1987 in which he said that the claimant's seizures had increased in freqency and were now two to three per week with loss of consciousness, that there was no warning, and that she had been attending the epilepsy clinic at the Western Infirmary. A letter from the epilepsy clinic confirmed that she was attending the clinic and that they would be grateful "if you could give her all assistance necessary in easing this difficult burden".

7. DMP's Determination

The DMP set out in paragraph 1 the documents to which he had referred and in paragraph 2 he dealt with day attendance and said that he did not accept that the claimant required frequent attention throughout the day in connection with her bodily functions. He then dealt in paragraph 3 with day supervision. In paragraph 4 he dealt with the night conditions and in paragraph 5 he dealt with the previous award of attendance allowance. Paragraphs 1, 3 and 5 fall for our particular consideration and we shall deal separately with each.

8. Paragraph 1. Documents

Mr Stein on behalf of the Secretary of State submitted that the determination was self-evidently made in ignorance of material evidence which might have had a bearing on the determination. It was clear, he submitted, from paragraph 1 of the determination that the DMP had not considered the letters from the claimant's friends (relating to what occurred when the claimant had a fit at their homes) and had not considered the hospital chart showing the frequency of the fits nor the appointments cards for EEG tests. He also submitted that the DMP had not considered the letter from the claimant's husband pointing out alleged factual inaccuracies in the general practitioner's first report and setting out his experience of the fits and the injuries sustained by the claimant. He submitted that the failure to consider that evidence constituted a breach - no doubt unintentional - of the principles of natural justice and that the decision could not be allowed to stand. He referred to and relied upon CA/139/1988, the decision of a Tribunal of Commissioners, to be reported as R(A)6/89, at paragraphs 7 and 8. The

documents referred to by Mr Stein are neither mentioned by the DMP nor listed in the scheduled evidence on the forms referred to in paragraph 1 of his decision. The object of giving such details in paragraph 1 is to make plain that the DMP has had before him and has considered all the evidence submitted prior to and in connection with his review. We must assume from the absence of any reference to the documents that they were not before the DMP as they should have been. The observations of the Tribunal of Commissioners in paragraph 8 of CA/139/1988 are directly in point in this case. It is not for us to comment upon the significance of these documents beyond saying that this is not one of those rare cases in which we could say that the documents would have made no difference. The decision of the DMP is therefore, on this ground alone, erroneous in law.

9. Paragraph 3. Supervision

Paragraph 3 of the DMP's reasons reads as follows:

> "3. So far as day supervision is concerned, [the claimant] is described as having a pleasant disposition and I note from the latest medical report that the examining medical officer states that she answers intelligently and is well orientated. I note from this medical report that [the claimant] suffers from grand mal epilepsy and that it is claimed that she has status epilepticus and has a tendency to wander after an attack. In a letter dated 23 February 1983 from [the social worker] it is claimed that when [the claimant] has been alone in the bathroom during a fit she has banged her head on the bath and that whilst on holiday in a caravan when she had a fit during the night she was found wandering round the caravan site. It was also claimed that she had a tendency to wander out of the house following a fit. However, the latest medical report from ...[the claimant's] family doctor dated 14 December 1987 shows that in his opinion her present condition is healthy and that she has normal mental status and she is fit and active. He confirms that she has grand mal epilepsy but that there is no history of any status epilepticus and that after a fit she has post-ictal sleep or a feeling of nausea and tiredness. It is my medical opinion that [the claimant's] house door, caravan door, or other house outer door should be locked to prevent any possible wandering. I also consider that a commode could be used to avoid the dangers in the bathroom. I have examined the medical evidence appertaining to the nature of fits. In my medical opinion unless there are complicating medical conditions or special features relating to the fits the risk of substantial danger is so remote a possibility that it ought reasonably to be disregarded. In the claimant's case there is no evidence of any mental impairment and there are no complicating medical conditions or special features relating to the fits. Minor injuries from biting the tongue or lips and minor abrasions caused by falling are likely to be suffered, but in my opinion no substantial danger is involved because of these and they do not therefore need to be taken into account. I appreciate she may derive reassurance from the presence of her attendant in predictable situations such as bathing, using stairs or out in traffic, but in the absence of any mental impairment I consider she is capable of refraining from any action which she believes could prove dangerous until someone is present

or calling someone to provide her with supervision. Any supervision thus given would not in my view amount to a continual supervision throughout the day... After careful consideration and for the reasons I have given I do not accept that she requires, or has required, continual supervision throughout the day in order to avoid substantial danger to herself or others."

10. Submissions

Mr Kelly submitted that the questions for consideration were - (i) Does the claimant's condition give rise to substantial danger? (ii) If yes, is the supervision reasonably required to avoid the danger? (iii) If supervision is required, is it continual? He then dealt with individual passages in the DMP's determination and we shall refer to those below. Mr Stein stated that the Secretary of State was departing from the written submission (at page 65 of the case papers) and now supported the claimant in relation to the need for supervision whether by day or by night. He submitted that there were a number of grounds on which the determination could not be allowed to stand. First, the decision was self-evidently made in ignorance of material evidence which might have had a bearing on the decision. We have dealt with that in paragraph 8 above. Mr Stein also submitted that the DMP had applied the wrong test in determining entitlement to attendance allowance; and that even if he had applied the right test, his application of it was so unclear as to be unsound in law. He further submitted that the DMP had failed to give any consideration to material evidence before him and that the decision was contrary to the evidence. Mr Davidson submitted that the decision was challengable on a number of grounds and in particular on two grounds namely (as he put it) (i) "Wednesbury" unreasonableness (referring, of course, to Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223) in particular through failure to take account of material evidence and especially the absence of warning of fits; and (ii) breach of natural justice through, in particular, failure to justify the departure from the Board's previous acceptance of substantial danger arising in the same circumstances as exemplified by Moran (referred to below).

11. We have referred to those submissions in only the barest outline as we think that it will be more convenient to deal with the points raised for decision in relation to paragraph 3 of the DMP's determination by considering separately the issues raised by that paragraph.

12. "It is my medical opinion that [the claimant's] house door, caravan door or other house outer door should be locked to prevent any possible wandering." Mr Kelly submitted that that was not a medical opinion but a judgment. There is in our view no doubt that a DMP may suggest practical solutions to a problem: see for example, CA/2/81 at paragraph 9. But the practical measures proposed by a DMP must be reasonable; and in determining whether or not a practical measure is reasonable, the DMP must consider the consequences of his proposal. To lock the house door or caravan door or other house outer door would be to impose a form of house arrest; and, more importantly, it could have dangerous consequences. For example, in the case of fire, not only would the claimant be prevented from making a speedy escape but outside assistance

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would be impeded. Is it reasonable to confine an adult claimant and by imposing such confinement place the claimant at risk? If the claimant were subject to supervision, no such confinement would be necessary. If a DMP proposes a solution with a view to avoiding the need for supervision, it is clearly incumbent upon him to evaluate the risk attendant upon his proposed solution. The DMP has failed to give any reasons to justify the imposition of his proposed solution to meet dangers arising from post-fit wandering and has failed to deal with obvious consequential hazards. In this respect his conclusion on the absence of need for supervision lacks adequate reasons and, in our judgment, the failure to set out the reasons adequately constitutes an error of law: see R(A)1/72.

13. "I have examined the medical evidence appertaining to the nature of fits. In my medical opinion unless there are complicating medical conditions or special features relating to the fits the risk of substantial danger is so remote a possibility that it ought reasonably to be disregarded. In the claimant's case there is no evidence of any mental impairment and there are no complicating medical conditions or special features relating to the fits."

Mr Stein submitted that the statement of the DMP's medical opinion (which we have frequently seen repeated in other recent determinations on behalf of the Board) "mirrored" a statement in the Handbook for Delegated Medical Practitioners in Chapter 9, headed "Epilepsy", which he conceded might be considered unduly wide. The passage in the Handbook however goes on to stress the necessity to have regard to the circumstances of each individual case and to detail features of the epilepsy which should be recorded and considered. Our concern is however with the determination of the DMP in this case. The plain meaning of the sentence commencing "In my medical opinion ..." is that, to be entitled to attendance allowance, the claimant must show that there are "complicating medical conditions" or "special features relating to the fits". In other words, a person suffering from epilepsy will <u>not</u> be entitled to attendance allowance "<u>unless</u>" there are complicating medical conditions or special features. Section 35, which we have cited above, provides that a claimant shall be entitled to attendance allowance on supervision grounds if he or she is so severely disabled physically or mentally that he or she requires "continual supervision" throughout the day and/or (as the section stood at the date of claim) throughout the night, in order to avoid substantial danger to himself or herself or others. That proper statutory test cannot in our judgment be allowed to be subverted in relation to sufferers from epilepsy by an expression of medical opinion which states a presumption against entitlement in their case.

14. The second issue raised by the passage quoted from the DMP's determination is that its approach departs from the approach previously adopted by the Board to the danger arising from fits accompanied by loss of consciousness. This was a matter considered in a similar context in CA/139/1988. In paragraph 22 of that decision the Tribunal of Commissioners stated:-

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".. It is the function of the Board to use their accumulated medical knowledge and expertise objectively to assess each case before them, and it is their right and, indeed, their duty to take account of any advances and other changes in such knowledge so that the opinions they express reflect the most up-to-date established thinking. It is, we think, implicit in what we have already said that that principle must be subject to the Board's obligation when, as in the instant case, they revise or modify a long established approach, to explain and, when appropriate, support such a variation".

The DMP'S explanation in the present case is limited to the words: "I have examined the medical evidence appertaining to the nature of fits". What that evidence may consist of is not explained. It certainly is not evidence produced in this case relating to the claimant's fits for it is merely said to be "evidence appertaining to the nature of fits." (Our emphasis). It is clear that the DMP has neither explained nor supported the variation of approach in this case.

15. The final point raised by this portion of the DMP's determination is that he has not explained what he means by "complicating medical conditions or special features relating to the fits." Thus he refers to the absence of mental impairment, which could be an obvious such medical complication, but does not refer to the claimant's arthritis which might have been thought to be potentially relevant. In addition he has neither explained what he understands by "special features" nor has he dealt with the features of the claimant's fits revealed by the evidence before him. Although the Handbook sets out in paragraph 9.3 under the heading "Features to be recorded" a number of features to be recorded and taken into account, including whether or not the patient gets any warning of an attack, the duration of the loss of consciousness and whether or not an attack is followed by confusion or automatic behaviour, the DMP has not followed the guideline in that paragraph. In the present case, as indicated above, there was evidence that the claimant had no warning of an impending attack, that she lost consciousness for appreciable periods and that she had a tendency to wander after a fit. These are not dealt with. The DMP, on the contrary, has stated that there were no complicating medical conditions or special features relating to the fits. It was clearly incumbent upon the DMP, in determining whether or not there was a need for supervision, to deal not only with the lack of warning, but also the loss of consciousness and the tendency to wander.

16. "I appreciate she may derive reassurance from the presence of her attendant in predictable situations such as bathing, using stairs or out in traffic, but in the absence of any mental impairment I consider she is capable of refraining from any action which he believes could prove dangerous until someone is present or calling someone to provide her with supervision."

As we have indicated, there was evidence that the claimant had no warning of an attack. If the claimant receives no warning of an attack, it is difficult to see how she can lead a normal life if she is to take no action which "could prove dangerous" unless someone is present or she

has/

has called someone to provide her with supervision. Compare CA/4/1988 at paragraphs 11 and 12; CSA/4/1987 at paragraph 2, and CA/168/1987. However those cases will be considered by a Tribunal of Commissioners in CA/222/1988 and we refrain from expressing any further views in relation to those words of the DMP in view of the pending decision of the Tribunal of Commissioners.

17. Paragraph 5. Previous award

We turn now to paragraph 5 of the DMP'S reasons which reads as follows:-

> "5. I appreciate that the delegated medical practitioner certified that /the claimant/ satisfied the day supervision condition when he made his decision on 28 January 1985. At the time the determination was made amongst other facts taken into account was the frequency of epileptic attacks. However, in the 1987 Court of Appeal case of Moran v Secretary of State for Social Services it was ruled that the relative frequency or infrequency of the attacks was immaterial so long as the risk of substantial danger was not so remote a possibility that it ought reasonably to be disregarded. I consider that the delegated medical practitioner was in error when he made his decision on 28 January 1985 as supervision related to fits on 10 affected days a month did not constitute continual supervision."

In the case of Moran it was clear that the DMP accepted that "a risk of substantial danger attends any and every fit which is accompanied by a loss of consciousness and that during her fits Mrs Moran requires supervision in order to avoid such a possibility": Appendix to R(A)1/88 at page 10. However, the DMP in that case went on to state in his reasons that he did not accept that a person who might have to intervene in the event of an attack should be regarded as exercising continual supervision between attacks. It was on that latter point that the Court of Appeal expressed a contrary view. Nicholls, LJ, said, in Appendix to R(A)1/88 at page 14:-

> "It follows from what I have said above that in my view the delegated medical practitioner erred in law in taking into account the relative infrequency of Mrs Moran's night-time attacks if, as was common ground before us, their onset is unpredictable and withhout warning."

In the case of Moran, the claimant suffered the same features as the claimant in the present case, namely a lack of warning and a loss of consciousness. The onset of the attacks being unpredictable and without warning, and the DMP having decided in that case that a risk of substantial danger attended any and every fit, Nicholls, LJ, stated that the delegated medical practitioner erred in law in taking into account the relative infrequency of the attacks. Yet the DMP in the present case has stated that the DMP was in error when he made his decision on 28 January 1985 and he has based that assertion on the ground that "supervision related to fits on 10 affected days a month did not constitute continual supervision". But that, as Nicholls, LJ, has made clear is not the point. If the onset of a fit is unpredictable and without warning, and we have indicated that there was evidence that that

was the position in the present case, the relative infrequency of the attacks is not, of itself, a matter to be taken into account. The evidence before the DMP in January 1985 was such as to warrant the acceptance of substantial danger attending each fit suffered by the claimant. The examining medical officer had specifically referred to the danger of the claimant choking on her dentures and the danger of post-fit wandering. It can in our view reasonably be assumed that the DMP in January 1985 accepted the existence of such substantial danger when finding the claimant in need of continual supervision by day. The DMP in the present case has, as Mr Stein submitted, misapplied the decision of the Court of Appeal and his criticism of the earlier DMP is wholly misplaced. It is, of course, open to one DMP to differ from another on medical questions but the difference must be explained and the preferred view supported.

18. As was pointed out by the Commissioner in CA/066/1986 at paragraph 5, a DMP must give clear and adequate reasons for the removal of an award to which the claimant had hitherto been entitled. The Commissioner in CA/066/1986 cited R(A)1/84 at paragraph 9 where the Commissioner said:-

> "In my opinion when the Attendance Allowance Board or a delegated medical practitioner thereof proposes to remove an existing award of attendance allowance, it is imperative that the claimant in question should be given clear and adequate reasons why that is being done."

In our judgment, the reasons must be not only clear and adequate but also valid. The DMP concluded at paragraph 5 of his reasons as follows:-

> "There were no complicating features to /the claimant's/ epilepsy which would, in my medical opinion lead to the need for continual supervision."

For the reasons already stated, the DMP was not entitled to reach that conclusion.

19. The determination on review made by the DMP in this case is in our judgment vitiated by the errors of law dealt with in paragraphs 8, 12 to 15 and 17 and 18 above and the claimant's case must accordingly be considered afresh by the Board.

20. Wednesbury.

Mr Davidson submitted (as we indicated above) that the DMP's determination was challengeable by virtue of the decision of the Court of Appeal in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation /1948/ 1 KB 223. In that case the Court of Appeal was dealing with the power of the courts to control executive acts - in that case the act of a local authority.

Whether or not the principles stated by the Court of Appeal in that case, in the judgment of Lord Greene MR, are appropriate to be exercised by a Commissioner deciding an appeal against a determination of a DMP

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is, we think, open to considerable doubt. Before reaching any decision on the question we would require further argument. Mr Davidson's submission was made with particular reference to the DMP's failure to take account of the absence of warning of fits, a matter which we have dealt with otherwise and we have, for the reasons given, reached a clear decision without the need to explore the application of the Wednesbury principles. As it is not necessary for us to do so we refrain from making any decision in relation to the point raised by Mr Davidson.

21. We allow this appeal.

(signed) Douglas Reith
Commissioner

(signed) J G Mitchell
Commissioner

(signed) A T Hoolahan
Commissioner

Date: 6 September 1989

REFERENCE: CA/351/89
(HAMILTON)

RULING BY NOMINATED OFFICER

An extension of time is granted to validate the Secretary of State's submission dated 22nd November 1989.

J FOWLER
NOMINATED OFFICER

28 November 1989

PLEASE COMPLETE THIS FORM AND RETURN IT TO THE COMMISSIONERS' OFFICE WITHIN 30 DAYS. IF YOU HAVE NO COMMENTS TO MAKE, PLEASE SAY SO IN REPLY TO QUESTION TWO AND COMPLETE THE REST OF THE FORM.

THE SOCIAL SECURITY COMMISSIONERS

File No. CA/351/89

Claimant's Name. Randolph J. Hamilton

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1. I (Full Name) Mr/Mrs/Miss/Ms _____

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Address (to which a reply should be sent) _____

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Phone (if any) _____

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2. I have received the observations referred to in the attached letter. My observations in reply are:

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Please continue on a separate sheet if necessary.
