

ATTENDANCE ALLOWANCE

Review by insurance officer following review by Attendance Allowance Board -- good cause for delay in applying for review of insurance officer's decision.

On a claim made by an appointee in February 1974, the delegated medical practitioner (DMP) determined that the medical conditions for an allowance were not satisfied. In 1977 following a further claim an allowance at the lower rate was awarded from 25 April 1977. In 1979 another DMP reviewed the determinations given in 1974 and 1977 and issued a certificate showing the conditions for an award at the lower rate to have been satisfied from 13 February 1974. The insurance officer, reviewing his earlier decisions, awarded an allowance of the lower rate from 25 April 1977. The earlier period was disallowed because the claimant had not shown good cause for failure to apply for review before that date. On appeal, the local tribunal held that good cause was established. The insurance officer appealed to the Commissioner.

Held:—

- i. the claimant's mother had not been appointed, under powers conferred by regulations, to act on behalf of the claimant in 1974 but, since the claimant's right depended on that claim, she could not have repudiated any subsequent delay on her mother's part and such delay would have been imputed to the claimant (paras 10, 11, 19 and 20),
- ii the record of the determination of the DMP on review (15 May 1979) should have been in the case papers from the start, it indicated that review was on grounds of mistake as to material fact (para 14);
- iii though there was obscurity about the grounds of that determination on review, the Secretary of State not having appealed against it to the Commissioner, the case had to be decided on the footing that such grounds for review existed (paras 15 and 16);
- iv the fact that there had been no application for review within 3 months of a determination being given on behalf of the Board is not relevant to the question whether there was good cause for failure thereafter to apply for review on the limited grounds then available (paras 18 and 21),
- v the proper course where there was doubt about the grounds on which a DMP had reviewed a determination of another DMP was to ask, under regulation 9 of the Social Security (Attendance Allowance) (No. 2) Regulations 1979, for a statement of the reasons for the review determination but if that course was not open there could be an appeal against the determination, neither of those courses having been taken the authorities did not know what were the grounds on which the DMP had power to review and had no means of drawing an inference as to these (para 22);
- vi the claimant's mother could not reasonably have been expected to know any earlier that grounds for review existed and she had therefore good cause for her failure to apply earlier (para 22).

1. My decision is that the claimant had good cause for any delay in applying for the review of the decisions of the insurance officer given on or about 3 April 1974 and on or about 19 July 1977 and that attendance allowance is payable to the claimant at the lower rate for the inclusive period from 13 February 1974 to 24 April 1977.

2. This appeal is one of four insurance officer's appeals which I heard together, all of which raise problems occasioned by the fact that (owing perhaps to the confusing circumstances that questions relating to attendance allowance fall to be decided by two different authorities) the matter has in my judgment been inappropriately dealt with. I think it expedient that I should, in order to explain my reasons, refer first to the prescribed methods of adjudicating upon claims for attendance allowance.

Methods of Adjudication

3. A person claiming to be entitled to the allowance has to satisfy two types of condition to which I shall refer as "the medical conditions" and "the non-medical conditions". The medical conditions are to be found mostly but not entirely in section 35(1) of the Social Security Act 1975. They comprise (section 35(1)(a)) what are known as "the day conditions" and (section 35(1)(b)) what are known as "the night conditions". To qualify for attendance allowance at the lower rate a claimant must at the relevant times satisfy one or other of the day conditions or one or other of the night conditions. To qualify for the allowance at the higher rate he has to show that he satisfies one or other of both the day conditions and the night conditions. The question whether he satisfies any of these medical conditions is for determination by the Attendance Allowance Board, who have power (under paragraph 5 of Schedule 11 to the Act) which they usually exercise and did exercise in the present case and the others heard with it to delegate their functions to a person who has come to be known as a delegated medical practitioner or DMP.

4. The question whether a claimant is entitled to the attendance allowance including the question whether he satisfies the non-medical conditions is for decision by the statutory authorities (the insurance officer and on appeal the local tribunal and the Commissioner). If a claim is made for the attendance allowance it is first considered by the insurance officer who may, if he decides that the non-medical conditions are not satisfied, reject the claim without considering whether the medical conditions are satisfied. If he does not think that he can so reject it, he must refer the medical questions for determination by the Attendance Allowance Board. The determination by the Board or its DMP usually takes the form of a certificate on form DS 7 to one of three effects viz. either (i) that the period commencing on a specified date for life or for a specified period is a period during which the person concerned has satisfied or is likely to satisfy one or more of the day conditions and one or more of the night conditions and was preceded by a period of not less than six months throughout which the claimant satisfied or was likely to satisfy such conditions (a higher rate certificate) or (ii) that a like period is a period throughout which the person concerned satisfied or is likely to satisfy one or other of either the day conditions or the night conditions and was similarly preceded by a like period of not less than six months (a lower rate certificate) or (iii) that it is not accepted at the date of the certificate that the person concerned satisfies any of the day or night conditions (which I will call a negative certificate).

5. If a negative certificate is given the insurance officer will then give a decision refusing attendance allowance. If one of the other two certificates is given he will if it has been shown that the other conditions for an award of the allowance are satisfied award the allowance at the higher or lower rate as the case may be for the period mentioned in the certificate subject only to the fact that the allowance cannot under section 35(4) of the Social Security Act 1975 be awarded for any date earlier than the date of the claim for it. The operation of section 35(4) has recently been modified slightly by paragraph 8 of Schedule 1 to the Social Security Act 1980, but not so as to affect the present appeals.

6. Appeal lies to the local tribunal from the insurance officer's decision, but such an appeal is useless if it is desired to upset the determination by the Attendance Allowance Board. For this purpose section 106(1) of the Social Security Act 1975 permits the Attendance Allowance Board or its DMP to review (for which either the Secretary of State for Social Services or the claimant may apply) any determination of the Board or DMP either —

- (a) at any time on the ground 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, or
- (b) within the prescribed period on any ground.

The prescribed period is defined in regulation 9(1) of the Social Security (Attendance Allowance) (No 2) Regulations 1975 [SI 1975 No 598] (to which I shall refer as "the Attendance Allowance Regulations") in such a way that any decision given on an application for review of a determination made within 3 months of the date of such determination is within the prescribed period.

7. The point of reviewing a determination is that it may be reconsidered and if necessary revised (cf Decision R(I) 11/62 at paragraph 13). In practice a decision or determination is often referred to as being simply reviewed when in fact it is both reviewed and revised. The possibility of applying within 3 months for the review on any ground of a determination of the

Attendance Allowance Board or DMP is thus analogous to the possibility of appealing against the decision of the insurance officer, while the possibility of applying for the review at any time on limited grounds is analogous to the possibility of applying for the review of a decision of any of the statutory authorities under section 104(1)(a) and (b) of the Social Security Act 1975. Where a determination is reviewed and revised a fresh certificate (either higher rate, lower rate or negative) is given by the reviewing authority under section 106(1)(c) of the Act; and where a decision of one of the statutory authorities has been based on the certificate replaced by this fresh certificate there is power under section 104(1)(c) of the Act to review such decision.

8. But regulation 31 of the Social Security (Determination of Claims and Questions) Regulations 1975 [SI 1975 No 558] (to which I shall refer as "the DCQ Regulations") provides in substance that where a decision relating to benefit is revised so as to make benefit payable or to increase the rate of benefit the decision shall have effect in relation to attendance allowance so as to make the benefit or increased benefit payable only from a date 3 months before the date of the application for review or, if there was no such application, the date on which the insurance officer decides to make the review. There is an exception (regulation 31(2)) however where it is shown broadly that the claimant was otherwise entitled to the benefit from an earlier date and had good cause continuing down to the date of the application for review or decision of the insurance officer to review for his failure earlier to apply for the review. In no circumstances (regulation 31(6)) can the decision have effect from a date earlier than that from which the decision revised had effect or would have had effect if an award had been made. There is a further restriction (regulation 31(4)) on backdating the effect of a review based on there having been a material (sic) change of circumstances since the date of the decision, but this is a reference to the grounds for the review of the decision of one of the statutory authorities (in this case the insurance officer) and not of the determination by the Attendance Allowance Board, and it has no relevance whereas in the present case the insurance officer's decision is reviewed and revised not (under section 104(1)(b)) on the ground that there has been a relevant change of circumstances but (under section 104(1)(c)) on the ground that it was based on a determination by the Attendance Allowance Board (including a DMP) which has been revised. I would add that regulation 31(3) contains an over-riding limit of 12 months for any backdating which is expressly excluded (by regulation 31(3)(a)(iii)) in relation to review by reason of a determination on review made by the Attendance Allowance Board (including a DMP).

9. Finally regulation 9(2) of the Attendance Allowance Regulations until its amendment by the Social Security (Attendance Allowance) Amendment (No 2) Regulations 1979 [SI 1979 No 1684] required the Secretary of State and the claimant to be notified of the determination on review or refusal to review with a statement of the reasons for the decision. Since the amendment, which took effect from 14 January 1980, a statement of the reasons is not required in a case where the result of the review and revision is more favourable to the claimant than the determination reviewed, but either the claimant or the Secretary of State may call for a statement of reasons. Regulation 10 of the same regulations permits the Secretary of State or the claimant with the leave of the Commissioner to appeal to the Commissioner against any determination on review or refusal to review of any question of law arising on the review or in connection with the refusal. The Commissioner if he allows the appeal can set aside the determination. He cannot go further and decide the question himself but must refer the matter back to the Attendance Allowance Board.

Facts before Local Tribunal

10. The claimant in the present case is a young woman born in the year 1952 who is not able to manage her own affairs. In the year 1968 her mother was appointed to exercise on her behalf any right to which she might be entitled under the Ministry of Social Security Act 1966, but no similar appointment has ever been made under regulation 28 of the Social Security (Claims and Payments) Regulations 1979 [SI 1979 No 628] (to which I shall refer as "the Claims and Payments Regulations") or any earlier regulation to the same effect in relation to rights under the Social Security Act 1975 or any Act which it replaced.

11. The claimant's mother on behalf of the claimant made a claim on form DS 2 for attendance allowance for her on 13 February 1974. In Part 6 of the form her mother, incorrectly but understandably, gave her name as the person who had been officially appointed by the Department of Health and Social Security to exercise on the claimant's behalf any rights that she might have under the National Insurance Act [1965], and she left blank that part of the form which invited her to nominate some person to be so appointed. On 18 March 1974 a DMP issued a negative certificate and on or about 3 April 1974 the insurance officer decided accordingly that the allowance was not payable. Notification of this decision was sent to the claimant's mother accompanied by form DS 173 which contained particulars of the rights (described in paragraph 6 above) to apply for a review of the DMP's determination. No application for a review of the DMP's determination was made within 3 months of its date.

12. On 21 April 1977 the claimant's mother made a fresh application for attendance allowance on her behalf. On this occasion a DMP gave a lower rate certificate dated 4 July 1977 to the effect that the period commencing 21 April 1977 for life was a period during which the claimant had satisfied or was likely to satisfy one of the day conditions for an award of the allowance and was preceded by a period of not less than 6 months during which she had satisfied or was likely to satisfy such condition. On or about 19 July 1977 the insurance officer accordingly gave a decision awarding to the claimant attendance allowance at the lower rate for a period from 25 April 1977, the Monday following 21 April 1977.

13. In the cases the subject of the other three appeals the DMP, on the analogy of the practice commended by a tribunal of Commissioners in Decision R(I) 11/62 at paragraph 12, treated a similar second claim for attendance allowance as an application for the review of the previous determination of a DMP made in relation to a similar first claim, and he dated back to the date of the original claim the period from which he gave his fresh certificate, but this was not done in the present case. However the claimant's mother saw an article in a newspaper about the possibility of dating back an award of attendance allowance and wrote to the paper about it and in due course the paper itself submitted the correspondence to the Department with a view to obtaining for the claimant an award of what they referred to as arrears. This was treated as an application for the review of both the previous determinations and a further DMP gave a lower rate certificate dated 15 May 1979 similar to that of 4 July 1977 but covering the period from 13 February 1974 to 14 May 1989. On 11 June 1979 the insurance officer gave a decision reviewing the previous insurance officer's original decision refusing benefit, and the later decision awarding the allowance at the lower rate from 25 April 1977, and gave a revised decision awarding the allowance at the lower rate for the period from 25 April 1977 to 14 May 1989. He decided however that the claimant had not shown good cause for failure to apply for a review before she had done so and that by virtue of regulation 31 of the DCQ Regulations attendance allowance would

not be awarded for any period before 25 April 1977, the date from which it had already been awarded. The local tribunal allowed an appeal from this decision finding that the claimant had good cause for the late application for review. The insurance officer appealed to the Commissioner and was represented at the oral hearing before me by Mr E O F Stocker of the solicitor's office of the Department of Health and Social Security. The claimant was represented by Mr Nicholas Warren a solicitor with the Child Poverty Action Group.

Additional Facts before Commissioner

14. When I first saw the DMP's determination dated 15 May 1979, I could not understand how it was suggested that there had been a review of any previous decision. The form of certificate (DS 7) is designed among other things to be issued by a DMP in consequence of a review by him, and naturally makes no reference to such review or to any facts justifying a review. In the circumstances it appeared simply to be a determination made in connection with a fresh claim for benefit (indeed in the other three appeals where a fresh claim for benefit was said to have been treated as an application for review that seemed to me to be the most rational explanation of the document). I intimated therefore in advance of the hearing that I wished to hear argument on this point. Mr Stocker accordingly produced at the hearing (in relation to this appeal and to two of the others, the relevant document in the fourth case having been mislaid) a review decision on form DS 202(OTR/RR) indicating the decision or decisions reviewed and the grounds on which it was considered that review was authorised. This was part of the record of the case and ought to have been in the papers from the start. The decision relative to the present appeal is dated 15 May 1979, the same day as the last of the three DMP certificates, and includes a statement that the reviewing DMP was satisfied that he could review the earlier determinations on the ground that they were based on a mistake as to a material fact. In one of the other two cases the reviewing DMP expressed himself as satisfied that there had been a relevant change of circumstances since the previous determination had been given and in the other he expressed himself as satisfied of both the above matters. The form contains no space for including the reasons for the review decision, even though regulation 9(2) of the Attendance Allowance Regulations at the time required the reasons to be given in all cases. Consequently the decisions include no reasons and in particular do not identify the material fact as to which there was a mistake or the change of circumstances relied on, which I should regard as an important feature of any statement of reasons.

15. I have some difficulty in seeing that any grounds for reviewing the decisions existed. The fact that a second DMP interprets the medical and other evidence differently from the first does not mean that the decision of the first was given in ignorance of or as the result of a mistake as to a material fact (cf Decision R(I) 3/75); if it did, the effect would be that a conclusion on the evidence about a person's capacity or condition at a particular time given some years after that time would automatically supersede a conclusion based on the same evidence given at the time in question. 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.

16. There is thus some obscurity about the nature of the grounds on which the DMP considered himself to have jurisdiction to review the determinations reviewed in this case. But the Secretary of State did not appeal against the review determination (I express no opinion on the likely result of such an appeal) and the review determination stands. I am bound to give my decision on this appeal on the footing that grounds for review as stated by the DMP in the review decision existed.

Grounds of Decision

17. It might be argued that as the ground for reviewing the insurance officer's decisions was that they were based on determinations of a DMP which had been revised, there must be good cause for not applying for the review prior to such revision, so long as there is no delay thereafter. This is a somewhat legalistic argument, and Mr Stocker submitted that in reality the important review is that of the DMP and that if there is unreasonable delay in applying for that review there would not be good cause for delay in applying for the consequent review of the insurance officer's decision even if it had been applied for immediately after (or even before) the review of the DMP's determination. This submission, which was not contested by Mr Warren, I accept.

18. Mr Stocker next submitted that as the claimant had, with the first at least of the two earlier insurance officer's decisions, received a notification on form DS 173 explaining that the determination on behalf of the Attendance Allowance Board could be reconsidered and that if application for such reconsideration was not made within 3 months it could be reconsidered only on the limited grounds mentioned in the form being those in paragraph 6(a), she was sufficiently put on notice of the need to apply promptly for a review.

19. Thirdly, anticipating an argument that was to be put by Mr Warren, he submitted that the claimant could not rely on the bare fact that she was incapable of managing her affairs as good cause for her late application. He submitted that the claimant's mother had been appointed to act for the claimant under regulation 28 of the Claims and Payments Regulations or the regulation which it replaced. He pointed out that that regulation did not require the appointment to be in writing and he submitted that the claimant's mother's incorrect assertion that she had been appointed to act for her and the Department's acquiescence in the assertion amounted to an appointment. If I could accept that the claimant's mother had been so appointed it would follow from Decision CWG 6/50 (KL) that the mother's acts and omissions subsequent to the appointment (though not on this account I think before it, cf Decision CS 453/50 (KL)) would be imputed to the claimant. I do not however think that I can accept that the claimant's mother had been appointed to represent her. As Mr Warren pointed out, even if the appointment is not required to be made in writing the application for an appointment must be in writing and the claimant's mother in the original claim deliberately omitted (no doubt because of a misunderstanding) to make any application.

20. But Mr Stocker put forward a much more formidable submission in support of this third point. He pointed out that the claimant cannot get her case on its feet at all without first adopting the claim expressed to be made

on her behalf by her mother. In those circumstances, he submitted, she cannot disown the subsequent acts and omissions of her mother without repudiating the claim made on her behalf. On this ground he sought to distinguish the decision CG 2/79 (unreported), on which Mr Warren relied, where a woman who was unable to manage her affairs was not adversely affected by any delay, prior to the making of the claim, of her son who, without having been appointed to represent her, made a claim on her behalf. In view of the fact that I find the claimant's mother to have had good cause for delay it is perhaps not necessary for me to adjudicate on this point; but, having heard full argument on it, I in fact accept this submission made by Mr Stocker and would hold any delay on the part of the claimant's mother subsequent to the original claim to be imputed to the claimant.

21. I think that Mr Stocker's main argument outlined in paragraph 18 fails because it ignores the difference between an application for a review on any grounds, which is analogous to an appeal, and a review on one of the grounds mentioned in paragraph 6(a) above which is a normal review. It would not be relevant to the question whether a claimant had good cause for late application for the review of an insurance officer's decision to stress that he had been notified of his right to appeal to a local tribunal against that decision within the relevant time. No more is it relevant here that the claimant's mother had been notified of the right to apply for a review on any ground within 3 months. Confusion has arisen in this case because no one has been able to find out what are the precise grounds on which the DMP considered that he could review the earlier determinations. As a result the case was approached by the insurance officer as if it was one for the exercise of a power (which does not in fact exist) to extend beyond 3 months the time for applying for a review on general grounds.

22. In my judgment the proper course where the authorities are in doubt about the grounds on which a DMP has taken upon himself to review a determination of another DMP on an application made outside the 3 month period is for them to ask, under the amended regulation 9 of the Attendance Allowance Regulations, for a statement of the reasons for the review determination or, if that course is not open, to appeal against it. Once the grounds are known there should be little difficulty in deciding whether there was good cause for any delay in applying for review. A person will have good cause for failing to apply for review at least down to the date on which he knew or might reasonably have been expected to know that grounds for review had arisen. And where review of a determination is based on the ground that there has been a relevant change of circumstance since the determination was given it ought not to be dated back beyond the date of the change and in any case (however cogent the good cause for not applying earlier) it will not be sensible to revise the consequent insurance officer's decision from a date earlier than that of the change, where that date is, as it ought to be, fixed by the review determination of the DMP or in the reasons for it. In a case such as the present where there has been no appeal and no grounds for the review have been ascertained (though they must be assumed to have existed), there is an artificial situation which I hope will not frequently recur. The authorities do not know what were the grounds on which the DMP had power to review and one cannot infer from any of the documents what those grounds were. In these circumstances it is impossible to say that the claimant's mother knew or might reasonably have been expected to know any earlier that grounds for review existed and I must hold her to have had good cause for her failure to apply earlier.

23. Mr Warren naturally addressed to me an argument to the effect that the claimant's mother had good cause for failure to apply earlier even if I accepted as correct the approach which in paragraph 21 I attributed to the

insurance officer. He pointed out that it had been frequently held (eg in Decisions CP 30/50 (KL) and R(I) 10/74) that a person who is induced by inadequate official advice to omit to apply at the proper time has on that account good cause for his lateness. He submitted that the case was even clearer where he is so induced by the decision of an adjudicating authority which is later upset. This contention was supported by a recent Commissioner's decision in a similar case on file CSA 6/80, and I should, if I considered the insurance officer's approach to the case correct, accept the submission. In fact I consider that the insurance officer's appeal should be dismissed on the more fundamental ground outlined in paragraphs 21 and 22, and I dismiss it accordingly.

(Signed) J G Monroe
Commissioner
