

ATTENDANCE ALLOWANCE

Review by insurance officer following a revised determination of a delegated medical practitioner.

On a claim for attendance allowance made in 1971, a Delegated Medical Practitioner having determined that the medical conditions for an allowance—at that time there was one rate only—were not satisfied, the claim was disallowed. A second claim made on 14 November 1978 was treated as an application for review and a Delegated Medical Practitioner reviewed the original determination and issued a certificate to the effect that one of the day conditions had been satisfied from 4 June 1973, the earliest date from which a lower rate award could be made following a change of the relevant law. The insurance officer had refused, on the grounds that there had been no relevant change of circumstances, to review his original disallowance decision and that refusal was upheld on appeal by the local tribunal. The claimant appealed to a Commissioner.

Held, in substance dismissing the appeal:

1. the insurance officer's decision of 1971 was one refusing benefit from the date of claim, possibly continuing down to the date of the decision, but was not a decision that the allowance would never be payable, though a change of law can constitute a change of circumstances for the purposes of section 104(1)(b) of the Social Security Act 1975 (R(G) 1/80), the disallowance decision was not rendered incorrect by the coming into operation of section 2 of the National Insurance Act 1972; there was, therefore, no relevant change of circumstances and the decision could not be reviewed under paragraph (b) of section 104(1) (paragraph 8);

2 no steps had been taken to set aside the certificate, issued on review of the determination that the conditions for an award were not satisfied, and it could not be treated as a nullity; it enabled review under section 104(1)(c) of the insurance officer's disallowance decision but did not call for revision of that decision (paragraphs 9 and 10).

1. My decision is that the decision of the insurance officer dated 22 December 1971 refusing the attendance allowance to the claimant in respect of her son Jonathan may be reviewed but is not to be revised on such review.

2. The claimant on 20 November 1971 made a claim for the attendance allowance in respect of her son Jonathan, who was born on 23 January 1966. At the time of that claim the allowance was payable in respect of a person who satisfied both one of the day conditions for an award and one of the night conditions for an award. On 17 December 1971 a delegated medical practitioner (DMP) of the Attendance Allowance Board made a determination to the effect that Jonathan was not so severely disabled as to require attention or supervision to the extent specified in section 4(2) of what is now referred to as the National Insurance Act 1970 and regulations thereunder. On 22 December 1971 an insurance officer gave a decision to the effect that the allowance was not payable to the claimant in respect of Jonathan.

3. The relevant law was changed by section 2 of the National Insurance Act 1972. Previously a person had to satisfy one of the night conditions and one of the day conditions for an award in order to qualify. The new section provided for a higher and lower rate of award, and though in substance the same requirements as before applied to a higher rate award, a lower rate award could be made if one of the day conditions or one of the night conditions was satisfied. The lower rate provisions came into force so as to enable benefit at such rate to become payable to a disabled person born after the year 1956 from 1 October 1973; (see the National Insurance Act 1972 (Commencement No 4) Order 1972 [S.I. 1972 No 833]).

4. The claimant, who did not know precisely what conditions the DMP had considered Jonathan did or did not satisfy, did not make a fresh claim in the light of these changes (of which she may not have been aware) until she made a claim dated 14 November 1978. It is provided by section 35(4) of the Social Security Act 1975 that (subject to immaterial exceptions) the attendance allowance shall not be payable to a person for any period before the date on which he [or she] makes a claim for it. In consequence, although a DMP made a determination dated 19 April 1979 to the effect that Jonathan satisfied one of the day conditions and had done so since 4 June 1973 (which was actually the date from which under another Commencement Order the allowance first became payable at the lower rate to persons born between the years 1908 and 1956 both years included), the insurance officer on the claim awarded the allowance at the lower rate only from 20 November 1978 the Monday following the date of claim.

5. The claim however was considered, both by the insurance officer (and by the DMP), in the alternative as an application for the review of the respective decisions (or determination) of the previous insurance officer (and DMP). The DMP gave a decision also dated 19 April 1979 reviewing the earlier DMP's decision on the ground that there had (in terms of section 106(1)(a) of the Social Security Act 1975) been a relevant change of circumstances since the decision was given; he identified the relevant change of circumstances as the lower rate certificate given on the claim, but I take him to have meant the difference in the circumstances that enabled that certificate

to be given whereas no such certificate could be given at the time of the first DMP's determination. The insurance officer however (who does not seem to have been aware of the DMP's review decision) decided that the original insurance officer's decision of 1971 was not to be reviewed on the ground that (in terms of section 104(1)(b) of the Social Security Act 1975) there had been no relevant change of circumstances since the earlier decision was given. This decision was confirmed on appeal by the local tribunal and the claimant now appeals to the Commissioner.

6. The claimant asked for an oral hearing of her appeal in order that she might support the point of equity which she makes. In her observations on the submission of the insurance officer now concerned she stated that she was not contending her claim complied with the legal requirements (i.e., I think, the legal requirements for an award of the allowance for a date earlier than has been awarded) but that in her view the claim should be met in equity. She complains that the Department of Health and Social Security undertook to, but did not, notify her of her entitlement to resubmit her original claim. This is an argument to which I have no power to give effect (cf Decision R(S) 4/74 at paragraph 14). If she has lost title to benefit as a result of being let down by the Department (and I make no finding whether she has) her only possible course is to ask for an *ex gratia* payment. I do not want to raise any false hopes of such a payment being made. As I cannot in any event give effect to her claim to be entitled in equity I decided that I could properly determine the appeal without a hearing.

7. The fact that the DMP gave the above review decision has now emerged and it has to be considered whether the original insurance officer's decision can be reviewed either under section 104(1)(b) above referred to or alternatively under section 104(1)(c) on the ground that it was based on a decision on a question for determination by the Attendance Allowance Board which had been revised under section 106(1)(a).

8. I shall take the question under section 104(1)(b) first. It is not suggested that there had been any deterioration in Jonathan's condition or any other factor than the change in the law that enabled the lower rate certificate to be given, when no certificate had been capable of being given at the time of the original claim or the decision thereon. But it is not in doubt that a change of law can constitute a relevant change of circumstances for the purposes of section 104(1)(b) (see for instance Decision R(G) 1/80 at paragraph 12). However as was pointed out in Decision R(I) 56/54 at paragraph 28 and in R(A) 2/81 at paragraph 15 the phrase "relevant change of circumstances" postulates that the decision to be reviewed has ceased to be correct. *I have not the exact terms of the original insurance officer's decision before me, but in its nature it was a decision refusing benefit from the date of claim and possibly continuing down to the date of the decision. It was not a decision that the allowance would never be payable. It thus remained perfectly correct even when the law was changed. It might have been different if the change of law had been retrospective (cf Decision R(G) 3/58 at paragraph 10). It would also be different if the decision, like a decision awarding the allowance for a specified period, had a continuing effect and the change of circumstances took place during the continuance of that effect. I hold therefore that there was in this case no relevant change of circumstances since the original decision was given and that such decision could not be reviewed under section 104(1)(b).*

9. I turn therefore to section 104(1)(c). I am taking it, as I think I must, that the second DMP regarded the lower rate certificate that he gave as constituting both the revision of the original DMP's decision consequent on his decision to review and the justification for that decision. It is for

comment that the reasons that I have given for upholding the insurance officer's refusal to review the original insurance officer's decision under section 104(1)(b) are relevant to the question on whether the second DMP could review the original DMP's determination under section 106(1)(a). But the second DMP in fact decided that he could do so and no steps have been taken to set aside that decision to review and I do not think that it is a nullity. It is a decision which stands until it is set aside (which on this appeal I have no jurisdiction to do), though, having regard to section 117(2) of the Social Security Act 1975, it did not bind the insurance officer (or on appeal the local tribunal or Commissioner) to hold that there had been a relevant change of circumstances for the purposes of section 104(1)(b). There is however for the present a subsisting decision revising the original DMP's determination, and I thus have jurisdiction to review the original insurance officer's decision (based on the original DMP's determination now revised) under section 104(1)(c).

10. Reviewing that decision however I find that the second DMP has certified only that the conditions for the lower rate award are satisfied from 4 June 1973. This does not appear to call for any revision of a decision refusing the allowance at a date about 18 months earlier and I hold that the decision is not to be revised. The claimant's appeal is in substance dismissed.

(Signed) J G Monroe
Commissioner
