ATTENDANCE ALLOWANCE

Attendance allowance—need to give reasons in renewal claims—continual supervision—exposure to risk.

The claimant, a tetraplegic, made a renewal claim for attendance allowance which had been awarded at the higher rate until January 1986. On his renewal claim the DMP issued a determination to the effect that the claimant satisfied one of the day conditions but neither of the night conditions for an award of the allowance The claimant applied for a review but another DMP declined to revise the determination

On appeal the Commissioner *held*:

1. where one DMP disagrees with the conclusion of a previous DMP he should give reasons for it, to avoid uncertainty. Paragraph 5 of R(A) 2/83 followed;

2. *Moran v. Secretary of State for Social Services* (reported as an appendix to R(A) 1/88) was a decision about the circumstances in which a need for a person to be on hand was a need for supervision and is not confined to cases where the claimant is an epileptic and in looking at the need for supervision regard should be had as to whether there was a relevant risk in the claimant being left alone at night and whether it is a risk which he could reasonably be expected to guard against.

1. My decision is that the determination of the delegated medical practitioner of the Attendance Allowance Board (DMP) dated 12 August 1986 was erroneous in point of law and it is set aside. The matter must be referred back to the Board or to another DMP.

2. The claimant is a tetraplegic (i.e. he suffers from paralysis of both arms and legs). He had, prior to his present renewal claim, been awarded

the attendance allowance at the higher rate on the basis that he satisfied one at least of the day conditions and one at least of the night conditions for an award of the allowance. On his renewal claim a DMP on 14 January 1986 issued a determination to the effect that the claimant satisfied one of the day conditions but neither of the night conditions for an award of the allowance. The claimant applied for a review of this determination but a DMP in the determination now appealed from declined to revise the determination.

3. The Secretary of State submits that the determination was erroneous in law on a somewhat narrow ground, viz. that the determination withholds acceptance that a night condition was satisfied where previously it had been accepted, but does not explain whether this is because in the view of the DMP there has been a change for the better in the claimant's condition or because, in his view, the previous determination was wrong, a conclusion that he might have difficulty in reaching without seeing the evidence on which the previous conclusion was reached. I accept this submission, which is supported by paragraph 5 of Decision R(A) 2/83. I acknowledge that in this case the DMP expressly alluded to the fact his conclusion differed from that given in relation to an earlier period, but nevertheless gave his different decision (determination) on the present claim. This is not however in my judgment sufficient. It leaves it uncertain whether (contrary to the express contention of the claimant) the DMP thought that there had been some improvement, or whether he simply disagreed with the previous DMP. If one DMP does disagree with the conclusion of a previous DMP it is desirable that he should put his name to a statement that he does so, and that he should not leave it to implication. This calls his attention to the significance of what he is deciding.

4. There is however a more fundamental matter that arises on this appeal. It is clear that the substantial question in relation to the night conditions is whether the claimant requires (i.e. reasonably requires) continual supervision throughout the night to avoid substantial danger to himself or others. And in the present case this involves consideration of the meaning to be given to the word "supervision". The Commissioner who granted leave to appeal directed that the claimant should be furnished with a copy of the judgments of the Court of Appeal in *Moran v. Secretary of State for Social Services* (unreported 13 March 1987). The Secretary of State now seems to submit that as that was a case in which the claimant suffered from epileptic fits that occurred at unpredictable times it was not relevant here. If I am misjudging the Secretary of State I apologise. But the reasoning that I have attributed to him is erroneous. *Moran* was a case about the meaning of the word "supervision" albeit in the context of epilepsy. More particularly it was a decision about the circumstances in which a need for a person to be on hand was a need for supervision. In Decision R(A) 1/83 a Tribunal of Commissioners included in their decision the following passage:

> "We do not consider that a person who might have to intervene in the event of an attack of epilepsy should be regarded as exercising supervision by reason only that he might have to intervene in the event of an attack."

Despite the restriction inherent in the words "by reason only" Nicholls L. J. in the leading judgment stated that this passage could not be sustained as a general proposition. He substituted the following:

> "In my view, depending on the circumstances a person standing by to intervene in the event of an epileptic attack may, for that reason alone, be exercising supervision. It is a question of fact and degree in each case."

This does not seem to me to be very different from saying that there may be circumstances which, when added to the circumstances that someone may have to intervene in the event of an attack, have the effect that the person intervening is exercising supervision. And this in its turn is not inconsistent with the passage quoted from R(A) 1/83. Be that as it may *Moran* is clearly a decision that in some cases the requirement of a person to stand by in case intervention is necessary is a requirement of supervision. The Board or DMP to whom this matter is referred will have to consider whether the present is such a case.

5. The claimant is a tetraplegic and if he were left alone in a house he would be unable to fend for himself in the event of an emergency as a fire or to stop a fire spreading. This may be a remote contingency but it is not fanciful. And anyone who left the claimant alone in a house where such an emergency actually arose would be criticised. The result could be catastrophic. In a passage from numbered decision CA 15/79 cited in paragraph 28 of decision R(A) 1/81 the Commissioner said that the question that a DMP should put to himself in this context was "Is there a relevant (i.e. not remote) risk of such an incident occurring?" and if so "if such incident does occur is it likely to give rise to substantial danger to the claimant or others?" Save that I would define a relevant risk as one that a person can reasonably be expected to guard against (even if remote) I would endorse this. The determining authority to whom the matter is remitted will have to decide whether during the night this claimant reasonably requires to have someone in the house in case of emergency and if so whether that is in terms of the *Moran* decision a requirement of continual supervision during the night. Strictly the same applies to the day, but as the day conditions are otherwise satisfied it is probably an irrelevant consideration.

6. The appeal is allowed.

Commissioner's File No: CA 8/87

(Signed) J. G. Monroe
Commissioner