

Nights & Day

CA 44/1980

DGR/EFM

SOCIAL SECURITY ACTS 1975 TO 1980

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.A. 4/80

Unreported decision CA 44/1980 .

1. I allow the claimant leave to appeal on a question of law from the decision of the Attendance Allowance Board, given on review on 18 January 1980, and the necessary consents having been given to my determining the relevant question of law as though it arose on an appeal, as provided for by regulation 29(7) of the Social Security (Determination of Claims and Questions) Regulations 1975, I set aside such decision.

2. On form DS 213 dated 23 February 1980 Mrs applied to the Commissioner in respect of the late Mr ("the deceased") for leave to appeal from the decision of the Attendance Allowance Board, given on review on 18 January 1980, refusing the issue of a certificate at the higher rate. A delegated medical practitioner ("DMP"), who acted on behalf of the Attendance Allowance Board, whilst accepting that the deceased satisfied one of the day conditions contained in section 35(1)(a) of the Social Security Act 1975, refused to accept that he satisfied either of the night conditions contained in section 35(1)(b). Accordingly, he refused to vary the earlier decision given on 8 August 1978. The full history of the claim is set out in the submissions of the Secretary of State dated 17 July 1980, and there is no merit in my repeating such history in this decision.

3. In paragraph 3 of the DMP's decision I note the following observations -

"With regard to the night conditions, Mrs in her signed statement in the medical report dated 3 August 1978 states "he goes to bed 8.00 pm. I get up 3-4 times per night. He has a lot of pain. I go to bed 2.00 am because I have to give him a lot of attention before I go to bed". It is to be noted that Mr required a great deal of attention before Mrs went to bed at night but I consider that this attention to be attention given during the day and I have taken this into account in considering day-time attention".

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The Secretary of State concedes that in adopting the above approach the DMP erred in law. Accordingly, I have to consider whether this concession is correct i.e. whether the DMP proceeded on an incorrect basis, in so far as he treated Mrs [redacted] attention before she went to bed as being attention given during the day-time as distinct from the night-time.

4. Where for the purposes of the statutory provisions day finishes and night begins has caused considerable difficulty in the past; manifestly it is not enough merely to say that night extends from sunset to sunrise. The problem has been considered by the Divisional Court of the Queen's Bench Division of the High Court of Justice in Regina v National Insurance Commissioner, Ex parte Secretary of State for Social Services (reported as an Appendix to decision R(A) 4/74). In the course of his judgment Lord Widgery C.J. accepted that the meaning of the word "night" could not be definitively determined for all cases. He observed as follows -

"Like the Commissioner I am not going to attempt to give any single definition of "night" for present purposes for the very good reason I do not think it can be done. The argument before us has been at one in a number of respects; both Mr Slynn and Mr Brown invite us to regard the night for the purpose of the section as being that period of inactivity, or that principal period of inactivity through which each household goes in the dark hours, and to measure the beginning of the night from the time at which the household, as it were, closed down for the night. I would commend to boards dealing with this difficult question in future that they should look at the matter in that way. It was fairly suggested in argument that the night begins at the time when in a hospital or an army barracks "lights out" is ordered; the night begins when everything closes down, people put the lights out and go to sleep".

Unfortunately, I do not derive much assistance from the "lights out" test. It may perfectly well work in the case of a hospital or an army barracks, but what happens in a normal household where the various members go to bed at different times? Is the criterion the time when the last person goes to bed? Or does night begin at a different time for each person, commencing from the time when he or she retires? The possibility that it is the latter alternative, where the entire household does not shut down at one and the same time, is suggested by the following passage from Lord Widgery C.J.'s judgment -

"It has been suggested also that night for this purpose begins when a child who having run about during the day is eventually put to bed, kissed by his mother, told to go to sleep, the light is put out and the door is shut. For that child it is perfectly sensible to describe "night", as beginning when the child was settled down for the night in that way".

5. But if "night" is a variable thing in any household, commencing in each individual case at the time the person concerned goes to bed, who is the particular person by reference to whom the commencement of night is to be determined for the purposes of deciding whether either of the night conditions for an award of attendance allowance has been satisfied? Is it the claimant or is it the person providing the night-time attention? (No one else would appear to be relevant.) In a particular case the claimant could retire at 9 pm, but the attendant not until 11 pm. Now, would any attention given between the hours of 9 and 11 pm be provided during the day or night-time for the purposes of the relevant statutory provisions? For these two hours, assuming that night is not a fixed time for the entirety of each household, would be night as far as the claimant was concerned but day-time in respect of the attendant.

6. I think on balance that the relevant person is the attendant rather than the claimant. I find support for this view from a further passage from the judgment of Lord Widgery C.J., which reads as follows -

"The purpose of the Act and the provision it seeks to make is not related to whether the sun is shining or not; it is related to the domestic routine of the house and the distinction between day and night in section 4 [now Section 35 of the Social Security Act 1975] is no doubt made because the giving of attention to a sick or disabled person may be far more onerous at night, when the attendant has to get out of bed in the middle of his sleep, than it would be in the middle of the day when the house is alive and people are about and ready to respond to the call of the sufferer. That is why I think this section distinguishes service by night from service by day. Therefore one must give a meaning to the words 'night' and 'day' which is consistent with that background".

Clearly the person who is occasioned the inconvenience is the attendant, and it would seem logical that whether the period when services are being rendered is night or day should be adjudged in relation to the sleeping times of the attendant.

7. However, assuming this conclusion is correct, a further problem arises. Suppose the attendant goes to bed at 11 o'clock and spends the preceding half-an-hour in giving attention to the claimant. Is this a case of the attendant's true time of retiring being 10.30 pm and as a result the half-an-hour of attention takes place during the night-time, or is it a case of the claimant giving up half-an-hour of leisure in order to perform the necessary services, so that his or her true time of retirement is genuinely 11 pm and the attention is in fact given during his or her day-time? Presumably, in the light of that part of the judgment of Lord Widgery C.J. last cited, night cannot (subject to what is said in the following paragraphs) commence for anybody until he or she has in fact retired to bed, and even if that time has been extended by the need to carry out services for the benefit of the claimant, the period in question must still be regarded as part of the day-time.

8. However, what happens when, as in the present instance, the attendant does not go to bed till 2 am and provides a great deal of attention in the period immediately preceding that hour? On the basis of the previous analysis that period of time will constitute day-time, but against that is it sensible to regard (say) the period from 12 midnight to 2 pm as being otherwise than part of the night? It is well known that many people keep very late hours and often do not retire until the early hours of the morning. But just because they adopt this particular course of conduct, can the period immediately preceding their eventual retirement to bed be regarded as day-time?

9. I respectfully agree with Lord Widgery C.J. that it is quite a hopeless task to define for all occasions what constitutes "night". In my judgment, one has to look at the circumstances of each individual case and, deriving whatever assistance is available from previous authority and particularly higher authority, to give a sensible interpretation as to what falls within the day-time and what falls within the night-time. I find support for this type of approach from the observations of Lord Upjohn in Jenkins v Allied Ironfounders Limited [1969] 3 All E.R. at page 1619 (albeit in a totally different context) where in an effort to define what is meant by the word "obstruction" he remarked as follows -

"Everyone is agreed that some limitation must be placed on the word but that limitation is itself incapable of definition. All one can do is to suggest tests by which to measure whether something is an obstruction or not. Lord Denning M.R. in Pengelly v Bell Punch Co Ltd laid down as a test -

'In this section, an "obstruction" is something on the floor that has no business to be there, and which is a source of risk to persons ordinarily using the floor'.

That in many cases will be a most useful guide but like all tests can be no more than a guide and as such must be applied with caution and bend to the particular facts and cases of each case; its slavish application may, and, in my opinion in this case would, fail to give any satisfactory answer or might even point to the wrong answer".

10. In the case I have to consider the claimant went to bed at 2 am, having for an unknown period prior thereto given attention to the needs of the claimant. In the circumstances of this particular case I am satisfied that the period of time during which such services were provided must, at least after 12 midnight, be regarded as part of the night-time, notwithstanding that the claimant had not as yet gone to bed. In determining what hours constitute the night one must have regard to what is generally accepted on any footing as being night-time, irrespective of the fact that some people may during such hours adopt the practice of remaining up and awake. The factor, which is, in my judgment, conclusive, is that after midnight a new calendar day

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commences, and, in my view, it would be unrealistic and therefore unacceptable to regard, whatever the sleeping pattern of the attendant, any period after midnight as part of the day-time of the preceding calendar day.

11. It follows from what has been said above that, in my judgment, the DMP erred in law in regarding Mrs ~~XXXX~~ attention to the deceased as being carried out wholly during the day-time. Accordingly I grant leave to appeal, and as the necessary consents have been given to my proceeding to determine the relevant question of law as though it were a question arising on an appeal and as though the application for leave were the appeal itself, I set aside the decision of the Attendance Allowance Board.

(Signed) D G Rice  
Commissioner

Date: 21 November 1980

Commissioner's File: C.A. 44/1980  
DHSS File: S.D. 450/1151