

CA/76/1984

JM/SH

SOCIAL SECURITY ACTS 1975 TO 1984

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

Name: Mrs Pamela M Foster, on behalf of James Edward Foster

1. This is an appeal, brought by my leave, against a determination on review dated 21 December 1983 and made by a medical practitioner ("the DMP") on behalf of the Attendance Allowance Board. My decision is that the said determination is erroneous in law and is accordingly set aside. It follows that there must be a further review.

2. The appeal is brought by the mother of a boy to whom I shall refer as "James". James was born on 3 April 1977. The birth was premature by ten weeks. James' health has suffered and still suffers in consequence. By way of outlining the picture I set out the following quotations and summarised paraphrases from the papers before me:

- (a) "Has frequent infections either chest or urinary. Goes to local school but has a lot of time off. In last full term has lost at least half. Seems to be able to go in mornings more than a full day. Is hoping to go Hospital for operation to cure the ductus arteriosus syndrome. Has poor respiratory reserve. Sleeps poorly because of coughing etc. Most nights has to be seen to. Especially when he gets an infection. Chest infections tend to turn to asthma and pneumonia. Has been in hospital about 3 times in the last 3 years. Goes to ... hospital mainly." (Statements made on 23 April 1983 by James' mother to the examining doctor.)
- (b) That examining doctor recorded that, by reason of coughing or convulsions, James had to be given medicines during the night. The frequency was stated to be once in each of about five nights a week. The time occupied on each occasion was put at five to ten minutes. It was further recorded that James had occasional fits in the night as well as during the day.
- (c) The examining doctor was of the opinion that James -
 - (i) was aware of common dangers;
 - (ii) had no tendency to wander away from home;
 - (iii) had no tendency to wander about the house;
 - (iv) was not physically aggressive to others;
 - (v) was not destructive to property; and
 - (vi) did not inflict injury on himself.

- (d) In a letter dated 20 June 1983, a very close friend of James' mother wrote:

"The claimant's mother rarely has an undisturbed night, either she is up during the night several times, or she has James sleeping with her.

The past 6-9 months James has had one virus infection after another which requires constant nursing from his mother."

- (e) In a letter dated 13 June 1983, the general practitioner of James' family wrote:

"I would support this mother's application for an attendance allowance on this child on the grounds that she has to get up most nights to attend to James either on account of his asthma or because of his convulsions. He was born prematurely and has a patent ductus arteriosus for which surgery is being awaited. He has also suffered from recurrent urinary tract infection."

- (f) On 24 August 1983 the claimant stated to a different examining doctor:

"Needs constant observation because of fits and breathlessness and total nursing - in mother's bed - during attacks of breathless and fever."

- (g) That examining doctor recorded:

"Danger of fits and attacks of breathlessness would be likely to choke or die of anoxia if left during attacks."

- (h) In a letter dated 27 November 1983, the claimant's mother denied that James was aware of common dangers. He was, among other things, addicted to playing with the cooker.

3. On 5 May 1983 a DMP decided that James did not satisfy either of the day conditions or either of the night conditions. It was upon a review of that decision that another DMP gave the decision the subject of this appeal.

4. The said review decision is detailed and careful. It is assailed by the claimant upon three main grounds:

- (a) James requires continual supervision between convulsions because those can lead to substantial danger if there is no intervention.
- (b) The degree of supervision required by James is qualitatively different from that required by children of normal health of the same age. The DMP misunderstood the nature of the supervision given to James when he sleeps in his mother's bed.

- (c) The DMP paid insufficient regard to the report made by the doctor who examined James on 24 August 1983.

5. The submission made on behalf of the Secretary of State is objective, careful and well-reasoned. It is submitted that neither ground (a) nor (b) advanced on behalf of James disclose any error of law on the part of the DMP. The reasoning behind that submission is fully set out. I accept it in its entirety. It would, accordingly, be pointless for me to repeat it here.

6. Ground (c) is a different matter. I agree with the submission of the Secretary of State that a measure of logical inconsistency has crept into the reasoning of the DMP in respect of the night conditions. The DMP's conclusion was expressed thus:

"The medical evidence shows that his epileptic attacks occur when he gets high temperatures and this happens approximately twice a month although his need for attention for coughing or convulsions is said to be required once a night on 5 nights of the week, but viewing the medical evidence overall the amount of attention and supervision which James receives during the night hours has no regular pattern and there is no suggestion that he ever needs assistance more than once on the same night or that any help given is of a prolonged nature."

7. In the review of the evidence which precedes that conclusion the DMP wrote:

"The up to date report shows that because of fits and attacks of breathlessness he is given constant observation during the night and when in attacks he requires total nursing. I accept that James requires the attention described when he is 'chesty' or has asthmatic attacks or during recurring urine tract infections and that there are times when James is taken into his mother's bed but I consider that many young children have disturbed nights for a variety of minor medical reasons and whilst I accept that during exacerbations of any attacks James' need for attention during the night will increase and that it is comforting if he wakes and goes into his parents' bed during the night, I take the view that it is not unusual for children of his age to require such attendance nor is it unusual for children of his age to be taken into their parents' bed and I do not accept that this is an occurrence for which he requires substantially more attention than any other boy of his age The indications are that any supervision which James requires does not extend beyond the period during which help is actually given if he is suffering from a minor illness, having a breathless attack or is suffering a minor epileptic attack necessitating supervision during and after such

an attack and I take the view that supervision confined to a specific time and required with comparative infrequency cannot be held to constitute continual supervision within the meaning of the 1975 Social Security Act."

As the Secretary of State submits, it is difficult to reconcile those findings with the DMP's conclusion that "there is no suggestion that he ever needs assistance more than once on the same night or that any help given is of a prolonged nature". I find it difficult, moreover, to understand how any DMP properly directing himself as to the facts of this case could reasonably equate James' condition with that of "many young children" who "have disturbed nights for a variety of minor medical reasons". The close friend of James' mother had written that in the past six to nine months James had had one virus infection after another (cf. paragraph 2(d) above) - and that had been confirmed by the claimant's mother herself. At the end of the day I have come to the conclusion that the reasoning of the DMP in respect of the night conditions is sufficiently unsatisfactory to amount to error of law.

8. It follows that the appeal by James' mother is allowed.

(Signed) J Mitchell
Commissioner

Date: 20 December 1984

Commissioner's File: CA/76/1984
DHSS File: SD 450/1764