

CLAIMANT BLIND - CLAIM FOR ATT OR BASIS OF NEED FOR FREQUENT
attention.

RFMH/SH/6

Commissioner's File: CA/117/1991

DSS File: SD450/4822

SOCIAL SECURITY ACTS 1975 TO 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Eric Mallinson

[ORAL HEARING]

1. My decision is that the determination on review by the delegated medical practitioner ("DMP") on behalf of the Attendance Allowance Board ("the Board") dated 12 December 1990 is not erroneous in point of law. As a result this appeal fails.

2. This is the claimant's appeal on a point of law against the determination of the DMP dated 12 December 1990, leave having been granted by a Commissioner. The claimant attended the oral hearing of the appeal held before me. He was represented by Mr M Rathfelder from the Welfare Rights Unit. The Secretary of State's representative failed to attend. No explanation was supplied. Having regard to all the circumstances, I decided to proceed with the case notwithstanding his absence. (Regulation 17(3) of the Social Security Commissioners Procedure Regulations 1987).

3. The claimant, now aged 47, is blind and suffers from hypertension. On 12 December 1990 the DMP acting on behalf of the Board reviewed the claimant's claim for attendance allowance, but decided in the light of the evidence that the claimant did not satisfy either the day or the night conditions contained in section 35(1) of the Social Security Act 1975 ("the Act"), that as a result he could not issue a higher or lower rate certificate, and accordingly that the original decision of 1 May 1990 to the same effect should not be revised.

4. Whether a person satisfies the conditions contained in section 35(1) of the Act is a matter for the exclusive determination of the Board or, where their function has been delegated to a medical practitioner, of that medical

practitioner. Such determination cannot be upset unless it is erroneous in law. It is, of course, a fundamental principle that if inadequate reasons are given for the determination, that is an error of law whether or not the actual determination is correct (R(A) 1/72). Mr Rathfelder submitted that the DMP's determination was inadequate and failed to comply with the statutory requirements (regulation 31(4) of the Social Security (Adjudication) Regulations 1986) in that the DMP failed to "deal explicitly with the question of whether the help needed with walking is to be considered as supervision or attention".

5. Mr Rathfelder readily conceded that the claimant did not satisfy the day time "supervision" condition contained in section 35(1)(a)(ii) of the Act because he accepted that any supervision the claimant required was not "continual". The main question at issue was whether the claimant satisfied the day time condition contained in section 35(1)(a)(i) of the Act that "he requires from another person frequent attention throughout the day in connection with his bodily functions." In his determination the DMP referred to the examining medical officer's (EMO's) report of 20 September 1990 and accepted that the claimant required assistance to bath and cut up his food because of his blindness. Mr Rathfelder referred me to his letter of 31 July 1990 and to the EMO's report which stated that the claimant needed supervision when walking in unfamiliar surroundings because of his previous injuries i.e. he had knocked out his front teeth on a lamppost. Mr Rathfelder argued that the DMP had erred in law in considering that the help needed by the claimant with walking fell to be considered under the day time "supervision" condition as in his view it fell to be considered under the day time "frequent attention" condition. He referred me to decisions R(A) 6/72 (approved in the Tribunal of Commissioners Decision R(A) 1/83) in which the Commissioner explained the difference as follows:-

"... in section 35 "attention" and "supervision" are intended to denote two different concepts. Attention denotes a concept of some personal service of an active nature, such as helping the disabled person to wash or eat. Supervision denotes a more passive concept, such as being in the same room with a disabled person so as to be prepared to intervene if necessary, but not actually intervening save in emergency. .."

6. I reject Mr Rathfelder's submission. It is not in dispute that the claimant is physically capable of walking. What is contended is that he requires assistance when walking in unfamiliar surroundings so that he does not injure himself. Section 35(1)(a)(i) relates to assistance without which the person with severe disabilities would not be able to perform his bodily functions. The DMP makes this clear in paragraphs 6 and 7 of his determination. The claimant in the present case is able to walk and even does so out of doors. However he does risk injury when walking in unfamiliar surroundings because he cannot see. In my view the DMP correctly considered the assistance required by the claimant when walking as "supervision" rather

than "attention". It follows that I cannot accept Mr Rathfelder's argument that the aggregate of the "attention" required by the claimant throughout the day when bathing, cutting up his food and walking satisfy the conditions contained in section 35(1)(a)(ii) of the Act. I should add for completeness that domestic duties such as preparation of meals, cooking, laundry, shopping and housework do not qualify as attention in connection with bodily functions (appendix to Commissioner's decision R(A) 2/80).

7. Although Mr Rathfelder did not contend that the claimant satisfied the day time "supervision" condition, nevertheless he submitted that the DMP erred in law because, having accepted that the claimant required supervision when he was out in traffic or in unfamiliar surroundings he went on to say "such supervision is limited in time and frequency and can be arranged in advance". Mr Rathfelder submitted that the decision was inadequate because the DMP failed to explain why he took that view and how it related to the statutory provisions. In his view it appeared utterly irrelevant that attention or supervision could be arranged in advance. It was the frequency or continuity which were significant. I disagree. The conditions laid down in section 35(1)(a)(i) and (ii) of the Act are separate and distinct. The DMP's comments referred to the "supervision" condition and in that context the question of the foreseeability of an injury is crucial. In the present case the claimant was only liable to injure himself when walking in unfamiliar surroundings and in my view the DMP was justified in suggesting how any potential injury could be averted. In the Court of Appeal judgment in Moran v. The Secretary of State for Social Services (Appendix to R(A) 1/88) it was held that:-

"A person who is in the same room or another room in the same house or a nearby property and who keeps himself available to be called by such a sufferer, in person or by bell or by telephone, may not be exercising "supervision" over the sufferer. It will all depend upon the particular facts of the case."

8. In the present case the claimant is capable of walking. Any potential danger is limited to occasions when he is walking in unfamiliar surroundings. These occasions are predictable and any supervision required during these periods do not amount to "continual supervision" in terms of section 35(1)(a)(ii). I agree with Mr Rathfelder that the claimant's blindness greatly affects the quality of his life but the statutory test is not related to this but to whether continual supervision is required to avoid substantial danger. In the present case the claimant is able to avoid the risk of substantial danger by taking reasonable precautions or summoning help and the need to provide continue supervision for the avoidance of substantial danger does not arise.

9. Finally Mr Rathfelder submitted that a normal person of the claimant's age would expect to encounter unfamiliar surroundings frequently. He objected to the Secretary of State's

representative's reply in his written submission dated 24 April 1991 in which he stated "that for most people everyday life follows a routine pattern in the familiar surroundings of home or workplace". This argument does not assist the claimant, because any supervision required in such circumstances does not constitute "continual supervision" for the purposes of section 35 of the Act.

10. For the reasons stated above the DMP's decision was not erroneous in point of law. The claimant's appeal is dismissed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs
Commissioner

(Date) 25 September 1991

ATTENDANCE ALLOWANCE

DECISION ON REVIEW OF DELEGATED MEDICAL PRACTITIONER

Claimant: Mr Eric MALLINSON
Representative: Mr Martin RATHFELDER

Reference: YE 45 60 36 D
Date of Birth: 5 July 1944

INTRODUCTION

1. I accept your letter dated 31 July 1990 as a request for review of the claim for Attendance Allowance and I grant leave for the application to be made. I can review the decision dated 1 May 1990 on any ground. That decision was notified on 3 May 1990. The medical conditions which must be satisfied before a certificate can be issued are set out overleaf. I have considered all the documents mentioned in the letter (form DS 276A) sent to you on 30 October 1990. No comments have been received.

2. Before I consider Mr Mallinson's attendance needs in detail may I explain that any help which may be needed with cooking, shopping, laundry, cleaning and other household jobs does not qualify as attendance within the meaning of the law on Attendance Allowance; nor am I able to take into account financial circumstances. Qualification for Attendance Allowance depends on the amount of attendance needed because of disablement, rather than the extent of disability or because a person suffers a particular type of disabling condition.

CONSIDERATION

3. I agree with the opinion expressed by the delegated medical practitioner in his written decision of 1 May 1990 a copy of which was sent to Ms B J Guest that on the evidence then before him Mr Mallinson satisfied neither of the day or the night conditions.

DAY ATTENTION

4. The examining doctor in the medical report of 20 September 1990 was of the opinion that Mr Mallinson required assistance to bathe and to cut up food. The medical evidence indicates that Mr Mallinson uses a white stick.

5. I appreciate that Mr Mallinson is blind but he has suffered from blindness for a number of years and it is clear from the evidence before me that he has adjusted well to disability.

6. Your letter dated 31 July 1990 indicates that Mr Mallinson regularly needs assistance with the bodily function of walking but this is not borne out by the medical evidence. The examining doctor in the medical report of 20 September 1990 was of the opinion that Mr Mallinson could walk without assistance from another person and having considered the clinical picture I agree with his opinion.

7. Mr Mallinson has no physical disorder of mobility and, therefore, he should be able to walk and to get about within his familiar surroundings without assistance.

8. Mr Mallinson requires assistance to bathe and to cut up food but this does not amount to frequent attention throughout the day. Consequently, my conclusion is that Mr Mallinson does not satisfy the day attention condition.

DAY SUPERVISION

9. The examining doctor in the medical report of 20 September 1990 was of the opinion that Mr Mallinson was aware of common dangers both inside and outside the house but he went on to indicate that Mr Mallinson cannot see dangers outside the house. He further indicated that Mr Mallinson could safely be left unsupervised all day. Mr Mallinson

is described as having normal mental ability.

10. Mr Mallinson has been blind for a number of years but he is stated to be mentally normal. I can see no medical reason why he should not be aware of his surroundings. He has not physical disorder of mobility and I consider that he should be able to find his way around in the familiar surroundings of his home.

11. I accept that supervision is required when he out in traffic or in unfamiliar surroundings but such supervision is limited in time and frequency and can be arranged in advance.

12. Taking an overall view my conclusion is that this condition is not satisfied.

**NIGHT ATTENTION
NIGHT WATCHING OVER**

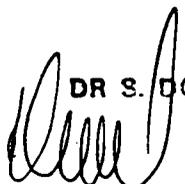
13. The examining doctor says that no night attention is needed during the night hours. He also indicates that Mr Mallinson can safely be left unsupervised all night

14. Mr Mallinson makes no mention of needing any help and there is no suggestion that he or anyone else is at risk of substantial danger because of his disability.

15. I conclude that Mr Mallinson does not satisfy the night conditions.

DECISION

16. As none of the day or night conditions is satisfied, I am unable to issue a higher or lower rate certificate. It must therefore follow that my decision on review is that the decision of 1 May 1990 be not revised.


DR S. DOEL

12 DEC 1990

Medical Practitioner for and on behalf
of Attendance Allowance Board