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Commissioner's File: CA/140/1985

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SOCIAL SECURITY ACTS 1975

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

Name: Mary M. Tucker (Mrs) on behalf of Patrick Alan Tucker

[ORAL HEARING]

1. My decision is that the determination on review dated 12 June 1985 made by a medical practitioner on behalf of the Attendance Allowance Board is erroneous in law and is accordingly set aside. I held an oral hearing of this appeal at which the claimant was represented by a friend Mr. S.E. Boucher who presented the appeal with moderation and skill. The Secretary of State was represented by Mr. P.M. Darby of counsel, to whom I am also grateful.
2. Mr T. was born on 16 October 1933. He was registered blind in 1967 and at all material times has been for practical purposes totally blind. His wife the claimant on his behalf is also a registered blind person although she has some degree of sight.
3. In 1982 and 1983 there was unsuccessfully made and pursued to appeal a claim for an attendance allowance; it was on 20 March 1983 that the delegated medical practitioner determined not to revise the initial adverse decision given on 14 May 1982. On 12 June 1984 there was received a claim for review in connection with which a medical examination took place on 16 August 1984. On 29 August 1984 it was determined that there were no grounds for review and the application for review was treated as a fresh claim and rejected. Shortly afterwards an application was made for a review of the decision to reject the fresh claim, and there was on 18 December 1984 a further medical examination in connection with that application. On 12 June 1985 a delegated medical practitioner for the attendance allowance board determined not to revise the decision given on 29 August 1984.
4. Amongst the documents which the delegated medical practitioner had before him were the reports of the two medical examinations on, respectively, 16 August 1984 and 18 December 1984, with an extensive series of questions headed "Attendance Allowance Check List" prepared by the Disability Allowance Educational and Research Association completed by or on behalf of the claimant's husband and a copy of the diary kept by the claimant covering the period 17 September to 30 September 1984 of which the following may be taken as a reasonably typical example:-

"Tuesday September 25

7.15 am	Prepared tea and did some tidying up
9.00 am	Prepared and served breakfast and then did ironing
11.00 am	Took Pat out shopping

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1.00 pm	Prepared and had lunch
2.00 pm	Went out for a walk with Pat and dog to the park
5.00 pm	Prepared and had dinner
9.00 pm	Prepared supper
10.30 pm	Helped Pat to bed.

Pat is of course the claimant's husband. Various other entries show that on occasional days Mr T. was taken out shopping, taken to college, or taken to a DHSS office.

5. In R. v. National Insurance Commissioner Ex Parte Secretary of State for Social Services [1981] 2 AER 738 the Court of Appeal considered attendance allowance and, materially, the expression "requires from another person ... frequent attention throughout the day in connection with his bodily functions". At page 741 of the report Lord Denning MR said that in order to qualify at all a person must be so severely disabled physically or mentally that he required attention, and he said that this requirement conveyed the thought that the attention must be required so as to enable the person to cope with his disability whatever it was. As to "frequently throughout the day" he said that "frequent" connoted several times, not once or twice. He said also that 'attention' is different from 'activity' or 'attendance', and that it connoted something personal to the disabled person. He further said as follows:-

"'Bodily functions' includes breathing, hearing, seeing, eating, drinking, walking, sitting, sleeping, getting in or out of bed, dressing, undressing, eliminating waste products, and the like, all of which an ordinary person who is not suffering from any disability, does for himself. But they do not include cooking, shopping or any of the other things which a wife or daughter does as part of her domestic duties, or generally which one of the household normally does for the rest of the family."

He then said that the words "in connection with" gave rise to difficulty and said that he thought that so far as possible the Court should lay down rules for guidance. He went on to say -

"I would hold that ordinary domestic duties, such as shopping, cooking meals, making tea or coffee, laying the table or the tray, carrying it into the room, making the bed or filling the hot water bottle, do not qualify as 'attention' ... in connection with [the bodily functions] of the disabled person. But that duties that are out of the ordinary, doing for the disabled person what a normal person would do for himself, such as cutting up food, lifting the cup to the mouth, helping to dress and undress or at the toilet, all do qualify as 'attention ... in connection with [the] bodily functions' of the disabled person. It will then be for the delegated medical practitioner to add up those items of attention which qualify and decide whether the answer is frequent attention throughout the day".

The conclusion to be drawn is one to be drawn from the frequency and pattern of what is required - see Decision R(A)4/78 at paragraph 28.

6. The form DS4 which was completed by the doctors who conducted the two medical examinations in 1984 has a section headed "attention needs" making provision for the medical practitioner to identify the extent of any attention need required by the person concerned in relation to a number of bodily functions. There are three choices offered,

'Without the help of another person', 'only with the help of a special aid', and 'only with the help of another person'. The doctor who conducted the medical examination on 16 August 1984 ticked that the following could be done without the help of another person, namely change position whilst in bed, get out of bed, get into bed, eat and drink. He ticked that the following could only be done with the help of another person namely walk, use stairs, dress, undress, wash, bath, get to the toilet, and cut up food and by all of the latter items he wrote with one bracket covering all "If completely familiar surroundings also in the order he expects to find them -he can just about manage these matters - but the arrangement is vital to his self-sufficiency and his wife has to organise every detail and rescue him if he encounters orientation problems".

7. The doctor who conducted the medical examination on 18 December 1984 completed form DS4 with the following differences, namely that getting to the toilet was put in the column headed 'without help of another person', used stairs was put in the column headed 'only with the help of a special aid', eat and drink were ticked in the column 'only with the help of another person' and walk was answered in the column headed 'only with the help of another person' with a question mark and the following words: "unaided in his own house, only with help outside his house". Adjacent to use stairs was "would need a stick". Bracketed together by the ticks related to dress, undress, wash and bath in the column headed 'only with the help of another person' were the words: "needs supervision only - clothes laying out, check washing adequacy etc. House and domestic arrangements have to be organised accordingly". Against the ticks for eat and drink in the column headed 'only with the help of another person' are the words "again needs supervision for laying out food, placing of cup etc."

8. I have set out this evidence since they are material to the conclusions to which I shall come, but the conclusions as a matter of expert medical opinion are for the delegated medical practitioner to reach and not for me; I am in no way entitled to substitute my view of the evidence for his. I am however required to consider whether the delegated medical practitioner has erred in law.

9. The decision of the delegated medical practitioner given on 12 June 1985 contains the following findings in relation to the day conditions:-

"The latest medical report shows [Mr T.] to be a mentally alert, intelligent and physically well person who has the ability to get around in his own home and I find from the evidence before me that his needs are confined in the main to the beginning and the end of each day. It is evident that once clothes have been laid out, he has been supervised when bathing, washing shaving etc. he required relatively little help during the remainder of the day. Both medical reports show that he is not incontinent of bowels or bladder, he is able to manage his toilet needs unaided and although food has to be cut up for him and he requires some supervision at meal times, in my medical judgment there are lengthy periods in the day where no help is necessary. Having regard to the evidence before me, I do not accept that [Mr T.] requires frequent attention throughout the day in connection with his bodily functions, or that he has required such attention throughout the period relevant to the claim".

10. The delegated medical practitioner thus proceeded by three stages to his conclusion. He firstly found that the needs were confined "in the main" to the beginning and the end of each day; he then found that there were lengthy periods in the day where no help was necessary; he then concluded that the requirement of frequent attention throughout the day

in connection with bodily functions was not satisfied.

11. In my judgment the principal error of law committed by the delegated medical practitioner was to fail to look as a whole at the evidence of the requirement of need throughout the day including both what occurred in the morning on getting up and what occurred in the evening on going to bed. It cannot I think be justified to split up the attention and then say that because of the resultant gaps the requirement of "throughout the day" was not justified. The evidence relating to the day must be looked at as a whole where naturally connected, as it is indeed in this case. In my judgment this approach discloses an error of law.

12. There is I consider a further error of law consequent upon the finding that Mr T's needs were confined "in the main" to the beginning and end of the day. It cannot in my judgment be a conclusion which a reasonable body acting judicially and properly instructed on the law could have reached that on the evidence Mr T's attendance needs were "in the main" at the beginning and end of the day so as to justify adopting a *de minimis* conclusion in relation to his needs in the remainder of the day. It was erroneous in my judgment to specify, given the pattern of this gentleman's daily activity, that once dressed in the morning there was no significant need for dressing subsequently; he went out every day and could hardly be expected to get up in the morning in his mackintosh. What happened if he got up in slippers, who was to choose the shoes of a pair so that he avoided wearing either two left shoes or one brown and one black one? As for eating and drinking he had the ordinary three meals a day with tea in the morning and apparently on occasions some late evening drink before going to bed. I accept as I was informed that the assumption that Mr T. took his bath at the beginning or end of the day was wrong because in fact he was accustomed to bath mid-morning. In short I consider that the finding of "in the main" could not justify the apparent "de minimis" approach as to what took place in the remainder of the day before going to bed which the delegated medical practitioner adopted. This was also in my judgment an error of law.

13. These conclusions are sufficient to determine the appeal. Mr. Boucher addressed me on the criteria identified by Lord Green in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1947] 2 AER 680 at 682-3, but given the basis upon which I have determined this appeal it is not necessary for me to go into the matters raised by this argument.

14. My decision is as in paragraph 1.

(Signed) Leonard Bromley
Chief Commissioner

Date: 10th October 1986