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SOCIAL SECURITY ACTS 1975 TO 1990

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that:

(a) the determination on review made on 20 February 1989 by the delegated medical practitioner ("DMP") on behalf of the Attendance Allowance Board ("the Board") is erroneous in point of law and accordingly I set it aside.

(b) pursuant to regulation 23(2)(a)(i) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 ("the Introduction Regulations") I give the decision which I consider the Board should have given, namely that a certificate be issued for the lower rate of attendance allowance from 12 October 1987 for five years which, in accordance with the provisions of regulations 2 and 3 of the Introduction Regulations, will take effect as a certificate for attendance allowance at the lower rate for the inclusive period from 12 October 1987 to 5 April 1992 and thereafter the care component of disability living allowance at the appropriate rate to 11 October 1992.

2. This is an appeal on behalf of the claimant against the determination on review made on 20 February 1989 by the DMP on behalf of the Board, leave having been granted by a Commissioner. An oral hearing of the appeal was directed. The claimant did not attend the oral hearing held before me and she was not represented. The Secretary of State was represented by Mrs J Wild from the Solicitors Office of the Departments of Health and Social Security.

3. As a result of tuberculous meningitis the claimant's eyesight was affected so that by 14 April 1986 she was registered as a blind person. She also suffered from depression. She was

79<sup>13</sup>  
awarded attendance allowance at the lower rate from 27 September 1985 to 11 October 1987 on the basis that she satisfied both the day conditions contained in section 35(1)(a) of the Social Security Act 1975 ("the Act"). On 16 June 1987 the claimant submitted a renewal claim for attendance allowance, which was rejected on 7 December 1987. In a letter dated 4 January 1988 the claimant's husband on her behalf requested a review of the claim. In a letter dated 13 April 1988 the Department of Health and Social Security (now the Department of Social Services) advised the claimant of the following:-

"... I am advised by the medical practitioner concerned, that on the evidence at present before him he is provisionally of the opinion that one of the day conditions had been satisfied since 29 February 1988. The 6 months qualifying period will not, therefore, end until 29 August 1988 and the delegated medical practitioner has advised me that he is unable to make a prognosis that far ahead on the amount of attention and supervision which will be then required. On this basis if he had to give a decision, now, he would be unable to revise (i.e. alter) the earlier decision."

On 20 February 1989 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 any of the day or night conditions contained in section 35(1) of the Act and that as a result he could not issue a higher or lower rate certificate and accordingly that the original decision of 7 December 1987 to the same effect should not be revised. Leave to appeal was sought on the ground that the DMP's decision was erroneous in point of law. In granting leave to appeal, a Commissioner requested the Secretary of State's representative's submission to refer in particular to the effect, if any, of the Department's letter dated 13 April 1988.

4. The written submission on behalf of the Secretary of State dated 5 January 1990 referred to the contents of the Department's letter dated 13 April 1988 but was silent as to its effect. A further direction was issued requesting a submission on the application of regulation 5A(1)(a) of the Social Security (Attendance Allowance) No. 2 Regulations 1975 ("Attendance Allowance No. 2 Regulations") on the facts of the present case. The oral hearing of the appeal was directed so that I could hear legal argument on both these issues. In the event Mrs Wild was unable to assist me on either. I therefore requested a further written submission on these issues. This accounts for the delay in the promulgation of this decision.

5. Attendance allowance may be awarded at the lower or higher rate depending upon whether a claimant satisfies one or both of the day time or night time conditions of entitlement contained in section 35(1) of the Act. Section 35(2)(b) requires one or both of those conditions to be satisfied for a period of six months prior to any award. Regulation 5A(1)(a) of the Attendance Allowance No. 2 Regulations (as inserted by the Social Security

(Attendance Allowance) Amendment (No. 2) Regulations 1979) relieves a claimant from this provision in the following circumstances:-

" 5A. - (1) This regulation has effect in respect of a claim for attendance allowance where for a period immediately preceding the date of the claim, either -

(a) there is not in force a certificate issued under section 35(2) of the Act (period for which an allowance is payable), and the Board consider that the person in respect of whom the claim is made has satisfied or is likely to satisfy either or both of the conditions specified in section 35(1) of the Act (the day and night conditions) for a period of at least 6 months beginning not more than 2 years after a period during which there was in force a certificate under section 35(2) in respect of that person; or

(b) ..."

6. It will be seen that the above quoted regulation permits a greater flexibility in relation to the six months qualifying condition in the case of a claimant who has a relapsing condition. Where there has been a remission in her medical condition so that she ceases to satisfy the conditions for receipt of benefit, and this is followed by a relapse, the claimant may rely upon either a six months period during which she had satisfied the conditions, or a period during which she is expected to satisfy the conditions, provided that the beginning of that six months period is within two years of the ending of her last period of entitlement to attendance allowance. In the present case the claimant's renewal claim was received on 22 June 1987, at which date a lower rate certificate was still in force. Accordingly although the provisional view was that the claimant satisfied one of the day time conditions as from 29 February 1988 she was unable to avail herself of regulation 5A(1)(a) and as a result was required to complete a further qualifying period. However, if the claimant had submitted a renewal claim after the expiry of the lower rate certificate on 11 October 1987, she would not have had to satisfy a further six months qualifying period. There appears to be an anomaly in the regulations. It defeats the purpose of the regulations, is unjust and creates an arbitrary result based on the date of any renewal claim irrespective of a claimant's medical condition. 1111

7. I now turn to the Department's letter of 13 April 1988 in which the claimant was advised that the DMP was provisionally of the opinion that one of the day conditions had been satisfied

since 29 February 1988. As already set out the letter reads:-

"The 6 months qualifying period will not, therefore, end until 29 August 1988 and the delegated medical practitioner has advised me that he is unable to make a prognosis that far ahead on the amount of attention and supervision which will then be required. On this basis if he had to give a decision now, he would be unable to revise (i.e. alter) the earlier decision.

The delegated medical practitioner has, therefore, suggested that a further medical report be obtained near the end of the six months qualifying period and has asked me whether you are willing for the decision to be delayed until after the report has been obtained .."

The claimant submitted a medical report dated 15 April 1988 from Dr. D A L Watt, a Consultant Physician and a medical report dated 18 April 1988 from Dr. M Z H Bhuiya, the claimant's own doctor, in support of her claim. However in a further letter dated 13 June 1988 the Department advised the claimant that the DMP had considered the evidence but had not changed his provisional opinion set out in the letter of 13 April 1988. The claimant was again examined on 10 September 1988 and on 24 November 1988. She was advised that the DMP was provisionally of the view that none of the medical conditions were satisfied.

8. In his written submission dated 5 January 1990 the Secretary of State's representative submits that "it is readily apparent from paragraph 2 of his decision that the DMP's view that from accepting the day attention condition was satisfied from 29 February 1988 (the day Mrs Gandhi [the claimant] was admitted to hospital) to it no longer being satisfied was based on the evidence contained in the up-to-date medical report of 10 September 1988". I do not agree. The DMP's determination is silent on this issue and there is nothing to indicate that he accepted that the claimant satisfied any of the medical conditions during the whole or any part of the period under consideration. In the light of the letter of 13 April 1988 which was confirmed in a letter dated 13 June 1988, the claimant was entitled to believe that subject to the six months qualifying period she satisfied one of the day time medical conditions as from 29 February 1988 and that this provisional view would be taken into account by the DMP in his determination of 20 February 1989. The Secretary of State's representative now submits that the DMP did not err in law in failing to have regard to the provisional view because it was not a determination in terms of section 105(3) of the Act and was not binding on the DMP in consequence. While I accept that submission, I consider it unfortunate that the DMP's provisional opinion contained in the letter dated 13 April 1988 and confirmed in the letter dated 13 June 1988 was disregarded without explanation in the letter dated 24 November 1988 setting out the DMP's provisional opinion following medical examinations on 10 September 1988 and 24 November 1988.

9. The DMP's decision was inadequate and did not comply with the requirements of regulation 25(2)(b) of the Adjudication Regulations for several reasons. The DMP failed to explain why he rejected the provisional opinion that the claimant satisfied one of the day conditions as from 29 February 1988; he failed to explain why he considered the claimant's condition had "improved" - it is not enough to say that he considered that the claimant had adapted to her disability to a degree where she no longer needed attention or supervision in terms of section 35(1) of the Act and there was no evidence to support such a conclusion; although he referred to Dr. Watt's medical report and noted that the claimant had developed hydrocephalus, he failed to explain why he rejected Dr. Watt's view that the claimant "is unable to cope on her own and requires constant attention" and he failed to give any indication that he had considered Dr. Bhuiya's medical report. The determination was erroneous on this ground.

10. As stated I propose to give the decision I consider the Board should have given. The examining medical officer's ("EMO") report on the relevant form DS4 in 1985 shows that the claimant was virtually blind and noticeably depressed; she made suicidal gestures; box 5 shows that the claimant needed no help in eight of the activities listed and needed help with four of the activities listed; she could manage to eat Indian food without help but found difficulty with English food when in hospital and she needed help to administer medication as she was unable to read the bottle labels.

11. Following the renewal claim for attendance allowance, the claimant was again examined and the EMO's report of 17 August 1987 shows little change in the claimant's condition - he described the claimant as apathetic and depressed and "still talks of knifing herself. There is a suicidal and or injury risk." Box 5 of the relevant form shows that the EMO assessed the claimant's ability to carry out the listed activities similarly to the earlier report except that he considered that she could walk and cut up food without someone's help. She needed help and supervision to administer medication because she was unable to see the labels. A medical report from a Consultant Physician dated 25 November 1987 shows that the claimant suffered from tuberculous meningitis and "repeated CT scans show mild but progressive hydrocephalus. She has had a ventriculo-peritoneal shunt inserted (May 1985) and has since remained stable - i.e. mobile but blind." On the basis of that information the claimant's claim was rejected on 7 December 1987.

12. The EMO's report of 7 March 1988 shows that the claimant was admitted to hospital on 29 February 1988 for brain surgery following brain scans on 27 January and 1 February 1988. Of the activities listed in box 5 of the relevant form the EMO assessed the claimant's ability similarly to the earlier medical reports. He noted that there was no recent suicidal talk and although blind there was no history of falls or injury. He noted that she needed help or supervision to administer medication because she was blind. Dr. Watt explained the claimant's medical condition

in the following terms:-

"As a complication of her illness she has developed hydrocephalus which has been treated by the neurosurgeons by the insertion of a ventriculo-peritoneal drain. She has also had involvement of both the nerves to the muscles of her eyes and the nerves conveying vision, as a result of which she is almost completely blind. Her present condition is apparently static, but she is unable to cope on her own and without constant attention."

Dr. Bhuiya provided a history of the claimant's medical condition and said:-

"Recent CT scan has shown multiple lumps throughout both cerebral hemispheres. She had a second ventriculo-peritoneal shunt in March 1988. She needs help for going up and down to the toilet and to bath. She is unsteady on her feet also, she is very dizzy and hardly can walk."

The EMO of 10 September 1988 assessed the claimant's ability in respect of the activities listed in box 5 of the relevant form similarly to the earlier reports. He considered that she needed help and supervision to administer medication because of poor vision.

13. I have considered all the medical evidence with care and I do not consider that the claimant's medical condition is materially different than it was during the period that she was in receipt of attendance allowance at the lower-rate. In those circumstances I consider it appropriate to issue a lower-rate certificate from 12 October 1987 because the claimant satisfies both the day conditions contained in section 35(1) of the Act. I now have to consider the period to be covered by the certificate. I appreciate that there is no medical evidence available after the EMO's report of 10 September 1988 but I am satisfied that looking at the medical evidence as a whole there is nothing to indicate that an improvement is likely in the claimant's medical condition in the immediate future. Accordingly I award the lower rate certificate from 12 October 1987 for five years which, in accordance with the provisions of regulations 2 and 3 of the Introduction Regulations, will take effect as a certificate for attendance allowance at the lower rate for the inclusive period from 12 October 1987 to 5 April 1992 and thereafter the care component of disability living allowance to 11 October 1992.

14. Under the provisions of regulation 23(3) of the Introduction Regulations I refer the question of entitlement to the respective allowances to the adjudication officer for decision.

15. The claimant's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs  
Commissioner

(Date) 7 May 1992