

page 2+3 "What activities might a reasonable person reasonably undertake"

CRO

EAS/11/LM

v. favourable.

Commissioner's File: CSA/4/87

DHSS File: SD 450/2309

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

Attendance Allowance - error of law for DMP to state that he expects a disabled person to avoid dangerous situations & :- she doesn't need attention/supervision - see CA/155/1985

Name; :

1. Mrs. [redacted] was admitted to the Western Infirmary in June 1985 because of pain in her back and legs and associated paraesthesia. An emergency operation was carried out on her spine. Following the operation some power was returned to her legs but she was left with bladder and other problems and she needed a substantial amount of care from her daughter. On 9 August 1985 Mrs I [redacted] made a claim for an attendance allowance but that was eventually rejected. She then asked for a review but the delegated medical practitioner (DMP) who carried out the review on behalf of the attendance allowance board decided that he could not revise the original decision because in his view on the evidence although from 4 June 1985 when she was admitted to hospital to 24 August 1985 when she was discharged Mrs I [redacted] had satisfied the day and the night attention conditions in section 35(1) of the Social Security Act 1975, she did not satisfy those conditions or the supervision conditions in the same section for the six months qualifying period imposed by section 35(2). All those provisions are set out in the attachment to the DMP's decision and I do not need to set them out again here. Mrs [redacted] now appeals to the Commissioner against the DMP's decision and, as is well known, to succeed with that appeal it must be shown that the decision was erroneous in law.

2. Mrs I [redacted] representative puts forward the following grounds for her appeal -

- "1) The DMP gives no adequate reasons why the suggested help supplied by my client's daughter, when emptying the suggested pail of urine, (Para. 2, Page 3, Line 1.) should not be considered as 'frequent attention' within the terms of the above Section of the Act.
- 2) The DMP has determined that my client's medical condition has generally improved, with regard to the medical examination's report of 25.02.86 (Para 2, Page 3, Lines 4-5), to the extent that she "----- only needs -----" help in the shower, but omits any findings on her need for help with her clothing or her need when her bowels are manually evacuated, both factors indicated in the same medical report.

In my view the omission of reference to these two facts in the determination imparts a failure on the DMP to indicate findings of fact on these two most important factors both of which are substantial issues within the terms of this Section of the Act.

- 3) It is my contention that the DMP's determination that my client does not meet the conditions of this part of the Section is erroneous in law.

I would quote for support Commissioners Decision R(A) 1/72 where the Commissioner held that;

- (a) a decision may be held erroneous in law if;
- (b) it is supported by no evidence.

or

- (c) the facts found were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question.

- In his determination the DMP states (Para 3, Page 4, Line 5) that there is "-----, the remote possibility of her falling -----". Firstly, there is no evidence to support such a claim. Secondly, there is ample evidence to the contrary, in the form of a written statement from my client that indicates that the above "possibility" is far from "remote". I also believe that had cognizance been given to Commissioners Decision R(A) 1/83 then the determination under this section would have been other than that made.

- 4) In Para 4, Page 5, Line 21 the DMP indicates that my client can change her urine bag herself emptying its contents into a bucket beside the bed. He gives no findings as to who should then empty this bucket or whether that function should be considered as part of my client's night-time requirements or day-time requirements.

As can readily be seen findings on the above are not only necessary in ascertaining qualification in this part of the above section but also 35 (1) (a) (i).

Again in support of my contention that the determination under this section is erroneous in law. I would refer to R(A) 1/72 Para (1)(c)."

In my view the DMP's decision is erroneous in law for the reason suggested in ground (3) above. There was evidence before the DMP that Mrs [redacted] had fallen down three times in 1986, at least two of those occasions being in the same month. As to that and in connection with the daytime supervision condition the DMP said in his decision that -

"I do accept that although her mobility has improved, there is still the remote possibility of her falling and this, together with her feeling of nervousness, may give rise to a need for supervision when she is in predictable, potentially dangerous situations such as getting into or out of the shower/bath, negotiating stairs and when outdoors ~~she may have to be taken by some form of transport or pushed in a wheelchair.~~ However, I am satisfied by the evidence that Mrs [redacted] is a sensible woman and would not expect her to undertake any predictable, potentially dangerous action without first ensuring that she was adequately supervised. Any supervision thus given would not, in my view, amount to continual supervision throughout the day. It is my medical opinion that she should be able to take precautions to minimise the possibility of falling when moving about and I would not expect her to undertake any activities which were beyond the limits imposed by her disabilities. Consequently, I do not accept that the risk of her falling and injuring herself requires continual supervision throughout the day."

That in my view does not take full account of the evidence that Mrs [redacted] had fallen on several occasions and, as her representative points out, to describe the possibility of falling as "remote" seems to fly in the face of what has actually happened. There is a further point which arises from the passage in the DMP's decision which I have underlined. A similar proposition was considered by the Commissioner in CA/155/1985. He said (paragraph 11) -

"11. There is in my judgment also an error of law in the sentence -

"Equally, I would expect him to be aware of dangerous situations and not to involve himself in activities beyond the limits imposed upon him by his disablement."

The ambit of that sentence appears to me to be so unclear as to amount to an error of law. If it meant that a blind person should not rashly engage in occupations dangerous for him (skiing or car driving come to mind) that is one thing, but if it is meant that a teenage boy such as M. should not do those things which a teenager albeit with such a disability would reasonably do, such as go to school (and M. attends a school for the blind) then the proposition is - to put it no higher, doubtful. Moreover the concept of being "aware of dangerous situations" may carry the implication that M. must not move out of his familiar surroundings such as his home; danger may lurk unexpectedly for a blind person. Again I am unclear as to the breadth of the proposition intended to be encompassed by this statement, and its uncertainty in my judgment is an error of law."

I agree with that and it seems to me that similar considerations apply in relation to what has been said in Mrs [redacted] case. If she is at risk of falling and indeed there is evidence that she has fallen it is simply not enough to say, as the DMP does, that she should take precautions and undertake only those activities which are within the limits imposed by her disabilities. Is he suggesting that when she has fallen she has been engaged in activities she should not sensibly have undertaken? Is she not to move from her chair without assistance? Is she expected to remain chair bound until assistance is available? If whenever she moves from her chair she needs supervision why does that not satisfy the condition?

3. I allow Mrs [redacted] appeal for the reasons to which I have referred. When the case is redetermined consideration will need to be given not only to the matters which I have mentioned above but also to the point made on behalf of Mrs [redacted] that on the evidence her need for assistance was not confined to those occasions when she took a shower.

(Signed) R A Sanders
Commissioner

Date: 15 July 1988