

JGmi/AB

Commissioner's File: CSA/68/91

*50/92

SOCIAL SECURITY ACTS 1975-1990

APPEAL TO THE COMMISSIONER FROM DETERMINATION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: MISS PATRICIA BRODIE

1. My decision is that the determination on review dated 23 April 1991 given by a Delegated Medical Practitioner (DMP) for and on behalf of the Attendance Allowance Board (the Board) is erroneous in law and is set aside. The decision which I give in its place is that the adverse decision of a DMP on behalf of the Board dated 7 August 1990 falls to be revised. The period commencing on 24 October 1989 and continuing to 23 October 1993 is a period throughout which the claimant has been or is likely to be so severely disabled physically as to require from another person repeated attention at night in connection with her bodily functions and has been immediately preceded by a like period of 6 months. I refer my decision to the adjudication officer who will determine the claimant's application for review in accordance with it.

2. This is an appeal by the claimant with leave on a question of law against the above mentioned determination on review dated 23 April 1991 in which the DMP reviewed (on any ground) but refused to revise the previous decision of a DMP given on a claim from 24 October 1989 that the claimant did not satisfy any of the day or night conditions of attendance allowance under Section 35 of the Social Security Act 1975.

3. The claimant, who was born on 9 August 1964, has had the misfortune to suffer from Crohn's Disease since the age of 11 and has undergone a number of surgical procedures over the years in connection with that condition. Attempts were made for a time to support the claimant nutritionally by means of a specialised diet via a nasogastric tube. This form of artificial feeding was poorly tolerated by the claimant and contributed to her short stature and reduced development. From November 1989 the claimant began to receive intravenous feeding through a catheter surgically inserted through the chest and connected to a volumetric infusion pump regulating the flow of a specially prepared intravenous diet contained in a 3 litre feeding bag. This apparatus known as a total parenteral nutrition machine (TPN) is housed on a heavy stand with small wheels. The claimant is able to be independent through the day but between the hours of 6pm and 8am at night is attached after careful preparation in sterile conditions to the TPN machine. As that machine delivers substantial quantities of fluid the claimant is obliged to make about 6 visits to the toilet between 10pm and 8am at nights and for this purpose has assistance from her sister or mother in manoeuvring the TPN machine with her to and from the toilet. As a result of her condition the claimant is only some 4 feet 8 inches tall and weighs some 6 and a half stone.

4. Dealing with the question of the claimant's need for attention from another person by night in connection with her bodily functions the DMP included the following in his determination on review:-

Night Attention.

"11. The medical report showed that in the opinion of the examining

doctor you did not need attention during the night hours. However, the Consultant Surgeons said in their reports that you experienced difficulty manoeuvring the equipment at night on the frequent occasions when you had to visit the toilet and these problems were obviously exacerbated at times when your Crohn's disease was active.

12. I accepted that a severe exacerbation of Crohn's would be very debilitating but symptoms experienced as described by the Consultant Surgeon in his report of 8 June 1990 while preventing you from providing your own nutritional support in my opinion would not significantly affect your ability to manoeuvre TPN bag and stand. I accepted carpets would be difficult and noted the difficulties experienced at night. However, it was my medical opinion that it would be reasonable to "clear a path" by rolling up carpets en route to toilet or laying down thick polythene matting to aid propulsion of the stand.

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14. The examining doctor said in the medical report that you pulled the machine across the room to where he was sitting and had no difficulty doing so. Consequently, I concluded that you did not satisfy the night attention condition."

5. In supporting the claimant's appeal against the termination of the DMP the Secretary of State's representative has made the following submission in paragraph 5 of observations in the present appeal:-

"In the present case the DMP considered it reasonable to suggest means to "clear a path" to obviate a need for nocturnal help with the propulsion of the claimant's TPN apparatus when going to the toilet. But, in so doing the DMP gave no indication as to whether or not he had taken into account the practical issues involved in such a suggestion. In other words the DMP failed to consider the feasibility of his suggestion. In consequence it is submitted the DMP's findings were inadequate and this constituted in law."

Having regard to the practical difficulties of and objections to the DMP's suggestion which immediately come to mind and which have been pointed out by the claimant I accept the Secretary of State's submission which is made under reference to 2 decisions on the Commissioner's file, CA/092/89 and CA/793/89.

6. In addition however the DMP has in my opinion failed to consider if assistance from another person is reasonably required by the claimant at night having regard to the relevant facts. See reported decision R(A)3/86 and the case of Regina v a Social Security Commissioner, ex parte Connelly 1 WLR 424. The relevant circumstances to be taken into account in the present case are obviously the claimant's small size, the awkwardness, size and weight of the machine and the difficulty of repeatedly manoeuvring it safely to and from the toilet by night, the need to maintain sterility and avoid the risk of overturning the machine, the number of occasions by night that this journey requires to be made, and the debilitating effects of the claimant's condition, particularly during exacerbations of it. The examining doctor's account of the claimant, when not attached to the machine, moving it once, by day, across a room was of limited value.

7. For the foregoing reasons the determination on review of the DMP is erroneous in law. I set that determination aside. The question of the feasibility of the claimant manoeuvring the TPN machine to and from the toilet by night unassisted and the reasonableness or otherwise of her requirement for assistance from another person are in my view largely non-medical issues and I consider it appropriate to exercise the power now available to me in accordance with the provisions of regulation 23 of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 to give the decision which the DMP should have given. Having regard to the circumstances referred to above I am satisfied that the claimant's condition has all along since November 1989 given rise to a need for repeated attention at night from another person in connection with her bodily functions. That need may, with the advance of medical and mechanical science, not continue indefinitely but I regard it as reasonable to treat that need as likely to continue to exist at any rate for the period up to 23 October 1993. So far as the requirement of section 35(2)(b) of the Social Security Act 1975 that the need should have existed for at least 6 months before the date of claim is concerned, the evidence of the examining medical practitioner who reported on 9 May 1990 indicates that the claimant required rather more assistance by night in that period when receiving nutrition by the nasogastric line. I am satisfied that the 6 months qualification is met in the circumstances of this case. My substituted decision is accordingly as set forth in the second part of paragraph 1. above and is referred to the adjudication officer for determination of the claimant's application for review in accordance therewith.

8. As a result of recent changes in the law the award of attendance allowance at the lower rate to which the claimant will become entitled in consequence of this decision technically becomes from 6 April 1992 an award of the middle rate of the care component of the new benefit called Disability Living Allowance, payable at the same rate.

9. The appeal of the claimant is allowed.

(signed) J G Mitchell
Commissioner
Date: 1 July 1992