CA/17/1977

RJAT/KMG

SOCIAL SECURITY ACTS 1975 TO 1977

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

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: Roy Howarth
On behalf of: Annie Howarth (Mrs)

1. This is an appeal by the claimant's husband on behalf of the claimant from a decision on review given on 24 September 1976 on behalf of the Attendance Allowance Board. The application for leave to appeal was made on 15 December 1976; on 13 June 1977 the applicant adopted certain questions involving points of law identified in a note dated 9 June 1977 upon which submissions were made on 22 August 1977 on behalf of the Secretary of State. I granted leave to appeal on 1 September 1977 and the applicant completed Form DS 219, the appeal form, on 12 January 1978. I extend the time so that the appeal may now be determined.

2. The review decision of 24 September 1976 decided that a decision of 10 June 1976 should not be revised. It decided in connection with a claim for attendance allowance that the claimant did not satisfy either of the day conditions or either of the night conditions in section 35(1) of the Social Security Act 1975, and the decision of 24 September 1976 was to like effect.

3. The delegated medical practitioner among other matters had to consider the question whether the claimant required continual supervision throughout the day in order to avoid substantial danger to herself or others, and whether there was a similar requirement throughout the night. In his consideration of the daytime requirement his decision contains the following observations. "The main fear is that she will have an epileptic attack during which time she could possibly fall and injure herself. However, while I accept that there is always this possibility, it would be unrealistic to provide continual supervision in anticipation of an epileptic attack and furthermore, no amount of supervision could possibly prevent such an attack occuring. ... However, while I accept that it is possible to suffer injury during an attack, by falling, it is very rare in practice for such dangers to manifest themselves although minor injuries resulting from biting the tongue or lips and minor abrasions caused by falling are more likely to be suffered."

4. He continued, having dealt with certain aspects of the evidence, "Her husband says in his latest signed statement that she has at least 4 fits a week but they can be more frequent, but as I have previously stated, no realistic amount of supervision could prevent such an attack occurring. I accept that Mrs Howarth is at risk, because of her tendency to epileptic fits, only when she is doing certain things i.e. using stairs, moving about in front of an unguarded fire, cooking with boiling water or when exposed to hazards in the kitchen. These are not unpredictable activities, however, and when Mrs Howarth wishes to do something which, if she had a fit simultaneously, might put her at risk she can provide herself with an escort". In conclusion as regards the requirement for supervision he found against the claimant, using the statutory language.

5. The word 'unrealistic' forms no part of the statutory language which deals with the requirement for supervision. Consideration of whether the provision of continual supervision would be unrealistic or not in anticipation of an attack is an erroneous approach to the statutory provisions, and the written submission of 22 August 1977 on behalf of the Secretary of State concedes that it is wrong in law; it is also accepted that it is wrong in law merely to consider the question of supervision in the light of whether supervision would prevent an epileptic attack from occurring.

6. The delegated medical practitioner accepted that the claimant was at risk when engaged in activities during the day where a potentially hazardous situation might arise. On such predictable occasions he concluded that supervision by an escort could be provided, presumably to enable her to avoid dangers which might arise if she had a fit whilst engaged in such activities. He concluded, in effect, that supervision on such predictable occasions would not constitute continual supervision.

7. That conclusion in my opinion must have proceeded from an erroneous view of what is meant by "continual supervision", which is the statutory language. It is not "continuous supervision", uninterrupted in time or sequence, but is supervision which is always going on or regularly recurring. (Decision C.A. 5/72). If the claimant was at risk at predictable intervals during the day, depending on where she was and what she was doing, the provision of escort supervision on such occasions would constitute continual supervision. I think it an error of law to conclude that because potentially hazardous activities (illustrated by the delegated medical practitioner) could be identified, supervision required on such occasions could not constitute continual supervision.

8. In my opinion the above errors go to the root of the decision and must materially have affected consideration of what the delegated medical practitioner had to decide.

9. I allow the appeal and set the decision of 24 September 1976 aside as erroneous in law. The review application will be for fresh consideration.

(Signed) R J A Temple
Chief Commissioner

Date: 3 May 1978

Commissioner's File: C.A. 17/1977
DHSS File: SD 450/885