

RJAT/VNW

SOCIAL SECURITY ACTS 1975

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

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: James Peter Lomas
On behalf of: Anne Lomas (Mrs)

Decision C.A. 5/76

1. This is an appeal made on behalf of the claimant to whom a lower rate certificate for attendance allowance was awarded on 23 April 1974 under section 2(2) of the National Insurance Act 1972 (now section 35(2) of the Social Security Act 1975), it having been decided that she satisfied one of the conditions in section 2(1) of the Act of 1972, that is to say, one of the day conditions.
2. An application was made for a review of that award, and on 13 January 1975 a delegated medical practitioner refused to revise the decision of 23 April 1974 on the ground, that although the claimant satisfied the condition in section 2(1)(a)(i) of the National Insurance Act 1972 he was not satisfied that she fulfilled either of the night conditions in section 2(1)(b) of the Act of 1972.
3. In a letter received by the Attendance Allowance Unit at Blackpool on 21 March 1975, and which was in fact addressed to "The Commissioner", the claimant (acting by her husband) wrote "I am appealing to the National Insurance Commissioner against the decision of the Attendance Allowance Board dated 13 January, 1975, allowing only the day time rate of allowance to my wife". The grounds of the appeal were then set out. Nothing could be clearer than that the intention was to seek leave to appeal to the Commissioner on a point of law. The matter was, however treated as an application for review, and in the result on 8 August 1975 a second delegated medical practitioner purported to decide that the determinations of 23 April 1974 and 13 January 1975 be not revised.
4. Representations, which it is unnecessary to set out, were made on the claimant's behalf to the Joint Under Secretary of State, who arranged for an application form for leave to appeal to be issued to the claimant's representative in respect of both decisions, and an application, received on 17 October 1975, was made for leave to appeal on a question of law from the decision of 8 August 1975. That application, together with submissions of 27 November 1975 on behalf of the Secretary of State, was considered by the Commissioner, who on 13 February 1976 granted leave to appeal from the determination of 13 January 1975, and it is the appeal from that decision with which I am now concerned.

Decision C.A.5/76

5. For reasons which he set out when giving leave to appeal ~~the~~ Commissioner held that the second delegated medical practitioner had no power to review the determinations of 23 April 1974 and 13 January 1975. Consequently he held that the decision of 8 August 1975 was a nullity, and gave leave to appeal from the decision of 13 January 1975, which was the relief for which the claimant had originally asked, and which conceded error on the part of the Department had prevented her from pursuing.

6. I refer to the written submission relevant to this appeal, and made on behalf of the Secretary of State, dated 15 June 1976. It is submitted that the decision of 8 August 1975 was not a nullity, for want of compliance with regulation 8 of the Social Security (Attendance Allowance) (No 2) Regulations 1975 S1 1975 No 598.

7. The Commissioner gave leave to appeal from the decision of 13 January 1975. Form DS 219 supplied to the claimant on 25 February 1976 for this appeal gives the date of the concerned decision as 8 August 1975, which the submission on behalf of the Secretary of State submits, - contrary to what the Commissioner found -, is not a nullity. The Commissioner's reasons are said to be reasons for which he contends. I do not think that the use of the word "contends" in relation to what the Commissioner determined is appropriate. If the granting of leave is itself appealable, no such step has been taken; if not appealable, then it is final. So I do not consider that the submission involving the proposition that there was an error of law in holding that the decision of 8 August 1975 was a nullity is open to be taken.

8. If however the point is open for submission I refer to regulation 8(2) of the 1975 Regulations which provides "(2) if within 12 months of an application having been made as in paragraph (1) a further review is sought, it shall be a requirement for such review that leave of the Board to make the application is first obtained". The original application for review was made on 26 September 1974, and it is submitted that the requirement of leave to make the application (of March 1975) was satisfied because the delegated medical practitioner, acting on behalf of the Board, stated at paragraph 2 of his decision of 8 August 1975 "I accept the letter received 21 March 1975 ... as an application for a further review and I grant leave for the application to be made".

9. Under regulation 8(2) leave to make application for further review must first be obtained before the substantive application is made. No such leave was ever asked for, or given before receipt of the letter on 21 March 1975 which was subsequently 'accepted' as the substantive application for further review. There was no application for further review to which leave could be related, and to "accept" the letter for what it was not could not change its character from what it clearly was, an intended appeal to the Commissioner. In my view the reality of the situation is that in stating that he gave leave for an application for further review the delegated medical practitioner was erroneously accepting jurisdiction under a specified provision to deal with an application which had not been made, which was not subsequently made, and if it had been made by the letter in question, was made without any leave first obtained. In the circumstances the acceptance and the leave given neither created or validated anything in respect of which a decision on further review could be given, and in my view there was no compliance with regulation 8(2).

10. Further to the point that the decision of 8 August 1975 was not a nullity for want of compliance with regulation 8(2), the provisions of section 106(4) of the Social Security Act 1975 are relied upon, in that although regulation 8(1) was made under the provisions of that subsection, it provides that "nothing in this subsection prevents ~~such~~ a review from being undertaken in a case where no application is made". The delegated medical practitioner did not, however, regard himself as undertaking a review under the Board's powers in such a case, but clearly acted on a supposed application by the claimant in a situation specifically provided for (see paragraphs 8 and 9 above). He had no recourse to the powers of the Board acting, as it were, of its own motion, and never called such powers into operation or intended to do so. No doubt an appellate court may endorse by its own judgment a decision by an inferior court which could have been made under powers available, but to which recourse was not had. But unless and until the decision of the inferior court is so endorsed by the appellate court, itself applying the correct jurisdictional basis, it does not in my opinion validate a decision, otherwise erroneous, to point to the fact that it could have been made under existing powers which were not in fact exercised.

11. I turn therefore to the substance of the claimant's appeal from the determination of 13 January 1975. Two points concern the night condition contained in section 2(1)(b)(ii) of the 1972 Act, namely, whether the claimant is so severely disabled physically or mentally that at night she requires from another person "continual supervision throughout the night in order to avoid substantial danger to herself or others". I will deal with the first of the points raised.

12. The delegated medical practitioner stated that there was "no evidence to show that because of her medical condition she is exposed to constant serious risk in the night hours". He noted that the latest medical report recorded that she was never left. That report of 7 November 1974, when the answer is read with the question, records that by night there was no period of time during which the claimant can be safely left unsupervised. There was a supplementary report of the same date on the claimant as an adult with mental disorder, which stated generally, with no specific attribution to day or night, that the most obvious reason for constant surveillance was the claimant's sudden and apparently unprovoked attacks of violent and irrational temper. Dr Cochrane on 26 September 1974 had described the claimant as unable to form reliable judgements. The available medical reports agreed that the claimant could turn in bed, and on 17 December 1974 the husband wrote that during the night constant checks were necessary to ensure her safety, because there was a real danger that she could fall out of bed or attempt to get out unaided.

13. The question for the delegated medical practitioner was whether the claimant was so severely disabled physically or mentally that at night she required continual supervision in order to avoid substantial danger to herself or others. Continual supervision to avoid exposure to "constant serious risk" is not the requirement, and in my opinion is a different and more stringent test than the regulation provides. The object of supervision is not necessarily directed to constant danger, but is to avoid substantial danger, which may or may not arise, and supervision may be precautionary and anticipatory yet never result in intervention (see the reported Commissioner's Decision R(A) 2/75 paragraph 9). It seems to me that the evidence was considered in relation to a question not covered by the statutory language. It is submitted on behalf of the Secretary of State that even if the delegated medical practitioner did not have sufficient regard to the statutory language, this was not material to his decision, as he gave

Decision C.A. 5/76

adequate reasons for his findings that the claimant was not a substantial danger to herself or others.

14. As to this submission I do not think it possible to ascertain to what degree the conclusion that the claimant failed to show that she was exposed to "constant serious risk" contributed to or affected the conclusion, expressed in the statutory language, that she did not require continual supervision to avoid "substantial danger". It does however, indicate that at some stage in his consideration of the evidence, the delegated medical practitioner was, as I think, testing the claimant's requirement for supervision by a standard other than that which the statutory provision enjoins, and substituting "constant serious risk" for "substantial danger". Such departure in my view was a wrong approach and a misdirection, and it would be speculative and unsatisfactory to hold that his ultimate conclusion, although expressed in statutory language, had not been affected by it at all.

15. I do not therefore find it necessary to express any view on the further submissions made on behalf of the Secretary of State, but for the above reason I allow the appeal. The decision of 13 January 1975 is set aside as erroneous in law and the matter remitted for fresh consideration.

(Signed) R J A Temple
Chief Commissioner

Date: 9 August 1976

Commissioner's File: C.A. 44/1975
D.H.S.S. File: S.D. 2360/825