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SOCIAL SECURITY ACTS 1975 TO 1977

APPLICATION FOR LEAVE TO APPEAL AND APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: K Curwen (Mrs)
On behalf of Andrea Curwen

[ORAL HEARING]

Decision C.A. 4/77 No. R(A) 1/78

1. This is an application for leave to appeal on a question of law from the decision on review of the Attendance Allowance Board dated 13 and 20 December 1976. I directed an oral hearing of this application, and on 17 November 1977 Mr Mark Rowland of the Citizens' Rights Office of the Child Poverty Act Action Group appeared for the claimant/applicant, and Mr H D Nathoo of the Solicitor's Office, Department of Health and Social Security, represented the Secretary of State. The application raised points of law which were argued, and consents had been given that in the event of leave to appeal being granted I should determine the questions of law as though the application were the appeal. I grant leave to appeal, and proceed to determine the questions of law accordingly as though the application were the appeal.

2. The applicant is the mother of a child to whom I will refer as Andrea, and in respect of whom the claim for attendance allowance is made. Andrea was born on 6 September 1968. I do not consider it is necessary in this decision to set out in any detail her present condition, which sufficiently appears from the medical reports, save to say that they record the diagnoses made as spina bifida, hydrocephalus, dislocation of the hip and recurrent bronchitis. A claim for attendance allowance was made initially on 7 July 1971, and on 10 September 1971, on a review application it was decided that Andrea satisfied one of the conditions of section 4(2) of the National Insurance Act 1970 as modified by the National Insurance (Attendance Allowance) Regulations 1971 [SI 1971 No 621], and a certificate to that effect was thereupon issued for the period from 6 December 1971 to 10 September 1976.

3. On 17 June 1976 a renewal claim was made for the allowance, the relevant statutory provisions then being section 35(1) of the Social Security Act 1975 as modified by regulation 6(1) and (2) of the Social Security (Attendance Allowance) (No 2) Regulations 1975 [SI 1975 No 598]. On 23 July 1976 a delegated medical practitioner decided that Andrea satisfied one of the day conditions (frequent attention) but neither of the night conditions for allowance. So he issued a lower rate certificate under section 35(2) of the 1975 Act with effect from 11 September 1976 to 23 July 1979.

4. The claimant applied for a review; further evidence was submitted and obtained, and on 13 December 1976, with an addendum dated 20 December 1976, it was decided on review that the decision given on 23 July 1976 should not be revised. That review decision is now challenged as being erroneous in law, and the submissions of law were directed to showing that the night conditions were wrongly held not to be satisfied. Had a night condition been satisfied the claimant would have received a higher rate certificate.

5. As modified by the regulations, and applicable in Andrea's case, section 35(1) provides for entitlement to attendance allowance if

> "(b) the child is so severely disabled physically or mentally that, at night, he requires from another person either -
>
> > (i) prolonged or repeated attention during the night in connection with his bodily functions (being attention substantially in excess of that normally required by a child of the same age and sex), or
> >
> > (ii) continual supervision throughout the night in order to avoid substantial danger to himself or others (being supervision substantially in excess of that normally required by a child of the same age and sex)".

6. Mr Rowland's first point was that in relation to Section 35(1)(b)(ii) the delegated medical practitioner misdirected himself on the question of "continual supervision", because it appeared that he thought that if Andrea had the ability to summon assistance, there was no need for continual supervision. He relied on the Commissioner's Decision R(A) 2/75, paragraph 10, to support his submission. The delegated medical practitioner expressed himself thus. "There is nothing in the latest medical report dated 30 September 1976 to indicate that she is deemed to need more supervision than is fitting for her age by night. Clearly, she could not be left alone in the house at night since on occasions she requires help when she has pain from wind or if she is uncomfortable. However, there seems to be no question of someone having to exercise continual supervision throughout the night and furthermore, her need for someone nearby appears to be related more to the need for someone to provide attention, as and when required, rather than for the purpose of avoiding substantial danger. Her behaviour is described as being normal and the fact that she is unable to get out of bed without assistance from another person, reduces to a large extent her liability to danger at night. She is able to summon assistance if required and having regard to the evidence before me I do not accept that she requires continual supervision throughout the night to avoid substantial danger to herself or others ..." In my opinion the above passage from the decision must be read as a whole, and I do not think that the delegated medical practitioner was saying that Andrea's ability to summon assistance was a sufficient reason, in itself necessarily excluding the requirement for an overall anticipatory supervision. (See Decision R(A) 2/75 paragraph 10). It was further submitted that the delegated medical practitioner did not address his mind to the question whether, if supervision was not continual, there was substantial danger to Andrea if no attention was given to dealing with her pain from wind, it being suggested that he had limited his consideration of possible dangers to those likely to arise from external sources, or from injuries self inflicted, to the exclusion of possible danger arising from the condition of wind itself.

7. It seems to me, however, that it is clear from the passage quoted above that the question of pain from wind was considered, not only in relation to nighttime attention but also in the context of supervision to avoid substantial danger. The delegated medical practitioner found that the need to have someone nearby was directed to the provision of attention, and in contrasting the need for attention with the requirement of supervision for the avoidance of substantial danger, he must have considered the circumstances for which attention was required, namely the pain from wind, and

concluded that that condition was not one of substantial danger in itself for which continual supervision was required.

8. The final point taken on behalf of the claimant arises out of the following admitted facts. Andrea is incontinent, and because her bladder does not empty completely there is a possibility of infection of the bladder and kidneys. Every 2 to 3 hours from rising in the morning until she is put to bed for the night Andrea receives attention from her mother to express the bladder manually, and to help evacuate the bowels.

9. Andrea does not require much sleep, and normal bedtime would be between 8.00 and 8.30 pm. She is in fact put to bed at about 10 pm so that the claimant herself may get some rest. Between about 8.30 pm and 10 pm the claimant gives the attention to Andrea which I have described above. The claimant herself goes to bed at about 10 pm, and when she rises at 6.30 am, Andrea is often then awake.

10. Holding that attention was not required with sufficient frequency to enable him to find that the night attention condition was satisfied, the delegated medical practitioner considered the attention given by Andrea's parents before they retire to bed at night to be attention required by Andrea during the day. The claimant's case is that this shows an erroneous approach; that the attention given to Andrea immediately before she is put to bed and the claimant herself goes to bed, is attention at night, and during the night. She relies on the approach adopted by the Commissioner in the unreported Decision CA 6/76, and upon certain observations of Lord Widgery L.C.J. in Regina v National Insurance Commissioner. Ex parte Secretary of State for Social Services [1974] 1 WLR 1290, reported as an appendix to Decision R(A) 4/74.

11. The delegated medical practitioner expressed his approach to "night" and "day" as follows. He wrote "I take the view that the question when "day" and "night" begin and end is not one which is probably susceptible to a universal answer, but is a question which should be determined having regard to the circumstances of each case. In this case I consider that the "night" begins when all normal activities of the household have ceased, the house closed for the night and the attendant has retired to bed".

12. The question is whether that was an erroneous approach to the meaning to be given to "night" in section 35(1) of the Social Security Act 1975, having regard to the observations of the Lord Chief Justice on the meaning of "night" in regard to section 4(2) of the National Insurance Act 1970 replaced by section 2(1) of the National Insurance Act 1972 now section 35(1) of the 1975 Act.

13. In Regina v National Insurance Commissioner, Ex parte Secretary of State for Social Services the question canvassed, which had arisen for determination by the Attendance Allowance Board was whether assistance required by an adult claimant when going to bed and getting up was assistance properly attributable to the day and not to the night. As to the meaning of "night", and by way of guidance to Attendance Allowance Boards when dealing with the problem whether the operations of going to bed and getting up are operations attributable to the day or the night, the Lord Chief Justice pointed out ([1974] 1 WLR at page 1296) that counsel concerned had invited the Court to regard the night for the purpose of the section as being that period of inactivity, or that principal period of inactivity through which each household goes in the dark hours, and to measure the beginning of the night from the time at which the household, as it were, closed down for the night. He continued, "I would commend to boards dealing with this difficult question in future that they should look at the matter in that way."

14. The Lord Chief Justice then referred to suggestions which had been put forward during argument on the question when night begins. At paragraph G he said "It has been suggested also that night for this purpose begins when a child who having run about during the day is eventually put to bed, kissed by his mother, told to go to sleep, the light is put out and the door is shut. For that child it is perfectly sensible to describe "night", as beginning when the child was settled down for the night in that way."

15. Based on the above passage, and supported by the Decision of the Commissioner in Decision CA 6/76 (unreported) the contention is that in the case of a child who is put down to sleep before the household closes down, "night" for the purpose of the relevant statutory provisions is the child's night, from the time he is put to bed until he awakes, and that "the coming of night according to the domestic routine of the household" (see p 1296 paragraph H) is an erroneous test in the case of a child. With the facts of this case and whether, if the contention is well founded and the appeal is allowed,

further consideration would on the facts result in a more favourable result for the claimant on the application of the proposition contended for, I am not concerned to deal.

16. A perusal of the judgment, with which the other members of the Court agreed, shows that the meaning of the words "day" and "night" was required to be consistent with the background distinction between service by day and service by night (page 1296, paragraph D), the purpose of the Act and the provision it seeks to make being related to the domestic routine, the distinction between "day" and "night" being made because attendance at night may be far more onerous for the attendant than it would be during the day, when the house was alive and people are about. The concept of a "child's night" starting when the child is put to bed at a time when the household is still active, and people are about, abandons that background related to the domestic routine of the household as such. I do not consider that in expressing agreement with what was put forward in argument it was intended obiter to put a gloss on the construction to be given to "night", which was based on the time when the attendant was called upon to function. It is to be observed from the report of the case that the final injunction is expressed as follows: "In future when these matters come before attendance allowance boards, I would recommend them first to instruct themselves as a matter of law in the meaning of "night" which I have given to it, namely, the coming of night according to the domestic routine of the household"; and that was the approach which the delegated medical practitioner adopted in this case.

17. The "child's night and day" approach would result in anomalies valid so long as the child did not attain 16 years of age. (The Social Security (Attendance Allowance) (No 2) Regulations 1975 regulation 1(2).) Thus a child who required prolonged or repeated attention after he went to bed i.e. during his night but whilst the parents were still up and about, if he also satisfied a day condition, would attract a higher rate allowance, whereas a child who required frequent attention after he got up in the morning but before his parents did, would not. Thus the mother whose sleep had not been disturbed at night would receive a higher rate, but the mother whose sleep was disturbed by the child's early rising would still receive the lower rate. Further in such case a higher rate award would be appropriate for a child who went to bed at 6 pm but who required one item of prolonged attention during his night before his parents went to bed to an uninterrupted night's sleep, but such a family including a disabled adult satisfying a day condition

who retired when the household did would not be entitled to a higher rate, no matter how much attention he required after 6 pm until the household went to bed.

18. I regret that for the above reasons I am unable to follow the approach of the Commissioner in Decision CA 6/76 (unreported) which I have read and considered. My view is that the meaning of "night" commended by the Lord Chief Justice applies to all claimants, children and adults alike, and I do not find the approach of the delegated medical practitioner in this respect to be erroneous in law.

19. In the result my decision is that the points of law raised by the claimant are not established; the decision dated 13 and 20 December 1976 is not erroneous in law, and I must therefore disallow the appeal.

(Signed) R J A Temple
Chief Commissioner

Date: 5 December 1977

Commissioner's File: C.A. 48/1977
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