

SOCIAL SECURITY ACTS 1975 TO 1986

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

DECISION OF THE CHIEF SOCIAL SECURITY COMMISSIONER

Name: [REDACTED]

[ORAL HEARING]

1. My decision is that the delegated medical practitioner erred in law in his decision in this matter dated 20 February 1987 and I set that decision aside.

2. I held an oral hearing of this appeal by the claimant. She was represented by Mr. Eric Illsley MP. The Secretary of State was represented by Mr. N. Butt of the Solicitors Office of the Department of Social Security. After the oral hearing I asked for the parties' submissions on a Decision of a Commissioner which had come to my attention, namely CA/168/87, and I received subsequent written submissions. The parties did not ask for a further oral hearing, rightly in my view, and I have not found it necessary to direct one. I am grateful for the skilful and pertinent submissions which I have received both at the oral hearing and subsequently in writing.

3. The case concerns the day conditions for attendance allowance. The claimant was born on 25 August 1941. She is a married lady living with her husband and two daughters aged in the early 20s. She unfortunately suffers from retinitis pigmentosa, which is an affliction of the eyes which is progressive. By December 1984 her vision had virtually completely deteriorated and she could only distinguish between light and dark.

4. For the period between 3 January 1985 and 12 December 1985 the claimant had been held to be entitled to and had been in receipt of attendance allowance. A renewal claim for attendance allowance was made on her behalf shortly before the then existing certificate expired, but on 13 November 1985 it was held that the relevant conditions under section 35(1) of the Social Security Act 1975 were not satisfied and accordingly the renewal claim for attendance allowance was rejected. The claimant has sought to reverse that rejection.

5. It is necessary in view of a point which I make later to summarise the procedural history subsequently of this matter.

The claimant (by which reference in the context of this case I mean by herself or by her daughter subsequently) applied for a review of the decision of 13 November 1985. There had been a medical examination report on 10 October 1985 and there was a report by the claimant's general practitioner on 2 March 1986, both of which contained elements supportive of the claims made by the claimant. On 25 June 1986 a delegated medical practitioner on behalf of the Attendance Allowance Board by his decision on review determined not to revise the decision of 13 November 1985. On 9 July 1986 the claimant's general practitioner issued a certificate to the effect that the claimant suffered from a "quite severe form of retinal atrophy (cone rod dystrophy - autosomal recessive)" (confirming his report of 2 March 1986) and the doctor stated as follows:-

"She is severely handicapped in managing on her own. She needs constant day and night supervision, in and outside her house for own safety."

The claimant subsequently lodged an application to a Commissioner for leave to appeal against that review decision, but certain letters were treated as a further application for review, leave for that application within 12 months of a previous application for review having been granted. I think it right to infer that the application for leave to appeal against the decision on review of 25 June 1986 was implicitly withdrawn. There was a subsequently medical examination of the claimant on 15 October 1986, and on 20 February 1987 a delegated medical practitioner on behalf of the Attendance Allowance Board conducted a review and by his decision declined to revise the earlier decision of 25 June 1986.

6. The material provisions are those contained in section 35(1) of the Social Security Act 1975. It is only the day conditions which are material in the present case, and the relevant statutory provision is as follows:-

"35.-(1) A person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain and either -

- (a) he is so severely disabled physically or mentally that, by day, he requires from another person either -
 - (i) frequent attention throughout the day in connection with his bodily functions, or
 - (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others;"

The alternative introduced by "either" refers to the night conditions. There is no issue about the satisfaction of the prescribed conditions in the present case.

7. It is clear that the delegated medical practitioner had before him the letters treated as constituting an application for

the second review (in fact of 11 and 14 July 1986), together with the doctor's certificate of 9 July 1986 to which I have referred, and also the report of the further medical examination held on 15 October 1986. I am prepared to assume that he also had before him what the earlier delegated medical practitioner considered on 25 June 1986, which included the reports of 10 October 1985 and of 2 March 1986. There is no evidence however that the delegated medical practitioner had before him the medical report of 3 December 1984 on which the initial award of (in substance) one year's attendance allowance was based, (the existence of which report I have confirmed).

8. The material paragraphs of the decision of the delegated medical practitioner of 20 February 1987 are as follows:-

"3. With regard to the day conditions, the medical report of 15 October 1986 which presents an up to date picture of Mrs. [] clinical condition shows that she is able to speak and hear satisfactorily. Her vision is limited to distinguishing light and dark. She cannot see objects. At the time of the medical examination she could rise unaided and stand with good balance and walk around the room safely. She removed upper garments for the examination and put them back on. I find from the evidence that she could, without the help of another person, get into and out of bed, rise from a usual chair, walk, use stairs, wash, get to the toilet, eat and drink. I accept that she requires some help to dress and undress in so far as clothes are laid out for her and that she requires help to get in and out of the bath and hard foods need to be cut up for her. I note that she is not incontinent and can use the toilet where she requires no help when there. I note from the statement signed by her husband in her presence that some ordinary domestic duties are performed on her behalf, ie cooking, housework etc. Even if such duties are required to be done because Mrs. Jones is too disabled to carry them out for herself, they do not qualify as attention in connection with her bodily functions and cannot be taken into account in my consideration of her requirements. This view was confirmed by a decision of the Court of Appeal in April 1981. That decision has been published as an annex to Commissioners decision R(A)2/80. I find from the evidence that Mrs. [] is given help at the beginning of each day in so far as having her clothes laid out and having a bath but once she has been helped with these the only attention she requires is for hard food to be cut up for her and I am satisfied that there are long periods throughout the day when no attention is required. Consequently I do not accept that she requires frequent attention throughout the day in connection with her bodily functions or that she has required such attention throughout the period relevant to the claim.

4. Turning now to the day supervision aspect, the examining medical officer, in the medical report of 15 October 1986 has indicated that in his opinion her condition cannot give rise to danger either to herself or anyone else. He states that she appears to know the house well and is not likely to

have any accidents. The signed statement reads "I am quite used to the house but have to look out in case the doors are not open and I am frightened of falling downstairs. I have not so far fallen downstairs". Mrs. Jones is described as mentally alert and she has no physical disorder of mobility. In view of this I consider that she should be able to find her way around in the familiar surroundings of her home. I am satisfied that she would not undertake any predictable potentially dangerous action without adequate supervision. Any supervision thus given would not in my view amount to continual supervision throughout the day. Looking at the evidence overall I do not accept that Mrs. [] requires, or has required, continual supervision throughout the day in order to avoid substantial danger to herself or others."

9. Mr. Illsley for the claimant criticised the absence of reference to the doctor's report of 9 July 1986. That report was in my view short on fact and strong on assertion on matters which were for the delegated medical practitioner to determine, and in the circumstances of this case (words which are important) I do not think it right to conclude that he erred in law by not expressly referring to it; it was for the delegated medical practitioner to exercise his own judgment and I am not satisfied that he did not give adequate regard to the doctor's certificate of 9 July 1986.

10. However, Mr. Illsley has drawn attention to a further consideration. The claimant had made a renewal application, after rather less than one year. The delegated medical practitioner on 20 February 1987 agreed with the decision of the delegated medical practitioner on 25 June 1986. It does not appear that he considered the medical report of 3 December 1984 on the basis of which attendance allowance was initially granted, nor does he make any reference to the medical reports of 10 October 1985 and 2 March 1986 which contained elements favourable to the claimant. As was stated by the Commissioner in Decision R(A) 1/84 at paragraph 9, where an existing award of attendance allowance is being removed, (as was the substance of the matter here), clear and adequate reasons for the removal should be given and there should if possible be avoided different decisions by doctors holding different views in similar medical circumstances. In my judgment the change is inadequately justified, and this is an error of law.

11. I further draw attention to paragraph 4 of the delegated medical practitioner's decision. He says -

"I am satisfied that she would not undertake any predictable potentially dangerous action without adequate supervision throughout the day".

The word "predictable" will be noted.

I do not however discern from this paragraph (or anywhere else in the decision) that there has been any adequate evaluation of the unexpected (both outside and inside the house), in particular, if accidents occur, whether they might lead to substantial danger. These risks were those referred to in the decision CA/168/87.

Life contains the unexpected, and it is in my judgment an error of law for a delegated medical practitioner in considering whether a person needs continual supervision throughout the day in order to avoid substantial danger to herself to fail to take adequate account of the unexpected happening and its danger-creating potential.

12. The present case affords particular examples of accidents occurring. The delegated medical practitioner refers to the passage from the evidence before him that the claimant had not so far fallen downstairs, (and she was a married lady living in the family home where she had lived for 20 years). However, (although strictly irrelevant), after the date of the decision, in November 1987 the claimant did in fact fall "half way down my staircase at home" and was then taken to hospital for examination in connection with a suspected fractured ankle. Also, on one occasion the claimant sprayed her hair with oven cleaner in mistake for hairspray. Claimants may be called to answer the door bell unexpectedly, a member of a family may leave a door open so that the claimant runs into the edge, a carpet may be rucked up so that the claimant trips, medicines or pills may be misplaced and not found or the wrong ones picked up, kerbstones may be tripped over, and so on.

13. In my judgment Mr. Illsley was right to emphasise in his written submission subsequently the relevance of the potential of accident which was dealt with in decision CA/168/87.

14. There is in my judgment a further error of law in the passage I have indicated. Where the question is whether a person needs continual supervision throughout the day in order to avoid substantial danger to herself it is not I think sufficient to find that she would not undertake predictably potentially dangerous action without adequate supervision, (my underlining). This is to incorporate into the findings in substance the question which has to be determined.

15. Mr. Illsley also made submissions to me as to that part of section 35 which relates to the requirement of frequent attention throughout the day in connection with bodily functions, and he referred to the decision of the Court of Appeal reported as the Appendix to Decision R(A)2/80. In the light of the view I have formed as to my decision in this appeal it is not necessary for me to go into this aspect of the matter. I do however draw attention to the observations of Lord Denning MR in the above Decision at p.17 of the report -

It will then be for the delegated medical practitioner to add up these items of attention which qualify and decide whether the answer is "frequent attention throughout the day".

The list under the heading of "Need for attention" to be ticked on form DS4 is no substitute for the application of the words in the statute (the sole governing words) to all of the material facts of the case.

16. My decision is as in paragraph 1.

(Signed) Leonard Bromley
Chief Commissioner

Date: 16 January, 1989