

RE: _____ (CHILD)

SOCIAL SECURITY (NORTHERN IRELAND) ACTS 1975 TO 1991

ATTENDANCE ALLOWANCE

Application by the above-named claimant for leave to appeal and appeal to the Social Security Commissioner on a question of law from the decision on review of the Attendance Allowance Board for Northern Ireland given on 13 September 1991

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant in this case is the mother of _____ a child of 12 who suffers from deafness. She seeks leave to appeal against the decision on review of the Attendance Allowance Board confirming an earlier determination of 17 April 1991 that none of the conditions of entitlement to attendance allowance, set out in section 35(1) of the Social Security (Northern Ireland) Act 1975, [the 1975 Act], were satisfied. I grant leave to appeal and, with the consent of the parties, treat this application as an appeal.
2. Briefly, the history of the claim is that attendance allowance in respect of _____ was in payment for almost 10 years from October 1981. For most of the time the award was at the higher rate; but this was reduced to the lower rate for the period from 31 August 1990 to 13 March 1991. A renewal claim was received on 3 February 1991 and after investigation a negative certificate was issued on 17 April 1991. The claimant requested a review and, as stated in paragraph 1 above, the Board, by their decision of 13 September 1991, confirmed the earlier disallowance. In her application for leave to appeal to the Commissioner the grounds relied upon by the claimant were set out in some detail and it is unnecessary for me to repeat them in full in this decision. The following two passages from the Board's decision came under criticism:-
 - "8. The Board accepts that because of deafness, poor speech and difficulty at communication _____ requires frequent attention from another person throughout the day. The Board however does not accept that this attention is substantially in excess of that normally required by a child of the same age and sex.

16. The Board is of the opinion that as has become more mature she has a better understanding of the risks associated with her deafness and needs less supervision in relation to situations of substantial danger."

3. The Department was requested to submit written observations on the application for leave to appeal with particular reference to the views expressed by the Board in paragraph 8 of their decision. In response, the Department commented that paragraph 8 of the decision on review should be read in conjunction with paragraph 7, and it was submitted that the Board, in applying their medical expertise, were entitled to reach the decision in question without explaining how they had done so.
4. I held an oral hearing at which the claimant, who was present, was represented by Mrs Jill Jones, of the National Deaf Children's Society. Mrs C Fearon, Solicitor, represented the Department.

Following a brief discussion of the provisions of section 35(1) of the 1975 Act as modified by regulation 10 of the Social Security (Attendance Allowance) Regulations (Northern Ireland) 1987, [the Attendance Allowance Regulations], Mrs Fearon accepted that the conclusion reached by the Board as set out in paragraph 8 of their decision on review constituted an error in point of law. Regulation 10 of the Attendance Allowance Regulations provides that section 35(1)(a)(i) of the 1975 Act shall have effect in relation to a child as if it read as follows:-

"35(1) A person shall be entitled to an attendance allowance in respect of a child who satisfies or is treated as having satisfied prescribed conditions and ...

(a) the child is so severely disabled physically or mentally that he requires from another person ...

(i) frequent attention throughout the day in connection with his bodily functions being attention substantially in excess of that normally required by a child of the same age and sex."

5. For my part I have no doubt that paragraph 8 of the Board's decision on review was erroneous in point of law. It is right to say that it was for the Board to decide whether in any given case the attention required by a child was substantially in excess of that normally required by a child of the same age and sex. In my view, however, the modification introduced by regulation 10 of the Attendance Allowance Regulations was intended to take account of the fact that all children require some attention in connection with their bodily functions. Depending upon the age of the child, such normal attention might well, in itself or when taken in conjunction with occasional required attention of a less usual

kind, constitute frequent attention throughout the day. Accordingly, to avoid the possibility that most if not all small children might qualify for attendance allowance it was provided that where "normal attention" was concerned, account was only to be taken of attention which was substantially in excess of that which would ordinarily have been required by a child of the same age and sex. In other words, if the required attention comprised or included attention of a kind normally needed by a child of the same age and sex, then even if it was frequent throughout the day, it did not satisfy the relevant condition unless it was substantially in excess of normal requirements. The modification had, however, no relevance to circumstances in which attention of a kind not normally required by a child of the same age and sex was required frequently throughout the day. The condition of entitlement set out in section 35(1)(a)(i) of the 1975 Act was satisfied without reference to, or reliance upon, attention normally required by a child of the same age and sex.

6. In this instance the Board identified in paragraph 7 the attention which required by reason of her disability, and in paragraph 8 it was expressly accepted that "because of deafness, poor speech and difficulty at communication" she required frequent attention from another person throughout the day. (My underlining) As was pointed out in the claimant's notice of application, attention of such a nature is attention in connection with ones bodily functions:- see R -V- National Insurance Commissioner, Ex Parte Secretary of State for Social Services [1991] 2 AER 738 at p741; see also R -v- Social Security Commissioner, Ex Parte Butler [1984] Legal Action 117 noted in the Law of Social Security by Ogus and Barendt 3rd Edition, page 165. Although the Board did not make any express finding on the point, it seems reasonably clear that the specified attention was recognised to be attention in connection with 's bodily functions. If that was indeed the view which they took, their further finding that they did not accept that this attention was substantially in excess of that normally required by a child of the same age and sex was, for the reasons set out in paragraph 5 above, irrelevant and of no effect. For the same reasons, in view of their finding as set out in the first sentence of paragraph 8, it was not in my opinion open to the Board to reach the more general conclusion expressed in paragraph 9 of their decision on review. In these respects I consider that their decision was erroneous in point of law.
7. I have considered whether there is any valid ground for criticism of the further passage in paragraph 16 of the Board's decision on review to which reference was made in the claimant's application for leave to appeal and have reached the conclusion that there is not. Until their recent dissolution, it was for the Board alone to rule on the merits of all claims and to decide contested issues of fact and medical questions. So far as the passage in paragraph 16 is concerned, the claimant may disagree with the opinion expressed by the Board; but I cannot see that any point of law is raised.

8. For the reasons given in paragraphs 5 and 6 above I allow the claimant's appeal and set aside the Board's decision on review of 13 September 1991.
9. In paragraph 8 of their decision on review the Board found as a fact that, without taking into account attention of a kind normally required by a child of the same age and sex, required frequent attention from another person throughout the day. I consider it expedient that I should make the further express finding that this "abnormal" attention so required by was attention in connection with her bodily functions. In the light of these findings, and in exercise of my powers under regulation 23(2)(a) of the Social Security (Introduction of Disability Living Allowance) Regulations (Northern Ireland) 1992, I give the decision which I consider the Board should have given; namely, that was so severely disabled physically that she required frequent attention throughout the day in connection with her bodily functions, being attention substantially in excess of that normally required by a child of the same age and sex. I further certify that the period commencing on 14 March 1991 and ending on 13 May 1992 is a period throughout which satisfied the condition mentioned in s.35(1)(a)(i) of the 1975 Act as modified by regulation 10 of the Attendance Allowance Regulations and at its commencement is within 2 years of the expiry of an earlier certificate of the same rate issued by the Attendance Allowance Board for Northern Ireland.
10. I refer my decision to an Adjudication Officer to determine the claim from which this appeal arose.

(Signed):

R. R. Chamberlain
CHIEF COMMISSIONER

(Date):

14 May 1992.