R(A) 5/90: Attendance allowance – medical question – liability to fall – sufficient reasons

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Decision

5.10.89

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

Claim for attendance allowance-liability to fall-evaluation of risk-whether sufficient reasons given for decision.

The claimant suffered from arthritis and cervical spondylosis which restricted her ability to move. It was alleged that the claimant frequently fell. An award of attendance allowance at the lower rate was awarded for a period of one year. In May 1986 the claimant made a renewal claim and a rejection certificate was issued. On review the Delegated Medical Practitioner (DMP) considered that the claimant, who is mentally competent, could refrain from activities beyond the limits imposed upon her by her disabilities, and could take precautions to minimize the possibility of falling.

Held:

The Delegated Medical Practitioner's decision was erroneous in law.

i. The Delegated Medical Practitioner must identify the precautions to be taken and the activities to be refrained from in order to avoid substantial danger.

ii. In reaching his decision the Delegated Medical Practitioner must evaluate the risk of falling. This is a medical question and as to be dealt with on the basis of medical judgement and expertise. The four elements referred to in R(A) 3/89 may assist in evaluating the risk.

iii. The Delegated Medical Practitioner's determination must be based on the evidence before him and must explain clearly and sufficiently the outcome to the claimant.

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

[ORAL HEARING]

1. Our decision is that the determination on review made on 12 August 1987 by a delegated medical practitioner on behalf of the Attendance Allowance Board is erroneous in law. We accordingly allow the claimant's appeal. The case must be reconsidered by the Board or another medical practitioner on their behalf.

2. In April 1985 the claimant, who was then 57 years old, made a claim for an attendance allowance. She had apparently made an earlier claim but we are not concerned with that. Medical examinations revealed that her main disabling conditions were arthritis and cervical spondylosis which restricted her ability to move around and particularly her ability to change position in bed, dress and undress and get to and from the toilet. She was said to have had frequent falls one of which, in January 1985, led to a head injury and one of the examining doctors said she was in constant danger of falling. An award of attendance allowance was made, at the lower rate, for one year from 10 April 1985. That was on the basis that the

claimant satisfied the condition imposed by section 35(1)(a)(ii) of the Social Security Act 1975 namely that she was so severely disabled physically or mentally that she required continual supervision throughout the day in order to avoid substantial danger. In May 1986 she made a renewal claim. A rejection certificate was issued in September 1986. The claimant requested a review and following a further medical examination a delegated medical practitioner on behalf of the Attendance Allowance Board ("DMP") determined, on 12 August 1987, that the rejection certificate should stand because in his view none of the day or night conditions for an award was satisfied. This present appeal concerns that determination. Because it raised a question of law of special difficulty the Chief Commissioner directed that the appeal should be dealt with by this Tribunal of Commissioners. We held an oral hearing. The claimant did not attend but was represented by Ms S. Robertson of the Disability Alliance. The Secretary of State was represented by Mr. J. Latter of Counsel instructed by the Solicitor to the Departments of Health and Social Security. We are grateful to them both for their considerable assistance.

3. The issue in respect of which this tribunal was directed arises from the way in which the DMP dealt with the evidence concerning the claimant's history of falling. In paragraphs 3 and 6 of his determination the DMP said

> "3. So far as day supervision is concerned, the examining medical officer records in the later medical report that [the claimant] appears to be mentally competent and both medical reports show that in the opinion of the examining medical officer her condition cannot give rise to danger to herself or someone else. The examining medical officer records in the later medical report that she has had falls and that she last fell in November 1985 but has had none since. The supplementary medical report of 10 April 1987 shows that she is aware of common danger indoors and outdoors.
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> There is no mention of any mental impairment leading to a lack of understanding of the situation and I would expect her not to involve herself in activities beyond the limits imposed upon her by her disabilities. Consequently, I do not accept that the risk of her falling and injuring herself requires continual supervision throughout the day. There is nothing in the evidence before me to suggest that she has any disturbances of behaviour or that she or anyone else would be in substantial danger as a result of her disablement if she were not under continual supervision throughout the day. The supplementary medical report shows that in the opinion of the examining medical officer she could be safely left unsupervised all day and I do not accept that she requires, or has required, continual supervision throughout the day in order to avoid substantial danger to herself or others.
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> 6. I note that a delegated medical practitioner certified that [the claimant] satisfied the day supervision condition when he made his decision on an earlier claim for a different period. I consider that the delegate was in error in accepting that this condition was satisfied because in my view the evidence in the medical report of 19 August 1985 does not support that conclusion in that although it shows that [the claimant] was subject to frequent falls usually in the day it also shows that she was mentally clear and competent and in my medical opinion she should have been able to take precautions to minimise the possibility of falling and the risk of falling would not have required continual supervision throughout the day."

Ms Robertson attacked those paragraphs principally on the basis that the DMP had failed to deal with the problem of falling in accordance with the principles said to have been established in R(A)3/89. In that case the Commissioner said (paragraph 12)

> "12. I would say that where there is evidence that a claimant may fall, A DMP must inquire into and determine the following questions:
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> (i) Are the situations in which the claimant may fall predictable or unpredictable? That is to say, does the claimant have a liability to fall anywhere at any time? Or does he

fall only in certain circumstances or situations? This is, of course, a matter of medical opinion; but the opinion must be based upon the evidence

(ii) If the falling is predictable, can the claimant reasonably be expected to avoid the risk of falling or to place himself at such risk only when adequately supervised? That again is a matter of medical opinion. If the claimant cannot reasonably be expected either to avoid the risk or to place himself at risk only when adequately supervised, the DMP should treat the case as one in which the falling was unpredictable.

(iii) If the falling is unpredictable, will the falling give rise to substantial danger to himself? This is again, of course, a matter of medical opinion. Nevertheless it must be borne in mind that a person, particularly a disabled person, may when falling hit his head on the corner of a cupboard or on a fire kerb or radiator; and whether or not he is injured in the course of falling, he may by reason of his disability be unable to rise or be unable to summon help. Or he may be of such an age that a fall will be likely to have serious consequences. Clearly such matters ought in an appropriate case to be taken into account.

(iv) Is the substantial danger too remote? In the present case, the DMP stated that in his medical opinion the risk of substantial danger arising from a fall "is too remote a possibility that it ought to be reasonably disregarded." But he has failed to give any indication why he reached that conclusion or to indicate on what evidence he relied to support that conclusion.

Although, as I have said, those questions are matters of medical opinion, it is incumbent upon a DMP to consider all the evidence, including the evidence of the claimant, to make the relevant findings of fact and to give adequate reasons for the conclusions which he reaches upon those findings of fact so that the claimant "looking at the decision should be able to discern on the face of it the reasons why" the evidence failed to satisfy the DMP: R(A) 1/72 at paragraph 8. In my judgment the DMP has failed to do so in the present case."

And Ms Robertson contended that the determination was erroneous in law because the DMP had not, at least on the face of his determination, inquired into and determined the questions to which the Commissioner had referred. Mr. Latter while not suggesting that R(A) 3/89 was, in relation to the circumstances of that case, wrongly decided submitted that it was entirely a matter for the Board or their delegate to determine how they should evaluate whatever risk of falling there might be on the evidence, and that while what was said in R(A) 3/89 was no doubt of assistance on the facts of that particular case it did not and certainly should not lay down any general rules to be followed in relation to the evaluation of the risk of falling.

4. Mr. Latter's approach followed that of the Commissioner in CA/154/87 where he said (paragraph 4) (in relation to facts which are not disclosed by the decision)

"4. I am aware that the claimant has put forward lengthy criticisms of the Secretary of State's observations and has produced, at considerable length, criticisms of the DMP's decision. However, at the end of the day it must be remembered that it is for the DMP to determine as a medical fact whether or not the claimant is in need of frequent attention by day, or prolonged or repeated attention during the night, or continual supervision throughout the day or throughout the night to avoid substantial danger to himself or others. After having considered the evidence, the DMP has to make a value judgment, and provided it is reasonable, having regard to the evidence before him, it is not open to the Commissioner disturb it. Moreover, what constitutes reasonable is not susceptible of further analysis on the part of the DMP, and he is not required to give reasons why he thinks a certain state of affairs is reasonable. In the present instance, I am satisfied that the DMP has adequately explained the reasons for the conclusions at which he arrived, and that he was entitled to reach those conclusions on the evidence

before him. Accordingly, I am satisfied that the DMP did not err in point of law, and in consequence this appeal fails."

Now there is no doubt that, as was submitted on behalf of the Secretary of State in the first written submissions in this case, the question whether any or all of the medical conditions appertaining to an award of attendance allowance are satisfied is a matter for the Board or their delegate to determine, having regard to the individual circumstances of the case and using their medical judgment and good sense. Medical matters are for the medical adjudicating authorities: R(A) 4/78. As Lord Widgery CJ said in R v National Insurance Commissioner Ex parte Secretary of State for Social Services (1974) 1 WLR 1290 "It is quite evident that Parliament intended to treat this question of a right to the allowance as a medical question and accordingly gave the decisions, yea or nay, into the hands of this newly constituted body". However there is equally no doubt that a failure by the Board or their delegate to give adequate reasons will render the determination erroneous in law; R(A) 1/84. As is often said, the claimant must be able to ascertain from the determination why, if it did, the claim failed. R(A) 1/72. This means of course, among other things, that the Board or their delegate must deal with and take account of all the relevant evidence in the case. There is nothing new in this; in all or at least most of the determinations on review reasons are extensively given and the endeavour is made to ensure that the claimant can see what has been taken into account and why the outcome is as it is.

5. Now in this particular case the DMP, in paragraph 3 of his determination (reproduced above), said that the evidence showed that the claimant had had no falls since November 1985 and that, as there was no mention of any mental impairment, he would expect her not to involve herself in activities beyond the limits imposed upon her by her disabilities. And in relation to those propositions Ms Robertson contended that it is not clear whether the DMP is saying that as the claimant had not fallen since November 1985 there was no risk that she would fall or that such risk as there was could be eliminated if the claimant refrained from certain activities, or both of those things. Furthermore, if the claimant was to refrain from certain activities the DMP had not explained what they were. If to avoid the risk of falling the claimant had to remain in bed all day would not a determination in which the need for supervision was ruled out on such a basis be perverse? In R(A) 3/89 the Commissioner dealt with this point in this way. He said (paragraphs 13 and 14)

"13. Mr. Qureshi referred to and relied upon CSA/1/87 and CA/145/1986. The decisions in both cases have been given in 1988. In CSA/1/87 the Commissioner came to the conclusion that the DMP was entitled to take the view that

"(other than in the predictable potentially dangerous situations which he recognised required supervision) the claimant should be able to avoid exposing herself to unnecessary risk of danger by not undertaking the potentially hazardous activities unless supervised. I reached the conclusion that the DMP was so entitled in view of the evidence before him of the claimant's mental competence together with medical evidence that 'the danger of falling was not observed to be great', and a lack of factual evidence to disprove that assessment."

However, the Commissioner went on in paragraph 7 to state:

"7. There could undoubtedly be an element of difficulty about the DMP's approach in relation to a disabled person, who, without in any way behaving unreasonably, naturally sought to lead as normal and independent a life as possible... Although this possibility is raised by the claimant's contentions and the observations of the Secretary of State's representative in reply it is not one which upon the particular evidence before him, the DMP was obliged to deal with."

That case clearly turned upon the evidence; but the Commissioner made it clear that the position might have been different where a disabled claimant sought to lead as

normal and independent a life as possible. In CA/145/1986 the Commissioner said paragraph 5:

> "Further in the absence of any mental impairment the DMP was satisfied the claimant should be aware of the limitations imposed upon her by her disablement, have the ability to adjust her lifestyle to minimise the risk of falling or bumping into objects when mobile and wisely refrain from attempting those domestic duties which might be thought to involve an element of danger... In my judgment the DMP has not suggested that the claimant should change her lifestyle dramatically to avoid the risk of a fall or other potentially hazardous situation."

> Those cases merely emphasise that, in the final analysis, each case must depend upon its particular facts. I have, since the oral hearing, had my attention drawn to the recent decision in CSA/4/1987 where the Commissioner said at paragraph 2:

> > "...If she [the claimant] is at risk of falling and indeed there is evidence that she has fallen it is simply not enough to say, as the DMP does, that she should take precautions and undertake only those activities which are within the limits imposed by her disabilities. Is he suggesting that when she has fallen she has been engaged in activities she should not sensibly have undertaken? Is she not to move from her chair without assistance? Is she expected to remain chair-bound until assistance is available? If whenever she moves from her chair she needs supervision why does that not satisfy the condition?"

14. I respectfully adopt and apply those observations. I have no doubt, in the present case, that the DMP did not fully investigate the facts and did not have before him the evidence upon which he could reach the decision that the claimant could avoid placing himself at risk and that the risk of substantial danger arising from a fall was so remote a possibility that it ought to be reasonably disregarded. I have no doubt, therefore, that for the above reasons the decision of the DMP was erroneous in law: R(A) 1/72 at paragraphs 4, 8; R(A) 1/73 at paragraph 14."

6. Ms Robertson derived support from and relied on those paragraphs. We think she was right to do so. She also contended that had the DMP in this present case inquired into and determined the four questions which the Commissioner in R(A) 3/89 said should be inquired into and determined it would have been made clear whether there was in fact any risk of falling and if there was what could be done to eliminate or reduce it and what then was the extent of the risk. In general we agree with Ms Robertson. It is simply not clear, in relation to the matters to which Ms Robertson refers, what the DMP meant in paragraph 3 of his determination; and the same point arise, but in a different context, in paragraph 6. It follows that in our view the determination is erroneous in law because the reasons are insufficient. But what does that say with regard to paragraph 12 of R(A) 3/89 and the four matters which the Commissioner in that case said should be inquired into and determined by a DMP who is confronted with evidence that a claimant is at risk of falling over? Mr. Latter contended that it was not for the Commissioner to lay down rules as to how the Board or their delegate should evaluate the risk of falling; that was a medical question to be dealt with on the basis of medical judgment and expertise. That submission in our view goes too far. It is for the Commissioner to decide whether the reasons given are sufficient and whether the DMP's decision shows that he has understood and correctly applied the legislation relating to attendance allowance. The four matters (in paragraph 12 of R(A) 3/89) will no doubt assist DMPs in achieving such sufficiency. We agree with Mr. Latter to this extent-the four matters are not to be treated as if they are statutory requirements; indeed it is clear from the last few lines of paragraph 12 of his decision that the Commissioner was not suggesting they should be. We agree that a DMP is not bound in law to answer precisely those four questions. There will no doubt be many cases in which it would be helpful in relation to sufficiency of reasons if he did. There may be other cases where different questions need to be posed and answered.

And it follows of course that a DMP who does not deal with any or all of the four matters does not necessarily on that account alone fall into error of law. It may be, though we doubt it, that the author of any particular determination in which the risk of falling is in issue may be able properly to evaluate the risk and give sufficient reasons for whatever the conclusion might be without going through the processes envisaged in R(A) 3/89. What is of prime importance of course is that in the end the determination should be based on the evidence and sufficiently explain the outcome to the claimant. And in cases where, as in this case, it is suggested that the claimant should be able to take precautions to minimise the possibility of falling or, as it is often put, "not involve herself in activities beyond the limits imposed by her disabilities" the determination should identify the precautions to be taken and/or the activities to be refrained from. If it fails to do that the reasons are in our view certain to be insufficient.

7. Other matters were raised in the course of the hearing. However, because we have concluded that the determination is erroneous in law for insufficiency of reasons in relation to the risk of falling, we do not need to deal with those other matters. We should however say, because it will be relevant when this case is reconsidered, that those other matters concerned firstly the fact that the claimant has never, she says, been given sight of the medical reports of 20 July 1985 and 19 August 1985; secondly, the fact that, as Ms Robertson contended, the DMP had failed to consider, in relation to the need for daytime attention, the undue length of time it took the claimant to dress and undress, and thirdly and again as Ms Robertson contended, that the DMP should have dealt with the risk of falling not only in relation to supervision but also in relation to the attention condition. If the claimant did not in fact receive the two medical reports that will no doubt be remedied and the claimant will have the chance to comment before the case is reconsidered; and no doubt the Board or their delegate will, having regard to the evidence before them, take account of the other two matters to which we have just referred.

(Signed) M J Goodman

Commissioner

(Signed) J J Skinner Commissioner

(Signed) R A Sanders Commissioner