

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

Attendance Allowance—Epilepsy—Continual Supervision

An epileptic claimed attendance allowance on the basis that she required continual supervision throughout the night in order to avoid substantial danger to herself or others. The Board's Delegate, following R(A) 1/83, paragraph 9, did not accept that a person who might have to intervene in the event of an attack should be regarded as exercising continual supervision between attacks.

On appeal the Commissioner held that in basing his decision on R(A) 1/83 the Delegate did not err in law. The claimant appealed to the Court of Appeal. On 13 March 1987 that Court (Purchas, Nicholls LJ and Sir Roualeyn Cumming-Bruce) allowing the appeal and remitting the case to the Attendance Allowance Board *held*:

1. supervision should not be given the restricted meaning adopted in R(A) 1/83, paragraph 9. Supervision may be precautionary and anticipatory and there is no justification for drawing hard and fast distinction between the position between and during attacks;
2. a person who is standing by to intervene in the event of an attack may be exercising supervision between attacks. It is a question of fact and degree in each case;
3. the relative frequency or infrequency of attacks is immaterial to the question whether supervision is continual so long as the risk of substantial danger is not so remote a possibility that it ought reasonably to be disregarded.

The decision of the Commissioner is set out below and the judgment of the Court of Appeal in the Appendix hereto.

1. My decision is that the decision on review dated 5 December 1984 made by the delegated medical practitioner ("the DMP") on behalf of the Attendance Allowance Board ("the Board") is not erroneous in law and therefore stands.

2. This is an appeal brought with my leave by Mr. W solicitor, on behalf of Mrs. DM against the above-mentioned decision whereby, on review, the DMP refused to revise the decision dated 12 May 1983 by issuing a higher rate certificate for attendance allowance on the ground that neither of the "night conditions" for such allowance was satisfied.

3. At the request of Mr. W I heard the appeal at an oral hearing of the appeal. Mr. Richard Drabble of Counsel, instructed by Mr. W represented the claimant. The Secretary of State was represented by Mr. J. H. Swanson

of the Solicitor's Office, Department of Health and Social Security. I am indebted to both representatives for their helpful submissions.

4. Attendance allowance at the lower rate may be awarded to a claimant who satisfied one or both of the day conditions prescribed by section 35 of the Social Security Act or one or both of the night conditions there prescribed and may be awarded at the higher rate to a claimant who satisfied one or both of the day conditions and also one or both of the night conditions. It follows that an allowance at the higher rate cannot be awarded unless the claimant satisfied at least one of the night conditions. The conditions are that the claimant 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, or
- (ii) continual supervision throughout the night in order to avoid substantial danger to himself or others.

5. The claimant, who suffers from epilepsy, submitted a claim for attendance allowance on 4 April 1983 and on 12 May 1983, following an examination and report by an examining doctor, a certificate was given on behalf of the Board to the effect that the period commencing on 4 April 1983 and ending on 12 May 1985 was a period throughout which one of the day conditions (but neither of the night conditions) had been or was likely to be satisfied and was a period immediately preceded by one of not less than 6 months throughout which that condition had been satisfied. Accordingly, the other relevant conditions of entitlement being satisfied, she was awarded attendance allowance at the lower rate.

6. Then, on 26 May 1984, the claimant submitted a further claim form accompanied by a letter from her husband. The DMP accepted the claim form and letter as a request for review of the claim for attendance allowance and considered that he was entitled to review the decision of 12 May 1983 because there had been a relevant change of circumstances since that decision was made, namely, that there had been an alteration in the frequency of the claimant's epileptic attacks. I am satisfied that he was so entitled.

7. It is not contended on behalf of the claimant that the night attention condition is satisfied and it is therefore necessary only to consider that part of the DMP's decision of 5 December 1984 which relates to the night supervision condition. He dealt with it as follows:—

“4. So far as night time supervision is concerned, I find from the supplementary report of 28 April 1983 that [the claimant] had approximately one grand mal attack on 2 nights of the month. It is recorded in the supplementary report of 18 July 1984 that as a rule [the claimant] has had approximately one grand mal attack on 12 occasions in 9 months and the record of fits supplied by [the claimant's husband] at the time of the examination presents an essentially similar picture. Both supplementary reports show that [the claimant] does not receive a warning of an impending attack during which she loses consciousness or has an altered awareness lasting $\frac{1}{2}$ –2 hours at a time. In her signed statement in the latest medical report [the claimant] says that she has fallen out of bed during some of her attacks but I take the view that precautions could be taken to prevent her falling out of bed or injuring herself against the bed head or bed structure by padding those parts. With regard to the risk of choking it is not in my medical opinion necessary to hold down the tongue to avoid this and simple precautions such as the provision of a firm pillow and lying [the claimant] on her

side are all that is required. Even without these precautions in my medical experience the risk of choking during a fit is rare. Nevertheless I accept that a risk of substantial danger attends any and every fit which is accompanied by a loss of consciousness and that during her fits [the claimant] requires supervision in order to avoid such a possibility. Both medical reports indicate that because of the possibility of an epileptic attack [the claimant] is not left unsupervised at all by night but I do not accept that a person who might have to intervene in the event of an attack should be regarded as exercising continual supervision between attacks even though it might be unwise for her to be left alone. The factual report dated 12 October 1984 from [the claimant's] General Practitioner shows that her epileptic attacks mainly occur in the day time and to his knowledge no injuries have been sustained during the night. In view of this evidence and the relative infrequency of [the claimant's] nocturnal epileptic attacks I am satisfied that her need for supervision because of them does not need to be continual throughout the night. There is nothing in either supplementary or medical reports to suggest that [the claimant] has any other disturbances of behaviour or dangerous tendencies and having carefully considered all the evidence before me I do not accept that she requires, or has required, continual supervision throughout the night in order to avoid substantial danger to herself or others.

5. As one of the day but neither of the night conditions is satisfied I am unable to issue a higher rate certificate and it must follow therefore that my decision on review is that the decision of 12 May 1983 be not revised." (my underlining).

8. The words I have underlined in the above quotation very closely resemble words used in paragraph 9 of Decision R(A) 1/83, which was the decision of a Tribunal of Commissioners and I think it is clear that the DMP had in mind and followed that paragraph. Decision R(A) 1/83 refers to the four elements of the "continual supervision" test as follows:

- (a) the claimant's medical condition must be such that it may give rise to substantial danger to himself or others,
- (b) the substantial danger must not be too remote a possibility. The fact that it may take the form of an isolated incident does not in itself constitute remoteness. Moreover, the mere infrequency of the contemplated danger is immaterial.
- (c) supervision by a third party must be necessary to avoid the danger,
- (d) supervision must be continual.

As regards (d) it is, of course, clear from the words of section 35 of the Act that what has to be shown is a *need* for continual supervision. Paragraph 8 of the decision deals with element (d) and concludes with the words:

"Supervision which is only occasionally or spasmodically required is insufficient".

Paragraph 9 then proceeds as follows:

"9. One might apply the above in relation to a person subject to epileptic fits as follows. A person subject to epileptic fits may between attacks be perfectly capable of looking after himself and be well aware of what things it is unwise for him to do in case a fit came on while he was doing it. Such a person requires no supervision between attacks. It may be that he requires supervision during attacks. But unless the attacks are very frequent he can hardly be said to require *continual* supervision, even if it is considered unwise to leave him alone. On the other hand some victims of epileptic fits are also mentally handicapped

and may even between attacks be incapable of appreciating that certain things are dangerous (e.g. climbing ladders) e.g. because the onset of an attack at such a moment could be disastrous. Such a person may require supervision between, as well as, during attacks and it may be that in such a case there is on account of epilepsy alone a need for continual supervision, though instances of this may be rare. We do not consider that a person who might have to intervene in the event of an attack should be regarded as exercising supervision between attacks by reason only that he might have to intervene in the event of an attack.’

9. As indicated above, I agree with Mr. Drabble’s submission that the DMP based his decision on paragraph 9 of R(A) 1/83. However, I cannot accept that in doing so the DMP erred in law. Mr. Drabble argued that paragraph 9 places an irrational limitation on the remainder of the decision and is wrong in law and that in any event it is inconsistent with the judgment of the Court of Appeal in *Connolly v Secretary of State for Social Services* delivered on 19 December 1985.

10. There is no reference to R(A) 1/83 in the *Connolly* judgment and I have been unable to find in it any indication of an intention to comment on R(A) 1/83 either favourably or unfavourably. At the hearing before me Mr. Drabble said that a copy of R(A) 1/83 was exhibited to an affidavit before the Court of Appeal but Mr. Swainson said there had been no discussion of it and Mr. Drabble did not dissent. In the circumstances Mr. Drabble had to rely on what he submitted were inconsistencies between paragraph 9 of R(A) 1/83 and the *Connolly* judgment. In particular he referred to the following passage in the latter:—

‘A little later in the course of his persuasive argument, Mr. Drabble came to what I regard as by far his strongest point. He submitted that the Board had misdirected themselves in their decision, on the grounds that they proceeded on the assumption that able adults were present in the house throughout the night, and failed to consider what would be Mr. Connolly’s position if no such adults were present. He submitted that the application of the correct test necessarily involves posing this last question. In his submission, the only possible answer to it, on the undisputed evidence before the Board, was that Mr. Connolly could not be left alone in the house at night without substantial danger to himself. Mr. Drabble identified two particular sources of suggested potential danger, namely the intrinsic risk of unforeseen household emergency and the risk that Mr. Connolly’s distress, if a call for help during the night remained unanswered, might cause him to leave his bedroom and do something unpredictable, like a small child might in similar circumstances. Accordingly, he contended, the application of the correct test on the evidence would inevitably have led the Board to the conclusion that Mr. Connolly “required continual supervision throughout the night in order to avoid substantial danger to himself”, within the meaning of section 35(1) of the 1975 Act. Thus, in his submission, the decision of the Board reveals (and ought to have revealed to the learned Commissioner who refused leave) a plain error of law or at very least a substantially arguable point of law.

These forceful submissions derive particular support from paragraph 10 of the Board’s decision, which contains three references to Mr. Connolly’s ability to “call for help” or “call for aid” at night time when he needs it. If, in including these references, the Board had intended to suggest that his ability to call for help at night time precluded him from satisfying the statutory condition in respect of night time allowance, then I think they would plainly have misdirected themselves; it would involve the proposition that he did not require

continual supervision throughout the night to avoid substantial danger to himself, on the grounds that in fact he had such continual supervision from his parents. As Lord Bridge pointed out in *Woodling v. Secretary of State for Social Services* [1984] 1 W.L.R. it seems a reasonable inference that the policy of section 35 was "to provide a financial incentive to encourage families or friends to undertake the difficult and sometimes distasteful task of caring within the home for those who are so severely disabled that they must otherwise become a charge on some public institution".

Mr. Drabble submitted that in the above quoted passage the Court of Appeal clearly accepted that, if the Board had approached the matter on the basis that a person is not supervising if he is merely waiting to intervene if required in the event of an attack, then they would have misdirected themselves. That acceptance, he argued, was consistent with the law as it stood before paragraph 9 of R(A) 1/83 and inconsistent with that paragraph. I do not agree that what was said by the Court of Appeal can bear the meaning contended for by Mr. Drabble and I must therefore reject his submission that paragraph 9 of R(A) 1/83 has been overruled by the Connolly judgment.

11. As regards Mr. Drabble's argument that paragraph 9 of R(A) 1/83 is wrong in law, my position is that I am bound by it and must follow it, be it right or wrong. However, I must draw attention to the fact that the learned Commissioner who gave the decision on Commissioner's file CA 27/1984 (not reported) did *confess*, in paragraph 8, that he found difficulty in applying paragraph 9 of R(A) 1/83 in certain circumstances. Another decision in which R(A) 1/83 was commented upon is that on Commissioner's file CA 69/1984. In that decision the learned Commissioner indicated that he had given leave to appeal from the Board's decision not because he considered R(A) 1/83 to be wrong but in order to avoid cutting the claimant off from all opportunity of taking the matter higher.

12. When I was asked to grant an oral hearing I was also asked to consider whether the case was a suitable one for hearing by a Tribunal of Commissioners. I did so but decided against asking the Chief Commissioner to direct a Tribunal because it appeared to me that the question whether paragraph 9 of R(A) 1/83 is correct in holding a person who is merely standing by waiting to intervene if required is not supervising within the meaning of section 35 of the Act is a question which would more appropriately be decided on appeal by the Court of Appeal, should any claimant decide to seek leave for such an appeal.

13. For the foregoing reasons the appeal is dismissed and my decision is as set forth in paragraph 1 above.

Commissioner's File No: CA 34/85

(Signed) J. N. B. Penny
Commissioner

A

APPENDIX TO R(A) 1/88

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SOCIAL SECURITY COMMISSIONERS**

**Royal Courts of Justice
Friday 13th March 1987**

B

Before:

**LORD JUSTICE PURCHAS
LORD JUSTICE NICHOLLS
SIR ROUALEYN CUMMING-BRUCE**

DOROTHY MORAN

v

C

THE SECRETARY OF STATE FOR SOCIAL SERVICES

(Transcript of the Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London WC2A 3RU).

MR. R. J. B. DRABLE, instructed by Messrs Bindman & Partners, London Agents for N. J. Warren, Esq., (Birkenhead Resource Unit), appeared for the Appellant (Appellant).

D MR. I. B. GLICK, instructed by the Solicitor to the Department of Health & Social Security, appeared for the Respondent (Respondent).

JUDGMENT

(Revised)

A LORD JUSTICE NICHOLLS: Mrs. Dorothy Moran suffers from epilepsy. She is receiving attendance allowance at the lower rate. The question raised by this appeal is whether the delegated medical practitioner who reviewed her case on behalf of the attendance allowance board on 5th December 1984 erred in the test he applied when refusing to issue her a higher rate certificate.

B Attendance allowance is a weekly, non-contributory, cash benefit payable under section 35 of the Social Security Act 1975 to persons who satisfy prescribed conditions. The provisions material on this appeal are all contained in section 35(1):

C “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

D (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(b) he 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, or

E (ii) continual supervision throughout the night in order to avoid substantial danger to himself or others.”

There are two rates of attendance allowance. The higher rate is payable to a person who satisfies both the day-time condition (subsection (1)(a)) and the night-time condition (subsection (1)(b)). The lower rate is payable to a person who satisfies only one of those conditions (section 35(3)). In the present case it is common ground that Mrs. Moran satisfies the day-time condition, as a person who is so severely disabled that she requires from another person continual supervision throughout the day in order to avoid substantial danger to herself. What is in issue is whether she satisfies the night-time, supervision condition. It is not suggested that Mrs. Moran satisfies the ‘attention’ requirement in either the day-time condition or the night-time condition.

G The history of the matter can be stated shortly. On 12th May 1983, Mrs. Moran became entitled, under a certificate issued by the attendance

- A** allowance board, to attendance allowance at the lower rate, as a person who for the relevant period had satisfied or who was likely to satisfy the day-time, supervision condition. A year later, on 26th May 1984, a further claim was made by Mrs. Moran, and this was treated as a request for review of her case because of a relevant change of circumstances. The change was that there had been an alteration in the frequency of Mrs. Moran's epileptic
- B** attacks. On 5th December 1984 the delegated medical practitioner decided that Mrs. Moran did not satisfy the night-time supervision condition and, accordingly, he declined to revise the decision of 12th May 1983. On 30th April 1986 the social security commissioner, Mr. Penny Q.C., dismissed an appeal, holding that the decision on the review application was not wrong in law. He granted leave to appeal to the Court of Appeal, and it is an
- C** appeal by Mrs. Moran pursuant to that leave which is now before the court.

The delegated medical practitioner's decision of 5th December 1984 made the following material findings of fact. The frequency of Mrs. Moran's grand mal attacks at night is about twelve times over a nine month period. She receives no warning of an impending attack. During an attack she loses consciousness or has an altered awareness lasting between half an hour and

- D** two hours at a time. Although the risk of choking during a fit is rare, a risk of substantial danger attends every fit which is accompanied by a loss of consciousness, and it "might" be unwise for her to be left alone. I must quote the doctor's conclusion in full: "Nevertheless I accept that a risk of substantial danger attends any and every fit which is accompanied by a loss of consciousness and that during her fits Mrs. Moran requires supervision"
- E** in order to avoid such a possibility. Both medical reports indicate that because of the possibility of an epileptic attack Mrs. Moran is not left unsupervised at all by night but I do not accept that a person who might have to intervene in the event of an attack should be regarded as exercising continual supervision between attacks even though it might be unwise for her to be left alone. The factual report dated 12 October 1984 from Mrs.
- F** Moran's General Practitioner shows that her epileptic attacks mainly occur in the daytime and to his knowledge no injuries have been sustained during the night. In view of this evidence and the relative infrequency of Mrs. Moran's nocturnal epileptic attacks I am satisfied that her need for supervision because of them does not need to be continual throughout the night. There is nothing in either supplementary or medical reports to
- G** suggest that Mrs. Moran has any other disturbances of behaviour or dangerous tendencies and having carefully considered all the evidence before me I do not accept that she requires, or has required, continual supervision throughout the night in order to avoid substantial danger to herself or others." (emphasis added).

A It is evident that, in thus deciding this claim, the doctor had in mind, and followed, observations made in the decision R(A) 1/83 given on 20th September 1982 by a tribunal of commissioners. This appeal is concerned with the correctness of those observations in that decision, to which I now turn.

B In decision R(A) 1/83 the commissioners were concerned, as is the present appeal, with the meaning and application of the night-time supervision condition in the case of a person subject to epileptic attacks. The commissioners cited extracts from two earlier decisions of commissioners on this matter. In the first of these (6/72) Mr. Commissioner Lazarus stated that in section 35 'attention' and 'supervision' are intended to denote two different concepts. Attention denotes a concept of some personal service of an active nature, such as helping the disabled person to wash or eat. Supervision denotes a more passive concept, such as being in the same room with the disabled person so as to be prepared to intervene if necessary, but not actually intervening save in emergencies. In the second of the two earlier decisions (2/75), the object of supervision was stated to be "to avoid substantial danger which may or may not in fact arise; so
C supervision may be precautionary and anticipatory, yet never result in intervention, or may be ancillary to and part of active assistance given on specific occasions to the claimant."
D

I pause to observe that before us no criticism has been made by either party of these observations in the two decisions 6/72 and 2/75.

E Having quoted these passages the tribunal of commissioners, in decision R(A) 1/83, added this (at the end of paragraph 7):

"Subject to the reservations made at the end of paragraph 9 below we accept the foregoing statements."

F In paragraph 8 the commissioners observed that the supervision must be "continual", and that supervision which is only occasionally or spasmodically required is insufficient. I must set out the whole of the crucial paragraph 9:

G "9. One might apply the above in relation to a person subject to epileptic fits as follows. A person subject to epileptic fits may between attacks be perfectly capable of looking after himself and be well aware of what things it is unwise for him to do in case a fit came on while he was doing it. Such a person requires no supervision between attacks. It may be that he requires supervision during attacks. But unless the attacks are very frequent he can

- A** hardly be said to require continual supervision, even if it is considered unwise to leave him alone. On the other hand some victims of epileptic fits are also mentally handicapped and may even between attacks be incapable of appreciating that certain things are dangerous (e.g. climbing ladders) e.g. because the onset of an attack at such a moment could be disastrous. Such a person may require supervision between, as well as during, attacks and
- B** it may be that in such a case there is on account of epilepsy alone a need for continual supervision, though instances of this may be rare. We do not consider that a person who might have to intervene in the event of an attack should be regarded as exercising supervision between attacks by reason only that he might have to intervene in the event of an attack." (emphasis added).
- C** In the present case the delegated medical practitioner gave effect to the view stated in the words I have underlined at the end of paragraph 9. In dismissing the appeal, Mr. Commissioner Penny stated that he was bound by that paragraph and was obliged to follow it.
- In my judgment, with great respect to the highly experienced commissioners, the view expressed in the underlined words in paragraph 9
- D** in decision R(A) 1/83 cannot be sustained as a general proposition. Given that supervision may be precautionary and anticipatory, or "presence on guard", as expressed in one of the submissions made to us, there is no justification for drawing such a hard and fast distinction between, on the one hand, the position between attacks and, on the other hand, the position during attacks. In each case the function of the other person is the same:
- E** standing by to intervene in case the epileptic needs attention. If presence for that purpose during an attack, when intervention may or may not be required, constitutes supervision, why may not presence for the same purpose between attacks also be supervision? Once an attack is in progress a higher degree of readiness to intervene may be called for, in that with the onset of an attack there is an increased chance of the need for immediate
- F** attention. But if (as in the present case) the attacks come on without warning and are not predictable, I do not see how that difference in the situation during attacks from the situation between attacks is sufficient to lead to the conclusion that although being present and watching over the sufferer during attacks is, admittedly, supervision, being present and watching over the sufferer between attacks is not supervision.
- G** Of course, if the sufferer has adequate warning of an impending attack, so that he or she can take steps to summon help, the position may be different. A person who is in the same room or another room in the same

A house or in a nearby property and who keeps himself available to be called by such a sufferer, in person or by bell or by telephone, may not be exercising 'supervision' over the sufferer. It will all depend upon the particular facts of the case.

In the present case there is no question of Mrs. Moran being in a position to summon aid. As I read his decision, the delegated medical practitioner's approach, following the decision R(A) 1/83, was to treat the constant presence of a person ready to intervene in the event of an attack as insufficient in itself to constitute continual supervision. In my view that was a wrong approach. Such a person may be exercising continual supervision even between the attacks: it all depends upon the facts. Thus if there is a requirement for such a person there may, depending on all the facts, be a requirement for continual supervision between attacks as well as during attacks.

A further point arises on paragraph 9 of the decision R(A) 1/83. The view was expressed there that an epileptic capable of looking after himself between attacks required no supervision between attacks, even though he might require it during the attacks: "unless the attacks are very frequent he can hardly be said to require continual supervision, even if it is considered unwise to leave him alone." I accept that if the underlined words at the end of paragraph 9 were correct, this passage also would be correct. If standing by between attacks so as to be able to intervene during an attack cannot per se be supervision, then unless the attacks are very frequent, the sufferer who is able to look after himself between attacks is not in need of continual supervision. But if standing by between attacks so as to be in a position to intervene in the event of an attack may be supervision, then the relative frequency or infrequency of the attacks is immaterial so long as the risk of 'substantial' danger is not so remote a possibility that it ought reasonably to be disregarded.

In the present case the delegated medical practitioner found that there was a risk of substantial danger to Mrs. Moran attendant upon every fit accompanied by a loss of consciousness. I read that as a finding that there was here a risk of substantial danger which was not so remote a possibility that it ought reasonably to be disregarded. However, following the decision R(A) 1/83, he then went on to take into account the frequency of Mrs. Moran's night-time attacks. He said (at paragraph 4):

G "In view of [the evidence that Mrs. Moran's epileptic fits occur mainly in the daytime and no injuries had been sustained during the night] and the

A relative infrequency of Mrs. Moran's nocturnal epileptic attacks I am satisfied that her need for supervision because of them does not need to be continual throughout the night."

It follows from what I have said above that in my view the delegated medical practitioner erred in law in taking into account the relative infrequency of Mrs. Moran's night-time attacks if, as was common ground **B** before us, their onset is unpredictable and without warning.

For the respondent Mr. Glick accepted that the consequence of the application of paragraph 9 of decision R(A) 1/83 in a case such as the present one is paradoxical: supervision during epileptic attacks may be necessary, but when intervention is necessary there may be nobody present to give that supervision when required or to intervene when needed. In my **C** view, the natural meaning of the word "supervision" in its context in section 35(1) is not as restricted as that adopted by the commissioners in the underlined words in paragraph 9 of their decision R(A) 1/83. In my view, depending on the circumstances a person standing by to intervene in the event of an epileptic attack may, for that reason alone, be exercising supervision. It is a question of fact and degree in each case.

D I should mention one other point. In the present case Mrs. Moran is never left alone. It seems that normally at night her husband sleeps in the same bedroom but his "antennae" are so attuned that, without any conscious call from Mrs. Moran, he awakes at the onset of one of her fits and is able to see to her as needed. Section 35, of course, is concerned with what a claimant requires, not with what he or she receives. Thus evidence of what **E** he or she receives is only relevant so far as it assists in determining what the claimant requires, for he or she may be receiving more, or less, than what is required. For the respondent a submission was advanced to the effect that since Mrs. Moran's needs are met adequately at night by the presence of a husband who is asleep, she does not require continual "supervision" throughout the night because conscious observation is one of the marks of **F** supervision: a person cannot supervise whilst asleep. I am unable to accept this. Again, it all depends upon the particular circumstances. I can envisage cases, and the present case may be one, where the purpose of the supervision (here, ability to intervene if needed during an attack) can be adequately achieved even if for some of the time the supervisor is asleep.

G For my part therefore I would allow this appeal, the delegated medical practitioner having misdirected himself. The matter should be remitted to

R(A) 1/88
(Appendix)

A the attendance allowance board for the board to reconsider Mrs. Moran's application for review in the light of the judgments of this court.

SIR ROUALEYN CUMMING-BRUCE: I agree.

LORD JUSTICE PURCHAS: I also agree.

For the reasons given in the judgments already handed down this appeal will be allowed in the terms of the ultimate paragraph of the judgment of

B Lord Justice Nicholls.