

## SOCIAL SECURITY ACTS 1975 TO 1985

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

Name:

[Hearing]

1. My decision is that the decision of the delegated medical practitioner of the attendance allowance board dated 12 February 1985 is not erroneous in point of law.
2. The claimant is a married man aged 28 years with 2 young children. He is an intelligent, alert young man who unfortunately has suffered from epilepsy since the age of 17 years. On 12 February 1985 the delegated medical practitioner of the attendance allowance board (hereinafter referred to as the DMP) determined on review that "As none of the day or night conditions is satisfied, I am unable to issue a higher or lower-rate certificate and it must follow, therefore, that my decision on review is that the decision of 9 August 1984 be not revised." That decision was to the effect that none of the day or night conditions relating to entitlement to attendance allowance was satisfied by the claimant. He has appealed from the determination of 12 February 1985 to the Commissioner on a question of law having been given leave to do so by me. The appeal was heard on 17 January 1986. The claimant attended, accompanied by his father. Mrs Wheatly of the Solicitor's Office of the Department of Health and Social Security appeared for the Secretary of State.
3. I am satisfied that there are no grounds on which the DMP's conclusions relating to the claimant's need for attention in connection with his bodily functions by day and also by night can be impugned. However the position in relation to the need for continual supervision by day and by night requires close attention.
4. The DMP observed that "So far as daytime supervision is concerned, the supplementary report of 27 June 1984 shows that on approximately one day in 2 months Mr D.... has one or 2 attacks of grand mal, during which he has an altered awareness or loses consciousness for up to 18 hours. I note that Mr D... has received injuries as a result of his fits and that the fits are followed by a period of confusion or automatic behaviour when he can be aggressive to others and destructive to property. The supplementary report shows, however, that Mr D... receives a warning of an impending attack some 10-15 seconds before it occurs. As a consequence I consider that he should be able to put himself in a position of relative safety, ie place himself out of harm by either going to bed or lying on the floor to await the forthcoming attack. I am satisfied that if Mr D.... heeds the warning he gets, substantial danger from injury through falling will not arise.

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 his fits and period of automatic behaviour Mr D... requires supervision in order to avoid such a possibility. I also accept that he should be supervised in predictable, potentially dangerous situations such as having a bath or crossing a busy street. However, the evidence shows him to be mentally alert and co-operative and I am satisfied that Mr D... is intelligent enough to identify potentially dangerous situations and to ensure that he is adequately supervised to negotiate them safely. Such a person, in my opinion, does not otherwise require supervision. It is stated in the medical report of 27 June 1984 that because of the danger of fits Mr D... is not left at all by day but I do not consider 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 him to be left alone. In his factual report dated 7 August 1984 Mr D...' General Practitioner says that he can find no history in Mr D....' record of status epilepticus and the letter from the Consultant Neurologist dated 4 December 1984 shows that when seen in July 1981 Mr D... was experiencing approximately one attack of epilepsy per month. Having due regard to the relative infrequency of Mr D....' attacks of epilepsy, I do not accept that the total amount of supervision required, ie during a fit and when undertaking activities such as those mentioned, can be said to constitute continual supervision throughout the day. From the Consultant Neurologist's letter of 4 December 1984 I find that Mr D....' other symptoms have included headaches, increased irritability and that in the past there have been periods of more serious psychological disturbance which led him to take an overdose of drugs on 2 occasions in the late 1970's. However, the record here has been good for 14 years and I am satisfied that in the light of all the evidence before me the risk of suicide in Mr D... case is not a relevant one within the meaning of the 1975 Social Security Act. The supplementary report of 27 June 1984 shows that Mr D... is aware of common dangers, he does not wander away from home or about the house, he is only physically aggressive to others, destructive to property or inflicts injury upon himself during or after his fits and having carefully considered all the evidence before me I do not accept that he requires, or has required, continual supervision throughout the day in order to avoid substantial danger to himself or others." and that "So far as night time supervision is concerned, it is stated in the medical report of 27 June 1984 that Mr D... is not left at all by night but whilst I accept that he could not be left alone in the house at night as he sometimes requires supervision during a fit, the medical conditions laid down in the 1975 Social Security Act are more stringent than this and I must be satisfied that there is a need for continual supervision which is related to the avoidance of substantial danger. The supplementary report of 27 June 1984 shows that Mr D...' fits occur equally day or night but I am satisfied that provided precautions are taken to prevent him falling out of bed or injuring himself against the bed head or bed structure by padding those parts Mr D... is unlikely to come to serious harm as a result of an epileptiform attack occurring in bed. I accept that Mr D... should be supervised during a nocturnal epileptic attack but for the reasons I have given when considering the day supervision condition, I do not accept that the supervision exercised at such intermittent times can be regarded as being continual throughout the night. It is clear from the evidence that more often than not Mr D...' nights are undisturbed and spent in bed where he comes to no harm and having regard to the evidence before me I do not accept that he requires, or has required, continual supervision throughout the night in order to avoid substantial danger to himself or others."

5. Mrs Wheatly maintained that the approach adopted by the DMP was wholly consistent with the guidance given in a decision of a Tribunal of Commissioner's namely Decision R(A)1/83 and in a subsequent unreported decision of a Commissioner namely the Decision on Commissioner's File CA/69/84 dated 9 May 1985. She referred me to the following paragraphs in the former -

"8. The final element relevant to the "supervision test" is that the supervision must be continual. In the opening words of paragraph 9 of Decision R(A) 2/75:

"In my opinion the characteristic nature of 'continual supervision' is overseeing or watching over considered with reference to its frequency or regularity of recurrence (see Decision C.A. 5/72 (not reported) paragraph 8)."

Supervision which is only occasionally or spasmodically required is insufficient.

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."

and to the following paragraph in the latter -

"There is in my judgment a difference between a requirement of someone to stand by and a requirement of someone to supervise. A person exercising supervision has to be constantly alert and ready to intervene to prevent the person supervised from doing something that would give rise to danger or, more rarely, to ensure that the person supervised does something the omission of which (eg taking some medicine or drug) might give rise to danger. A person who is standing by in case an emergency arises (whether it be an epileptic fit or the house catching fire) does not require to be constantly on the alert; he may well be asleep in the case of night stand-by and a much less exacting standard is required of him. The relevant provisions of the Act do not provide that a person who requires continual stand-by shall for that reason be entitled to the attendance allowance, but only a person who requires continual supervision."

Mrs Wheatly maintained that in the subsequent proceedings in the Divisional Court and in the Court of Appeal relating to Decision R(A)1/83 the correctness of the guidance given by the Tribunal was not questioned and that the deliberations in both Courts related in the main to the interpretation of the words "substantial danger". I accept that this was so. The claimant made no comments on Mrs Wheatly's submission. He asserted that his wife had had to give up work to look after him and could not leave him and that otherwise his young children would be in danger if he had a fit.

6. The claimant fortunately has fits relatively infrequently. However he only has a brief warning that he is about to have a fit. As the DMP observed during an attack he may lose consciousness for up to 18 hours. He has received injuries as a result of his fits for example a fracture of the left shoulder and a fracture of the ribs. They are followed by a period of confusion or automatic behaviour which can be aggressive to others and destructive to property, for example he is said to have chased his brother with an axe following a fit. It would appear to me that the DMP determined in effect that the claimant was not in the category of a person who required continual supervision but was in the category of a person who required what has been described as "continual stand by". In drawing this distinction he was clearly adopting the approach outlined in the cases to which I have referred. It would appear to me that there are cases in which it is far from easy to determine into which category a particular claimant should be placed. I certainly consider the present case to be one of them. However all the indications are that the DMP applied the appropriate test and that in coming to his decisions in relation to the need for continual supervision throughout the day in order to avoid substantial damage to himself or others and in relation to the need for continual supervision throughout the night in order to avoid substantial damage to himself or others, he did not err in law. I do not consider that it can be maintained that the decisions to which he came were decisions to which, in the light of the evidence, he was not entitled to come. Accordingly my decision is that set out in paragraph 1.

7. The claimant's appeal is disallowed.

(Signed) E Roderic Bowen  
Commissioner

Date: 7 February 1986.