

T/EA

SOCIAL SECURITY ACTS 1975 TO 1981

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

CA 1/1982

1. Our decision is that the determination on review dated 13 October 1981 and made by a medical practitioner on behalf of the Attendance Allowance Board is erroneous in law and is accordingly set aside.
2. On 13 October 1981 a delegated medical practitioner ("DMP") acting on behalf of the Attendance Allowance Board reviewed the claimant's claim for attendance allowance, but decided in the light of the evidence that she did not satisfy either of the day or either of the night conditions contained in Section 35(1) of the Social Security Act 1975, that as a result he could not issue a higher or lower rate certificate, and accordingly that the original decision of 20 February 1981 to the same effect should not be revised. The claimant sought leave to appeal on the ground that the DMP's decision was erroneous in point of law, and such leave was given on 28 January 1982. The claimant suffers from fits, and leave to appeal was granted in view of the way in which the DMP dealt with this feature of the claimant's condition. Written submissions were invited on this aspect of the case, and these were duly received from the Secretary of State. However, the Chief Commissioner considered that the issues involved were complex and difficult, and thought it expedient that the matter be heard by a Tribunal of Commissioners and that the hearing take place orally. At the hearing the Secretary of State was represented by Mr R G S Aitken of the Solicitor's Office of the Department of Health and Social Security, and we are grateful to him for his assistance. The claimant did not appear, nor was she represented.
3. The effect of section 35(1) of the Social Security Act 1975 is that a claimant will not be entitled to attendance allowance unless 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; 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
 - (ii) continual supervision throughout the night in order to avoid substantial danger to himself or others."

4. Whether or not a person satisfies the aforesaid conditions or any of them is a matter for the exclusive determination of the Attendance Allowance Board or, where its functions have been delegated to a medical practitioner, of that medical practitioner. Such determination cannot be upset unless it is erroneous in point of law. We have carefully considered the determination of the DMP in the present case, and are satisfied that the only aspect which is open to doubt is whether or not the DMP applied the proper test in deciding whether the claimant required from another "continual supervision throughout the day in order to avoid substantial danger to himself or others" (section 35(1)(a)(ii)), and if he did so, whether he adequately expressed the reasons for his conclusion. The doubt arises from the manner in which the DMP applied the "continual supervision" test and expressed his conclusion in the light of the claimant's liability to fits.

5. Before examining the relevant passage from the DMP's decision it is appropriate that we should explain the nature of the test. For a claimant to satisfy section 35(1)(a)(ii) the following elements have to be present. First, the claimant's medical condition must be such that it may give rise to a substantial danger either to himself or someone else. What is a substantial danger will, of course, depend upon the facts of each individual case. The second element that must be present is that 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. An isolated incident can have catastrophic effects. In the words of the unreported decision on Commissioner's file C.A. 15/79 (paragraph 9) "If a small child, escaping the supervision of its mother, runs out of the house on to a public highway, that may well be an isolated incident. But it only requires one such incident for the child to be killed by passing traffic. In my view, the fact that the incidents in question were isolated is nothing to the point." The relevant question is whether or not the relevant danger is likely to occur. If it is, then its infrequency is immaterial.

6. The third element which is relevant to the "continual supervision" test is the need for supervision on the part of some other person to ensure that the claimant avoids the substantial danger referred to above. Sometimes the claimant is fully capable himself of taking the appropriate precautions against the relevant

danger occasioned by his condition. This point was considered in unreported Decision C.A. 7/73 at paragraph 3, where the learned Commissioner observed as follows:

"A number of pronouncements have been made by Commissioners as to the interpretation of the phrase "continual supervision" and these are mentioned in paragraph 6 of the Secretary of State's submission, where reference is made to the unreported Decisions C.A. 5/72, C.A. 6/72, C.A. 7/72, C.A. 8/72, C.A. 10/72 (to be reported as R(A) 1/73). The references in that paragraph include one to a decision of the Chief Commissioner of Northern Ireland, Appeal No.12/72 (AA). This decision is not binding on a Commissioner appointed in Great Britain, but it is of course of strong persuasive force. I wish to point out, however, that the decision must be read in the light of the facts with which it dealt. The disabled person in that case was a lady who, when she needed help during the night, was able to summon it. The Chief Commissioner of Northern Ireland held that a person sleeping within earshot was not exercising supervision over the disabled person and, on the facts, I respectfully agree with this decision. In my judgment, a disabled person who has the physical and the mental powers to summon help by means of voice or bell, when he or she needs it, does not require the kind of supervision contemplated in the National Insurance Act 1970 and its successor the National Insurance Act 1972. On the other hand, in my judgment the case must not be taken as an authority establishing that somebody sleeping within earshot of a disabled person is necessarily not exercising supervision. It may well be that a person sleeping either in the next room or the same room as the disabled person should be held, in some circumstances, to be exercising supervision over the disabled person. The question depends upon the facts of the particular case."

7. "Supervision" must of course be distinguished from "attention" within section 35(1)(a)(i). In unreported Decision C.A. 6/72 at paragraph 10 the Commissioner said:-

"At the outset I must point out that section 4(2)(a) [now section 35(1)(a)(i) and 35(1)(b)(i)] speaks of "attention" whereas section 4(2)(b) [now section 35(1)(a)(ii) and 35(1)(b)(ii)] speaks of "supervision". It is evident that these two words are intended to denote two different concepts. In my judgment, the word "attention" denotes a concept of some personal service of an active nature; for example, helping the disabled person to bath or eat his food, or cooking for him, or dressing a wound. On the other hand "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."

The notion of preparedness to intervene if necessary is expressed again in paragraph 9 of Decision R(A) 2/75 as follows:-

"The object of supervision is to avoid substantial danger which may or may not in fact arise; so 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."

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

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.

10. If a claimant is to satisfy the "supervision test" he or she must show that the four elements referred to above are present in his or her case. Whether or not he or she succeeds will depend upon the determination of the Attendance Allowance Board, or the DMP, as the case may be, but if the claimant fails, he or she is entitled to know the reasons for such failure. Thus, in an epileptic case considered in an unreported decision on Commissioner's file C.A. 26/79 the learned Commissioner observed as follows:

"I am most anxious not to burden the Board or their delegates with requirements of impracticable particularity. But it

does seem to me to be important in the case of epileptics that if the board or one of its delegates is of opinion that it is perfectly safe to leave the epileptic subject to fits unsupervised on the ground that he or she will not come to any harm if he has a fit when unattended they should say so expressly and not leave it to implication. Only if it is stated expressly can one be sure that the full implications of what is being said are appreciated by the Board or their delegate."

11. In the present case the DMP made the following relevant observations:

"Having examined the evidence relating to the nature and frequency of fits I take the view that although it is possible to suffer serious injury during an epileptic attack by falling or choking, it is very rare in practice for such dangers to manifest themselves and I have no evidence that she has suffered such major injuries. Minor injuries such as biting the tongue or lips or minor abrasions caused by falling are more likely to be suffered but do not in my medical opinion constitute a substantial danger. Consequently, 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."

In our judgment, this statement does not adequately explain why the claimant does not satisfy the "supervision test". The DMP asserts that the claimant has not suffered any major injury whilst undergoing a fit - there is nothing to suggest that this conclusion is erroneous - but he then goes on to express the view that the occurrence of a danger which is substantial is very rare. This assertion is equivocal. It is not clear whether the DMP is saying that the possibility of any substantial danger occurring is so remote that it can properly be disregarded or whether he is asserting that, although it does happen sometimes, it does not happen very often. If it is the latter view which he is expressing, then it is erroneous, in that isolated incidents have to be taken into account notwithstanding their infrequency (see paragraph 5 above). Moreover, we are not entirely sure that it is proper to regard "biting the tongue", which the DMP concedes is a more frequent occurrence, as a minor injury. But, in any event, for the reasons already given it is not clear that the DMP applied the proper test in determining the effect of falling or choking during the course of an epileptic fit, and, whether or not he did, the grounds for his reaching his conclusion are inadequately expressed. The claimant is entitled to a clearer exposition.

12. If, when the Attendance Allowance Board or the DMP, as the case may be, comes to reconsider the matter, the view is taken that another person can do nothing to prevent the onset of an epileptic attack, and that that person's supervision will be confined to preventing a substantial danger arising during the course of such attack, and if further, on the facts, it is concluded that the

occurrence of such attacks is likely to be very infrequent, then, in our judgment, it is difficult to avoid the conclusion that the relevant supervision cannot on any footing be regarded as "continual". In so far as the final paragraph of Decision R(A) 1/81 indicates the contrary, we specifically disapprove of the views there expressed, and they should not be followed.

13. The decision of the DMP is erroneous in point of law, and accordingly it is set aside. We allow this appeal.

(Signed) I O Griffiths
Chief Commissioner

(Signed) J G Monroe
Commissioner

(Signed) D G Rice
Commissioner

Date:

Commissioner's File: C.A. 1/1982
DESS File: S.D. 450/1354