

JSW/EFM

SOCIAL SECURITY ACTS 1975 TO 1981

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

C A 7/1982

1. My decision is that the determination on review of the Attendance Allowance Board by the medical practitioner on their behalf (the DMP), dated 13 August 1981, is erroneous in law and is set aside as provided by regulation 10 of the Social Security (Attendance Allowance) (No 2) Regulations 1975.
2. The claimant, now aged 33, suffers from epilepsy and diplegia, probably crossed. She was awarded a higher rate certificate in May 1977 for 4 years. On her renewal claim, she was awarded an allowance at the lower rate because she required, or was likely to require, continual supervision throughout the day in order to avoid substantial danger to herself or others for 4 years from 14 May 1981. On review of that determination, the DMP, in his determination of 13 August 1981, found that the claimant is unaware of common indoor and outdoor dangers and accepted that she requires continual supervision throughout the day in order to avoid substantial danger to herself. He found that neither of the night conditions was satisfied.
3. I granted the claimant leave to appeal on a point of law as to whether the DMP had applied the right test to the frequency and/or risk of danger to the claimant from an epileptic fit during the night. In Decision R(A) 1/81, paragraph 25, the learned Commissioner cited from paragraph 7 of Decision C.A. 15/79 (not reported) to the effect that a determination in a particular case should not rest on what is generally experienced by epileptics. He continued -

"I do not think that the DMP directed his mind to the right question. The question which he had to put to himself was not: Is it generally true that epileptics are at risk of suffering serious injury in an attack? The question which he needed to put to himself was: Is this epileptic exposed to such a risk."

4. An examining doctor, in a report dated 14 May 1981, stated, in part 3, paragraph 7, that by night - "She can smother herself in the fits". In his determination, the DMP expressed "the general

medical opinion" that the risk of suffocation is remote and also his medical opinion that the risk of injury arising from a fit occurring in bed is minimal. His language indicates that his approach was objective and not subjective in the case of the claimant. It is submitted on behalf of the Secretary of State that the DMP misdirected himself by having regard to what was generally true of epileptics instead of asking himself and resolving the question whether there was a relevant (i.e. not remote) risk of the claimant suffocating during a fit. It is submitted that the DMP's decision is erroneous in law. For the reasons stated, in my judgment, the determination of the DMP is erroneous in law.

5. I commented, when granting leave to the claimant to appeal, that her condition would not appear to have changed for the better since she was awarded a higher rate certificate in May 1977 for 4 years. It is submitted on behalf of the Secretary of State that the DMP was not bound to follow the earlier decision, dated 13 May 1977, which awarded a higher rate certificate. I have not even suggested that the DMP was so bound. Plainly, a person's condition might change for the better or for the worse and, even so, the DMP must consider the matter in the light of the prevailing evidence. Such determinations depend, however, largely upon individual medical opinion and, in my view, it is desirable that, when there has been a previous certification in respect of a condition relating to attendance allowance, in the absence of material change, careful consideration should be given to whether subsequent evidence warrants a different conclusion. It may be that the previous determination was plainly wrong. If possible, a situation should be avoided in which medical practitioners, who hold different personal opinions on similar medical circumstances, give contrary decisions, which the general public, and particularly those afflicted by disabling conditions and those associated with them and who care for them, do not understand, and is apt to produce a feeling of injustice.

6. Solicitors on the claimant's behalf have submitted other matters relating to the evidence which are not for me to determine on an issue of law. Deciding whether or not the conditions for attendance allowance are satisfied is the function of the Attendance Allowance Board. The review decision is set aside and it follows that there will be a further review when the claimant and her solicitors will have an opportunity of making the submissions enclosed with their letter of 24 May 1982 and any other submissions.

7. The claimant's appeal is allowed.

(Signed) J S Watson
Commissioner

Date: 2 August 1982

Commissioner's File: C.A. 7/1982
DHSS File: S.D. 450/1356

C.A. 7/82 KNIGHT

This decision is circulated because of the
observation in paragraph 5.

J S Watson