

RFMH/BDS

CA 9/1984

SOCIAL SECURITY ACTS 1975 TO 1982

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

Name: Carole Hyslop (Mrs) On behalf of: Jamie Hyslop

1. My decision is that the determination on review of the Attendance Allowance Board by a delegated practitioner (the 'DMP') on their behalf dated 16 May 1983 is erroneous in law and is accordingly set aside.

2. The claimant is the mother of the child Jamie, who was born on 16 August 1973 with complete epispadias resulting in complete absence of any of the muscles required for urinary control together with the epispadiac deformity of the penis. On 16 May 1983 the 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 Jamie did not satisfy either of the day or 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 7 May 1982 to the same effect should not be revised. Leave was sought on behalf of a claimant to appeal on the ground that the DMP's decision was erroneous in point of law, and such leave was given. It is contended on behalf of the claimant that the DMP failed to satisfy the requirements to give clear and adequate reasons for his decision (regulation 9(2) of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 as amended) ('the Regulations') and that his decision was not supported by the facts.

3. The effect of section 35(1) of the Social Security Act 1975 is that a person 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. In the case of a child under the age of 16, the attention or supervision required must be substantially in excess of that normally required by a child of the same age and sex (regulation 6(2)(c) and (d) of the Regulations).

5. 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. It is, of course, a fundamental principle that if inadequate reasons are given for the decision that is an error of law whether or not the actual decision is correct (Decision R(A) 1/72, paragraph 8). In my judgment, the DMP in this case did not fully comply with the statutory requirements.

6. In order to satisfy the conditions contained in section 35(1)(a)(i) and 35(1)(b)(i), the "attention" must be required "frequently throughout the day" or "prolonged or repeated during the night". "Frequently" connotes several times - not once or twice. "Prolonged" means some little time. "Repeated" means more than once at any rate. "Attention" is different from "activity" or "attendance". It denotes "something personal to the disabled person". (Regina v National Insurance Commissioner, Ex parte Secretary of State for Social Services /1981/ 2 All E.R. 738 at 741 (Appendix to R(A) 2/80).) It is important to observe that the intention and supervision referred to in the statutory conditions must be "required rather than provided".

7. With regard to the condition contained in section 35(1)(a)(i) the medical report dated 4 February 1982 noted that Jamie seeped urine and suffered from frequent urinary infections. He required the help of the claimant to wash and bath him "because of incontinence and to guard against urinary tract infection". In a letter dated 14 June 1982 Mr P.G. R, Consultant Urologist at a hospital in London, stated the following:-

"This child Jamie is under my care on account of his severe congenital abnormality. He was born with complete epispadias and therefore complete absence of any of the muscles required for urinary control together with the epispadiac deformity of the penis.

He has undergone a lot of corrective surgery but unfortunately remains completely incontinent of urine I feel quite strongly that coping with a completely wet child at the age of 9 is a major burden for the family and I would strongly support the application for an attendance allowance"

In a statement to the examining doctor on 24 October 1982 the claimant stated that Jamie wore pads and rubber knickers all day and night. He was able to change his pads but needed help and supervision. She stated that he used 80 incontinent pads a week and that he wore 4 ordinary pants over his incontinent pads and then plastic knickers. In his report dated 24 October 1982 the examining doctor recorded that Jamie was able to do "everything for himself except attending to his complete incontinence. This requires a special incontinence attention." The examining doctor also noted "the boy is too young to be able to look after his incontinence, needs help with pads, knickers, baths. See letter from Mr P.G. R..., FRCS dated 14 June 1982. I concur". In her letter dated 1 December 1982 the headmistress of Jamie's school stated "Jamie has to change his pads and pants at frequent regular intervals throughout the day. Provision has been made for him to come to the medical room so that he may have privacy where he is supervised by either the school secretary or welfare assistant". In the light of that evidence the DMP concluded that Jamie failed to satisfy the conditions contained in section 35(1)(a) (i) because "apart from when he is bathed Jamie is relatively independent in the management of his bodily functions. I base this opinion on the fact that there is nothing in the evidence before me to indicate that Jamie is other than a sensible boy and I consider that he is quite capable of changing his own incontinent pads". It is contended on behalf of the claimant that such a conclusion is not justified on the evidence and I agree. It is clear that Jamie is obliged to wear substantial protective clothing and in his report dated 24 October 1982 the examining doctor states 'the boy is too young to be able to look after his incontinence, needs help with pads, knickers, baths". I do not consider that the headmistress's letter which refers to "supervision" without reference to "help" outweighs the claimant's statements and the medical evidence of the examining doctor and consultant urologist. Accordingly in my view the DMP's decision was erroneous in law.

8. With regard to the condition contained in section 35(1)(b)(i) the medical report dated 4 February 1982 indicated that Jamie required attention once or twice nightly from midnight to 6 00 am for periods of 5-10 minutes. The examining doctor also noted that frequent changing was necessary to avoid infection and prevent soreness. The medical report dated 24 October 1982 indicates that the claimant attended Jamie twice each night for periods of 15 minutes in order to change his pads and sheets. The examining doctor also noted that he required special incontinence attention. The DMP concluded that Jamie did not satisfy the condition on the ground that if he "were changed last thing at night before his mother retires to bed and first thing in the morning it would not be necessary for him to be changed more than once in the same night which attention cannot be regarded as repeated nor can attention for 10-15 minutes be considered as being prolonged". The medical evidence indicates that Jamie's urine "seeps" and that he is susceptible to urinary tract infections and soreness if he is not changed when soaked. There is no medical evidence to support a finding that even if he were changed last thing at night he would not be "soaked" at least twice before the morning and medical evidence further supports the conclusion that such attention is required and necessary rather than provided. Accordingly in my view a DMP's conclusion is inconsistent with the facts before him and is erroneous in law.

9. In order to satisfy the conditions contained in sections 35(1)(a)(ii) and 35(1)(b)(ii) it has to be shown that Jamie requires continual supervision in order to avoid substantial danger to himself or others. In Decision R(A) 1/83 a Tribunal of Commissioners set out four elements that must be satisfied to comply with the "continual supervision" test. 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 relevant question is whether or not the relevant danger is likely to occur. If it is, then its frequency is immaterial. The third element is the need for supervision on the part of some other person to ensure that the claimant avoids the substantial dangers. Sometimes a claimant is fully capable himself of taking the appropriate precautions against the relevant danger occasioned by his condition. The final element is that the supervision must be continual. In this context, the Tribunal of Commissioners approved 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)."

10. In the present case the medical report dated 4 February 1982 indicated that Jamie could be left unsupervised for periods between 2-3 hours during the day and during the night but that supervision was otherwise required to avoid "dangers arising from possible urinary tract infection". The medical report dated 24 October 1982 indicates that Jamie can be left unsupervised for periods of 2 hours during the day but never during the night, and that he is too young to be able to look after his incontinence. The DMP concluded on the evidence that Jamie did not satisfy the conditions and he gave as his reasons the following:-

"So far as daytime supervision is concerned, there is nothing in the evidence before me to indicate that Jamie has any disturbances of behaviour or dangerous tendencies and he is described as being a bright child. It is recorded that he is in danger from a urinary tract infection occurring but I do not consider that because of this he requires continual supervision throughout the day. It is stated in the earlier medical report that he can be safely left unsupervised for 2-3 hours and in the later medical report it is recorded that he can be safely left unsupervised for 2 hours during the day. Having regard to the evidence before me I do not accept that Jamie requires, or has required, continual supervision throughout the day in order to avoid substantial danger to himself or others, being supervision substantially in excess of that normally required by a boy of the same age."

So far as night time supervision is concerned, there is nothing in the evidence before me to indicate that Jamie in any way exposes himself or others to danger when in bed at night. It is stated in the earlier medical report that he can be safely left unsupervised at night for 2-3 hours and in the later medical report it is recorded that he is never left unsupervised at night. Bearing in mind that no child of Jamie's age should be left alone in the house at night 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 being supervision substantially in excess of that normally required by a boy of his age."

11. It is contended on behalf of the claimant that these findings are inconsistent with the evidence. So far as daytime supervision is concerned both the medical reports agree that Jamie can be left unsupervised for periods of 2-3 hours but subject to this the medical evidence supports a conclusion that there is a real risk of urinary tract infection if he is then left unattended and that in his particular condition would constitute a substantial danger. The medical report dated 24 October 1982 indicates that Jamie is too young to be able to look after his incontinence. In my judgment the DMP considered all the evidence before him and using his medical expertise was entitled to reach his decision as to whether or not Jamie complied with the "continual supervision" test during the day and I do not consider that his conclusion was erroneous in point of law. However I do not accept that his conclusion so far as night time supervision is concerned is justified on the evidence before him. The medical report dated 24 October 1982 clearly states that Jamie is never to be left unsupervised during the night and the medical evidence indicates the possibility of substantial danger to Jamie's health by way of urinary tract infection if his needs are not met when required. The DMP's statement that no child of Jamie's age should be left unsupervised at night is not for the same reasons as Jamie and nor can it be concluded on the evidence that the continual supervision required by Jamie is not substantially in excess of that normally required by a boy of his age. It is contended on behalf of the claimant that the DMP's conclusion is inconsistent with the facts and I agree. Accordingly his decision was erroneous in law as I do not consider that so far as the night time supervision was concerned he applied the "continual supervision" test correctly.

12. For the reasons stated, in my judgment the determination of the DMP is erroneous in law. Accordingly the decision is set aside and the claimant's appeal is allowed.

(Signed) R.F M Heggs
Commissioner

Date: 26 July 1984

Commissioner's File: C.A. 9/1984
DHSS File: S.D. 450/1663