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RSL/JP

SOCIAL SECURITY ACTS 1975 TO 1979

APPLICATION FOR LEAVE TO APPEAL AND APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: Peter Frank Brayley

/ORAL HEARING/

1. This is an appeal by the claimant made with my leave from a review decision dated 28 September 1978 given by a medical practitioner delegate (referred to below as "the DMP") of the Attendance Allowance Board and holding that the claimant failed to satisfy any of the conditions of section 35(1)(a) and (b) of the Social Security Act 1975 for entitlement to an attendance allowance. I have heard the appeal at an oral hearing at which the claimant, who did not attend, was represented by Mr T J Morgan, Solicitor of the Garratt Lane Law Centre, and the Secretary of State was represented by Mr M N Qureshi of the Solicitor's Office of the Department of Health and Social Security.

2. The claimant is aged 38 and is a married man with one child, a son now about 4 years old. He suffers from epilepsy and is subject to both grand mal and petit mal seizures. He claimed attendance allowance on 16 January 1978 but, as already indicated, delegates of the Attendance Allowance Board have considered themselves unable to issue the necessary certificate.

3. Included in the medical evidence considered by the DMP was a letter dated 27 July 1978 from the senior registrar of the hospital where the claimant had been treated as an out-patient since 1977, and in which the writer stated: "There can be no doubt that his epilepsy is not under satisfactory control". And he indicated that an alteration in medication might achieve better control although it would take some months at least. The evidence also included statements from the claimant's wife relating her experiences on occasions when the claimant suffered an epileptic attack. On one occasion when he was alone in the bathroom with their child, then two years old, he had an attack and fell on the child. On another occasion he fell down a flight of 13 stairs in their home. The claimant's wife also stated that he was subject to petit mal attacks which came on without warning and, therefore, that she dared not let him go out without escorting him in case he should be brought to an abrupt halt in the middle of a road by such an attack.

4. This case depends upon the question whether or not the claimant satisfies the condition of section 35(1)(a)(ii) which requires that he should be "so severely disabled .... that, by day, he requires from another person .... continual supervision throughout the day in order

to avoid substantial danger to himself or others". No claim has been made that he requires frequent attention either by day or by night, and, although in the application for leave to appeal it was contended by Mr Morgan on the claimant's behalf that he required continual supervision throughout the night, I do not consider that the DMP's determination of this issue can be faulted.

5. The passage of the review decision dealing with the claimant's day time supervision requirements expressly mentions medical reports made by the claimant's general practitioner and two other doctors. This part of the review decision then continues (in para 2) as follows:-

> "I have examined the evidence appertaining to the nature and frequency of fits and I take the view that although it is possible to suffer serious injury during an epileptiform attack by falling or choking, it is very rare in practice for such dangers to manifest themselves. Minor injuries from biting the tongue or lips and minor abrasions caused by falling are more likely to be suffered. In my judgment, no substantial danger would arise if [the claimant] were to suffer such fits as those described in the evidence when completely alone."

6. In my view there are two criticisms to be made of this passage. There is no reference in it to the letter from the hospital registrar. I find this surprising because that letter provides a scientific basis for the unpredictability, frequency and severity of the attacks of which the claimant's wife gave evidence.

7. My second criticism of the passage is that the DMP seems to rest his determination on this part of the case on what is generally experienced by epileptics. He states that "it is very rare in practice" for serious injury to be suffered by an epileptic during an attack. This seems to be the guiding reason for his conclusion that no substantial danger "would arise if [the claimant] were to suffer such fits as those described in the evidence when completely alone". In the light of the evidence of the claimant's wife of his falling downstairs on one occasion, this also is surprising. And 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 <u>this</u> epileptic exposed to such a risk?

8. Turning to the question whether there was a substantial risk of the claimant injuring others during an attack, the DMP (also in paragraph 2 of his decision) dealt with this point as follows:-

> "I note that [the claimant's wife] has suffered 2 injuries this year, when [the claimant] has had an attack and that he has fallen on their child during an attack. However, I consider that these are isolated incidents and viewing the evidence as a whole I do not accept that the risk of him causing injury to other people necessitates continual supervision throughout the day."

9. This reasoning strikes me as unacceptable. 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. Again, I consider that the DMP asked himself the wrong question. He appears to have asked himself the question: How often is such an incident likely to occur? The question which he should have put to himself was: Is there a relevant (ie not remote) risk of such an incident occurring? Supposing he gave an affirmative answer, he then needed to go on to the further question: If such incident does occur is it likely to give rise to substantial danger to the claimant's wife or child?

10. In a later part of his decision the DMP commented on a written submission made to him by Mr Morgan in which he referred the DMP to the three reported Commissioner's Decisions R(A) 1/75, R(A) 2/75 and R(A) 1/73; and quoted a passage from each of the two latter decisions. The DMP's comment on this part of Mr Morgan's submission was as follows:-

> "I have noted Mr Morgan's letter of 4 August 1978 in which he quotes various Commissioner's decisions and I would like to explain that I am not bound by any previous decisions."

Plainly the DMP is under a misapprehension. It is true that one decision cannot govern another by virtue of a similarity of facts. But the reported decisions of the Commissioners are binding on the Attendance Allowance Board, and their delegates, on points of law. Mr Morgan was referring the DMP to passages in the cited Commissioner's decisions containing interpretations of that part of the law which makes use of the word "supervision". These interpretations are binding on the Attendance Allowance Board and their delegates. Accordingly, taken literally, the comment which I have quoted is inaccurate.

I have considered whether I ought to regard that comment as vitiating the decision because it expresses a mistake of law. However, I have come to the conclusion that that is not the right step for me to take. No question has arisen in any part of the case concerning what constitutes "supervision" within the meaning of the relevant statutory provision and the DMP did not appear to challenge the interpretation of the law to which Mr Morgan had referred him. Consequently his observation that previous decisions are not binding on him, although inaccurate, is not, in my view, a relevant inaccuracy.

11. On the other hand, the earlier criticisms which I have expressed of the decision do seem to me to point to errors of law. I think that it constitutes error of law that the DMP should have put to himself the wrong questions. It seems to me that he failed to deal with the issues which the facts of the case raised. In other words, he misdirected himself, and, in my view, that constitutes an error of law.

12. Accordingly I allow this appeal.

(Signed) R S Lazarus
Commissioner

Date: 2 November 1979

Commissioner's File: C.A. 15/1979
DHSS File: SD 450/1051