Perry Hardman
Sue Shire

CA 15/1981

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CA/15/1981 (DEVLIN)

This decision is "starred" because it rejects a contention that CA/4/80 decided that any time after mid-night must be "right" for attendance allowance purposes.

M J GOODMAN

MJG/FB

SOCIAL SECURITY ACTS 1975 TO 1980

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

1. My decision is that the decision of a delegated medical practitioner (for and on behalf of the Attendance Allowance Board) dated 3 September 1980 is not erroneous in law. Consequently I dismiss the claimant's appeal against that decision: Social Security Act 1975, section 106.

2. On 3 September 1980 a delegated medical practitioner ("DMP") gave a decision on behalf of the Attendance Allowance Board on an application by the claimant's husband for review of the claim for attendance allowance. The basis of the application for review was that "night" allowance should be paid, as well as the "day" allowance which was already being paid.

3. In paragraph 3 of the DMP's decision the following passage occurs,

> "3. Before, however, I can revise the decision of 9 January 1979 and issue a higher-rate certificate, I must be satisfied that in addition to fulfilling the day conditions [the claimant] also satisfies one of the night conditions ... In this connection, both medical reports state that [the claimant's] night attention needs are none. In the earlier medical report of 4 January 1979 [the claimant's husband] in his signed statement says 'No attention is needed at night'. The signed statement in the later medical report says 'At night she usually needs no help but her husband has to help her until she goes to bed at either 11 pm, midnight or 1 am'. It is plain from this evidence that [the claimant] requires no attention at night. Consequently, I do not accept that she requires prolonged or repeated attention during the night in connection with her bodily functions or that she has required such attention throughout the period relevant to the claim".

4. In her appeal to the Commissioner, the claimant's representative concedes that the claimant does not require continual supervision throughout the night in order to avoid substantial danger to herself or others (1975 Act, section 35(1)(b)(ii)) but asserts that she does require prolonged or repeated attention during the night in connection with her bodily functions (section 35(1)(b)(i)).

The representative further asserts that in the decision of 3 September 1980 the DMP misdirected himself as to the meaning of "night", as contrasted with "day", in section 35(1) of the 1975 Act.

5. There is no definition of "day" and "night" in the 1975 Act or elsewhere and the question must therefore be considered on general principles. There has been cited to me by both parties an unreported decision of the Commissioner, numbered as C.A. 4/80, which decision was I observe given on 21 November 1980, i.e. after the DMP in this case gave his decision on 3 September 1980. However if Decision C.A. 4/80 contained a definition of a legal principle which had been ignored or wrongly applied by the DMP in his decision then that would of course constitute an error of law by the DMP. However, I am satisfied that in his decision the DMP did give consideration to the fact that the claimant's husband stated that he has to help the claimant until she goes to bed at either 11 pm, midnight, or 1 am and considered whether or not that could constitute "night", in view of the comparatively late retiring hours mentioned by the claimant's husband. The DMP clearly held the view that there was nothing unusual about a married couple going to bed as late as 1 am and concluded therefore that the period up to 1 am was not "night" for the particular household constituted by the claimant and her husband.

6. However it is asserted on behalf of the claimant that the Commissioner in C.A. 4/80 ruled that if the claimant's attendant does not retire until after midnight and is giving attendance to the claimant after midnight that must as a matter of law constitute "night". I have given careful consideration to the whole of Decision C.A. 4/80 and in particular to paragraph 10 of that decision which is relied upon for the above proposition and which reads,

> "10. In the case I have to consider the claimant went to bed at 2 am, having for an unknown period prior thereto given attention to the needs of the claimant. In the circumstances of this particular case I am satisfied that the period of time during which such services were provided must, at least after 12 midnight, be regarded as part of the night-time, notwithstanding that the claimant had not as yet gone to bed. In determining what hours constitute the night one must have regard to what is generally accepted on any footing as being night-time, irrespective of the fact that some people may during such hours adopt the practice of remaining up and awake. The factor, which is, in my judgment, conclusive, is that after midnight a new calendar day commences, and in my view, it would be unrealistic and therefore unacceptable to regard, whatever the sleeping pattern of the attendant, any period after midnight as part of the day-time of the preceding calendar day".

In my view that paragraph, as well as the rest of the decision, make it clear that the Commissioner was not seeking to lay down any general principle that any time after midnight must be "night" within section 35 of the 1975 Act. I have consulted the Commissioner who gave Decision C.A. 4/80 and he agrees with that interpretation.

On the facts of the particular case before him in C.A. 4/80, the Commissioner concluded that where an attendant, who it appears was not the husband of the disabled claimant, stayed up till 2 am to help the claimant, that period after midnight constituted "night" in that particular household.

7. In the present case before me a husband and wife were in the habit of going to bed at a late hour but there is nothing unusual in husband and wife doing that. As was emphasised by the Divisional Court in R v The National Insurance Commissioner Ex parte Secretary of State for Social Services [1974] 1 W.L.R. 1290; [1974] 3 All E.R. 522; also reported as an Appendix to Decision R(A) 4/74 one must "regard the night for the purpose of the section as being that period of inactivity, or that principal period of inactivity through which each household goes in the dark hours, and to measure the beginning of the night from the time at which the household, as it were, closed down for the night" (Appendix to R(A) 4/74, p.52B). In my view the application of that particular test in this case, as must be the case with the vast majority of households consisting simply of a husband and wife, is that "night" does not start until the married couple have both retired to bed for the night, no matter how late. The circumstances in Decision C.A. 4/80 were different. There was some evidence before the Commissioner in that case that the attendant, who was not the claimant's husband, was having to stay up beyond the time that he would normally go to bed in order to attend the claimant and moreover staying up till 2 am. Those circumstances are very different from the present case.

(Signed) M J Goodman
Commissioner

Date: 27 July 1982

Commissioner's File: C.A. 15/1981
DHSS File: S.D. 450/1224