"Thinking" ~~probably~~ not a bodily function (NB – pre: Cuthbertson)

PLH/1/LM

Commissioner's File: CA/022/93

DSS File: SD450/

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the determination dated 13 November 1991 by the delegated medical practitioner ("DMP") reviewing this claim for attendance allowance on behalf of the Attendance Allowance Board was not erroneous in law. Accordingly this appeal does not succeed.

2. The claimant is a lady now aged 47 who has suffered from a post-viral fatigue syndrome ("M.E.") since March 1989. The fatigue caused by her condition, and the associated depression and other psychological difficulties, mean that she is considerably disabled and on bad days requires a great deal of assistance and encouragement to do even the simplest tasks such as washing herself. She is fortunate enough to have a determined and devoted husband who has given up full-time work in order to look after her. Because of the frequent attention she receives a further decline in her emotional and psychological condition has been stopped and she has made some progress but is very dependent on him, and is largely confined to a wheelchair. She appeals against the decision on review that none of the day or night time conditions for the allowance were satisfied in her case and that the original rejection of her claim should therefore stand.

3. Whether the statutory medical conditions for attendance allowance are satisfied in any particular case is a question of medical and factual judgment for the tribunal of fact (in this case the Board or the DMP on its behalf) to determine, and not a question of law. The appeal is concerned only with whether there is some error of law in the decision itself or the way it has been arrived at. It is however well established that a decision has to be set aside as erroneous in law if there has been a failure to make adequate findings on a relevant issue of fact or if clear and sufficient reasons are not given to explain the conclusions reached: R(A) 1/72.

4. In the present case the claimant's husband who is acting on her behalf puts forward a number of grounds for the appeal. First he says that the suggestion in paragraph 4 of the DMP's determination that the claimant could use a commode for

micturition is made without regard to practicality since it ignores the need for washing facilities. I am unable to find that this amounts to an error of law. In view of the evidence from the claimant's husband in his signed statement of 6 February 1991 that she could use a commode, it was in my judgment open to the DMP to find that this was a possibility. It has been held that any suggested solution to a claimant's problems must take into account individual circumstances: it is no solution unless it is feasible: CA/092/1989. However the objection in the present case is not that the solution is not feasible but that it is unreasonable. Assessing what is medically and practically reasonable is a matter for the DMP and not for me, and I am unable to find his suggestion so unreasonable as to amount to an error in law.

5. Secondly the claimant's husband points out (correctly) that it is not necessary to qualify in <u>all</u> areas of assistance with bodily functions: he contends, in substance, that the constant attention he gives his wife is reasonably required because it is preventing her relapsing, as she would do on her own. Without such attention she is in danger of lying in bed too much and there is no hope of her recovering from her depression. He raises the question whether assistance with emotional and psychological needs can be included as assistance with "bodily functions" on the footing that they are connected with brain function and the brain is part of the body. Further, he suggests that the risk of deterioration in his wife's mental (and perhaps physical) condition if left on her own means that she requires his supervision to avoid substantial danger to her health.

6. I have considered all the careful and well argued submissions put forward in the claimant's grounds of appeal and reply, but I have come to the conclusion that none of them shows any error of law in the DMP's determination, and I must therefore dismiss the appeal, as the Secretary of State in an equally well argued submission invites me to do. In particular, it seems to me that:-

(i) the claimant is correct in contending that "required" in the statutory conditions for attendance allowance means "reasonably required" (R(A) 3/86); but the requirement of attention in this context must be in connection with the day to day <u>performance</u> of the disabled person's bodily functions, and additional general attention that is given with a view to securing an improvement in the person's state of health, desirable though this may be, is strictly outside what is "required" to enable those functions to be performed.

(ii) "bodily functions" in section 35(1)(a) Social Security Act 1975 (as in force and applicable at the time of this claim) refers primarily to physical functions, although the need for attention with them may of course arise out of a

mental rather than a physical disability. The expression in this context is in my view concerned with more than mere hygiene, but does not include attention given in connection with the cognitive and other functions of the brain unrelated to physical functions, even though the brain is of course an organ and is part of the body. I would therefore hold that there is a distinction between "bodily needs" and emotional and psychological needs for the purposes of section 35.

(iii) "substantial danger" in the context of the statutory supervision test connotes some immediate threat to a person's life, or of physical injury, or perhaps in the case of a mentally disabled person, sudden mental trauma: but does not include the risk of longer-term deterioration to the disabled person's mental or physical health from being left unattended for too long without stimulation and encouragement, since it is difficult to see how the degree of supervision needed to avoid this could be said to be continual.

7. The DMP in this case has in my judgment applied the correct tests for the purposes of the statutory conditions, and his conclusions are based on sufficient findings and adequately stated reasons. In my view the determination contains no error of law and I must accordingly dismiss the appeal. Document T29 which is queried in the claimant's reply, is left blank in the case papers and there was no medical evidence which has not been disclosed to the claimant.

(Signed) P L Howell
Deputy Commissioner

Date: 20 January 1994