IEJ/AJH

Commissioner's File: CA/27/1984
DHSS File: SD 450/1706

SOCIAL SECURITY ACTS 1975 TO 1984

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

Name: Audrey Goodman (Mrs.)

1. (1) This is a claimant's appeal from the review decision dated 18 October 1983 of a delegated medical practitioner ("the DMP") on behalf of the Attendance Allowance Board ("the Board"), brought by my leave and upon the contention that the DMP's decision was given in error of law. By his decision the DMP decided (as had earlier a different delegated medical practitioner who had given a decision to the like effect dated 3 February 1983) that the claimant did not satisfy either of the qualifying "day conditions", or either of the qualifying "night conditions", qualification whereunder is pre-requisite to any entitlement to attendance allowance.

(2) The claimant has been represented on her appeal by Doctor P. Martinez, a senior Welfare Rights Officer of the Metropolitan District in which the claimant resides, and I am indebted to him for his cogent and closely reasoned written submissions on her behalf. I am indebted also to the Secretary of State's representative for written submissions of no less clarity, the content of which is directed to supporting the DMP's decision as having been given without error of law, but which nevertheless allows that there is one issue raised which is to be regarded as "for consideration".

(3) After anxious consideration, because I accept that the DMP's decision is in the main expressed with sufficient clarity and precision, I have concluded that the appeal should be allowed on grounds which are included amongst those advanced by Doctor Martinez and are those also indicated by the Secretary of State's representative as being "for consideration".

(4) I allow the appeal and direct that the claimant's application for review of the above-mentioned decision of 3 February 1983 (which was the precursor of the DMP's decision of 18 October 1983) be referred afresh to the Board or to a different delegated medical practitioner.

2. The basic facts of the case have not been in dispute and can for my purposes be sufficiently summarised as follows:-

(1) The claimant, who was rising 45 years of age at the time of her material application for review, suffers from diabetes mellitus, myxoedema and deafness; and has also undergone bilateral cataract removal. Her son lives with her.

(2) The claimant uses a hearing aid to assist with her deafness and reading glasses to compensate for the consequences of her cataract operation.

She is fully mobile around her own home and (subject to the incidence of the attacks to which I shortly refer) is capable of performing all normal bodily functions and of looking after herself generally, although she does not go outside her own home unless accompanied.

(3) She suffers from irregular attacks of hypoglycaemia. Such attacks are unpredictable, they overtake her without warning, and she cannot therefore call for assistance in regard to them. When such an attack occurs she requires attention and supervision; and they frequently include significant losses of consciousness. The timing and frequency of such attacks are variable. At July 1983 she was having an attack or attacks on approximately 8 days a month, at a frequency of one fit on an affected day, and on approximately 4 nights a month, at a frequency of approximately one attack a night; and all such attacks were classified as "major". Her unconsciousness and/or altered awareness during an attack would last for some 40 minutes.

(4) The claimant's son in fact listens out for the noises which are made by the claimant when she suffers an attack at night, and attends upon her when he hears such. He also administers a precautionary sugary drink once a night at approximately 2 a.m. He was at the time himself attending a Polytechnic for 3 to 4 hours a day, but exercising further supervision over the claimant whilst at home.

3. Though not so stated in terms, the claimant's appeal has been effectively confined to challenge of the DMP's decision that the claimant did not satisfy either of the "night conditions". The whole case will again be before an adjudicating authority upon the rehearing I have directed, but I need say no more as to the "day conditions" than that whilst it is clear that the claimant's most acute worry is as to her having night attacks of hypoglycaemia, the DMP has not in his decision explained to my satisfaction how it was, in the light of the figures before him as to frequency of attacks which I have above cited, that he concluded (as he in fact he states) that her attacks "do not normally occur during the day". Indeed, if (contrary to the conclusion at which I have arrived) there were no other grounds for setting aside the DMP's decision I would have regarded it as necessary to set it aside by reference to that ingredient both in the context of a perverse finding of fact and in the context of an inadequacy of stated reasons for decision. Furthermore, whilst it was necessary and proper for the DMP to deal separately with each of the day conditions and each of the night conditions, and it is true that much of what has been contended on the claimant's behalf as to the severity and potentially lethal character of the claimant's hypoglycaemic attacks has been directed to the night conditions - and whilst it is true also that if, as the DMP found as a fact, the claimant, a diabetic, "gives her own insulin" (which presumptively refers to day-time periods) there may well be valid differentiations to be made as between the degrees of need for attention and/or supervision as between day and night - the DMP needed, in my view to state reasons in support of his determination that neither of the day conditions was fulfilled which took account of the evidence before him as to all the claimant's attacks being unpredictable and as to the conditions which they produced, and of the risks (if any) properly foreseeable should the claimant suffer a day-time attack in the absence of anyone to attend upon her or exercise precautionary supervision over her.

4. With special reference to the "night conditions", Doctor Martinez has expressed the grounds of appeal upon the present appeal as follows:-

"1.0 The first ground of appeal is that the delegated medical practitioner has not 'asked himself the right questions' in the light of Decisions R(A)1/73, R(A)1/75 and R(A)5/81 in regard to a need for continual supervision by night; and in further particular, the DMP has not sufficiently considered the danger to the claimant were a hypoglycaemic attack to occur whilst the claimant was asleep and in circumstances in which the degree of supervision in fact exercised by [the claimant's] son was absent.

2.0 The second ground of appeal is that the DMP came to a decision on the basis of facts that were not in dispute which no reasonable person suitably instructed in the law could have arrived at.

2.1. [The claimant] suffers from Diabetes, Mellitus and Myxoedema. She suffers from hypoglycaemic attacks up to three times and on average once per week. If she did not receive immediate treatement, she could die. The treatment is given by way of a glucose drink. [The claimant] has no warning of an impending attack since these occur in her sleep. Following such an attack she experiences confusion it appears of up to one hour. She cannot call for assistance because of the rapidity of the onset of the attack and the fact that these occur in her sleep. [The claimant's] son listens for the onset of attacks which are detectable because of noises [the claimant] makes while she is having an attack. [The claimant] has attempted to prevent the onset of attacks by being woken in the middle of the night by her son and drinking a glucose drink. This has not materially affected the situation.

2.2 On the facts as stated [the claimant] should qualify for an award of the lower rate of attendance allowance on the ground of continual supervision by night. Her case would appear to be virtually identical to that determined by the Commissioner in Commissioner's Decision R(A)3/74. Her case would appear to be distinguished from that determined by a Tribunal of Commissioners in R(A)1/83 since:

(a) the hypoglycaemic attacks are unpredictable;

(b) [the claimant] cannot call for assistance;

(c) the attacks can lead to a substantial danger in the most innocuous circumstances, i.e. being asleep in bed;

(d) [the claimant] needs continual anticipated [I read this as "anticipatory"] supervision between attacks and active intervention in the case of an attack.

3.0 The third ground of appeal is that stated in the application for leave to appeal to the Social Security Commissioner."

Except that, for the avoidance of confusion, I am re-numbering the same, the grounds imported referentially by paragraph 3.0 of Doctor Martinez's submissions last above are as follows:-

"(1) Regulation 9(2) of the Attendance Allowance Regulations provides that:

'Where review was refused ..., the claimant ... shall be notified in writing of the reasons for such refusal or determination.'

(2) A Social Security Commissioner in Decision R(A)1/72 held that a claimant looking at a decision by the Attendance Allowance Board should be able to discern on the face of decision the reasons why the evidence failed to satisfy the Authority.

(3) In my letter to the Attendance Allowance Board dated the 20 September 1983, it was specifically put in issue that:

(a) Hypoglcaemic attacks to which the appellant is subject can cause death if not treated immediately.

(b) the attacks are unpredictable.

(c) the appellant cannot call for assistance.

(d) the attacks can lead to substantial danger in the most innocuous circumstances for example being asleep in bed.

(e) the appellant needs continual anticipatory supervision at night in respect of such attacks and active intervention in the case of an attack.

(f) such supervision is undertaken by the appellant's son.

(4) The ground of appeal to the Social Security Commissioner is that the Attendance Allowance Board did not give adequate reasons for its decision. No findings of fact were made in respect of any of the points listed at [(3)] above."

5. Whilst, I stress again, each of the two day conditions and each of the two night conditions fell to be taken into separate consideration and made the subject of separate findings and reasons for decision by the DMP, I can for my present and more limited purposes here narrow the arena further by indicating that the thrust of Doctor Martinez's submissions is effectively confined to the DMP's treatment of the case in relation to the "second night condition", that requiring that a person be so severly disabled physically or mentally that he requires from another person:-

"Continual supervision throughout the night in order to avoid substantial danger to himself or others."

6. The three reported Commissioner's Decisions to which Doctor Martinez has referred in his submission 1.0 (and to which I had myself directed the attention of the adjudication officer now concerned) have now been effectively subsumed into the higher authority constituted by the Tribunal of Commissioners' Decision R(A)1/83, which (whilst it does not infringe upon the validity of the propositions for which they respectively stand as authority) consolidates that authority in a number of respects and goes on to provide additional authority upon aspects of the second night condition with which those decisions did not themselves deal. It is nevertheless helpful to recall that Decision R(A)1/73 indicated

that if a person was liable to require attention at unpredictable intervals it might be necessary for someone to be continually available to provide attention when needed, and that in such a case the requirement of continual supervision could properly be found; that Decision R(A)1/75 indicated first that the characteristic nature of 'continual supervision' was an overseeing or watching over, considered with reference to its frequency or regularity of recurrence and secondly that the question as to what in practice was or was not being done in the material respect and as regards the claimant was not itself relevant, the material question being "whether the claimant in the particular case requires continual supervision within the meaning of the statutory language"; and that Decision R(A)5/81 materially decided that the question of how often serious injury was likely to occur if continual supervision was not provided was the wrong question, the right question being as to whether there was a relevant (i.e. not remote) risk of such an incident.

7. The headnote to Decision R(A)1/83 conveniently summarises what I may term the "mainstream" of the propositions for which in relation to the need or otherwise for continual supervision that decision stands as authority. It reads:-

> "(1) Four elements are involved in the continual supervision test,
>
> (a) the claimant's medical condition must be such that it may give rise to substantial danger to himself or others,
>
> (b) the substantial danger must not be too remote a possibility, the fact that an incident may be isolated or infrequent is immaterial,
>
> (c) supervision by a third party must be necessary to avoid the danger,
>
> (d) supervision must be continual."

That summary, whilst convenient, is skeletal, and it is I think important to recognise that in the main body of the decision it is made plain that the relevance of it being immaterial that an incident may be isolated or infrequent is because even one isolated incident may have catastrophic effects, as also that head (d) refers to the substantiation of a need for continual supervision.

8. Under the doctrine of legal precedent Decision R(A)1/83 will be binding upon the adjudicating authority conducting the rehearing I have directed (as indeed it would be upon a Commissioner). But I confess to finding a difficulty in its application in certain cases - of which the present might be one - not as regards the proposition as stated in the headnote above cited, but with what para. 9 of that decision goes on to say, and which is summarised in the second paragraph of the headnote as follows:

> "2. Where supervision will not prevent an epileptic attack so that care is only needed at the time of an attack, if attacks are infrequent relevant supervision is unlikely to be continual. In so far as R(A)1/81 paragraph 29 is to the contrary it is not to be followed."

That reference to Decision R(A)1/81 is in fact to be found in paragraph 12 of the decision, but substantially founds upon the intimation in paragraph 9:-

"We do not consider that a person who might have to intervene in the event of an attack should be regarded as exercising supervision between attacks by reason only that he might have to intervene in the event of an attack."

My difficulty in that context lies in reconciling the Tribunal of Commissioners' acceptance that an isolated incident can have catastrophic effects with the intimation to be found in the body of paragraph 9 that:-

"A person subject to epileptic fits may between attacks be perfectly capable of looking after himself and be well aware of what things it is unwise for him to do in case a fit came on while he was doing it. Such a person requires no supervision between attacks. It may be that he required supervision during attacks. But unless the attacks are very frequent he can hardly be said to require continual supervision, even if it is considered unwise to leave him alone."

But for the last ten words of that passage, I would have read it as indicating that the Tribunal of Commissioners had there in contemplation a case other than that in which the risk, if it materialised, might be of serious injury or indeed fatality, or that they were contemplating a condition such that the claimant himself might have both the means and sufficient forewarning to avoid materialisation of the risk. But unless, although left unsaid in the decision, the passage is to be read as predicating that the likelihood of catastrophe ever attending a fit as suffered by the claimant in point, if unsupervised, was so remote as to take the case out of the main prescription antecedently indicated, I am left unclear as to what it was really intended to convey as to the proper determination of a case in which it falls to be predicated that there is a substantial danger (identifiable) which is not too remote a possibility, although it might take the form of an isolated incident; that its occurrence is unpredictable, and that though the adverse consequences could be avoided or materially dimished by intervention of an available supervisor if and when it did occur, they could not be without a supervisor being already then at hand.

9. It will be for the Board or its delegated medical practitioner to consider in the present case, upon its rehearing, how far, if at all, what Decision R(A)1/83 had indicated as to need for continual supervision in the case of claimants who suffer epileptic fits is to be regarded as as well applicable as regards unpredictable hypoglycaemia as suffered by the present claimant. But, for my part - and on the case-law authorities as they stand - I do not consider that Doctor Martinez' contentions as to the DMP not having "asked himself the right questions" can be sustained by reference to the DMP's approach, in principle, to the issue of need for continual supervision. What then falls to be considered is what the DMP indicates as his application of the principles in regard to the circumstances of the individual case. And that is as follows:-

"5. Turning to the night-time supervision condition, I note from the earlier medical report that [the claimant] can be safely left unsupervised for most of the night. The earlier medical report also states that she needs supervision in case of a hypoglycaemic attack. I note from the latest medical report that she is not left and that she is very worried in case she should have a fatal attack of hypoglycaemia at night. It also states that her son listens for any noise she might make. I note from Doctor Martinez's letter dated 18 April 1983 that her son hears her making noises when she is having

an attack and whilst I accept that these noises warn her son of the onset of hypoglycaemia and that it is desirable for someone to be on call, prepared to get up and give her any necessary attention. This is not the same as saying that continual supervision is required, which is related to the avoidance of substantial danger. I note too that in the factual report completed on 21 August 1983 by Doctor [named, being the claimant's General Practitioner], that the frequency of his visits due to hypoglycaemic attacks is lessening and he also states that [the claimant] appears to be able to treat her own hypoglycaemic attacks. I have carefully considered the evidence before me and I do not accept that she requires, or has required, continual supervision throughout the night in order to avoid substantial danger to herself or others."

10. Now, whether one puts it under the head of "failure to ask the right questions", or the head of failure to state adequate findings of fact, or to express adequate reasons for decision, there is to my mind a shortcoming in that paragraph 5. The General Practitioner's report to which the DMP was referred is in general terms, and does not in terms amount to any expression of belief that the claimant's stated (and otherwise unchallenged) concern in case she should have a fatal attack of hypoglycaemia at night was misconceived either on the ground that she would have no attack at night or on the ground that even if she did it could not be fatal or of sufficiently serious repercussion upon her as to come into the category of "catastrophe" contemplated in the general exposition in R(A)1/83. Nor does the DMP appear to have rejected the evidence before him that the attacks suffered at night were unpredictable - indeed he has expressly accepted that it is "desirable for someone to be on call, prepared to get up and give her any necessary attention". But there was no evidence before the DMP that the claimant would have adequate, or any, forewarning of an attack which commenced whilst she was asleep at night such as would or might enable her "to treat her own hypoglycaemic attacks". And in my judgment a reasonable tribunal properly instructed in the law could not in context have accepted what the General Practitioner had indicated as to the claimant's ability to control her attacks as indicating an ability to ward off an unpredictable night attack whilst asleep. Indeed, so far as precautionary medication might be relevant there was specific evidence (document 53) dated 18.7.83 by an examining doctor as to the son getting up at 2 a.m. to give the claimant a sugary drink to try to prevent hypoglycaemia "she is unable to awake on time on her own to drink it. She also has hypo attacks when her son gives her sugar ...".

11. In the circumstances it may in my view properly be said that the DMP "failed to ask himself the right questions" because paragraph 5 of his decision reflects an omission on his part to consider what the GP's statement really added up to in the light of the other evidence and the facts not in controversy. But if that foundation be thought to infringe too closely upon the boundaries of what constitutes an error of law and what is a question of fact, then in my judgment it is a sufficient alternative ground for my setting aside the DMP's decision that in the light of the claimant's stated fears known to him, he has failed to express findings as to the acuteness or otherwise of danger if a night attack was to occur unsupervised, and also to demonstrate his awareness of the irrelevance of the assistance in fact provided, and has, in summary, failed to afford to the claimant or her representative by the record of his decision adequate explanation as to why the contentions advanced on her behalf have been rejected.

12. (1) I have in the above paragraphs dealt sufficiently, in my view, with head "1.0" of the grounds of appeal and I read "2.0" and "2.2" therein as collectively constituting in effect, a single head. However, it is to be noted that whilst 2.1 expresses a number of matters of fact which were common ground, it also raises some matters which do not appear to have been common ground - in particular I can find nothing in the evidence before the DMP indicating in terms that if the claimant did not receive immediate treatment she could die, whilst - also - the reference made to the frequency of attacks appears to telescope a number of different reports into a conclusion which may be justified but is not the only conclusion which could tenably be reached upon the whole of the evidence.

(2) Nor can I accept Decision R(A)3/74 as affording any material support for the claimant's case in relation to the second night condition, or indeed at all. It is a decision relating to the first night condition (prolonged or repeated attention during the night in connection with his bodily functions); and I have been unable to identify anything indicated in it which bears significantly in the present case. As regards the asserted distinction of the claimant's case from that of the claimant in R(A)1/83, founded on the distinction (valid in itself) that the claimant there concerned suffered from epilepsy, not hypoglycaemia, reading Doctor Martinez' observations as referable to the principles which are indicated in Decision R(A)1/83 it is my view that whilst it is clear that his (a) and (b) are relevant considerations in accordance with that guidance, I can find nothing constituting substantiation by evidence (as distinct from contention) to support "the attacks can lead to substantial danger" - though in so indicating I am not to be taken as expressing any personal conclusion that they did not. And, as regards his (d) - and with the same reservation - what is there indicated is not in correct analysis a fact which was common ground, but a contention advanced upon the material issues involving conclusions as to both fact and law, and as to the former, also secondary conclusions of fact which also are not common ground.

13. (1) As regards the claimant's third ground of appeal as formulated by Doctor Martinez, I need say only that I have above already accepted his submission that the DMP did not adequately state reasons for decision and that with the other points so made substantially it overlaps points separately made by him elsewhere in the grounds of appeal with which I have already dealt. But, in the light of the written submissions on behalf of the Secretary of State upon the present appeal, Doctor Martinez has put in further written submissions on the claimant's behalf. Those I have closely considered; but in the light of the course I am taking, and of what I have already indicated, I need refer to them only as next below.

(2) In support of the DMP's decision the Secretary of State's submissions rely upon Decision R(A)1/83 above referred to. Doctor Martinez contends that what is said in paragraph 9 of Decision R(A)1/83 is irrelevant in the present case because that tribunal specifically addressed themselves to the cases of epileptics and the claimant does not suffer from epilepsy. In my judgment Decision R(A)1/83 stands as authority on a number of important matters of principle in evaluating whether a particular case satisfies or does not satisfy the requirements of the

second day and night conditions applicable in respect of attendance allowance, and applies as authority whatever may be the medical condition of the particular claimant - though when the principles so enunciated fall applied they are to be applied with a close regard to the particular and material facts of the particular case. It may or may not be, in a given case, that the medical condition of the particular claimant is such as to warrant assimilation to that of the epileptic claimant with whom the decision in R(A)1/83 was directly concerned; but that does not affect the validity of the principles indicated in that decision in so far as they are put forward as general principles (as distinct from principles applicable only to epileptics). That said, I accept Doctor Martinez' point that paragraph 9 was particularly directed to claimants with epileptic conditions, and that if it is to be regarded as applicable to other conditions the necessary bridge of affinity must first be built (as, for example, by an express intimation of medical opinion so expressed as to be referable to the particular claimant's condition, and not - see Decision R(A)2/83 - as a broad generalization). Making the necessary distinctions, and finding - as I do - difficulty in reconciling what is indicated in paragraph 9 of the decision with that which is summarised under head 1 of the headnotes of that decision, I would not myself be prepared to apply what is said in paragraph 9 of R(A)1/83 "as a matter of course" to a claimant with the different medical conditions suffered by the present claimant. But that is not a matter with which I need to be concerned here except in the possible context of directions for the rehearing; for there is nothing to indicate any reliance by the DMP upon such paragraph 9 when arriving at his decision. Further, I am not prepared to give any directions precluding the taking into consideration of such paragraph 9 if in so far as the adjudicating authority concerned with such rehearing takes the view that the necessary bridge is built. I am, however, prepared to direct that what is indicated in such paragraph 9 is not to be taken as applicable to the claimant's case unless such adjudicating authority is satisfied that the requisite bridge has been built.

(3) Doctor Martinez then moves on to submissions in the alternative, the first of which is so closely aligned with earlier submissions of his with which I have already dealt that I do not consider it necessary to deal separately with it. The second submits that the decision of the tribunal in Decision R(A)1/83 paragraph 9 is erroneous in law. That is a decision which I regard as binding upon me in the present state of the authorities but, in the light of the course I am taking, it is not authority on which I need to act for the purposes of my decision; and I will say no more in regard to that submission than that such paragraph 9 can be effectively challenged as authority only in the Court of Appeal.

14. I would at this point mention that determination of the present appeal has, with the concurrence of both sides and my approval, been deferred beyond the date at which it would otherwise have been decided in order for it to be ascertained whether or not another attendance allowance case known to be the subject of an application to the High Court would take a course which might lead to paragraph 9 of decision R(A)1/83 being considered by the Court of Appeal, with possible reference to this appeal; but that it has lately become known that the course in fact taken in that other case has not led to that result.

15. My decision is as indicated in paragraph 1(4) above.

(Signed) I. Edwards-Jones
Commissioner

Date: 22 April 1985