CA 29/1975

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SOCIAL SECURITY ACTS 1975

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

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: Reginald Cohen

On behalf of: Ruth Cohen (Miss) [ORAL HEARING]

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1. My decision is that the decision on review of the Attendance Allowance Board, dated 5th May 1975, is not erroneous in law.

2. I gave leave to appeal to the Commissioner, dated 1st October 1975. At the oral hearing before me the claimant was represented by her father, Mr. Reginald Cohen, a solicitor, and the Secretary of State was represented by Mr. J. St. L. Brockman, of the solicitor's office of the Department of Health and Social Security.

3. The claim for an attendance allowance was made by the claimant's father on behalf of his daughter, now 19 years of age. This is the second appeal by the claimant on a point of law from determinations by the Attendance Allowance Board (referred to as "the Board"); in the previous appeal the decision was that of a medical practitioner to whom the functions of the Board had been delegated. In the present appeal the decision, dated 5th May 1975, was by the Board in which two members participated. The learned Commissioner's decision in the previous appeal is dated 13th August 1974 in which the relevant details as to the claimant's disabilities are summarised and other aspects of the claim referred to. The learned Commissioner decided that there had been inadequate compliance with the obligation of regulation 14(2) of the National Insurance (Attendance Allowance) Regulations 1971 (referred to as "the 1971 regulations") to give reasons for the decision and, treating the application as an appeal, he remitted the application for review of the decision of 2nd November 1973 for rehearing by the Board.

4. Since then the previous legislation has been repealed and regulations revoked. The conditions for entitlement to an attendance allowance are now contained in section 35 of the Social Security Act 1975, which has replaced the National Insurance Act 1972, and the Social Security (Attendance Allowance) (No. 2) Regulations 1975 (referred to as "the 1975 regulations") have replaced the 1971 regulations. The changes in legislation do not affect this appeal as the provisions which have been

re-enacted and which apply to the present appeal are in the same terms as under the previous provisions.

5. The effect of the learned Commissioner's decision of 15th August 1974 was that by regulation 18(2) of the 1971 regulations, now regulation 12(2) of the 1975 regulations, "... the Board shall review its determination for the purpose of confirming or revising it." The regulations thus provide for a further review by the Board, or, in other words, a reconsideration of the case. The Board arranged for a further medical report to be obtained as appears from paragraph 7 of their decision. At the hearing before me, Mr. Cohen put in a written summary of his submissions, with page and other references, which I have found most useful and helpful in following his submissions. He has stated that paragraphs 1, 2, 3 and 4 of the Board's decision sets out the background to the review and I need not refer to them further. I also consider it unnecessary to set out extracts or passages from the decision of the Board, a copy of which is at pages 117 to 122 of the case file.

6. At the outset I would draw attention to my jurisdiction in this matter. Parliament has enacted that the Board shall determine whether the conditions for the award of an attendance allowance are satisfied, no doubt because these import mainly medical questions and issues. An appeal lies to a National Insurance Commissioner, with the leave of a Commissioner, on any question of law arising on a review or in connection with a refusal to review by the Board. Statutory interpretation is a matter of law as is any question as to whether statutory provisions have been correctly applied or statutory requirements observed. I refer also to Global Plant Limited v. Secretary of State for Social Services /1972/ 1 Q.B.139, which is referred to in Decision R(A)1/72, in which a Divisional Court of the Queen's Bench Division stated the grounds on which a decision may be held to be erroneous in law. I mention this because, with respect to the claimant's representative, he has submitted a great deal of detail and material which, in my opinion, is quite irrelevant to any question of law which I have jurisdiciton to decide. I am not empowered to deal with medical questions or the degree or nature of attention or supervision required in the medical sphere, however sympathetic I may feel towards the claimant.

7. The claimant had been in receipt of an attendance allowance from 6th December 1971 to 5th February 1973 under the earlier legislation. On a further claim, it was decided that she satisfied a day and night condition of section 2(1) of the National Insurance Act 1972 and she was awarded a higher rate certificate from 6th February 1973 (when she attained the age of 16) to 13th December 1973. On the next claim it was decided that the claimant satisfied only a day condition for entitlement and a certificate for a lower rate of attendance allowance was

issued from 14th December 1973. That decision was dated 2nd November 1973 and has been the subject matter of subsequent reviews as a result of which the claimant's entitlement to a lower rate certificate only has been maintained. The Board accepted that, in view of the claimant's physical and mental disabilities, she required continuous supervision throughout the day in order to avoid substantial danger to herself. They found that she did not satisfy either of the night conditions.

8. Mr. Cohen submitted a number of points of law as to which he contended that the decision of the Board was in error. He stated frankly that, in regard to some of his points, he did not attach much substance and I initmated to him at the hearing that I would deal with such points shortly, from which he did not demur.

9. The claimant submitted that the decision of the Board was ultra vires because the Board was not authorised, in the circumstances of the matter being remitted to them by the Commissioner, to obtain and/or base their decision on fresh evidence. This relates to the further medical report obtained by the Board from Dr. P. S. Hawkins, dated 6th December 1974. The Board refer to the objection taken by Mr. Cohen in paragraph 7 of their decision. Mr. Cohen objected to a further medical examination but later withdrew his objection. He relied on the fact that, because the Board agreed to cancel the arrangements for the doctor to visit the claimant when he objected, that that constitutes an admission that there is no statutory power to compel the claimant to submit to a further medical examination. As far as I am aware, there is no statutory power to obtain any medical examination or report by compulsion but that does not make the decision of the Board ultra vires if they obtained a report by consent. In my judgment, on any review it is open to the Board, or a delegate of the Board, to avail themselves of such evidence and information as they are able to obtain in order to assist them in their determination. Mr. Cohen has stated that there is no statutory authority for obtaining a further or up-to-date medical report, or liberty to seek further evidence, but, in my opinion, the authority is implicit in the very statutory functions which the Board have to carry out. The point, as it seems to me, would not in any event assist the claimant. If the Board, on reconsideration following the Commissioner's decision of 13th August 1974, were merely to review the reasons for their decision, which the Commissioner found inadequate, the claimant would be left with the same substantive decision based on the original evidence to which adequate reasons had then been added. I do not find that there was an error of law by the Board in obtaining and considering further medical evidence.

10. The next point taken by Mr. Cohen was that the Board is estopped from denying the need for the claimant to have a reassuring presence merely because it is not contained in its second decision on review. He has stated that it is an admission

already contained in the first decision on review. It was submitted that the Board's conclusion in paragraph 11 of their decision of 5th May 1975 constitutes an error of law. I do not agree. In my opinion, no question of estoppel arises. I also regard it as doubtful whether the doctrine of estoppel can arise in such proceedings.

11. In the same context it was submitted that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question, that there was a breach of the obligation to act according to the demands of natural justice and that there is no evidence to support the Board's decision. Mr. Cohen has written that this appeal rests solely on the assessment of the claimant's mental age as about that of a child of 8 years and that all else is totally irrelevant. I do not think the Board made any error of law in mistaking the expression "continual supervision" for "continuous" supervision.

12. Mr. Cohen has stated that no responsible parent would leave a child of 8 years alone at night. The Board have not suggested that the claimant can be left in a house alone at night in the sense of no other person being present inside the house or dwelling (paragraph 13 of their decision). Mr. Cohen has based a great deal of his submissions on whether the claimant should be left alone. The Board found in paragraph 8 of their decision that, at night, the claimant requires a certain amount of attention. Mr. Cohen based his argument on the need for a reassuring presence. That is no doubt true of any normal child of 8 years of age and was no doubt true of the claimant having regard to her mental state. It is, however, a question for the Board whether the extent of such presence required would, in the case of the claimant, amount to requiring "continual supervision throughout the night in order to avoid substantial danger" to herself. There is no suggestion of danger to others. I have read Mr. Cohen's written submissions on the three points mentioned in paragraph 11 above and have heard him. In my judgment, there is no substance as a question of law in any of those matters relating to the facts, circumstances and determination of the Board of 5th May 1975.

13. Mr Cohen has cited from Commissioners' Decisions R(A) 1/73 and R(A) 2/75. Attention was drawn to Decision R(A) 1/73, paragraph 15, in the learned Commissioner's decision of 15th August 1974 and the Board referred to it in paragraphs 3 and 5 of their decision. Decision R(A) 2/75 also referred to decision R(A) 1/73, paragraph 15. I have no reason to doubt that the Board had regard to those decisions and to paragraph 9 of the learned Commissioner's decision. In paragraphs 9 to 12 of the Board's decision they referred in some detail to the evidence and their conclusions as to the conditions at night. In the present appeal it has not been contended that the claimant required from another person prolonged or repeated attention during the night in connection with her bodily functions. In paragraph 13 the Board concluded that the amount of attention required at night did not amount

to continual supervision and, even if they accepted that the claimant is supervised at night, they did not accept that she was in substantial danger. Those are findings of fact supported by evidence and reasons and, in my opinion, the decision is not assailable as being in error of law, even although Mr. Cohen is dissatisfied with the findings of fact.

14. Mr. Cohen also alleged bias on the part of the Board, based on an alleged direction by the Department of Health and Social Security on the need for economy. In a written statement, which was submitted for and on behalf of the Secretary of State for Social Services, dated 10th February 1976, it was stated that no directive or other communication had been sent to the Board either requiring or requesting them to contain or reduce the number or cost of attendance allowances. At the hearing before me Mr. Cohen withdrew the allegation of bias (page 17 of his written submission).

15. The remaining question is whether the Board has complied adequately with the requirement to give reasons for their decision as now required by regulation 9(2) of the 1975 regulations. This is the same point on which the previous appeal was allowed under the former regulation 14(2) which was in similar terms. Mr. Brockman said that the only possible way in which it might be suggested that the Board were in error of law was that in paragraph 13 of their decision it might be said that the Board were having regard to physical dangers if the claimant was left unsupervised at night, but might not have applied their minds to the claimant's mental state as indicated in paragraph 9 of the learned Commissioner's decision of 13th August 1974. In view of that aspect of the case, to which their attention was specifically drawn, and as the members were medical practioners (section 5(2) of the National Insurance Act 1970 and section 105 of the Social Security Act 1975 refer), I do not consider that the Board failed to take account of her mental state which, having regard to the evidence before them and reading their decision as a whole, must have been present in their considerations. One must not lose sight of the requirement that the supervision required is not to avoid some possible danger but to avoid substantial danger. I suppose that persons who are mentally or physically disabled might be said always to be at risk of some possible danger, such as falling or tripping.

16. Mr. Cohen also contended that, as the claimant had a mental age of a child of 8 years, the provisions of regulation 7(4) of the 1971 regulations, as amended, now regulation 6(2) of the 1975 regulations should apply to her case. The effective language which he relies upon are the words which require attention and supervision

"substantially in excess of that normally required by a child of the same age and sex". The answer is, however, that the claimant was and is not a child during the relevant period and those provisions do not apply to her.

17. Mr. Cohen has also contended that the claimant's handicaps, both physical and mental, have remained unchanged yet subsequent decisions have withdrawn the higher rate certificate for which the claimant qualified up to 17th December 1973. The claimant was thus entitled to a higher rate certificate as satisfying a day and a night condition after she had attained 16 years of age. There is substance in that point as regards findings of fact but not in the contention that, as a matter of law, the Board are estopped from denying the claimant's entitlement to a higher rate certificate. It may be that the decision of the delegated medical practitioner who decided that the night condition was satisfied after the claimant had ceased to be a child was in error, or, indeed, subsequent decisions might be erroneous on matters of fact. It would appear that, apart perhaps from an obvious case, there can be no positive and clearly defined conclusion on medical fact in these unfortunate cases. Parliament has entrusted responsibility for deciding claims to the Board (now section 105(3) of the Social Security Act 1975), which is composed mainly of persons with medical qualifications who are entitled to use their medical expertise in reaching their conclusions. See the judgment of Lord Widgery C.J., in R v. National Insurance Commissioner, Ex parte Secretary of State for Social Services [1974] 1 W.L.R. 1290 at p. 1292 (published as an appendix to decision R(A) 4/74), and compare R v. Medical Appeal Tribunal (North Midland Region), Ex parte Hubble [1958] 2 Q.B. 228 at pages 240-41; [1958] 2 All E.R. 374. Mr. Cohen has submitted that I should require the Board to give specific answers to questions he has framed but these deal with matters of fact or are irrelevant.

18. In conclusion, while I sympathise with the claimant, which is perhaps unlikely to afford consolation to Mr. Cohen, I would point out that, 12 months having passed since the Board's decision of 5th May 1975, he may on the claimant's behalf apply for a further review without leave of the Board as provided by regulation 8 of the 1975 regulations.

19. The claimant's appeal is dismissed.

(signed) J. S. Watson
Commissioner

Date: 14th May 1976

Commissioner's File: CA/29/1975
D.H.S.S. File: SD 2560/S10