

CA 30/1978

RJAT/KMG

SOCIAL SECURITY ACTS 1975 TO 1977

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: May Baurley (Mrs)

1. This is an application for leave to appeal on a question of law from a review decision dated 7 December 1977 given on behalf of the Attendance Allowance Board. It was then decided by a delegated medical practitioner that a decision of 24 June 1977 should not be revised, and that a day condition for attendance allowance was satisfied, but that as neither of the night conditions was satisfied a higher rate certificate could not be issued.

2. The application for leave to appeal is directed towards the finding that continual supervision by night is not required by the claimant throughout the night in order to avoid substantial danger to herself. The provisional view of the delegated medical practitioner, subsequently confirmed, was objected to as being inconsistent with the evidence, and the application itself is based on a submission that account should have been taken of the situation as it would be in the absence of the supervision in fact provided. I think that by implication the claimant is raising the point that there is an error of law on the face of the decision in that the delegated medical practitioner misdirected himself and adopted a wrong approach to the question concerning supervision by night.

3. I give leave to appeal on the above ground, and since the necessary consents have been given I treat the application as the appeal, and deal with the point as a question of law arising on such appeal.

4. The claimant was born in 1905. She was in hospital from February 1976 to February 1977. She had a left mid-thigh amputation. Returning home she has had the services of agency nurses both by day and by night to look after her needs.

5. The delegated medical practitioner, finding that assistance for 10 to 15 minutes for toilet purposes once a night 3 to 4 nights a week did not constitute a requirement for attention during the night which was either repeated or prolonged, dealt with the night supervision question as follows. He wrote "So far as supervision is concerned, the earlier medical report does not indicate the length of time Mrs Baurley could have been left unsupervised, whilst the latest medical report states that she can be left for most of the night. I accept that prior to having an agency nurse Mrs Baurley had falls, but both medical reports show that she is now unable to get out of bed without assistance and therefore I do not consider that the risk of falling presents a substantial danger. It is clear from the medical reports that her nurse is present to attend to her toilet needs at night thus obviating the need for Mrs Baurley to attempt to get out of bed unaided."

6. The occasions on which the night nurse attended the claimant for her toilet needs are submitted, on behalf of the Secretary of State, to be the only occasions when supervision by way of an escort would be needed, and would not constitute continual supervision. This submission, with which I should deal, in my opinion does not take sufficient account of why the night nurse was present overall. In paragraph 9 of the decision R(A) 2/75 the following passage occurs: "The object of supervision is to avoid substantial danger which may or may not in fact arise; so supervision may be precautionary and anticipatory, yet never result in intervention, or it may be ancillary to and part of active assistance given on specific occasions to the claimant." See also the decision R(A) 1/75, paragraph 12. It was at least for consideration whether, when the night nurse is waiting to be summoned to give attention, she is exercising supervision of an anticipatory nature, such waiting period being additional to the period of supervision during her escort duties, supervision and attention then simultaneously occurring. This the delegated medical practitioner does not appear to have considered, and I refer to the above having regard to the view I have reached on the point raised by the appeal.

7. The delegated medical practitioner had to decide the claimant's supervision requirements, by night, for the statutory purpose. What he decided was that the presence of the night nurse did away with any question of danger, because the claimant would not need to try to get out of bed unaided. In determining what was required a consideration of what supervision the claimant had, and what were its effects, was an irrelevant consideration, save perhaps for a view that

what was provided might be an indication of what was thought to be necessary. In my judgment the delegated medical practitioner should have considered the claimant's requirements based on her disability, unaffected by what supervision was in fact provided for her; it was erroneous to include the effect of the supervision provided as a reason for concluding that supervision to avoid substantial danger was not required. If the claimant's disability was such that she required supervision, the existence of that need could not be affected by the fact that she had already been provided with it.

8. I allow the appeal on the above ground. The decision of 7 December 1977 is set aside as erroneous in law and the matter remitted for fresh consideration.

(Signed) R J A Temple
Chief Commissioner

Date: 4 October 1978

Commissioner's File: C.A. 30/1978
DHSS File: SD 450/990