JSW/SH/MD

Commissioner's File: CA/33/1984
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SOCIAL SECURITY ACTS 1975 TO 1984

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

Name: Brenda Joyce Shipman (Mrs)

[ORAL HEARING]

1. My decision is that the decision of the Attendance Allowance Board, dated 12 September 1983, by their delegated medical practitioner (DMP) is erroneous in law and is set aside. The review is therefore for further consideration by the Board.

2. The claimant appeals with leave granted by me. At the hearing before me, the claimant was represented by Miss B. Lakhani of the Child Poverty Action Group and the Secretary of State by Mr P Milledge of the Solicitor's Office of the Department of Health and Social Security.

3. The claimant, now aged 35, suffers from epilepsy both grand mal and petit mal. She lives in a house with her husband and her children aged 12 and 4 years. She has stated that the occurrence of attacks is totally unpredictable and that after a minor attack she becomes extremely nervous and disorientated and after a major attack becomes unconscious, incontinent and occasionally violent, which requires physical restraint by her husband. Her case is that she requires from another person continual supervision throughout both the day and the night in order to avoid substantial danger to herself or others. Those are essentially matters for medical determination subject to the legal interpretation of the meaning of continual supervision. It is not contended on this appeal that the claimant requires attention in connection with her bodily functions. The DMP decided that neither by day nor by night did the claimant require attention or supervision in terms of the provisions of section 35(1) of the Social Security Act 1975.

4. Initially on the claimant's appeal, it was submitted by the Secretary of State, after analysis of the findings in relation to the day and night conditions, that the decision of the DMP was not erroneous in law. Interpretation of the words "continual supervision" in the statutory provisions has been considered in a number of Commissioners' decisions. The claimant has referred to Commissioners' decisions drawing attention to the word "continual" as opposed to "continuous" supervision. In Decision R(A)1/83, a Tribunal of Commissioners stated principles applicable to the "continual supervision" test.

5. The hearing of the appeal was postponed in November 1984 pending the hearing in the High Court of Justice, Queen's Bench Division, of an application for judicial review of a decision of a Commissioner to refuse leave to appeal in Regina v Social Security Commissioner, Ex parte Connolly in which it was expected that the correctness of Decision R(A)1/83 was being challenged. In the event, Woolf J in his judgment did not refer to that decision. In a further submission on behalf of the Secretary of State it is stated that the decision in R(A)1/83 is "binding" on me in the present case. A Commissioner will follow a decision of a Tribunal of Commissioners unless there are compelling reasons for not doing so (see Decision R(I)12/75, paragraph 21).

6. Since the adjournment, a further submission on behalf of the Secretary of State has been made which does not comment further on the DMP's decision on the day and night findings in relation to attention in connection with bodily functions. In relation to the "night supervision condition", the Secretary of State relies on the clear finding of the DMP that - "once precautions have been taken ..... (the claimant) is unlikely to come to serious harm as a result of an epileptic attack in bed." However, it is submitted, in relation to the "day supervision conditions" that the findings of the DMP were perverse in terms of Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 and therefore the decision of the DMP is erroneous in point of law.

7. The submission that the decision was perverse is based on a statement, dated 25 March 1985, by Dr. P. Watson, a Senior Medical Officer of the Department of Health and Social Security, who is responsible for advising on medical questions in relation to claims for attendance allowance. He has studied the case papers and has commented on the evidence and the DMP's findings and observations. He refers in particular to two findings that in the particular circumstances of this case the claimant is not likely to be placed in substantial danger as a result of such attacks and that she could be safely left unsupervised for reasonable periods during the day when she would be unlikely to come to any serious harm. Dr. Watson, in his medical judgment, concludes that those two findings, in view of the evidence, are findings which no reasonable doctor could have reached. He deals with the risk in the future of serious injury and, in his medical judgment, concludes that such evidence should have led inescapably to the conclusion that continual supervision was required to avoid substantial danger to the claimant during the period in question. Accordingly, he concludes that, in his view, the findings of the DMP to which he has referred were wholly unreasonable in the face of the evidence before him.

8. As a preliminary issue, I asked Mr Milledge to submit on the admissibility and relevance of Dr. Watson's medical opinion on an appeal which lies only on the ground that the decision is erroneous in law. He referred to Decision R(A)1/73, paragraphs 13 and 14. In paragraph 13, when the statutory provisions for attendance allowance were relatively new, the learned Chief Commissioner drew attention to the Commissioner's function being limited and that the question whether the medical conditions are satisfied is for decision by the Board or their delegate. He pointed out the limits beyond which the Commissioner had no power to act. In paragraph 14, he referred to the test laid down in the judgment of the Lord Chief Justice in Global Plant Ltd v Secretary of State for Social Services [1972] 1 Q.B.139 in which he stated grounds for deciding that a decision is erroneous in law. Mr Milledge submitted that, on the evidence of Dr Watson, he relied on the ground that the decision of the DMP was one which no person acting judicially and properly instructed as to the relevant law could have given. He submitted that where medical inferences and judgment are to be drawn on the findings of fact, the evidence of Dr. Watson was properly something which I could take into account.

9. I pointed out that if he was right it would be open to consultants and doctors to give similar evidence and express similar opinions on any application for leave to appeal or appeal to the Commissioner. Mr Milledge said that he was standing by his submission which he made on instructions. Naturally, Miss Lakhani was in favour of my taking account of Dr. Watson's evidence.

10. In my judgment, it is not open to me to take account of Dr. Watson's evidence and opinion on medical fact, for such it is, in determining points of law and to do so would be going beyond the limited jurisdiction of the Commissioner. This is simply an attempt to introduce evidence of medical fact and opinion. If the Secretary of State considers that the medical issues in a decision by the Board or their delegate may have been wrongly decided, it is open to him to obtain evidence on the point and submit it to the Board with a view to the Board of their own volition reviewing the decision (Section 106(4) of the Social Security Act 1975). I am aware in other jurisdictions in which the Commissioner considers and decides medical issues that there is often a wide variety of opinion amongst doctors on medical questions. Insofar as the ground on which Mr Milledge relies in the Global Plant case is concerned, Dr. Watson has properly confined himself to his medical judgment which falls short of Mr Milledge's submission that the decision of the DMP was perverse in the legal sense, which includes that the person concerned is properly instructed as to the relevant law.

11. By section 106(1) of the Social Security Act 1975, the Attendance Allowance Board may - (a) at any time review a determination of theirs under section 105(3) if they are satisfied that there has been a relevant change of circumstances since the determination was made, or that the determination was made in ignorance of a material fact or was based on a mistake as to a material fact and (b) within the prescribed period, review such a determination on any ground. Regulation 63(1) of the Social Security (Adjudication) Regulations 1984 [SI 1984 No.451] provides that the prescribed period within which the Board may review a determination under (b) shall be a period of 3 months from the date on which notice of the determination was given or sent to the claimant so however that if an application for review is made within 3 months from that date, the prescribed period shall be extended until the application for review is determined. Thus, the regulation has restricted the power to review if it subsequently transpires that a determination may have been made on erroneous medical consideration or opinion. It appears that this restriction was made to restrain a vexatious person from applying repeatedly for a review but it has the effect of putting a restraint on the Board if they consider that the decision was wrong on medical fact which does not become apparent, or is not brought to their attention, within the 3 months period. Thus, on the time factor in the present case, Mr Milledge said that the Board could not review the decision. Three months is a very limited period and could be remedied by amending the regulation to extend the length of the period.

12. Turning to the issues of law in the appeal, the DMP in paragraph 3 of his decision deals with day supervision. He noted from the supplementary medical report completed on 3 January 1983 that the claimant has grand mal epileptic attacks on one day a month with one attack on the affected day. In the report on Form DS4, completed by the same doctor, he records in his clinical findings that the claimant suffers from grand mal attacks once every 2 or 3 weeks but gets petit mal attacks almost daily. The DMP accepted that in theory considerable dangers may attend any and every fit but in the claimant's case he found no report of or a reference to a situation of substantial danger or injury sustained as a result of fits. He found that the only injuries sustained had been burns, scalds, cuts and she had fallen down stairs. The

claimant had also stated that she had spilt hot liquid over herself and her daughter on different occasions which is not mentioned by the DMP. The DMP noted that in the supplementary medical report it was recorded that the claimant also suffers from petit mal attacks on 15-17 days a month with up to 22 attacks on any affected day and he found no report of or reference to, any serious injury sustained by the claimant as a result of her fits. He observed that in her correspondence the claimant indicated that she may injure herself when carrying out general tasks such as ironing, cooking or using knifes and that in the medical report it was suggested that she could be a source of danger to herself or others if she set the house alight in a fit. The DMP continued that he would have expected that because of her epilepsy the claimant would have made necessary adjustments to her mode of living to ensure that she did not expose herself to unnecessary risk and he did not consider that incidents involving injury prove that she needs continual supervision. He also considered that the claimant could safely be left unsupervised for reasonable periods during the day when she would be unlikely to come to any serious harm. The claimant, in her letter of 16 July 1983, stated that fits during the night varied considerably and that major fits had occurred on consecutive nights. The DMP noted from the supplementary medical report that the claimant did not have grand mal attacks during the night although she suffered from petit mal attacks on 4-5 nights a month, with 2-3 attacks on any affected night.

13. Mrs Lakhani, in an able submission, submitted that the DMP had applied the wrong test as to substantial danger. She said that he took the view that the injuries were minor and that therefore there was no substantial danger. She referred to Decision R(A)1/83, paragraph 5, in which the Tribunal of Commissioners dealt with the nature of the test as to substantial danger. It is there stated that the fact that it may take the form of an isolated incident does not in itself constitute remoteness and the mere infrequency of the contemplated danger is immaterial. She submitted that in order to make the necessary adjustments expected by the DMP the claimant would have to give up the everyday tasks of a housewife, such as cooking, handling hot things, and housework because of the risk of cutting herself on sharp edges, dropping things and falling downstairs or against a lighted fire etc. She referred to the claimant's doctor's letter in which he wrote that during an attack she dropped things from her hands and once had dropped the baby. She also referred to paragraph 9 of Decision R(A)1/83 and submitted that the claimant suffered from a lot of petit mal attacks without warning and that the DMP had not considered the frequency test. Mrs Lakhani also made a number of criticisms of the danger in relation to night supervision.

14. Mr Milledge accepted that there was a conflict of evidence on night supervision which the DMP had not resolved. He referred to Decision R(A)1/83, paragraph 9, in which it is stated that unless the attacks are very frequent, a claimant can hardly be said to require continual supervision even if it is considered unwise to leave him alone. He also submitted that the DMP had not considered the frequency of the attacks.

15. The DMP has investigated in some detail the evidence as to the number and extent of attacks of both grand mal and petit mal epilepsy. I note that Dr. Brohi, the claimant's doctor, in his answers to an attendance allowance epileptic questionnaire, dated 6 May 1983, does not appear to support the claimant's statements as to the frequency and severity of epilepsy by day and by night. His prognosis was that she will suffer from epilepsy but can be controlled with medication and he mentions the medication at that time. Although the DMP accepted that in theory considerable danger may attend any and every fit which is accompanied by loss of consciousness, in his experience in practice such dangers are very seldom experienced and he found that to be so in the claimant's case. I agree with both submissions that the DMP has not considered the frequency of the attacks or had regard to potential danger in the future but has based his opinion on incidents in the past. Although these may provide some guide as to the future, the DMP does not appear to have given sufficient weight to the risk of danger to the claimant who loses conciousness and frequently suffers attacks of

petit mal. In my judgment, he has applied the wrong test in that he has not considered the probability that danger could be substantial and has based his findings on there being no report of, or reference to, a situation of substantial danger or injury sustained as a result of the claimant's fits. In my judgment to that extent the decision was erroneous in law.

16. The claimant's appeal is allowed.

(Signed) J.S. Watson
Commissioner

Date: 2 July 1985