JNBP/LS

Commissioner's File: CA/34/1985

DHSS File: SD/450/1916

SOCIAL SECURITY ACTS 1975 TO 1985

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

Name:

[ORAL HEARING]

1. My decision is that the decision on review dated 5 December 1984 made by the delegated medical practitioner ("the DMP") on behalf of the Attendance Allowance Board ("the Board") is not erroneous in law and therefore stands.

2. This is an appeal brought with my leave by , solicitor, on behalf of against the above-mentioned decision whereby, on review, the DMP refused to revise the decision dated 12 May 1983 by issuing a higher rate certificate for attendance allowance on the ground that neither of the "night conditions" for such allowance was satisfied.

3. At the request of I heard the appeal at an oral hearing of the appeal. Mr Richard Drabble of Counsel, instructed by represented the claimant. The Secretary of State was represented by Mr J.H. Swainson of the Solicitor's Office, Department of Health and Social Security. I am to both representatives for their helpful submissions.

4. Attendance allowance at the lower rate may be awarded to a claimant who satisfied one or both of the day conditions prescribed by section 35 of the Social Security Act or one or both of the night conditions there prescribed and may be awarded at the higher rate to a claimant who satisfied one or both of the day conditions and also one or both of the night conditions. It follows that an allowance at the higher rate cannot be awarded unless the claimant atisfied at least one of the night conditions. The conditions are that the claimant is so severely disabled physically or mentally that, at night, he requires from another person either -

(i) prolonged or repeated attention during the night in connection with his bodily functions, or

(ii) continual supervision throughout the night in order to avoid substantial danger to himself or others.

5. The claimant, who suffers from epilepsy submitted a claim for attendance allowance on 4 April 1983 and on 12 May 1983, following an examination and report by an examining doctor, a certificate was given on behalf of the Board to the effect that the period commencing on 4 April 1983 and ending on 12 May 1985 was a period throughout which one of the day conditions (but neither of the night conditions) had been or was likely to be satisfied and was a period immediately preceded by one of not less than 6 months throughout which that condition had been satisfied. Accordingly, the other relevant conditions of entitlement being satisfied, she was awarded attendance allowance at the lower rate.

6. Then, on 26 May 1984, the claimant submitted a further claim form accompanied by a letter from her husband. The DMP accepted the claim form and letter as a request for review of the claim for attendance allowance and considered that he was entitled to review the decision of 12 May 1983 because there had been a relevant change of circumstances since that decision was made, namely, that there had been an alteration in the frequency of the claimant's epileptic attacks. I am satisfied that he was so entitled.

7. It is not contended on behalf of the claimant that the night attention condition is satisfied and it is therefore necessary only to consider that part of the DMP's decision of 5 December 1984 which relates to the night supervision condition. He dealt with it as follows:-

> "4. So far as night time supervision is concerned, I find from the supplementary report of 28 April 1983 that [the claimant] had approximately one grand mal attack on 2 nights of the month. It is recorded in the supplementary report of 18 July 1984 that as a rule [the claimant] has had approximately one grand mal attack on 12 occasions in 9 months and the record of fits provided by [the claimant's husband] at the time of the examination presents an essentially similar picture. Both supplementary reports show that [the claimant] does not receive a warning of an impending attack during which she loses consciousness or has an altered awareness lasting ½ - 2 hours at a time. In her signed statement in the latest medical report [the claimant] says that she has fallen out of bed during some of her attacks but I take the view that precautions could be taken to prevent her falling out of bed or injuring herself against the bed head or bed structure by padding those parts. With regard to the risk of choking it is not in my medical opinion necessary to hold down the tongue to avoid this and simple precautions such as the provision of a firm pillow and lying [the claimant] on her side are all that is required. Even without these precautions in my medical experience the risk of choking during a fit is rare. Nevertheless I accept that a risk of substantial danger attends any and every fit which is accompanied by a loss of consciousness and that during her fits [the claimant] requires supervision in order to avoid such a possibility. Both medical reports indicate that because of the possibility of an epileptic attack [the claimant] is not left unsupervised at all by night but I do not accept that a person who might have to intervene in the event of an attack should be regarded as exercising continual supervision between attacks even though it might be unwise for her to be left alone. The factual report dated 12 October 1984 from [the claimant's] General Practitioner shows that her epileptic attacks mainly occur in the day time and to his knowledge no injuries have been sustained during the night. In view of this evidence and the relative infrequency of [the claimant's] nocturnal epileptic attacks I am satisfied that her need for supervision because of them does not need to be continual throughout the night. There is nothing in either supplementary or medical reports to suggest that [the claimant] has any other disturbances of behaviour or dangerous tendencies and having carefully considered all the evidence before me 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.
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> 5. As one of the day but neither of the night conditions is satisfied I am unable to issue a higher rate certificate and it must follow that my decision on review is that the decision of 12 May 1983 be not revised." (my underlining).

8. The words I have underlined in the above quotation very closely resemble words used in paragraph 9 of Decision R(A) 1/83, which was the decision of a Tribunal of Commissioners and I think it is clear that the DMP had in mind and followed that paragraph. Decision R(A) 1/83 refers to the four elements of the "continual supervision" test as follows:-

(a) the claimant's medical condition must be such that it may give rise to substantial change to himself or others,

(b) the substantial danger must not be too remote a possibility. The fact that it may take the form of an isolated incident does not in itself constitute remoteness. Moreover, the mere infrequency of the contemplated danger is immaterial.

(c) supervision by a third party must be necessary to avoid the danger,

(d) supervision must be continual.

regards (d) it is, of course, clear from the words of section 35 of the Act at what has to be shown is a need for continual supervision. Paragraph 8 of the decision deals with element (d) and concludes with the words:-

"Supervision which is only occasionally or spasmodically required is insufficient".

Paragraph 9 then proceeds as follows:-

"9. One might apply the above in relation to a person subject to epileptic fits as follows. 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 requires 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. On the other hand some victims of epileptic fits are also mentally handicapped and may even between attacks be incapable of appreciating that certain things are dangerous (e.g. climbing ladders) e.g. because the onset of an attack at such a moment could be disastrous. Such a person may require supervision between, as well as, during attacks and it may be that in such a case there is on account of epilepsy alone a need for continual supervision, though instances of this may be rare. 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."

9. As indicated above, I agree with Mr Drabble's submission that the DMP based his decision on paragraph 9 of R(A) 1/83. However, I cannot accept that in doing so the DMP erred in law. Mr Drabble argued that paragraph 9 places an irrational limitation on the remainder of the decision and is wrong in law and that in any event it is inconsistent with the judgment of the Court of Appeal in Connolly v Secretary of State for Social Services delivered on 19 December 1985.

10. There is no reference to R(A) 1/83 in the Connolly judgment and I have been unable to find in it any indication of an intention to comment on R(A) 1/83 either favourably or unfavourably. At the hearing before me Mr Drabble said that a copy of R(A) 1/83 was exhibited to an affidavit before the Court of Appeal but Mr Swainson said there had been no discussion of it and Mr Drabble did not dissent. In the circumstances Mr Drabble had to rely on what he submitted were inconsistencies between paragraph 9 of R(A) 1/83 and the Connolly judgment. In particular he referred to the following passage in the latter:-

> "A little later in the course of his persuasive argument, Mr. Drabble came to what I regard as by far his strongest point. He submitted that the Board had misdirected themselves in their decision, on the grounds that they proceeded on the assumption that able adults were present in the house throughout the night, and failed to consider what would be Mr. Connolly's position if no such adults were present. He submitted that the application of the correct test necessarily involves posing this last question. In his submission, the only possible answer to it, on the undisputed evidence before the Board, was that Mr. Connolly could not be left alone in the house at night without substantial danger to himself. Mr. Drabble identified two particular sources of suggested potential danger, namely the intrinsic risk of unforeseen household emergency and the risk that Mr. Connolly's distress, if a call for help during the night remained unanswered, might cause him to leave his bedroom and do something unpredictable, like a small child might in similar circumstances. Accordingly, he contended, the application of the correct test on the evidence would inevitably have led the Board to the conclusion that Mr. Connolly "required continual supervision throughout the night in order to avoid substantial danger to himself", within the meaning of section 35(1) of the 1975 Act. Thus, in his submission, the decision of the Board reveals (and ought to have revealed to the learned Commissioner who refused leave) a plain error of law or at very least a substantially arguable point of law.
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> These forceful submissions derive particular support from paragraph 10 of the Board's decision, which contains three references to Mr. Connolly's ability to "call for help" or "call for aid" at night time when he needs it. If, in including these references, the Board had intended to suggest that his ability to call for help at night time precluded him from satisfying the statutory condition in respect of night time allowance, then I think they would plainly have misdirected themselves; it would involve the proposition that he did not require continual supervision throughout the night to avoid substantial danger to himself, on the grounds that in fact he had such continual supervision from his parents. As Lord Bridge pointed out in Woodling v. Secretary of State for Social Services [1984] 1 W.L.R. it seems a reasonable inference that the policy of section 35 was "to provide a financial incentive to encourage families or friends to undertake the difficult and sometimes distasteful task of caring within the home for those who are so severely disabled that they must otherwise become a charge on some public institution".

Mr Drabble submitted that in the above quoted passage the Court of Appeal clearly accepted that, if the Board had approached the matter on the basis that a person is not supervising if he is merely waiting to intervene if required in the event of an attack, then they would have misdirected themselves. That acceptance, he argued, was consistent with the law as it stood before paragraph 9 of R(A) 1/83 and inconsistent with that paragraph. I do not agree that what was said by the Court of Appeal can bear the meaning contended for by

Mr Drabble and I must therefore reject his submission that paragraph 9 of R(A) 1/83 has been overuled by the Connolly judgment.

11. As regards Mr Drabble's argument that paragraph 9 of R(A) 1/83 is wrong in law, my position is that I am bound by it and must follow it, be it right or wrong. However, I must draw attention to the fact that the learned Commissioner who gave the decision on Commissioner's file CA/27/1984 (not reported) did confess, in paragraph 8, that he found difficulty in applying paragraph 9 of R(A) 1/83 in certain circumstances. Another decision in which R(A) 1/83 was commented upon is that on Commissioner's file CA/69/1984. In that decision the learned Commissioner indicated that he had given leave to appeal from the Board's decision not because he considered R(A) 1/83 to be wrong but in order to avoid cutting the claimant off from all opportunity of taking the matter higher.

12. When I was asked to grant an oral hearing I was also asked to consider whether the case was a suitable one for hearing by a Tribunal of Commissioners. I did so but decided against asking the Chief Commissioner to direct a Tribunal because it appeared to me that the question whether paragraph 9 of R(A) 1/83 is correct in holding a person who is merely standing by waiting to intervene if required is not supervising within the meaning of section 35 of the Act is a question which would more appropriately be decided on appeal by the Court of Appeal, should any claimant decide to seek leave for such an appeal.

13. For the foregoing reasons the appeal is dismissed and my decision is as set forth in paragraph 1 above.

(Signed): J N B Penny
Commissioner

Date: 30 April 1986