MHJ/6/LS

Commissioner's File: CA/066/1986
DHSS File: SD 450/2117

SOCIAL SECURITY ACTS 1975 TO 1986
APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

Name: Perihan Yilmaz (Mrs) on behalf of Irfan Yilmaz

[ORAL HEARING]

1. My decision is that the decision dated 3 September 1985 given by a medical practitioner for and on behalf of the Attendance Allowance Board ("the delegated medical practitioner", hereinafter referred to as "the DMP") is erroneous in point of law. Accordingly I set it aside and remit the matter to the Attendance Allowance Board for rehearing by them or by a different DMP to be appointed by them.

2. The claimant, who is the mother and appointee of IY, who is now aged 19, appeals to and with the leave of the Commissioner against the aforesaid decision of the DMP, declining to revise on review the decision dated 6 December 1984 rejecting IY's claim for attendance allowance. The claimant requested and I granted an oral hearing of the appeal, which took place on 5 November 1987. The claimant was represented by Mr Jan Luba of the Child Poverty Action Group, and the Secretary of State was represented by Mr P. Darby, of counsel. I am grateful to both Mr Luba and Mr Darby for their assistance.

3. IY is disabled by spastic diplegia, apparently as a result of a fall at the age of 6 months. He can walk for a short distance with the aid of two elbow crutches but if he travels any distance he uses a wheelchair. He cannot negotiate stairs by himself and needs some help bathing, dressing and undressing. At some date which is not entirely clear he came with his family to live in this country and he was in receipt of attendance allowance at the lower rate from 9 January 1978 (which may well have been about the date of his arrival in England) until 14 October 1984, the day before his 16th birthday. Thereafter, as is necessary when any award comes to an end, a fresh claim was made upon his behalf on form DS258 dated 23 October 1984. IY was subsequently examined by a doctor on 3 December 1984, as a result of which the certificate dated 6 December 1984 was issued to the effect that IY did not, had not and was not likely to satisfy the conditions of section 35(1) of the Social Security Act 1975. Following representations by the claimant in her letter dated 11 March 1985, and following a further medical examination on 22 May 1985, the matter was referred to the DMP.

4. In paragraph 1 of his decision dated 3 September 1985, the DMP accepted the claimant's letter of 11 March 1985 as a request for review of the decision of 6 December 1984, both of which documents were clearly before him. The claimant's letter begins by saying that she has been informed that attendance allowance "will no longer be paid" (my emphasis) to her for IY, and continues by stating that his circumstances have not changed at all. The certificate of 6 December 1984 contains a note that IY had been in receipt of attendance allowance for the immediately preceding period from 3 March 1981. In my opinion there can be no doubt that the DMP was on notice of the previous award and it is therefore surprising that he does not mention this in his decision.

5. A DMP is not, of course, bound by any earlier decision; circumstances can, and do,

change and he must apply his medical expertise to the facts as he finds them at the relevant time. Nevertheless, at paragraph 5 of decision R(A) 2/83 the Commissioner held that it was -

> " ... desirable that, when there has been a previous certification in respect of a condition relating to attendance allowance, in the absence of material change, careful consideration should be given to whether subsequent evidence warrants a different conclusion."

Further, in decision on file CA/96/1984, the Commissioner held that where some specific contention is addressed to the tribunal "it is certainly essential for the tribunal to give reasons for its rejection", and went on to say that -

> "If a claimant makes the point that there has been no change since the previous award, I do not see how the Board or its DMP can meet that specific point except by expressing disagreement with the previous certification or by pointing out that there has been a change."

And I would add that at paragraph 9 of R(A) 1/84 the Commissioner said -

> "In my opinion when the Attendance Allowance Board or a delegated medical practitioner thereof proposes to remove an existing award of attendance allowance, it is imperative that the claimant in question should be given clear and adequate reasons why that is being done."

In the instant case the DMP has failed to comply with those requirements. As the Commissioner said at paragraph 8 of R(A) 1/72 -

> " ... in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant looking at the decision should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority."

As things stand the claimant does not have any means of knowing whether it is considered that IY's condition has improved or whether the previous decisions are thought to have been wrong. In the instant case the DMP's silence on these matters becomes even more puzzling in view of the fact that regulation 62(c) and (d) of the Social Security (Attendance) (No 2) Regulations 1975 provides that a child, i.e. a person under the age of 16, shall only b entitled to attendance allowance if he requires attention or supervision, within the meanin of section 35(1) of the Social Security Act 1975, which is "substantially in excess of that normally required by a child of the same age and sex". The DMP's failure to deal with the above matters is clearly erroneous in law and his decision is accordingly set aside.

6. Mr Luba and Mr Darby were in agreement that, for the aforesaid reasons, the DMP's decision was eroneous in law. However, Mr Luba submitted that there were further errors and he also invited me to give certain directions in the light of the judgment given on 13 March 1987 by the Court of Appeal in Moran v The Secretary of State for Social Services (to be published as an appendix to R(A) 1/88).

7. Mr Luba submitted that the DMP's finding that IY "can manage the majority of bodily functions listed in the medical reports" (my emphasis) indicated an erroneous approach in law; he said that the questions which the DMP should properly have asked himself was, firstly, does the claimant require help with his bodily functions and, if so, then secondly, is that help required frequently throughout the day? Mr Darby agreed - as do I - that an "arithmetical approach" is clearly wrong (as the help a claimant might need with only one function might nevertheless be needed frequently as, for example, in the case of incontinence), but he submitted that it should be left to the individual DMP to formulate and apply the appropriate test in each case.

8. Mr Luba further submitted that, when dealing with night-time attention in paragraph 4 of his decision, the DMP erred in law in finding that the attention of another person was not "medically necessary because of nightmares". Again Mr Darby accepted that, as there is no statutory requirement for attention to be "medically necessary", those words were wrong if taken simply at their face value, but he submitted that, in the context of the DMP's decision, they could have been used merely to distinguish between attention which arises from disablement (i.e. a medical cause) and that which arises from some other cause.

9. In my judgment, if the DMP in fact used the phrases in paragraphs 2 and 4 of his decision in the way that Mr Luba contends they should be understood, then they also constitute errors in law. However, it is not necessary, and I do not consider tht it would be helpful, for me to decide the proper construction of those words in this case. What I have said above will, I trust, be sufficient, to indicate the importance of adjudicating authorities keeping firmly in mind the criteria laid down in the relevant legislation.

10. Turning now to the consideration of the Moran judgment, Mr Luba urged me to give directions as to its application to the instant case. He said, in summary, that it was unreasonable for IY to be confined to a wheelchair and that, if he walked with the aid of crutches, there was a substantial risk he would fall down, hurt himself and, even if unhurt, be unable to rise again. It said that, in those circumstances, it was necessary for the claimant to "be alert and on hand to exercise watchful supervision" of IY and that it was sufficient if she could "show the necessity for another adult person to be supervising in the sense of being on hand to prevent risk of injury or to intervene if there was an accident". Mr Luba went on to contend that, in Moran, Slade LJ, giving the judgment of the Court, could equally well have been referring to any disabled person as to, in that case, someone suffering from epilepsy.

11. There can be no doubt that Moran's case lays down important general principles, which I do not need to set out in detail. Towards the end of the judgment Slade LJ says -

> "In my view, the natural meaning of the word 'supervision' in its context in section 35(1) is not as restricted as that adopted by the Commissioners in ... R(A) 1/83. In my view, depending on the circumstances a person standing by to intervene in the event of an epileptic attack may, for that reason alone, be exercising supervision. It is a question of fact and degree in each case."

12. Although I cannot go as far as Mr Luba would wish, I accept without hesitation that the principles contained in the judgment in Moran's case are not necessarily confined to claimants suffering from epilepsy; see, for example, decision on Commissioner's file CA/034/1986, which is concerned with a case of cystic fibrosis. Mr Luba cited to me the decision of the Chief Commissioner on file CA/155/1985, dealing with a blind teenaged boy; but that seems to me a case which depends upon its own particular facts and one which I find distinguishable from the instant case. In my judgment, in order to come within the ambit of Moran, the risk of danger to a severerly disabled claimant (or to others) must arise involuntarily and unpredictably from his medical condition - in other words the danger must be beyond his control. I would add that, in decision on file CA/155/1986, where I expressed similar views, I also approved a submission made on behalf of the Secreatry of State that "the statutory test is not whether continual supervision is essential for the claimant's well-being or happiness", an observation which may well be apposite in the instant case.

13. That is all I consider it useful to say. It will be for the Attendance Allowance Board, or a DMP appointed by them to look at the claimant's case afresh in the light of the law as it now stands.

14. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 25 November 1987