CA 73/1980

RSL/MC

SOCIAL SECURITY ACTS 1975 TO 1980

APPLICATION FOR LEAVE TO APPEAL AND APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.A. 2/81

1. This is an application for leave to appeal to a Commissioner from a review decision of the Attendance Allowance Board dated 3 March 1980 in which they held that from and including 17 May 1979 the claimant did not satisfy any of the conditions for an award of attendance allowance specified in section 35(1)(a) and (b) of the Social Security Act 1975.

2. I grant leave to appeal and, having the requisite consents, I will determine the questions of law stated in the application for leave as though that were an appeal: see regulation 11(5) of the Social Security (Attendance Allowance) (No 2) Regulations 1975 /SI 1975 No 598/.

3. The claimant is a young man born on 17 May 1963 who is described in the decision under consideration as "mentally retarded" and "substantially mentally disabled", and unable to read or write. It appears that he also has some degree of physical disablement in that he has a weak right hand which he has difficulty in controlling. I will refer to the claimant by his first name, David; to the Attendance Allowance Board as "the Board"; to the decision under consideration as "the relevant decision"; and to the Social Security Act 1975 as "the Act".

4. Before dealing with the substance of the case I wish to draw attention to the absence from the papers presented to me of any indication that David's mother or some other person has been appointed to act for him under regulation 28 of the Social Security (Claims and Payments) Regulations 1979 /SI 1979 No 628/ or another authority. I do not wish to cause delay by an enquiry on the point, but such an appointment is of great importance and should have been evidenced in the case papers. I assume that one has been made.

5. In outline the history of the applications for an attendance allowance made in respect of David is as follows:-

(a) The allowance first became payable on 6 December 1971, and the claimant's mother had then already established title to an award and an allowance became payable to her in respect of David until 5 October 1976.

(b) From and including 6 October 1976 her allowance was renewed. The renewal was at first granted at the lower rate, but she applied successfully for a grant at the higher rate, which was made for the period until David's 16th birthday, 17 May 1979.

(c) In anticipation of that event an application for the further renewal of the allowance was made in February 1979, ostensibly by David himself but in reality by his mother on his behalf. On 2 August 1979 a medical practitioner decided that David did not satisfy any of the conditions for an award of the allowance provided for in section 35(1)(a) and (b) of the Social Security Act 1975.

(d) The last-mentioned decision was reviewed by the Attendance Allowance Board in the relevant decision in exercise of their powers under section 106(1) of the Act. As already appears they declined to revise the decision under review.

6. David is represented by solicitors instructed by his mother, who have submitted that on a number of grounds the relevant decision erred in law. I will not discuss those points which seem to me to be adequately answered in the submissions made to me on behalf of the Secretary of State. The remaining grounds of appeal I will discuss in the order in which they appear in the application for leave to appeal.

7. The first submission made on David's behalf is that the Board "misapplied the statutory language". This allegation is founded on a passage in the relevant decision dealing with David's requirement of attention at night. The Board accepted that David was being taken three or four times to the toilet every night, and recorded that his parents sought to justify this practice on the ground that he needed help to prevent spillage of urine on the floor and down his clothes because of the weakness in his right hand. The Board had already referred in their decision to daytime attention given to David for the same reason. Paragraph 11 of the relevant decision contains the following passage on this subject:-

> "We accept that he may make a mess when visiting the toilet and that he may even do so were he to use his normal left hand in place of his weakened right one. We recognize too that it is natural in the circumstances for his parents to accompany him to the toilet to ensure that he does not make a mess. Looking at the situation from a medical point of view however, we find from the medical reports ... that /David/ is able to go to the toilet on his own and that he is able to get out of and back into bed and to walk without assistance. In the light of this information we conclude that /David/ could manage to go to the toilet on his own during the night and whilst we sympathise with his parents for the mess he may make in the toilet we can not accept that the prevention or cleaning up afterwards, of spilt urine constitutes attention in connection with a bodily function within the meaning of the Act."

8. The relevant decision is an impressive document and it is with reluctance that I hold that the passage quoted above, in my view, reveals a misinterpretation of the statutory phrase "attention ... in connection with his bodily functions" which occurs in both section 35(1)(a) and (b) of the Act. The phrase is not so narrowly framed that, for example, it covers assistance to a disabled person to unbutton his trousers for the purpose of relieving himself but not assistance to ensure that he does not spill urine on the trousers or the floor. In my view, it is wide enough to include assistance in enabling the disabled person to deposit his excreta in the receptacle intended for them. Moreover, I note that the Board have not dealt at all with the possibility that David might spill urine on his clothes and accordingly that it was possible that he might return to his bed after going to the toilet with pyjama trousers soiled by urine, and that this might happen two or three times a night. I think that that is a point which they should have discussed.

9. The next material point concerns night-time supervision. David's mother asserts that he requires continual supervision throughout the night to avoid substantial danger to himself, because he has the habit of waking during the night two or three times and banging his head on his pillow for a few minutes. She fears that he may injure himself by missing the pillow and hitting his head on the bed's headboard. The Board declined to accept this as making it medically necessary, during the night, for David to have attention or supervision to avoid danger, and suggested that any danger there might be of his hurting himself could be avoided by padding the bedhead.

The argument advanced against this conclusion is that there was no evidence before the Board to show that such padding was possible or would avoid the danger. But, in my view, the Board were well entitled to reach the conclusion which I have outlined above. It is to be remembered that the Board's duty is to determine what attention and supervision the disabled person concerned requires, and these are not always the same as the attention and supervision which he receives. Sometimes the disabled person is over-protected but, whether or not that is so, the Board is well entitled to suggest practical means of overcoming a problem thought to involve a requirement of attention or of supervision but capable of solution by other means. Indeed, I would not have been surprised if in the present case the Board had suggested practical solutions to the problem discussed in paragraph 8 above. In my view they are entitled to rely on their own experience and common sense and do not have to call for evidence before making a suggestion of this kind, although cases may arise in which that is desirable.

10. In another ground of appeal an allegation is made that the Board erred in holding that David did not require continual supervision throughout the day in order to avoid substantial danger to himself or others. This point amounts to no more than an assertion that the Board took the wrong view of the evidence. The only answer it requires is that there was evidence on which the Board were entitled to reach their conclusion.

11. Finally, it is asserted that the Board's decision was arbitrary and capricious because David's mother had been awarded attendance allowance in respect of David from the first day on which an allowance was payable, and David's medical condition had not changed. In answer to this, I think that it is fair to point out that David is no longer a child and his condition has necessarily changed because he has grown up. The question whether, now that he is older, he requires any and if so what attention or supervision within the terms of section 35 of the Act is for the Board to determine. And, in my view, there is nothing arbitrary or capricious in their determination.

12. My attention has been very properly drawn by the Secretary of State's representative to what he has described as "a minor procedural error". David's doctor wrote to the Board after having been shown the letter which, according to the Board's practice, was sent to David's mother before the relevant decision was finalised indicating that the Board had in mind to give an adverse decision and inviting her further evidence and comments. The doctor indicated general agreement with the view provisionally reached by the Board but added that David needed some attendance from his mother and wondered "whether this is sufficient for the allowance". By oversight, a copy of this letter was not sent to the claimant's mother, and that is the procedural error referred to by the Secretary of State's representative. I do not consider that, in the circumstances, the error was significant. Its receipt by David's mother could not have achieved more than a mention in the grounds of appeal formulated by David's solicitors, and they had ample time to make a representation concerning the omission or to frame a further ground of appeal based on it before I proceeded with this decision.

13. For the reason explained in paragraph 8 above, I hold that the relevant decision contained an error of law and I therefore set it aside. David's case should now be reviewed anew by the Board, and if possible the members of the Board carrying out the review should not include any who was a party to the relevant decision.

(Signed) R S Lazarus
Commissioner

Date: 10 March 1981

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