

RSL/OG

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR ATTENDANCE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.A. 1/81

1. My decision is that attendance allowance at the lower rate is payable to the claimant in respect of her child Alison for the inclusive period 7 September 1979 to 14 March 1982.

2. On 14 March 1980 a medical practitioner acting on behalf of the Attendance Allowance Board issued a certificate covering the period 7 September 1979 to 14 March 1982 that Alison satisfied one of the day medical conditions for an attendance allowance at the lower rate: see section 35(1)(a) of the Social Security Act 1975. On 5 June 1980 the local insurance officer gave his decision of which the effect was that attendance allowance was not payable to the claimant for any day of Alison's free in-patient treatment in a hospital. The claimant appealed to the local tribunal who, by a majority decision the chairman dissenting, allowed the appeal. The insurance officer now appeals from that majority decision.

3. The case depends upon the application of regulation 7(1)(c) of the Social Security (Attendance Allowance) (No 2) Regulations 1975 [S.I. 1975 No 598], which provides that -

"Attendance Allowance shall not be payable in respect of a child for any period during which the child is undergoing medical or other treatment as an in-patient in a hospital or similar institution"

4. The relevant facts concerning Alison are stated in a letter written in July 1980 by Dr G H Bush, a consultant anaesthetist at a children's hospital, and used as the grounds of the claimant's appeal to the local tribunal. The material parts of the letter read as follows:-

"Alison ... suffers from a most unusual condition called ONDINE'S CURSE precipitated by Herpes Simplex Encephalitis

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which she contracted in September 1977. She recovered reasonably well from the encephalitis but has been left with residual disabilities. Consequently she has to be placed on a ventilator each night, because if she goes to sleep she is liable to stop breathing and die. This treatment, in her case, can only be given in hospital. She also has difficulty in walking. Because of the need for artificial ventilation at night, she has to have a permanent tracheostomy.

During the day she is discharged from the hospital to attend a local school for the handicapped during term time, and she is collected by her mother and taken to her home in in the evening. The parents bring Alison back to hospital to be placed on her breathing machine for the night. During school holidays and week-ends, she leaves hospital in the morning and is at home all day. Because of the disabilities mentioned above, it is essential that her mother is present with her throughout the day. In different circumstances it might have been possible to have provided her with an artificial respirator for home use, but in this particular instance we have deemed it not to be advisable. We regard Alison's visits to her home as absolutely essential in trying to provide as normal a development as possible, and her parents have co-operated most magnificently in her care, and indeed one can, without doubt, say that they are devoting the whole of their lives to Alison's care and well being."

5. So far as concerns the administration of the hospital, Alison is classed as an in-patient. She is not discharged from the hospital each morning but remains on the books as an in-patient. No doubt the hospital could discharge her each morning and re-admit her as an in-patient each evening, but the administrative inconvenience of this course is obvious. And I do not consider that the administrative practise of the hospital, adopted for convenience, can influence the claimant's right to attendance allowance in respect of Alison.

6. The insurance officer's case is the simple one that Alison is an in-patient undergoing medical treatment in hospital, and therefore the payment of attendance allowance to her mother in her respect is prohibited by regulation 7(1)(c). And in support of this view of the case he has relied on the reported Commissioner's Decision R(I) 27/59. In the case dealt with in that Decision, the then claimant travelled daily from his home to a rehabilitation centre for remedial treatment but, owing to an insufficiency of beds, returned to his own home each night after spending the day at the hospital and receiving the remedial treatment which he required. The Deputy Commissioner held that that person was not an in-patient and therefore was not entitled to the benefit which he claimed. In paragraph 13 of the decision he wrote:-

"I think the word "in-patient" is not itself defined in the legislation and it must therefore be given what I take to be its ordinary English meaning of a patient who occupies a bed in a hospital as distinguished from an out-

patient who comes daily or from time to time to be treated or attended to".

In the present case, the chairman of the local tribunal accepted the insurance officer's submission and in doing so was influenced by that Decision.

7. The majority of the tribunal felt that the lines of demarcation in the claimant's appeal were artificial and administrative. They considered that Alison's return to the hospital each evening occurred simply because the parents did not have the relevant equipment at her home.

8. I must look at the realities of the case. First, it must be noted that the regulation quoted in paragraph 3 mentions a child who is ~~not merely an in-patient in a hospital but is undergoing medical or~~ other treatment as such. In view of the wide definition of "Medical treatment" in Schedule 20 of the Social Security Act 1975 I do not doubt that Alison receives medical treatment as an in-patient in hospital at night when she is on the ventilator. But in the daytime she leaves the hospital and so far as possible leads a normal life. In my view, in the daytime she receives no medical or other treatment within the meaning of the regulation, and is not a patient of the hospital at all. Her case does not resemble that of an in-patient, usually of a mental hospital, who leaves the hospital in the daytime or for a week-end or other appropriate period as part of the treatment prescribed by the medical authorities of the hospital for effecting a cure or improvement of his condition. Alison's daytime absences from the hospital have no purpose of medical or other treatment, such as the regulation contemplates. Their purpose is, so far as possible, to ensure for Alison an upbringing such as every little girl is given by her parents; in other words it is for ordinary living.

9. I see no need to hold that Alison must be an in-patient when she is not in the hospital at all, and consider myself free to hold that, in accordance with reality, she is an in-patient at night and not a patient at all during the day. Nor do I think that there is any conflict between this view and Decision R(I) 27/59. In that decision the Deputy Commissioner held that a person who does not sleep in a bed in a hospital is not an in-patient. He did not decide the converse, that is to say that a person who does sleep in a bed in a hospital is invariably to be regarded as an in-patient for all purposes. I would add that whatever the learned Deputy Commissioner stated, it would be wrong to treat his dicta as though they were included in the provisions of a statute and had statutory force.

10. Possibly arrangements could be made for Alison to be discharged from the hospital and re-admitted daily. But that seems to me unnecessary.

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11. In the result, therefore, I am in agreement with the decision of the majority of the local tribunal and I dismiss this appeal. My decision is set out in paragraph 1 above.

(Signed) R S Lazarus
Commissioner

Date: 30 January 1981

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C I O File: I.O. 7100/AA/80
Region: A.A Unit, Norcross