

RSL/MC

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it is important
RS/70/SAR/LEE

SOCIAL SECURITY ACTS 1975 TO 1980

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

CA/85/1980

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.A. 6/81

R(A)5/81

1. This is an appeal by the claimant from a review decision dated 4 June 1980 given on behalf of the Attendance Allowance Board ("the Board") by its authorised delegate, leave to appeal having been given on 19 February 1981 by the then Chief Commissioner. My decision is set out in the final paragraph below.

2. The claimant, whose first name is Lindsey, is a young woman who was born on 3 June 1959. She is an epileptic, suffering from both grand mal and petit mal. The present appeal is in reality made on her behalf by her father although he does not appear to have been formally appointed to represent her.

3. Application was first made to obtain a certificate for an attendance allowance for the claimant on 10 July 1975 but the application was unsuccessful at first instance, and was finally rejected by a decision dated 27 November 1975 declining to revise the first instance decision. The present appeal arises out of a second application, which was made on 19 May 1979. This application was also rejected at first instance on 16 July 1979, and again led to a decision declining to revise that rejection. This is the decision dated 4 June 1980 referred to in paragraph 1 above, from which appeal is brought to me; I will refer to it as "the relevant decision" and to its author as "the DMP" (an abbreviation for delegated medical practitioner).

4. The claim which was rejected by the relevant decision is for a certificate that the statutory conditions are satisfied for an award of an attendance allowance at the higher rate on the ground that both by day and by night the claimant requires continual supervision. The statutory provisions laying down the conditions at issue are in section 35(1) of the Social Security Act 1975 and read as follows:

"35.-(1) A person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain and either -

(a) he is so severely disabled physically or mentally that, by day, he requires from another person either -

(i) ..., or

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- (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or
- (b) he is so severely disabled physically or mentally that, at night, he requires from another person either -
 - (i) or
 - (ii) continual supervision throughout the night in order to avoid substantial danger to himself or others".

It is not disputed that the prescribed conditions as to residence or presence in Great Britain are satisfied by the claimant.

5. The passages in section 35(1) omitted from the above quotation deal with the requirements of a disabled person for attention from another person in connection with his bodily functions. The DMP dealt at length with the question whether Lindsey had such a requirement, and held that she did not. But no claim was made on Lindsey's behalf that she had a requirement of that nature, and no point has been taken concerning the DMP's conclusions on the subject.

6. The passages of the relevant decision which I must discuss are reproduced below, the underlining and side numbering being inserted by me for ease of reference. I will refer below to each underlined passage by its number.

- (a) "Regarding daytime supervision, it is noted that both medical reports record that she can be safely left unsupervised for 1 to 2 hours. Lindsey suffers from grand mal and petit mal epilepsy the evidence regarding the incidence of grand mal attacks varies between the 2 medical reports, the June 1979 report indicates that these broadly average 2 per week both day and night and the report of 26 January 1980 indicates that they average about 4 a week.
- (i) Whilst there is no warning of a grand mal attack, the post-epileptic state of automatism is predictable and it is indicated that the incidence of grand mal attacks peaks towards ovulation time. The question I need to resolve is whether it is reasonably likely that Lindsey would cause serious injury to herself or others if continual supervision was not provided. I have examined the evidence relating to the nature and frequency of Lindsey's fits and take the view that, although it is possible to suffer serious injury during an epileptic attack by falling or choking it is very rare in practice for such dangers to manifest themselves and I have no evidence that Lindsey has suffered such major injuries. She did receive a serious burn from a heated towel rail, but this appears to have been an isolated incident. Minor injuries such as biting the tongue or lips or minor abrasions caused

- by falling are more likely to be suffered but are not relevant to my decision It is not considered
- (iii) realistic to provide continual supervision to guard against the possibility of an epileptic fit and spontaneous recovery is normal in this condition. I accept that in Lindsey's case, some restraint may be necessary after a grand mal attack because of her automatism for the 10 minutes or so it lasts. She is stated to be fully aware of all common dangers and it is indicated that, from this viewpoint, it is safe to leave her in the house. She has developed some traffic sense and can cross her local road after leaving the Training Centre. I have carefully considered the evidence of the medical reports and all the supportive letters, but there is nothing in the documents to lead me to the conclusion that Lindsey is in substantial danger during the day or is a danger to anyone else necessitating the continual supervision envisaged by the Act...."

- (b) "...Regarding night time supervision, Lindsey is fully aware of all common dangers and it seems reasonable to suppose that when she gets up at night to use the toilet, having regard to the fact that her mother indicated on 18 June 1979 that she only gets up if Lindsey has a fit, that Lindsey is aware of the danger of falling downstairs.
- (iv) For the reasons given in my consideration of daytime supervision, I do not accept that Lindsey requires or has required continual supervision throughout the night in order to avoid substantial danger to herself or others".

7. I must relate the factual context in which the DMP had to make his decision. Lindsey is to some extent mentally subnormal because of brain damage. Also she has brief spells of automatism which follow immediately after a grand mal episode and which drive her to walk away from where she finds herself. These two conditions form the basis of the claim made on her behalf.

8. Lindsey attended a school for epileptics at one time but was discharged from there because the staff could not cope with her propensity to wander away. Later she attended an educationally sub-normal unit from which she was also discharged for the same reason. Now she attends an adult training centre and also a Youth Club for the mentally handicapped. While attending these two institutions she has received and continues to receive continual supervision, and her attendances have accounted, and continue to account, for the greater part of the daytime of the week days, Monday to Friday. But, of course, the fact that she has received such supervision does not prejudice the question whether, within the meaning of the relevant statutory provision she has "required" it. The case papers include letters from representatives of the authorities responsible for the two institutions which Lindsey attends, including a letter from a lady who runs the Youth Club and who has known Lindsey since 1970 or 1971. They provide evidence from

exceptionally objective and responsible sources. I think it a pity that the DMP had no comment to make on them save that he had considered them.

9. Lindsey lives with her parents in the parents' house. Her father has referred to three occasions on which he considers that Lindsey experienced situations of danger by reason of her subnormality or her automatism. On one occasion she was an in-patient in hospital but escaped the vigilance of the staff and wandered out of the hospital. She was later found by the police some way away from the hospital. On another occasion she wandered out of her home and was found three miles away having walked along a motorway in a bewildered state. He has also referred to an incident when Lindsey suffered burns to her hands from a heated towel rail in the bathroom of her home. She had been left unattended for a few minutes and, had she not been rescued speedily by her mother, would have suffered more serious injury.

10. In passage (i) the DMP has stated that "whilst there is no warning of a grand mal attack, the post epileptic state of automatism is predictable ...". I do not follow how this can be so. If grand mal attacks occur without warning, that is to say at unpredictable times and in unpredictable places, so also does a bout of automatism which is the immediate sequel of such an attack. It is, of course, predictable to persons who are present or near when the grand mal attack occurs but not to others and not earlier than the start of the attack. In my view, it cannot be said to be predictable in any relevant sense and I am driven to regard the DMP's finding that Lindsey's bouts of automatism are predictable as a finding of fact which falls within the principle considered by Lord Widgery C.J. in Global Plant Ltd v Secretary of State for Social Services [1972] 1 Q.B. 139 at p 155 (see also the reported Commissioner's Decision R(A) 1/75, paragraph 7); that is to say as a finding of fact which no person acting judicially and properly instructed as to the law could have reached. It is not irrelevant to observe that in passage (iii) the DMP accepted that Lindsey needed restraint after a grand mal attack because of her automatism, but did not suggest a solution of the problem how to provide this unless some person is present or near at hand when an attack starts.

11. Also in passage (i) the DMP defined the question which he needed to resolve. His statement of this reads: "... whether it is reasonably likely that Lindsey would cause serious injury to herself or others if continual supervision was not provided". In my view, he misdirected himself in posing that question, which is too limited in scope. The question should not be confined to the risk of injuries caused to Lindsey by herself or by her to others. It must also include the risk of injuries caused to Lindsey by others. It is arguable that such injuries could happen on an occasion when her automatism has led her into situations of danger; for example in a road accident. I think that the explanation for the DMP's limitation of what he regarded as the relevant question lies in his having directed his mind to the possibility of Lindsey suffering or causing injury during an epileptic attack. This is the common cause of a claim made by or on behalf of an epileptic, and support for the view that the DMP's mind was focussed on the risk to Lindsey of self-inflicted injury in the course of a grand mal attack is found both in the penultimate

sentence of passage (i) and in the first sentence of passage (iii). But in the present case, the claim is made on a different ground, that is to say because of Lindsey's automatism and subnormality; the risk of her suffering or causing injury arising directly out of an epileptic attack is nowhere mentioned in the documents supporting the claim.

12. In passage (ii) the DMP dismissed the incident in which Lindsey suffered burns by describing it as "an isolated incident", a phrase commonly used in the decisions of the Board's delegates. In my view, in the present case at least, the use of that description indicates another misdirection. It does not advance matters to describe an incident of danger or potential danger as "isolated". As I have pointed out on another occasion (in the decision on Commissioner's File C.A. 15/1979 to which my attention was drawn by the grounds of appeal in this case) if a child, escaping the supervision of its mother runs out of the house on to a public highway, that may well be an isolated incident. But it only requires one such incident for the child to be killed by passing traffic. In my view reliance on the description "isolated incident" reveals that the wrong question is posed, that is to say the question how often is such an incident likely to occur. I consider that the correct approach is expressed in the questions: Is there a relevant (i.e. not remote) risk of such an incident occurring? If so, is it likely to give rise to substantial danger to the disabled person concerned or others?

13. As to passage (iv), I have only underlined this by way of explaining that it is unnecessary for me to discuss separately Lindsey's alleged requirements of supervision for the daytime and the night-time. The DMP has rejected the claims in respect of both for the same reasons.

14. My conclusion is that the relevant decision contains erroneous determinations of questions of law by reason of the finding of fact discussed in paragraph 10 and the misdirections discussed in paragraphs 11 and 12 above. I consider that the appeal could be allowed alternatively on the ground that the DMP did not fully apprehend the nature of the case being made for Lindsey and consequently failed to determine it fully.

15. The application for review of the decision dated 16 July 1979 (see paragraph 3 above) will have to be redetermined by the Board or another of its delegates. For the reasons already stated my decision is as follows:-

The review decision dated 4 June 1980 contains erroneous determinations of questions of law and is set aside.

(Signed) R S Lazarus
Commissioner

Date: 11 September 1981

Commissioner's File: C.A./85/1980
DESS File: S.D. 450/1194