MR/SH /1

Commissioner's File: CA/092/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal is allowed. The decision of the Attendance Allowance Board given on 9 October 1991 is erroneous in point of law and is set aside. The case is referred to an adjudication officer for second tier adjudication in accordance with this decision under regulation 23(2)(b) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991.

2. On 11 February 1991, the Department of Social Security received from his mother a claim for attendance allowance on behalf of Nicholas who was born on 27 May 1989. On 22 February 1991, Nicholas was seen, in the presence of his mother, by an examining medical officer and on 27 February 1991 a delegated medical practitioner decided, on behalf of the Attendance Allowance Board, that Nicholas did not satisfy, had not satisfied and was unlikely to satisfy any of the conditions in section 35(1) of the Social Security Act 1975 as modified by regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975. By a letter dated 29 April 1991, the claimant sought a review of that decision. On 9 October 1991, another delegated medical practitioner, on behalf of the Attendance Allowance Board, reviewed the decision but decided that it should not be revised. The delegated medical practitioner accepted that Nicholas' development had been delayed and that he was at the developmental stage of a child approximately six months younger than himself. However, he took the view that Nicholas' attention and supervision requirements were not substantially in excess of those of most children of his age.

General Principles

3. Before looking at the facts of this particular case, it is convenient to consider the general approach which should be taken in cases concerning claims for attendance allowance (and now disability living allowance) in respect of children. The conditions for receipt of attendance allowance set out in section 35(1) of the Social Security Act 1975 were substantially modified in respect of children by regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 so as to read as follows:-

> "A person shall be entitled to an attendance allowance in respect of a child who satisfies or is treated as having satisfied prescribed conditions as to the residence or presence in Great Britain and either -
>
> (a) the child is so severely disabled physically or mentally that, by day, he requires from another person either -
>
> (i) frequent attention throughout the day in connection with his bodily functions (being attention substantially in excess of that normally required by a child of the same age and sex),
>
> (ii) continual supervision throughout the day in order to avoid substantial danger to himself and others (being supervision substantially in excess of that normally required by a child of the same age and sex); or
>
> (b) the child is so severely disabled physically or mentally that, at night -
>
> (i) he requires from another person prolonged or repeated attention in connection with his bodily functions (being attention substantially in excess of that normally required by a child of the same age and sex), or
>
> (ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him (these requirements being substantially in excess of the requirements normally placed upon another person by a child of the same age and sex)."

The equivalent provisions governing entitlement to disability living allowance are now to be found in section 72(1) and (6) of the Social Security Contributions and Benefits Act 1992.

4. In applying the statutory provisions in any particular case, it is important to bear in mind the clear distinction between attention and supervision. In CA/6/72 (not reported but cited with approval in R(A) 3/74 at paragraph 11) the Commissioner wrote:-

> "In my judgment, the word "attention" denotes a concept of some personal service of an active nature; for example, helping the disabled person to bath or to eat his food, cooking for him or dressing a wound. On the other hand, the word "supervision" denotes a more passive concept, such as being in the same room with a disabled person so as to be prepared to intervene if necessary; ..."

It may be added that, if the supervising person does intervene, the intervention is likely to be attention. (The reference to cooking in CA/6/72 is no longer good law having regard to the decisions of the Courts in Regina v. National Insurance Commissioner ex parte Secretary of State for Social Services [1981] 1 WLR 1017 and In re Woodling [1984] 1 WLR 348, both reported as Appendices to R(A) 2/80.)

5. In the case of a child, it is to be noted that the attention or supervision required must be "substantially in excess of that normally required by a child of the same age and sex" and there is a similar modification to section 35(1)(b)(ii). Attention or supervision may be required "substantially in excess of that normally required" either by virtue of the time over which it is required or by virtue of the quality or degree of attention or supervision which is required.

6. The idea of a greater quality of degree of attention can be illustrated by considering meal times. A young child may require attention in connection with eating because he or she requires the food to be cut up. A disabled child of the same age may require attention in excess of that normally required by a child of the same age because he or she not only requires the food to be cut up but also requires it to be spooned into the mouth. The fact that the child will be supervised anyway is irrelevant: there is still an additional requirement for attention. Whether such additional attention, taken with any other additional attention requirements, is "substantial" and "frequent .... throughout the day" are matters of judgment to be determined in each case where the condition in section 35(1)(a)(i) is being considered. Those may be significant limiting factors.

7. When considering the condition in section 35(1)(a)(ii), the additional condition that the supervision required must be substantially in excess of that normally required by a child of the same age is indeed "stringent" as it was described in

CA/21/88. Because young children normally require continual supervision throughout the day in order to avoid substantial danger to themselves, the focus will be on the quality or degree of supervision. Thus a very young immobile baby or an older child might normally be regarded as being adequately supervised by a person who was getting on with his or her own chores in a different part of the home. On the other hand, a disabled child of the same age may need much closer supervision amounting, perhaps, to being watched over. That would be supervision in excess of that normally required. Again, it is necessary to consider whether such additional supervision is "substantial" and "continual ... throughout the day" and those may be significant limiting factors.

8. Similar considerations apply to the night conditions in section 35(1)(b), although it may in practice be more difficult for claimants to qualify on the basis of the additional quality or degree of attention or watching over rather than on the basis of the additional frequency or length of time for which attention or watching over is required.

9. The other general question raised by this appeal is how one judges what attention of supervision is normally required by a child of the same age and sex. Children vary considerably in their requirements for attention and supervision, particularly when they are young. At any age, there is a range of requirements for attention or supervision. It is significant that the legislation does not speak of attention or supervision substantially in excess of that which would be required by the particular child being considered were he not physically or mentally disabled. So that, if it were possible to ascribe tantrums to frustration arising out of a disability, that would not be enough for the child to qualify unless the attention or supervision was substantially in excess of that normally required by a child of the same age and sex. It seems to me that the legislation contemplates a yardstick of an average child, neither particularly bright or well behaved nor particular dull or badly behaved, and then the attention or supervision required by the child whose case is being considered must be judged to decide whether it is "substantially" more than would normally be required by the average child. That, I think, comes to much the same thing as saying that the attention or supervision required must be substantially more than that normally required by <u>most</u> children, which is the way the delegated medical practitioner put it in paragraph 4 of his decision in this case. Attention or supervision is not to be regarded as "substantially" in excess of that normally required unless it is outside the whole range of attention or supervision that would normally be required by the average child. However, it need not necessarily be substantially in excess of that which would be required by a particularly dull or badly behaved, but not physically or mentally disabled, child. I appreciate that all this is pitched at a fairly theoretical level and that there may be significant evidential problems and problems of judgment in individual cases, but it seems desirable to provide some sort of theoretical framework within which the present case can be considered.

Applying the general principles to this case

10. I can, or course, only set aside a decision of the Attendance Allowance Board if it is erroneous in point of law. Whether I agree or disagree with the delegated medical practitioner's judgment on questions of fact is irrelevant.

11. So far as the day attention condition is concerned (section 35(1)(a)(i)), the delegated medical practitioner reviewed the evidence and then wrote:-

> "I recognised from the evidence that because of his medical condition, [Nicholas] was suffering a slight developmental delay which caused him to have the attention needs of a child approximately 6 months younger than himself. However, bearing in mind that all children of his very young age required a great deal of attention, I did not consider that his attention needs as described by the examining doctor were substantially in excess of most children of his age. Consequently, it was my medical opinion that this condition was not satisfied."

12. The claimant complains that that decision was either supported by no findings of fact or else was such that no person acting judicially and properly instructed as to the law could have made. It seems to me clear that the delegated medical practitioner accepted the findings of fact of the examining doctor. Therefore, there were some findings of fact, although whether they were adequate is something I will consider in the next paragraph. So far as the second point is concerned, in so far as the delegated medical practitioner made a judgment on the evidence before him, I do not consider that he can be said to have made a decision that was so unreasonable as to be erroneous in point of law.

13. However, I am left with considerable unease about the delegated medical practitioner's decision on the day attention condition. He states that he did not consider that Nicholas' attention needs "as described by the examining doctor" were substantially in excess of most children of his age. The Attendance Allowance Board had an inquisitorial function like that of an adjudication officer and that was only discharged if the correct questions were asked. What is striking about this case is that the examining medical officer had frequently to write "see age" on the standard form of medical report which he was completing because so many of the questions asked in that standard form were not really relevant to young children. At the end of the report, one is left with the knowledge that Nicholas' development at the age of 21 months was that of a 15 or 16 month old child but with no knowledge as to what the examining medical officer considered the practical effects of that to be. The delegated medical practitioner had reports from a health visitor, a paediatrician and a general practitioner all suggesting that Nicholas did have needs of some sort in excess of those normally required by a child of the same age but not

explaining why they thought that. Given the inadequate extent to which the examining medical officer's report dealt with that issue, I take the view that the delegated medical practitioner should have asked the examining medical officer to provide more specific details as to why he considered that Nicholas' attention and supervision needs were not substantially in excess of those normally required by a child of the same age and sex and ought to have asked Nicholas' mother to provide more specific details as to why she considered that he did satisfy the statutory test. I do not consider that sending a draft decision (which incidentally was not in the papers before me) accompanied by form DS276A was good enough in this particular case.

14. As it was, the decision of the delegated medical practitioner does not, in the circumstances of this particular case, contain an adequate record of findings of primary fact so as to enable the reasoning to be followed and that resulted in the reasons not be sufficiently clear to comply with regulation 39(2) of the Social Security (Adjudication) Regulations 1986. In the absence of those findings of fact, it is not clear how the delegated medical practitioner approached the case. For that reason only, the decision on the day attention condition is erroneous in point of law and must be set aside. That is not to say that the adjudication officer who must now consider the case afresh will necessarily reach a different decision. In particular, it must be borne in mind that, while the attention needs of Nicholas may differ from those of most 21 month old children, they are not necessarily any greater.

15. Turning to the day supervision condition (section 35(1)(a)(ii) I do not consider that the delegated medical practitioner's decision on that issue is erroneous in point of law. The reports of the examining medical officer deal specifically with the correct question at question 4(a) of the main report and question 1(e) and (f) of the supplementary report. Plainly Nicholas needed continual supervision throughout the day in order to avoid substantial danger to himself. There is nothing in the other evidence in the case to suggest that he required such supervision substantially in excess than that normally required by child of his age and sex. So far as his tendency to tantrums is concerned, to the extent that he required to be restrained and calmed down, those requirements were attention requirements rather than supervision requirements. Of course they gave rise to a requirement for supervision so that someone would be on hand to provide that attention should the need arise but, in the absence of any evidence that the supervision required was particularly close, that was not a requirement for additional supervision but was merely an additional reason for providing the same supervision as would be required in any event by a child of Nicholas' age. That is not to say that the adjudication officer who must now reconsider the case should necessarily take the same view as the delegated medical practitioner if evidence is provided of an additional requirement for supervision. (Tantrums must, as I have said, be considered under the heading of attention, and I would add that, while many people might say that 21 month old children are more

prone to tantrums than 15 month old children, there is a suggestion in this case that Nicholas had considerably more than the average 21 month old child or than most 21 month old children. It will be necessary for the adjudication officer consider whether that was so and, if it was, the extent to which that may have given rise to additional attention requirements.)

16. Turning to the night attention condition (section 35(1)(b)(i)), the evidence that Nicholas needed attention at night was to the effect that he needed help once or twice a night for 30 minutes at a time when he needed to be given a drink or got back to sleep. The delegated medical practitioner did not suggest that the attention was not "prolonged" or "for a prolonged period" but suggests that Nicholas' requirements for attention was not substantially in excess of the normal requirement of a child of the same age and sex. He said:-

> "I accepted that [Nicholas] was given the attention described, but many 2 year olds have disturbed nights and needed to be reassured and tended in this way. As such, it was my medical opinion that his night attention needs were not substantially in excess of that normally required by a child of the same age and sex. It was accordingly my medical opinion that this condition was not satisfied."

17. I take the view that that discloses an error of law. To say that <u>many</u> children of a particular age need attention at night is not the same as saying that such attention is <u>normally</u> required by children of that age. If Nicholas requires substantially more attention at night than <u>most</u> children, attendance allowance could be payable in respect of him. The fact that many children of a particular age require prolonged or repeated attention at night does not mean that attendance allowance may not be payable in respect of those children of the same age for whom it could be shown that such requirement for attention arises from physical or mental disablement. It does of course mean that the authorities will be slow to accept that physical or mental disablement is the cause of the requirement for attention in the absence of fairly clear evidence to that effect. The adjudication officer will now have to consider whether the attention that Nicholas requires is substantially in excess of that required by most children and whether the additional requirement for attention is due to physical or mental disablement. I do not know why the delegated medical practitioner used the word "many" in paragraph 8 of his decision having correctly used the word "most" in paragraph 4.

18. There does not appear to be any suggestion that Nicholas required watching over at night and the delegated medical practitioner did not err in law in holding that the condition in section 35(1)(b)(ii) was not satisfied.

19. For the reasons given in paragraphs 13 and 17, I allow this appeal.

(Signed) M. Rowland
Deputy Commissioner

(Date) 10 March 1993