

MH/1/SH/LM

Commissioner's File: CA/124/93

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR ATTENDANCE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Gladys Cockburn (Mrs)

Appeal Tribunal: Nottingham

Case No: D/41/121/93/0038

[ORAL HEARING]

1. My decision is that this appeal must be allowed. The case is remitted for reconsideration by a differently constituted disability appeal tribunal in accordance with the terms of this decision set out below.

2. The claimant was born on 14.12.1925, and is accordingly now 68 years old. She applied for attendance allowance on 13.7.92 and this was not allowed. She applied for a review of that decision, and the initial decision was upheld. She appealed to the Nottingham disability appeal tribunal, which, on 16.4.93, allowed her appeal, and awarded her attendance allowance at the lower rate. The actual decision awarded the allowance at the "daily" rate, and clearly this should have been a reference to the "day time" rate, otherwise known as the lower rate of attendance. The qualification for the award was that her attendance needs for dressing and undressing and getting out of bed, when added to laundry generated by her incontinence, meant that she required frequent attention throughout the day in connection with her bodily functions from another person, which is one of the conditions for attendance allowance set out in section 64(2) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"). Medical evidence before the appeal tribunal showed that the claimant was incontinent of urine only, although there is no express finding of fact to that effect.

3. The adjudication officer now appeals with the leave of the chairman of the tribunal. I held an oral hearing of the appeal at which the adjudication officer was represented by Mr P Stinchcombe, of Counsel, and the claimant was represented by Miss J French, Welfare Rights Officer. Two written submissions had been made on behalf of the adjudication officer, and one on behalf of the claimant. The second submission on behalf of the adjudication officer was consequent upon the receipt of the judgment of the House of Lords dated 21 April 1994 in the case of Mallinson v. Secretary of State for Social

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4. At the oral hearing, the arguments were directed to the question whether the generation of additional laundry, above the normal, arising from the incontinence of the claimant amounted to something which required frequent attention throughout the day in connection with her bodily functions. Mallinson's case in fact referred to a claimant who was blind. The arguments in the House of Lords judgments related in large part to the proper meaning of that phrase in section 64(2)(a) of the 1992 Act. The majority judgment delivered by Lord Woolf is accordingly highly relevant in, and, it is submitted on behalf of the adjudication officer, decisive of the present appeal. Miss French does not seek to argue that the reasoning in Mallinson's case is not applicable, but seeks to establish that that argument sustains the case put forward on behalf of the claimant.

5. Mr Stinchcombe submitted at the hearing that there were three parts of the statutory requirement which were important in the present case:-

- (1) "Frequent" attention;
- (2) "In connection with"; and
- (3) "Attention"

referred to the printed judgment of the House of Lords at pages 7, 8, and the first full paragraph on page 9. He said that there was no issue between the parties that the claimant was not very severely disabled physically or that, by day, she required the necessary attention from another. He then referred to the issues referred to in Mallinson's decision, namely R v. The National Insurance Commissioner, Ex Parte Secretary of State for Social Services (Packer's case) (1981) 1 W.L.R. 1017, and referred to the following two statements from the judgment of Lord Denning in Packer's case:-

"Bodily functions" include breathing, hearing, seeing, eating, drinking, walking, sitting, sleeping, getting in or out of bed, dressing, undressing, eliminating waste products - and the like - all of which an ordinary person - who is not suffering from any disability - does for himself. But they do not include cooking, shopping or any of the other things which a wife or daughter does as part of her domestic duties or generally which one of the household normally does for the rest of the family."

"... ordinary domestic duties such as shopping, cooking meals, making tea or coffee, laying the table or the tray, carrying it into the room, making the bed or filling a hot water bottle, do not qualify as "attention ... in connection with the bodily functions of the disabled person. But that duties that are out of the ordinary - doing for the disabled person what a normal person would do

for himself such as cutting up food, lifting the cup to the mouth, helping to dress and undress or at the toilet - all do qualify as "attention in connection with bodily functions of the disabled person".

He then relied upon the passage from the judgment of Dunn L.J., set out at page 8 of the Mallinson judgment reads:-

"To my mind the word "function" in its physiological or bodily sense connotes the normal actions of any organs or set of organs of the body, and so the attention must be in connection with such normal actions. The word "attention" itself indicates something more than personal service, something involving care consideration and vigilance for the person being attended. The very words suggests a service of a close and intimate nature. And the phrase, "attention in connection with bodily functions" involves some service involving personal contact carried out in the presence of the disabled person".

A reference was then made to the case of Moran v. Secretary of State for Social Services, reported as an Appendix to decision R(A) 1/88. These cases were expressly approved in the majority judgment of the Mallinson case, and the majority decision in that latter case was in accordance with the principles set out in the quotations above. It was accordingly submitted on behalf of the adjudication officer that the laundry of extra clothes and linen arising out of the claimant's condition was not attention within the descriptions and definitions which had been laid down by the Court of Appeal, and approved by the House of Lords.

6. Miss French, on behalf of the claimant, submitted that the question to be decided in the present appeal was whether the laundry of soiled clothes and linen was a "normal" household job. She submitted that it was not, but only necessary because incontinence was one of the main disabilities of the claimant. She relied upon the difference made in the second of the quotations from Lord Denning cited above between "ordinary domestic duties" and "duties that are out of the ordinary". She submitted that laundry of soiled sheets and clothing was sufficiently "intimate" to come within the test referred to by Dunn L.J. in Packer's case; further, there is sufficient "personal contact" in relation to laundry to come within the definition approved by the Court of Appeal. She further relied upon a Commissioner's decision, R(A) 1/91, where the issue was whether extra laundry required in relation to a boy with a skin complaint amounted to "attention" for the purpose of attendance allowance. In reply, it was submitted that the Commissioner's case was wrongly decided and was not in accordance with the principles accepted in Packer's case. It was submitted that it was wrong to say the test is to enquire whether laundry was an ordinary domestic chore in the circumstances of the present case; that the washing of laundry does not amount to attention in connection with a bodily function.

7. I accept the submissions put forward on behalf of the

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adjudication officer, and accordingly reject those put on the basis that the extra laundry in the present case did amount to "attention" within the statutory definition. In particular the case for the claimant depends in large part upon the idea that tests accepted by the Court of Appeal in Packer involves comparing "ordinary" with "out of the ordinary". The passage as cited above show that what in fact was being compared by the Court of Appeal was, on the one hand, necessary chores which are normally done by a particular member of the family and without personal or intimate connection with the claimant, and, on the other hand, those that were out of the ordinary because, although normally done by one person for his own benefit, had, by reason of the disability, to be done by some other person, and that that was the extra-ordinary element in the situation. Clearly, it cannot be said that doing laundry, of whatever volume, must be intimate, or personal, or needs to be done in the presence of the disabled person. Argument to the same effect was in fact put forward in Packer's case, by Counsel appointed by the court, and expressly rejected in both the judgments of Dunn L.J. and O'Connor L.J.. The arguments are set out in their judgments in the report referred to above.

8. Accordingly, this appeal must be allowed. The case is remitted for reconsideration to a differently constituted disability appeal tribunal, who will consider all matters afresh. In particular the tribunals will not be limited by the features considered by the first appeal tribunal, but may, if the parties put forward arguments to that effect, consider such further possible areas of attention such as the services of another person, probably the daughter of the claimant, to assist in removing and handling the soiled clothes or other personal attention. In accordance with Mallinson's case, any matter which is probably within the definition of "in connection with bodily functions" can be considered by the fresh tribunal.

(Signed) M Heald
Commissioner

Date: 18 August 1994