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LB/MB

Commissioner's File: CA/137/1984

DHSS File: SD/450/1835

SOCIAL SECURITY ACTS 1975 TO 1985

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

Name: Kobirun Nessa Begum on behalf of Kamran Hussain Toropdar (child))

1. My decision is that there was no error of law in the decision dated 10 April 1984 of the delegated medical practitioner on behalf of the Attendance Allowance Board whereby, he reviewed but did not revise an earlier decision dated 15 August 1983 to the effect that the claimant was not entitled to an attendance allowance in respect of her son Kamran Hussain Toropdar pursuant to the claim made by her on his behalf on 23 June 1983 (effective date of claim 20 June 1983). I accordingly dismiss the claimant's appeal.

2. The claimant's little boy was born in England on 23 June 1978. He had an operation on his right heel in February 1983. He walks with a mild limp due to a weak right leg. He is severely disabled in his right hand and arm; the right arm is shorter than the left arm and there is severe weakness of the grip of the right hand. He and his family are Muslim Bangladeshi and it is their religious and cultural practice in the eating of food which raises the issue on the appeal I have to determine.

3. I turn first to the relevant statutory and regulatory provisions which have to be applied.

Section 35(1) of the Social Security Act 1975 provides 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 -
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> (i) frequent attention throughout the day in connection with his bodily functions, or
>
> (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) prolonged or repeated attention during the night in connection with his bodily functions, or

(ii) continual supervision throughout the night in order to avoid substantial danger to himself or others."

Since the claimant's son is a child subsection (1) above has effect as if after the word "functions" in both places where that word appears there are inserted the words:-

"(being attention substantially in excess of that normally required by a child of the same age and sex)"

and after the word "others" in both places where that word appears there were inserted the words -

"(being supervision substantially in excess of that normally required by a child of the same age and sex)".

These further provisions appear from regulation 6(2)(c) and (d) of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 [SI 1975 No. 598). The other conditions for an attendance allowance which have to be satisfied are satisfied in this case and no point arises as to them.

4. Pursuant to section 105(3) of the Social Security Act 1975 the question of whether the claimant's son has satisfied any of the conditions of section 35(1) above is to be determined by the attendance allowance board (I add, or by a delegated medical practitioner acting on its behalf), and an appeal can only be brought against that decision if the board or delegated medical practitioner has erred in law. The issue in the present case is whether an error of law was made in not taking account of the cultural and religious practices of this little boy in connection with what is admittedly the bodily function of eating food. I added at this point that the cutting up of food is established to be in connection with the bodily function of eating - see R. v. National Insurance Commissioner ex parte Secretary of State for Social Services [1981] 1 WLR 1017 at 1027 per O'Connor LJ, since eating is a bodily function - per Lord Denning in the same case at p. 1022. There is no dispute that there was no error of law in relation to the non-satisfaction of either of the night time conditions or in relation to the day-time supervision condition. The issue is as to day-time attention in connection wih the little boy's bodily function of eating his food.

5. In a letter from the Kings Cross Citizens Advice Bureau dated 24th February 1984 the following was stated:-

"The family are from Bangladesh and are practising Muslims. According to Muslim law, food is eaten with the fingers, using the right hand. The left hand is considered unclean as it is used when washing the private parts after defecation. Because of this, [the son] is unable to eat at home without help, as his disability makes him unable to use his right hand for eating."

This information was amplified by a letter from the Kings Cross - Brunswick Neighbourhood Council of the same date in which the writer confirmed the importance attached to the use of right and left hands by Muslims and wrote this:-

"The right hand is used to eat food with the fingers. The hand is washed, before and after eating, by manipulation of the fingers of that hand only - never by using the two-

handed system so common here. This is because the left hand - used for washing the body after defecation - is never allowed to come into contact with food or the right hand, except for rare occasions."

In the submission on behalf of the claimant made by Child Poverty Action Group the following is submitted;-

- "It is submitted that the wording of the Statute is such that the adjudicating authorities must look to what is factually required by the claimant in consequence of their severe physical or mental disability. There must be an element of such disability which gives rise to the need for attention or supervision. However, once an element of disability has been shown, the test is then to be the level of attention or supervision required in fact by the individual claimant. It is submitted therefore that the adjudicating authority looking at what is required should take into account all factors relevant to the need of the claimant. It is submitted that the Secretary of State is wrong in contending that the prescribed extent of attention or supervision must be required on account solely of the disabled person's physical or mental condition. The attention or supervision must be required i.e. be necessary. Mere personal preference on the part of the claimant is therefore not to be taken into account. However, the adjudicating authorities must take claimants as they find them in terms of their deeply held cultural or religious beliefs. Where the Attendance Allowance Board is persuaded that the performance of an action would be contrary to such deeply held religious or cultural beliefs that it does not effectively represent a course of action open to the claimant to take then it is submitted that the Board must take this into account when deciding whether attention or supervision is required".

6. The language of section 35 has to be considered as a whole - per Lord Bridge of Harwich in re Woodling [1984] 1 WLR 348 at 352. At the same reference Lord Bridge also said this:-

> "Again, it seems a reasonable inference that the policy of the enactment was to provide a financial incentive in encourage families or friends to undertake the difficult and sometimes distasteful task of caring within the home for those who are so severely disabled that they must otherwise become a charge on some public institution".

It is also clear from the recent decision of the Court of Appeal in Connolly v. the Secretary of State for Social Services that "requires" in section 35(1) is to be construed in the sense of "reasonably requires" - p.4 of the transcript. Also, the question is whether the attention is equired, not whether it is provided -R(A)1/73 at paragraph 15.

7. The submission on behalf of the claimant from which I have cited is in my judgment skilful but wrong so far as it seeks to sever into two questions the element of disability on the one hand and then the level of attention required by the individual claimant on the other. I see no ground for any such severence on the statutory language. The need for attention or supervision must be the consequence of the severe disablement; this follows from the words "so severely disabled ... that .. he requires ...". I go with the submission so far as I agree it is necessary to have regard to the particular person concerned; this is no abstract problem but one which relates to the needs of an identified person. However, it is not in my judgment right to say that a person must be taken as he is found to be and then to reach a conclusion which in substance amounts to holding that the need for attention flows from the combined effect both of the severe disablement and also of the religious and cultural beliefs of the person concerned; the section does not in my view allow of any such combined operation.

8. In my judgment therefore in the present case, where the little boy's need for attention stems from the combined effect of his physical disablement and his cultural or religious

beliefs then that is not a satisfction of the statutory requirement. Accordingly the appeal fails.

9. My decision is as in paragraph 1.

(Signed) Leonard Bromley
Chief Commissioner

Date: 27 February, 1986