JM/SH/1

Commissioner's File: CA/271/1988

DHSS File: SD450/2710

SOCIAL SECURITY ACTS 1975 TO 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal, brought by leave of the Commissioner, against a determination of the Attendance Allowance Board ("the Board") dated 1 February 1988. My decision is that the said determination is not erroneous in point of law.

2. I held an oral hearing of the appeal. The claimant did not attend but he was most ably represented by Mr E Salmon, a disablement adviser with the South Tyneside Disablement Advice Service; and the claimant's mother also attended. The Secretary of State was represented by Mr J Latter, of counsel, instructed by the Solicitor's Office of the Departments of Health and Social Services. Mr Latter is, of course, well experienced in this field and for his assistance I am also grateful.

3. Before I turn to the case itself, I repeat here certain general observations which I made to the parties' representatives in the course of the hearing. There is in this jurisdiction a danger in allowing the best to become the enemy of the good. I have been a Commissioner for more than nine years. I am in no doubt that during that period I have seen a higher and higher standard expected of the determinations of the Board and of its DMPs. That may be all to the good. At least two considerations are, however, relevant. In the first place, among the many types of case which come before the Commissioner, those involving attendance allowance are unique in that, until they reach the Commissioner, no qualified lawyer has been in any way involved in the decision making process. In the second place (somewhat anomalously, perhaps), the determinations of the Board and of its DMPs are - and throughout my time as a Commissioner always have

been - set out at a length and with a degree of particularity that is virtually unknown in the case of the other benefits which come before us. It is my personal view that the Board is in danger of being driven into (if I may be pardoned the neologism) a "no-win situation". If the relevant determination fails to deal with a material aspect of the case, it will rightly be set aside as erroneous in point of law. But those without legal qualifications are not necessarily to know confidently what a trained lawyer will regard as material. Understandably, accordingly, the determinations of the Board and of its DMPs range widely over the evidence. But my experience as a Commissioner has taught me that there is danger here. If the determination chooses to deal with factors A, B and C, which I myself might not regard as of crucial materiality, it is liable to be assailed upon the ground that it has not dealt with factor D, which is also not of crucial materiality. In no way am I to be taken as suggesting that the Commissioner should turn a blind eye to clear errors of law. But I consider that a relentless search for a perfection which is not generally sought in the case of the decisions of social security appeal tribunals or medical appeal tribunals carries the danger of making, in the case of attendance allowance, the system of adjudication so costly and protracted that it may end up by being replaced by something which, overall, is less in the interests of claimants. So (harking back to the opening of this paragraph) the pursuit of the best may result in the replacement of the good by something which is less acceptable to claimants at large.

4. This case undoubtedly commands sympathy. The claimant was born on 3 August 1965. From birth he has suffered from hydrocephalus and spina bifida with paraparesis - and he is wheelchair bound. There is no function at all in his right leg and he can barely move his left leg and left hip joint. But he is mentally alert, has normal speech and a normal memory. He is obviously very well motivated. He can get into and out of bed and to the lavatory by himself. Unaided he can get into and out of his specially adapted motor car; and that car he can drive by himself. His arms are unusually powerful. In his wheelchair he has taken part - and recorded a good time - in the Great North Run. In his wheelchair he plays basketball. He can slide into and out of the bath. He can dress, apart from his trousers, socks and shoes. He can cut up his food and eat it by himself. All that represents a very considerable triumph over very substantial disabilities. But in respect of one substantial disability there is little or nothing that motivation can achieve for him. He is doubly incontinent by day and by night. That involves the constant use of incontinence pads. He requires the help of his mother in the changing of those pads and in any consequent cleaning of his body. He is also liable to suffer from night nose bleeds during the hay-fever season. Unsurprisingly, he is in receipt of mobility allowance.

5. Attendance allowance at the higher rate was awarded in respect of the claimant from 6 December 1971 until his 16th birthday (ie until 3 August 1981). A DMP then issued a certificate to the effect that attendance allowence should be

paid at the lower rate from 3 August 1981 for life. The relevant papers are not before me; but that must have been the subject of a review for I am told that, in fact, attendance allowance was awarded at the higher rate from 3 August 1981 to 26 November 1984. It is with the subsequent narrative that this case is directly concerned.

6. On 27 October 1984 a DMP issued a certificate to the effect that the claimant would satisfy the medical conditions for payment of attendance allowance at the lower rate for five years from 27 November 1984. That was upon the basis of the day attention condition. On behalf of the claimant, a review was sought. It was contended that he also satisfied the night attention condition. The emphasis was, of course, upon the changing of the incontinence pads.

On 29 March 1985 the claimant was seen by an examining medical officer ("EMO") acting for the Department of Health and Social Security. I quote from the claimant's statement as recorded on the form DS 4:

> "I am doubly incontinent. I wear pads. My mother changes me as it's not easy for me when on my back. My bowels work about 4 times a week and I need help with cleaning.
>
> I go to bed about midnight. I need some help to undress but can get into bed. I wear pads at night and sleep soundly. Some nights, about 3-4 weeks ['weeks' is typed but I think that the EMO actually wrote 'weekly'] I wake up and find myself wet and call my mother to help change me."

On the form the claimant's mother put her own signature to corroborate that the claimant's statement had been correctly recorded. But I quote from an undated letter written towards the end of April 1985 by the claimant's then representative:

> "In both medical reports concerning [the claimant] ..... the examining doctor notes that once a night about three or four times a week [the claimant] requires attention because of his incontinence. The time this attention is needed for is considered by the doctor to be 10 minutes. [The claimant] feels that this is a large underestimation of the real time needed to attend to him every night.
>
> When he wakes up because of his incontinence [the claimant] calls for his mother who changes not only his incontinence pads, but also cleans him up, changes his night clothes, and replaces the soiled bedding. [The claimant's] mother estimates that this takes approximately three quarters of an hour when all the items she needs are within easy reach, and not the ten minutes stated in the medical reports.
>
> It is my opinion that the three quarters of an hour needed to attend to [the claimant] constitutes prolonged attention ....."

8. A DMP gave a reasoned determination on 6 June 1985. He confirmed the certificate which had been issued on 27 October 1984 (see paragraph 6 above). In dealing with the night attention condition he said this:

> "The later report states that he requires attention once a night on 3-4 nights of the week, taking 10 minutes at a time when he calls his mother to change him and the bed. I also note from the report that during the summer months he occasionally requires attention because of a nose bleed due to hay fever. I note from the letter from [the claimant's then representative] which was received on 29 April 1985 he states that [the claimant's mother] has to attend to her son every night and that it normally takes three-quarters of an hour. I accept that he is incontinent during the night which sometimes necessitates changing the bed clothes, cleaning him up and changing his nightclothes. However, I do not accept that attention of this nature, required on a regular basis, would normally constitute prolonged attention. I accept that some night attention is required from time to time and that occasionally during the hay fever season he may require repeated attention but the evidence clearly indicates that on the majority of nights the attention required is only required once and in my view is not of a prolonged nature."

9. The claimant carried that determination to the Commissioner. That appeal was supported by the Secretary of State. The relevant submission drew attention to the Court of Appeal case of R v National Insurance Commissioner ex parte Secretary of State for Social Services (published as an Annex to Commissioner's Decision R(A) 2/80) in which Lord Denning MR said that "prolonged" meant "some little time". The submission continued:

> "It is submitted that it is not, therefore, necessary for the disabled person to require a considerable spell of attention on every night of the week in order to satisfy the prolonged element of the night attention condition, but that lengthy attention on a few nights in a week may be considered to satisfy the condition if the overall picture makes it reasonable to come to that conclusion ..... it is for consideration whether the DMP's conclusion is consistent with the meaning 'some little time' as cited above, and also, whether he has given an adequate explanation as to why he does not accept that the attention is sufficient to meet the statutory requirement."

By a decision dated 1 July 1986 the Commissioner set aside the determination given on 6 June 1985. His decision was extremely brief. It quoted (slightly more extensively than I have done) from the submission of the Secretary of State; and recorded that the Commissioner found substance in the criticism therein. So the whole matter went back into the melting-pot.

10. When seeking the Commissioner's leave to appeal against the

aforesaid determination of 6 June 1985 the claimant's then representative had written that the claimant's own general practitioner would confirm the contentions of the claimant's mother in respect of night attention. The Department made written enquiry of that general practitioner. The answer was dated 12 September 1986. It was extremely brief and somewhat uninformative. In answer to the specific question "What attention is likely to be required during the night?", the general practitioner merely wrote:

> "Attention required for urinary drainage."

11. Another EMO saw the claimant on 9 October 1986. I quote from the claimant's recorded statement:

> "I do not have bed-sores. My mother tends to my skin daily. I tried a penile sheath, but it leaked too much and was painful. I need the incontinence pads changed 3 times a day.
>
> I go to bed midnight my mother sees me into bed and changes the pads and attends to my skin. I do not take sleeping pills. I sleep well. My mother stays up to 2.00 am. She only comes in if I call her. I call her if I am wet and she then changes me - it takes 15-20 minutes to attend to me. Once a night is the average, but three times a week my mother has to attend to me twice because I am wet. She is up every night. After she has gone to bed she has to get up on average 3 times a week."

Once again the claimant's mother signed to indicate that she accepted the correctness of the claimant's statement as recorded. In respect of night attention, the EMO wrote this comment:

> "If he persevered with penile sheath, I see no reason why he could not last throughout the night without assistance, since he agrees that he can turn himself in bed."

He also wrote this comment:

> "Till 1979 he was less independent and needed to be lifted about, for the last 7 years he has been able to transfer himself between wheelchair/bed/car."

12. A medical officer of the Department then sought a report from a consultant neurologist at a hospital which had in the past treated the claimant (whether as an in-patient or otherwise does not appear from the papers). The report was dated 6 February 1987. I quote therefrom:

> "He is able to wash himself but cannot wash his groin and requires mother's help for this. He cannot toilet himself without her help and requires [her] to wipe him after he has passed a stool ..... he can dress except for his trousers and requires mother to help him on with his trousers.

I asked her specifically about the problems at night and she tells me sometimes he is returning home after a drink with 'some of the lads' and will soil himself during the night and 'she has to be there in order to help him to be clean' .....

He is able to transfer from bed to wheelchair without the aid of a mechanical support.

There is no real danger of his being left without continual supervision by night nor by day."

13. The Board then expressed the provisional view that the claimant no longer satisfied either of the day conditions or either of the night conditions. The claimant sought a detailed explanation. The consequence was the determination dated 1 February 1988, which is the determination with which I am immediately concerned. That determination was not given by a DMP. It is a determination of the Board itself. I quote paragraph 5 which sets out the Board's conclusions:

"We have reviewed the decision of 27 October 1984 on any ground and find that neither a day nor a night condition is now satisfied, nor has been throughout any relevant period from 6 February 1987 [the date of the report by the consultant neurologist]. Accordingly, we revise the decision of 27 October 1984 and revoke the certificate issued on that date from 6 February 1987."

14. As one might expect, the Board's determination is very fully and carefully expressed. Earlier in this decision I have set out - at a length unusual in a Commissioner's decision in an attendance allowance case - parts of the evidence which was before the Board. In case on Commissioner's file CA/154/1987 the Commissioner said this in respect of a DMP's determination:

"However, at the end of the day it must be remembered that it is for the DMP to determine as a medical fact whether or not the claimant is in need of frequent attention by day, or prolonged or repeated attention during the night, or continual supervision throughout the day or throughout the night to avoid substantial danger to himself or others. After having considered the evidence, the DMP has to make a value judgment, and provided it is reasonable, having regard to the evidence before him, it is not open to the Commissioner to disturb it. Moreover, what constitutes reasonable is not susceptible of further analysis on the part of the DMP, and he is not required to give reasons why he thinks a certain state of affairs is reasonable. In the present instance, I am satisfied that the DMP has adequately explained the reasons for the conclusions at which he arrived, and that he was entitled to reach those conclusions on the evidence before him."

I endorse and adopt that passage in respect of the Board's determination which is before me. I can find nothing in it which

would justify interference by the Commissioner.

15. In fairness to Mr Salmon I should say that his assault upon the Board's determination was couched in relatively muted terms. He was particularly concerned with the night attention condition. It was, of course, to that condition that the Commissioner's short decision of 1 July 1986 had been directed (see paragraph 9 above). Complaint was made that the Board had not expressly referred to that decision or to what Lord Denning had said in R v National Insurance Commissioner ex parte Secretary of State for Social Services. But I in no way regard either omission as constituting vitiating error of law. The substance of the issue itself was dealt with with the greatest care:

> "We have carefully appraised all the evidence before us and we accept that [the claimant] requires attention at night when he is wet to change his incontinence pads. The amount of attention and the time taken for that attention is variously recorded as set out above. We note that the evidence as to frequency is contained in the statements on medical reports signed by [the claimant]. [As I have indicated above, they were in fact signed by the claimant's mother; but she was, of course, directly involved, with first-hand knowledge of the circumstances.] It is not clear from the statement of 9 October 1986 whether the first occasion on which he needs help each night is before his mother's normal retiring time of 2.00 am or not. If it is this would constitute day time attention. [The claimant] has, however, in this report, given the time taken to change him as 15-20 mins. We do not accept [the claimant's mother's] contention that three-quarters of an hour is taken on each occasion. Our reasons are as follows:- 10-15 minutes should be adequate time to change a pad, wipe any spillage with a pre-moistened cloth and, if necessary, change his night clothes and bedclothes - the use of a rubber sheet and a draw sheet will facilitate this. We accept that if there has been faecal incontinence it might take longer. However in this regard we note that bowel incontinence was given as 3 times weekly on 11 October 1984 and 4 times on 29 March when [the claimant's] night needs were said to have reduced since he had started going to bed later. [The claimant's] statements do not suggest that all episodes of bowel incontinence occur at night although [the claimant's mother's] report to [the consultant neurologist] suggests that some of them do. In the light of all the evidence before us, we consider that if [the claimant] were to restrict his liquid intake before going to bed at night, there would be a reduction in his need for attention during the night from another person. We also find that on most nights he needs only 10-15 minutes assistance and this constitutes neither frequent nor prolonged attention within the meaning of the Act. Notwithstanding the attention required in connection with nose bleeds (which can normally be arrested simply by pinching the nose) during the hay-fever season (which is very limited) our overall conclusion is that [the claimant] does not require prolonged

or repeated attention during the night in connection with his bodily functions, nor has he done so throughout any relevant period from 27 November 1984, the effective date of the renewal claim dated 16 July 1984."

For my part, I cannot fault that. I cannot see that the claimant's - or anyone else's - understanding of the decision would be enhanced by a semantic discussion of the difference in meaning between "prolonged" and "some little time".

16. Mr Salmon - without overt enthusiasm - canvassed the relevance of the penile sheath. He was quite right in submitting that, as a matter of law, attention or requirements should not be dismissed upon the basis that they might be reduced if some course were persevered with. But that was not an error into which the Board fell. The Board made findings as to the attention which was actually being received; and drew its conclusions accordingly. Its only reference to a penile sheath was in paragraph 10 when it was rehearsing the evidence relevant to the night attention condition:

> "We note that in the opinion of the medical officer who examined [the claimant] on 9 October 1986 he would not need attention at night if he were to persevere with a penile sheath, particularly as he agreed he was able to turn himself over in bed without assistance."

But I cannot see that that speculation was in any way invoked in support of the Board's conclusions.

17. Mr Salmon also stressed that if the claimant were not in fact receiving the attention from his mother which he does regularly receive, his condition would be very much worse. He might have bed-sores or skin rashes. He would not sleep so soundly if he were not confident that, when necessary, his mother would help him with the consequences of his incontinence. Factually, those observations are - I am sure - true. But the Board was entitled to look at the situation as it exists in reality. The attention given by the claimant's mother is undoubtedly of the utmost value to the claimant. But the Board found - justifiably in my view - that it is neither frequent throughout the day nor prolonged or repeated during the night.

18. I have already quoted extensively from the Board's treatment of the night attention condition. I now quote from paragraph 8 where the Board dealt with the day attention condition:

> "We agree with our delegate who decided on the evidence before him on 27 October 1984 that [the claimant] then satisfied the day attention condition but the subsequent evidence, particularly that shown in [the consultant neurologist's report of 6 February 1987] leads us to the conclusion that [the claimant's] attention needs have reduced in that he can transfer to and from his wheelchair himself and needs his incontinence pads changed only 3 times a day. We find therefore, that he no longer requires

frequent attention throughout the day in connection with his bodily functions, nor has he done so throughout any relevant period from 6 February 1987. We give him the benefit of the doubt for any earlier period."

That, too, I find unexceptionable.

19. Mr Salmon's last point was of a generalised nature. He suggested that the Board had been too much influenced by the mastery which the claimant had established in respect of his wheelchair and by the fact that he had a motorcar which he could drive. In the course of the hearing I myself commented that it was unusual - to say the least - to find an attendance allowance claimant who could drive himself around in his own motor car. But, of course, that facility is not necessarily incompatible with entitlement to attendance allowance. I have read and re-read the Board's determination. I cannot find in it anything to justify the suggestion that the Board fell into error of law allowing the claimant's undoubted ability to use his wheelchair and his uncontroverted ability to drive his motor car to blur the Board's consideration of the essential criteria upon which entitlement to attendance allowance depends.

20. At the conclusion of the hearing the claimant's mother courteously asked whether she might add a few words of her own. I readily agreed to that. Her relatively brief remarks were made with good humour and restraint. (She is clearly of sterling character.) Her main point was that she felt that the claimant was being penalised because he had worked hard to make the best of his distressing physical condition. Others in his physical condition, she told me, have attempted far less by way of overcoming their disabilities. They receive attendance allowance. I have no doubt that that is true. It is, however, a consequence of the manner in which Parliament has enacted the relevant legislation. A somewhat similar position obtains in respect of damages for personal injuries. A plaintiff who fights his way back to a reasonable recovery will obtain less by way of damages than a plaintiff who does not make the effort. The only comfort which I could offer to the claimant's mother was the reflection that the claimant, in his present condition, is probably deriving more satisfaction from life than are the less resolute claimants who are in receipt of attendance allowance. And, of course, to that satisfaction the claimant's mother is making a most substantial contribution.

21. The claimant's appeal is disallowed.

(Signed) J. Mitchell
Commissioner

(Date) 22 January 1990