A4 - Terminally ill baby - unable to satisfy qualifying conditions

29/93

MHJ/1/LM

Commissioner's File: CA/481/92

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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. My decision is that -

(a) the determination of the delegated medical practitioner ("DMP") of the Attendance Allowance Board is erroneous in point of law and is accordingly set aside;

(b) the claimant is not entitled to payment of attendance allowance for any day prior to 1 March 1991, for the reasons hereinafter set out.

2. The claimant, Shaun, was born on 31 August 1990 and died in 1992. He was brain damaged at birth and during his short life suffered from severe cerebral palsy, being virtually blind and deaf, having spastic episodes and being unable to feed normally.

3. On 15 October 1990 Shaun's mother, Mrs I, claimed attendance allowance on his behalf and, following a medical examination on 28 October 1990, an award of attendance allowance at the higher rate was made on 12 November 1990 to take effect from 1 March 1991. A letter dated 8 January 1991 explained that the "commencing date of the award" was the "first pay day six months after Shaun's date of birth". That was in accordance with section 35(2)(b) of the Social Security Act 1975 which provided that the period of entitlement to the allowance had to be preceded by a period of not less than 6 months throughout which the claimant had satisfied the necessary conditions.

4. On 28 January 1991 Mrs I applied for review under the "special rules" relating to terminally ill claimants, introduced by section 35(2B) and (2C) of the 1975 Act, for Shaun to be deemed to have satisfied the qualifying conditions since the date of his birth. Her application was supported by a report on form DS 1500 from Dr R.H.A. Campbell, the consultant paediatrician in whose care Shaun was. Unfortunately there was some confusion and delay in dealing with the "special rules" claim, and it was not until 11 November 1991 that the Department asked Dr Campbell the question -

" ... is Shaun terminally ill, i.e. likely to die within 6 months?"

Dr Campbell's answer on 15 January 1992 was, in effect, that, as Shaun had survived to that date, he was unable to answer the question. On 26 March 1992 the DMP held that, "in the light of the evidence" before him, Shaun did not satisfy the conditions of section 35(2B).

5. I have been assisted in this sad case by the submission dated 2 October 1992 on behalf of the Secretary of State for Social Security. It is submitted that the DMP should have directed his mind to the position as it was at the date of the application for review, 28 January 1991, rather than, as was in fact the case, the irrelevant consideration that, by the date of the determination, Shaun had lived for more than 6 months. Section 35(2C) of the 1975 Act provided that a person was "terminally ill" if -

" ... he suffers from a progressive disease and his death in consequence of that disease can reasonably be expected within six months."

Dr Campbell's attention was drawn neither to the precise issues nor to the relevant date upon which his opinion, and prognosis, was sought.

6. Clearly, the DMP's determination is erroneous in point of law and accordingly I set it aside. However, that is not the end of the matter in view of the further question raised by the Secretary of State's representative, namely the effect of regulation 2(1)(c) of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 [SI 1975 No. 598].

7. Section 35(1) of the 1975 Act provided that, subject to the relevant medical conditions being satisfied -

"A person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain ... "

Those conditions are prescribed in regulation 2(1) of the Attendance Allowance (No. 2) Regulations as -

"(a) that he is ordinarily resident in Great Britain; and

(b) that he is present in Great Britain; and

(c) that he has been present in Great Britain for a period of ... not less than 26 weeks in the 12 months immediately preceding ... "

(Those conditions are repeated in regulation 2(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991 [SI 1991 No. 2890]).

8. Plainly the requirement that a claimant be resident and present in Great Britain for not less than 26 weeks prior to an award of attendance allowance (or, now, disability living allowance) is quite separate from and independent of the six months' qualifying period prescribed by section 35(2)(b) of the 1975 Act (now section 72(2) of the Social Security Contributions and Benefits Act 1991).

9. It follows that for Shaun to have fulfilled the conditions of section 35(1), he would have to be deemed to have been "present in Great Britain" during the 26 weeks prior to his birth. The ordinary and natural meaning of regulation 2(1) is that the person in question must have an independent existence and, on the face of it, cannot include an unborn child.

10. I have considered whether the principles set out by the House of Lords in Elliot v Lord Joicey [1935] AC 209, in which it was held, following Villar v Gilbey [1907] AC 139, that for the purposes of preserving an interest under a will, a "fictional construction" of the words "born" before or "living" at a particular time was permissible to include a child en ventre sa mère at the relevant date, but subsequently born alive.

11. Such a construction, as the House of Lords emphasised, is only justified in the special circumstances of such a case; otherwise the words must bear their ordinary and natural meaning (Cozens v Brutus [1973] AC 854). I have come to the conclusion, with, I admit, regret in the present case, that there can be no possible justification for extending the fictional construction sanctioned by the House of Lords to the words "resident" and "present" in regulation 2(1) of the Attendance Allowance (No. 2) Regulations. In my judgment those words in that context plainly do not envisage an unborn child.

12. Although I have held that the DMP's determination was erroneous in point of law, it is clear that, even if evidence should be forthcoming that Shaun satisfied section 35(2C) of the 1975 Act, Mrs I's application for his allowance to be backdated to the date of his birth could not succeed. In those circumstances no useful purpose would be served by my remitting the case for second tier adjudication pursuant to regulation 23(2)(b) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 [SI 1991 No. 2891]. I have no doubt that it is expedient that I should give the decision I consider appropriate under regulation 23(2)(a)(ii), which is that Shaun was not entitled to receive an attendance allowance until he had been present in Great Britain for 26 weeks, that is to say 26 weeks after his date of birth, which is 1 March 1991 - coincidentally the same date as the original award.

13. I cannot leave this case without remarking that it seems to demonstrate a lacuna in the law. While terminally ill claimants are very properly exempted from the 6 months qualifying period for attendance and disability living allowance, and while

provision is made for persons temporarily or necessarily abroad, for example serving members of the armed forces, to fulfil the residence and presence conditions (see regulation 2(2) of the Attendance Allowance (No. 2) Regulations and regulation 2(2) of the Disability Living Allowance Regulations), the situation of those born terminally ill appears to have been overlooked. One sincerely hopes that that it comprises very small class but, however that may be, it must be beyond doubt that it includes those cases in which assistance is most urgently needed.

14. In conclusion I need only say that while this appeal technically succeeds; for the reasons set out above, the result must remain the same. My decision is set out in paragraph 1.

(Signed) M H Johnson
Commissioner

Date: 22 April 1993