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SOCIAL SECURITY ACTS 1975 TO 1990

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987 REGULATIONS 24(1)

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Name: Lynne Frances Hammond (Mrs) on behalf of Katherine Michelle Hammond

Page 4	Paragraph 7	line 6	after "R(A) 2/92" insert "; he"
Page 4	Paragraph 8	line 9	after "had been shown" insert "on"
Page 4	Paragraph 9	line 10	delete "statement" insert "condition"
Page 4	Paragraph 9	line 26	delete "R(A) 2/90" insert "R(A) 2/92"

(Signed) M Heald
Commissioner

Date: 13 January 1993

Commissioner's File: CA/648/91

9/93

MH/1/LM

Commissioner's File: CA/648/91

DSS File: SD450/5510

SOCIAL SECURITY ACTS 1975 TO 1990

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Lynne Frances Hammond (Mrs) on behalf of Katherine Michelle Hammond

1. My decision is that this appeal brought on behalf of the claimant by her mother must be dismissed. The claimant was not entitled to attendance allowance between 3 May 1988 and 1 May 1990.

2. I held an oral hearing in the case at which the claimant was represented by Mr Mark Rowland of Counsel, and the Secretary of State was represented by Mr Leo Scoon of the Office of the Solicitor, DSS.

3. Attendance allowance had been paid in respect of the claimant, whose date of birth was 1 May 1980, on a certificate dated 15 November 1984 stating that she satisfied or was likely to satisfy both the day and the night "attention" conditions from 15 March 1984 until 15 November 1985. A further certificate to the like effect was issued on 27 August 1985 for a period up to 1 May 1988. On 3 May 1988, a further certificate was issued in respect of the period to 1 May 1991, but that stated that the claimant was likely to satisfy only the day "attention" condition. The claimant's mother on her behalf sought a review, on which the award given was set aside on appeal to myself as a Commissioner under case CA/709/89. The appeal to the Commissioner was allowed on three grounds set out in paragraphs 5, 6 and 7 of that decision, dated 10 July 1990. The order made on such appeal was that the case was to be reconsidered by the Attendance Allowance Board or its DMP.

4. A further review was carried out by a DMP on behalf of the Attendance Allowance Board and the decision is dated 29 May 1991. The decision of the DMP was that the certificate dated 3 May 1988 should be revoked altogether on the ground that the claimant was not suffering from a severe mental or physical disability at all. The decision was based largely upon two medical reports - one dated 2 August 1988 by Dr Robinson, a consultant paediatric neurologist at Guy's Hospital, and the other by Dr Morrell, a senior registrar in the Department of Adolescent and Child Psychiatry at the West Middlesex Hospital. The DMP accepted, in paragraph 4 of his decision, Dr Robinson's report and found that

"K. is not mentally retarded, does not exhibit dangerous behaviour or automatisms and on testing it became clear that there was a considerable emotional component involved."

In paragraph 7, he found it clear from Dr Morrell's report that

"Her attacks do not involve loss of consciousness and their frequency can be modified by the behaviour of those around her and it would be counter productive to treat her differently."

5. The conclusion of the DMP at paragraph 8 was:-

"I have taken account of all the medical evidence before me, showing that K. has displayed bizarre behaviour and complained of various physical symptoms but doubt is expressed that she has ever suffered from epilepsy in the past and it is clear from recent evidence that there is no diagnosis of an epileptic condition. Her symptoms are behavioural in origin (and now improving with psychiatric help). In my view, there is no evidence, therefore, to sustain a finding that at any time during the period under consideration, K. has suffered from a severe mental or physical disability."

The reference to "epilepsy" in the first sentence of that passage is one which arises because at an earlier stage of the case, the medical conclusion had been that the claimant was suffering from an epileptic condition. It is quite clear on the evidence, and accepted by Mr Rowland, that there was a considerable change in the medical view of the condition of the claimant, as can be seen from the three passages quoted above from the decision of the DMP. I should add at this point that Mr Rowland also accepted the reference to improvement in the condition of the claimant, since he expressly limited the period of the claim for attendance allowance to 1 May 1990, at the hearing.

6. The claimant appealed with leave of the Commissioner. Section 35(1) of the Social Security Act 1975 read:-

"A person shall be entitled to attendance allowance if he is -

(a) so severely disabled physically or mentally that he requires, by day from another person, either -

(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) so severely disabled physically or mentally that, by night, either -

(i) he requires from another person prolonged or repeated attention during the night in connection with his bodily functions, 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."

7. The element in such statutory test which arose as the main issue in the present case turned upon the meaning and application of the part of the expression "disabled physically or mentally" in either of the places in which it appears. In addition to the submissions made before me at the oral hearing, two written submissions were made on behalf of the claimant, and also a written submission on behalf of the Secretary of State. In the second submission on behalf of the claimant dated 30 December 1991, the main issue was stated as follows in paragraph 2:-

> "It is not disputed that the delegated medical practitioner was entitled to use his medical judgement and to conclude that K.'s symptoms were behavioural in origin and it is not suggested that the Commissioner should interfere with that finding. The issue is whether the delegated medical practitioner was right to hold that K. could not be said to be "disabled .... mentally" <u>because</u> her symptoms were behavioural in origin. That is a question of law."

At the hearing, Mr Rowland submitted that the question of severity was to be decided by the degree of attention required in order to satisfy the test required by section 35. He accepted that there must be a mental disablement, but his submission was that it was plain that she was suffering from mental disablement. The meaning of section 35 should be approached in accordance with the tests laid down by Lord Bridge in <u>In re Woodling</u> (1984) 1 WLR 348 at p. 352, where it was said that the language of the section should be considered as a whole rather than an attempt be made to analyse each word or phrase separately in that section. He submitted that there was no dispute that the claimant required attention, and no policy reason why she should be refused benefit. She ought not to be refused benefit just because no identified disease of the brain could be medically attributed as the cause of her conduct. After referring to the medical reports in the papers which are summarised in the decision of the DMP, Mr Rowland submitted that for the purpose of attendance allowance, if a person has complaints which are psychological in origin that person is still entitled to benefit if the other requirements of section 35 are complied with. The second written submission on behalf of the claimant, in referring to earlier Commissioners decisions, submitted that

decisions CA/440/89, CA/490/89 and CA/123/91 were all wrongly decided to the extent that it was held that the language of sub-section 35(1) could be "severed" or "reframed" so that the issue whether a person suffers from severe physical or mental disablement becomes an issue to be decided without reference to his or her needs for attention or supervision. At the hearing Mr Rowland also criticised the decision in R(A) 2/92; he submitted that it could not be treated as a precedent since the background of facts were not certain from the decision, and may well have been entirely different from those in the present case.

8. Mr Scoon, for the Secretary of State, submitted in the first place that any question whether a person is mentally ill is a medical question for the Board or its delegate, (R(A) 4/78) he next submitted that the decision of the DMP at line 2 of paragraph 8 that there was no mental or physical disability was one which was entirely open to the DMP to reach on the evidence before him. A person may have no disability for the purposes of section 35 but only a personality disorder which was the cause of bizarre conduct such as had been shown on the evidence to have happened in the present case. If the medical conclusion was, he continued, that the claimant was not suffering from a condition that could possibly be described as a disability in terms of section 35, that was a question for the Board or its delegate, and not a matter of law to be enquired into before the Commissioner. By the 1975 Act authority was given to the Board to decide any medical matter, see R(A) 4/78 at paragraph 4.

9. My conclusion is that the case for the claimant has been too widely stated. Whether a person is disabled physically or mentally is a question for the medical authorities, and for them alone. In considering such question, they must be entitled to come to a conclusion that bizarre conduct by a claimant may not be caused by any "disability" but for some other reason recognised by the medical authorities. In the present case, it seems to me that the crucial expression is "behavioural in origin". To the layman, or indeed to a Commissioner, it may not be immediately obvious exactly to what extent such a ~~statement~~ condition can be identified. In my view it should be accepted that it is a description which can properly be used in medical diagnosis, and was clearly one not unfamiliar to the doctors concerned in the present case. In my view, it is not possible to fault the DMP for basing his conclusion upon such a concept, except by trespassing upon the question of medical expertise. There is ample authority that that is not something which the Commissioner can do, purporting to treat it as a question of law. Clearly in the present case the reported conduct of the claimant was such that caused all those concerned to seek medical advice as to its causation. Once they had expressed their medical conclusions upon that question, it was for the DMP, exercising his separate medical judgment, to reach his medical conclusion. I cannot improve upon a statement of the position in law of the Commissioner than by quoting the concluding statement in paragraph 8 of Commissioner's decision R(A) 2/92, as follows:-

"It is not for me to substitute my own view of the evidence

for that of the doctors. It seems to me that the Board evaluated the evidence which was before them and drew inferences from it which they were entitled to draw. In doing so they used their expertise and it is not for me to disagree with their clinical judgment."

10. In view of my conclusion that the DMP did not commit any error of law, I do not find it necessary to go into a close analysis of the authorities referred to. It is, I think, sufficient to say that each are examples of a particular set of facts where a medical conclusion has been drawn by the appropriate doctors, and the Commissioners concerned in the authorities, particularly in CA/490/89 and CA/123/91, declined to interfere with such medical conclusions.

11. For those reasons, this appeal must be dismissed.

(Signed) M Heald
Commissioner

Date: 8 October 1992