

JGmi/DH

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SOCIAL SECURITY ACTS 1975 TO 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [REDACTED] (Mrs)

on behalf of [REDACTED]

/ORAL HEARING/

1. My decision is that the decision on review given for and on behalf of the Attendance Allowance Board dated 16 October 1984 is erroneous in law and is set aside. The claimant's case is referred to the Board for consideration afresh.
2. This is one of 3 appeals by claimants for attendance allowance heard before me at an oral hearing at which the claimants, who attended in person, were represented by Mr C Quinn, Welfare Rights Officer of Strathclyde Social Work Department. The Secretary of State was represented by Mr Butt of the Solicitor's Office of the Department of Health and Social Security.
3. All three children on whose behalf attendance allowance has been sought suffer from Phenylketonuria (PKU). Specialist evidence before the Attendance Allowance Board shows that this is an inherited metabolic disease which requires strict dietary control with restriction of protein. The diet is extremely demanding and as all forms of protein are limited its implementation requires constant supervision. With poor control due to dietary indiscretion the child is at risk of becoming mentally retarded. In the United Kingdom all babies have a blood test called the Guthrie test a few days after birth. That test in the case of these children showed that they suffered from PKU. Children suffering from PKU cannot cope with phenylalanine, an amino acid found in all protein foods. Unfortunately that amino acid is essential for the children's growth and accordingly, although in general phenylalanine is to be avoided in the children's diet, a certain carefully limited amount is essential and is imparted to them by means of what is known as a phenylalanine exchange list which is a list of specific foods containing, in their prescribed weights, a set amount (50mg) of phenylalanine. The number of such exchanges which each child is to be allowed is individually assessed. It is then regularly reassessed and if necessary varied following periodical blood tests. If successfully followed, the diet can in general be relaxed when the child is about 10 years of age and then phased out without subsequent adverse effects.

4. Section 35(1) of the Social Security Act 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-

(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."

Under the provisions of regulation 6(2) of the Social Security (Attendance Allowance) (No 2) Regulations 1975, made under section 35(5) of the Social Security Act 1975, section 35(1) has effect in the case of a child over the age of 2 as if after the words "functions" and "others" in each of the day and night conditions there were inserted the words "(being attention (or supervision) substantially in excess of that normally required by a child of the same age and sex)".

5. The present claimant made a claim for attendance allowance on behalf of her son, [REDACTED], then aged 5, on 16 January 1984. A delegated medical practitioner ("DMP") on behalf of the Attendance Allowance Board decided on 16 February 1984 that none of the "day" or "night" conditions of the allowance were satisfied in his case. The claimant applied for a review of that decision and submitted a letter dated 9 April 1984 from Dr King, Lecturer in Child Health at the University of Glasgow Department of Child Health, Royal Hospital for Sick Children, Yorkhill, which is the Department concerned with [REDACTED] case. An additional medical examination was also carried out at the Board's request. By decision on review dated 16 October 1984 a DMP again decided that none of the day or night conditions were satisfied and that the previous decision should not be revised. The claimant, having obtained leave to appeal on a question of law has brought the present appeal to the Commissioner.

6. Giving reasons for his conclusion that the day condition of attention was not satisfied in Barry's case the DMP said this regarding his need for attention arising from PKU:-

"Because of his condition I recognise that [REDACTED] has to adhere

strictly/

strictly to his special diet which has to be carefully selected and prepared. I accept that the diet requires a little more time to prepare and that care has to be exercised in the selection of items of food for [REDACTED] but I do not accept that the diet is sufficiently complex and time consuming to differ significantly in terms of attention from that which has to be devoted to children generally."

In my judgment that passage does not make clear that relevant matters have been properly taken into account nor does it adequately explain the DMP's conclusions upon them. No mention is made of attention by way of blood tests carried out by the claimant or periodical hospital visits. I think it may be inferred that the DMP has accepted that all aspects of the attention required in connection with Barry's diet are relevant attention for the purposes of section 35(1). The assessment of that attention was, of course, a matter for the DMP but bearing in mind the complexity of the diet as outlined in paragraph 3, which the DMP himself has accepted has to be carefully selected and prepared, I find his treatment of this aspect of attention unsatisfactorily dismissive and unenlightening.

7. I consider that a broadly similar criticism is applicable to the DMP's treatment of the evidence bearing on [REDACTED] need for supervision, both by day and at night. No mention is made of the observation of the second examining doctor that [REDACTED] has been much less inclined to adhere to his diet since starting school. No reference is made to Dr King's letter, referred to above, in which she referred to [REDACTED]'s obvious need of "constant supervision" arising from his condition. I do not understand the DMP's conclusion that the supervision required by [REDACTED] to ensure that he avoids harmful foodstuffs is not substantially in excess of that normally required by a boy of the same age, particularly as he has earlier stated in the same paragraph: "It is shown that [REDACTED] cannot be safely left unsupervised by day at all because there is a danger of him eating foodstuffs not on his diet." As regards the night condition of supervision the DMP states: "It is said that he is never left unsupervised by night but I am satisfied that this is in keeping with all 5 year old children." I do not think that the DMP meant to imply by that observation that no 5 year old could ever satisfy the night condition of supervision. However the DMP's conclusion that the condition was not satisfied in [REDACTED] case is stated without any evaluation of the supervision required at night in his case by reason of his condition in order to avoid substantial danger to himself.

8. For the foregoing reasons I have decided that the DMP's decision on review must be set aside as erroneous in law. I refer the claimant's case to the Board for consideration afresh. It may be that the Board will feel it appropriate to deal with these three cases directly rather than by delegation.

9. The appeal of the claimant is upheld.

(signed) J G Mitchell  
Commissioner

Date: 16 September 1986