

JGMI/DH

Commissioner's File: CSA/7/85  
D'of H and SS File: SD 450/1908

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 4 September 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)/

"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] on 16 January 1984 when he was within one month of 2 years old. A delegated medical practitioner ("DMP") on behalf of the Attendance Allowance Board decided on 6 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. Much additional information was then supplied including a hospital report by the consultant at the unit responsible for monitoring [REDACTED] case, details of the condition PKU and the dietary regulation required for it and a submission on the implications for attendance allowance purposes. By decision on review dated 4 September 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. In support of the contention that the DMP's decision is erroneous in law - which is the only ground upon which I am entitled to disturb his decision - it was submitted on behalf of the claimant that there was no evidence to entitle the DMP to conclude that the attention required by day in connection with [REDACTED] diet did not differ substantially from that required for a normally healthy boy of the same age. I do not accept that contention. In paragraph 2 of his decision the DMP states:-

"With/

-3-

"With regard to [REDACTED] special diet, I have noted and carefully assessed the evidence in the letters and enclosures forwarded by Mr Quinn, Welfare Rights Officer, on Mrs [REDACTED] behalf. I recognise that [REDACTED] food requires special selection, precise weighing or measuring before it is prepared and cooked. As such, this action effectively forms part of the overall treatment of his condition and I accept that this particular aspect of attention is required in connection with his bodily functions. I do not accept, however, that the selection of items of food, the preparation and cooking of it is sufficiently complex and time-consuming to differ significantly in terms of attention from that which must be devoted to children of [REDACTED] age generally. I accept that he requires frequent attention throughout the day but would point out that all 2 year old children require a great deal of attention and, even taking fully into account the attention related to the preparation of his special diet, I do not consider his attention needs to be substantially in excess of those of most children of his age."

In that passage the DMP has made clear that he has considered the evidence tendered, which he has accepted as being relevant to the day condition of attention, bearing on the attention required in connection with [REDACTED] diet and has come to the conclusion that his attention needs are not substantially in excess of those required by most children of his age. That was an assessment of the degree of excess with which I do not necessarily agree but which I cannot say that the DMP was not entitled to reach.

7. Similar contentions are advanced in criticism of the DMP's conclusion upon the day condition of supervision. In general and in so far as these contentions challenge the DMP's evaluation of evidence in a matter which is essentially one of fact and degree I do not accept that they establish any error of law. There is however one point upon which I take a different view. The DMP states in the course of paragraph 3 of his decision:-

"The doctor who examined [REDACTED] on 30 January 1984 said that he needed the same level of supervision as any 2 year old boy except that extra vigilance was required to prevent him from obtaining and eating foodstuffs other than those stipulated by his diet, particularly when he was playing with other children or when out shopping with his mother. Whilst I recognise the difficulties this problem presents, I am satisfied that precautions can be taken to ensure that all foodstuffs are locked away or retained out of [REDACTED] reach. I note there are 2 other children in the home who eat a normal diet and I have no doubt they are suitably warned or educated about [REDACTED] condition and that they should not give him anything to eat or drink."

8. The passage quoted appears to represent a virtual rejection of the need for any extra supervision of [REDACTED] whilst in the home, to prevent his obtaining and eating forbidden food mainly on the basis of taking

precautions/

precautions to "ensure that all foodstuffs are locked away or retained out of [redacted] reach." I do not doubt that, as the Commissioner in unreported decision CA 2/81 pointed out, a DMP is entitled to suggest and take account of practical measures to overcome a problem thought to involve a requirement of attention or supervision. In this case however the DMP does not explain how his suggestion is practical and compatible with the evidence of [redacted] agility and with anything resembling normal domestic arrangements, bearing in mind that the other two children in the household might reasonably be expected to be permitted some access to items of food and drink. The DMP's bald statement is in my view too sweeping and simplistic. Bearing in mind the evidence of the complexities of the food restrictions on [redacted] and of the need for a high degree of supervision in the home in that regard I consider that in respect of the day condition of supervision the DMP has not given reasons which adequately justify his conclusion, and that his decision is in that respect erroneous in law.

9. I set aside the DMP's decision and refer the claimant's case to the Board for consideration afresh. I have no doubt that the opportunity will be taken by the Board to take account of a highly relevant letter dated 13 November 1984 by Professor Forrester Cockburn which was not submitted in time to be considered by the DMP.

10. The appeal is allowed.

(signed) J G Mitchell  
Commissioner  
Date: 16 September 1986