

Attendance Allowance - washing clothes - whether attendance
in connection with bodily functions

WRS

yes

1.

DR/JOB

Commissioner's File: CSA/17/89

*33/90

SOCIAL SECURITY ACTS 1975 TO 1988

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: -

ORAL HEARING

1. My decision is that the decision on review given for and on behalf of the Attendance Allowance Board dated 14 November 1988 is erroneous in point of law and is set aside. The claimant's case is referred to the Board for consideration afresh.

2. The claimant made a claim for attendance allowance on 10 July 1987 in respect of her son who was born on 7 October 1978. The said son, C, suffers from a skin condition. This skin condition can best be explained having regard to a report dated 11 April 1988 which was given by a Professor of Dermatology in connection with review proceedings which are mentioned hereafter. That report is in the following terms:-

"C (date of birth - 07 10 78) suffers from Ichthyosiform Erythroderma. This is a scaling erythematous skin condition which causes considerable discomfort and requires a degree of care and attention from his mother much greater than that which is required for a normal child. The volume of time and care which is needed to cope adequately with this skin condition to allow C to attend a normal school is considerable and I would hope sympathetic attention could be given to his case."

3. The relevant statutory provisions are contained in section 35 of the Social Security Act 1975 and in the relevant attendance allowance regulations. Their effect is as follows:-

A person must be so severely disabled physically or mentally that,

BY DAY he requires from another person frequent attention throughout the day in connection with his bodily functions;

or

he requires from another person continual supervision throughout the day in order to avoid substantial danger to himself or others;

2.

BY NIGHT he requires from another person prolonged or repeated attention in connection with his bodily functions;

or

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.

In the case of children, the attention or supervision they require must be substantially in excess of that normally required by a child of the same age and sex. (Social Security (Attendance Allowance) (No 2) Regulations, regulations 6(1) and 6(2) as amended by the Social Security (Attendance Allowance) Amendment Regulations 1988 .

To qualify for Attendance Allowance one must satisfy one or more of the medical conditions for at least 6 months.

There are 2 rates of Attendance Allowance. The higher rate is payable if attendance is needed both by day and night. The lower rate is payable if the attendance is needed by day or night.

4. In connection with the claim for attendance allowance C was examined by a medical practitioner on 22 August 1987. This report gave information regarding the treatment given to C by his parents for his skin condition. It contained the following sentence "He requires a great deal of laundry because of his ointment and his profuse scaling." A medical practitioner for and on behalf of the Attendance Allowance Board (a DMP) decided that attendance allowance was not payable in respect of C. C's mother applied for a review of the claim for attendance allowance and gave further information regarding the treatment given to C in connection with his skin condition. ~~A DMP gave a decision dated 14 November 1988 that his~~ decision on review was that the decision of 1 September 1987 should not be revised. In the course of his decision the DMP stated "She [C's mother] also mentions that she has to trim his nails twice a week and they have to be softened in water first and that [C] requires a great deal of laundry because of his ointment and his profuse scaling but I do not consider that cutting his nails adds appreciably to his overall attention needs nor do I accept that the washing of bedding and clothing is attention in connection with the bodily functions as envisaged by the 1975 Social Security Act." The DMP also stated in the course of his decision "After careful consideration and viewing the overall picture I do not accept that he requires frequent attention throughout the day in connection with his bodily functions being attention substantially in excess of a boy of his age or that he has required such attention throughout the period relevant to the claim."

5. C's mother applied for leave to appeal to a Commissioner on a question of law from the said decision dated 14 November 1988 given by the DMP. I granted that application. C's mother requested an

oral hearing in connection with the appeal, and I granted that application. C's mother appeared at the hearing before me and was represented by a welfare rights officer. The Secretary of State for Social Security was represented by Mr Cassidy from the Scottish Office. At the said hearing the claimant's representative produced information giving far more details regarding the attention given to the claimant by his mother in connection with his skin condition. This information did indeed show that the claimant required very extensive attention in connection with his skin disability. It is not for me to speculate regarding whether the DMP might have reached a different decision if he had been in possession of this additional information which was placed before me. I have, however, decided that the DMP's decision is erroneous in point of law for the reasons given below.

6. At the said hearing before me the Secretary of State's representative mentioned that a question might arise in regard to whether the additional washing of clothes and bedding which had to be carried out in connection with the claimant's skin disability were in any way relevant to the attention condition contained in said section 35 of the 1975 Act. That issue, however, was not discussed in any detail before me. After the said hearing I decided that I should have a further hearing to enable submissions to be made regarding whether the washing of bedding and clothing could ever be regarded as attention in connection with the bodily functions as envisaged by the 1975 Act. A further hearing took place before me in due course which was attended by the claimant and her representative as well as the representative of the Secretary of State.

7. It would appear from the said decision dated 14 November 1988 that the DMP was of the view that no matter how extensive the additional washing of bedding and clothing might be, that that was an irrelevant consideration when considering whether the said attention condition was satisfied. At this second hearing before me the Secretary of State's representative maintained that the said washing of clothing and bedding no matter how complex could not be regarded as sufficiently intimate and proximate to constitute attention in connection with bodily functions within said section 35 of the 1975 Act. In this connection he founded on the Court of Appeal decision R v National Insurance Commissioner, ex parte Secretary of State for Social Services /1981/ 2 All ER 738. In that case the Court of Appeal held that the cooking of meals and the performance of other domestic or household duties for a disabled person are not sufficiently connected with that person's bodily functions to constitute attention in connection with his bodily functions within section 35 of the 1975 Act so as to qualify him for an attendance allowance under that section. In the course of his opinion Lord Denning stated:-

"I would hold that ordinary domestic duties, such as shopping, cooking meals, making tea or coffee, laying the table or the tray, carrying it into the room, making the bed or filling the hot-water bottle, do not qualify as "attention ... in connection with [the] bodily functions" of the disabled person. But that duties that are out of the ordinary, doing for the disabled

person what a normal person would do for himself, such as cutting up food, lifting the cup to the mouth, helping to dress and undress or at the toilet, all do qualify as "attention ... in connection with [the] bodily functions" of the disabled person.

The other two members of the Court of Appeal agreed with these views and also expressed the opinion that cooking including the preparation of a special diet was not as a matter of law capable of being attention in connection with bodily functions on the ground that it was too remote from them. Having regard to the principles laid down in the said decision by the Court of Appeal it seems to me that I must hold that the normal washing of clothes and bed-clothes are not sufficiently connected with a person's bodily functions to constitute attention in connection with the person's bodily functions within section 35.

8. In my opinion the Court of Appeal in the said decision mentioned above did not lay down that the preparation and cooking of food can never be relevant to the attention condition in said section 35. A person may suffer from a disability necessitating such involved and complex preparation and cooking of food which may well in my view render these matters relevant to the attention condition in section 35. That appears to have been accepted by the DMP in the case involving a child suffering from phenylketonuria (PKU) - see decision R(A)1/87. In the course of his decision in that case the DMP stated "I recognise that [G's] 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." The DMP nevertheless decided that in the circumstances of that case the said child did not satisfy the attention condition.

9. I am of the opinion that a similar position arises in regard to the washing of clothes and bed-clothes. As already stated the normal washing of clothes and bed-clothes, and of course children's clothes need frequent washing, are doubtless not relevant to the attention condition. Nevertheless the frequency and type of washing of clothes and bed-clothes may in certain cases be relevant to the attention condition. In the present case the very severe skin disability suffered by the child in question involving the frequent application of ointment and the profuse flaking of skin etc. demands not only very frequent washing of clothes and bed-clothes but also the hand washing of clothes. The DMP in the present case and his representative have adopted the view that the washing of clothes and bed-clothes, no matter how complex, can never be relevant when considering whether the attention condition is satisfied. I am not prepared to accept that submission. In my opinion the washing of clothes and bed-clothes can in certain cases constitute attention in connection with bodily functions under said section 35 - if, for instance, the abnormal amount of laundry changes are regarded as required as part of the overall treatment of the person's condition. In those circumstances I have reached the conclusion that in the present case the DMP's decision is erroneous in point of law in that it has been given on the basis that the said washing operations are

always irrelevant when considering whether the attention condition is satisfied. The case must now be reconsidered by the Attendance Allowance Board. Having decided as a matter of law that the washing of clothes and bed-clothes can in certain circumstances be relevant when considering whether the said attention is satisfied it will now be for the Attendance Allowance Board to decide whether that is the position in the present case. It will be open to the claimant and her representative to place before the Attendance Allowance Board the additional information regarding the attention needs of the child which were placed before me at the said oral hearings.

10. The claimant's appeal is allowed.

(signed) Douglas Reith
Commissioner
Date: 24 April 1990