

Attendance Allowance - PKU - req. for supervision  
- dietary management = bodily functions.

JGMi/DH

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SOCIAL SECURITY ACTS 1975 TO 1986

APEAL 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 29 April 1985 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 daughter, [REDACTED], then aged 2, in July 1984. After consideration of the usual report of a medical examination and certain evidence as to [REDACTED] needs for attention and supervision a delegated medical practitioner ("DMP") for and on behalf of the Attendance Allowance Board on 24 August 1984 certified that none of the "day" or "night" conditions of the allowance were satisfied. The claimant sought review of that decision and supplied detailed evidence of the nature and time-consuming extent of the attention and supervision required by [REDACTED] together with a short specialist report and evidence from a health visitor. By decision on review dated 29 April 1985 a DMP decided that none of the day or night conditions of the allowance were satisfied and that the previous decision refusing the allowance 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. The decision on review which is under appeal contains detailed references to the evidence in the course of the DMP's evaluation of the possible applicability of any of the day or night conditions of attendance and supervision to the claimant's child. Despite the detail given I regret to say I find the DMP's analysis in paragraph 2 of his decision dealing with the day conditions unsatisfactory. In that connection Mr Butt on behalf of the Secretary of State submitted (1)

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that the DMP had accepted that the claimant's child required frequent attention throughout the day in connection with her bodily functions and continual supervision throughout the day in order to avoid substantial danger to herself; (2) he had found those requirements not to be substantially in excess of those normally required by a child of the same age and sex; and (3) the latter was a matter entirely for the DMP to decide.

7 I accept that the approach set out in (1) and (2) above would be a proper method of dealing with the attention and supervision requirements of a young child but I am not satisfied that the DMP adhered to it in his evaluation of the evidence. Dealing with [REDACTED] attention needs the DMP states:-

"I note that she suffers from a metabolic disorder (phenylketonuria) and has to adhere strictly to a special diet, her parents having to ensure that special foods are ordered well in advance by doctor's prescription and this is done usually once a month. Her food requires careful selection, weighing, measuring and preparation and it is supervised to ensure that food exchanges are suitable for [REDACTED] essential growth. Additionally she has to regularly have tests which her mother does once every 3 weeks and she attends Yorkhill Sick Children's Hospital for development assessment and dietary appraisal. I accept that [REDACTED] condition results in a need for careful planning with her food with regard to it's special selection, precise weighing or measuring and a certain amount of inventiveness to ensure that it is appealing to a young child of [REDACTED] age and as such these actions effectively form part of her overall treatment of her condition and I accept that these particular aspects of attention are required and are in connection with her bodily functions. However, the tests and hospital visits which are essential are not required frequently throughout each day, being confined to 3 weekly or monthly occurrences and I do not accept that the diet is sufficiently complex and time consuming to constitute frequent attention throughout the day in connection with [REDACTED] bodily functions. Bearing in mind that all young children's likes and dislikes regarding food, both appearance and tastewise are changing constantly I do not accept that [REDACTED] dislike of certain foods, necessitating inventiveness and persuasiveness on the part of her parents, gives rise to a need for attention which I would regard as being substantially in excess of attention given to any other child of her age."

Later in the same paragraph the DMP states:-

"Similarly, I appreciate the difficulties encountered when attempting to prepare meals which contain a special diet for one member of the family but I cannot take these domestic situations, inconvenient and restricting as they are, into consideration when assessing [REDACTED] need for attendance allowance as they do not qualify as attention in connection with her bodily functions and consequently cannot be taken into account in my consideration of

her/

her requirements. Having regard to the evidence before me it is my medical opinion that [REDACTED] is capable of doing most things that one would normally expect a child of her age to do and I do not consider that her attention needs are substantially in excess of those of most children of her age."

8. There are 2 comments to be made on those passages in so far as they deal with attention needs. The earlier part of the first passage quoted indicates the acceptance of the relevance of need for attention in respect of dietary planning and preparation and yet the first part of the second passage quoted and especially the words "meals which contain a special diet for one member of the family" suggests that this element falls to be discounted. It may be that in the second passage the DMP intended to convey that he was discounting the preparation of meals other than the diet for [REDACTED] but the reader is left in doubt. Furthermore as mentioned above, I am not satisfied that the DMP adhered in paragraph 2 to the approach referred to by Mr. Butt. In the first passage quoted where the DMP considers [REDACTED] requirements for attention in connection with the preparation of diet and the relative tests and hospital visits he appears to consider these matters separately and in isolation as not constituting frequent attention throughout the day for the purposes of the day condition of attendance. When the DMP comes to consider the question of whether the attention required is substantially in excess of that normally required by a child of the same age he refers to one aspect only, namely the "inventiveness and persuasiveness" required on the part of [REDACTED] parents in dealing with her feeding. The proper question however was whether the attention required in all relevant respects arising from the child's condition of PKU, i.e. all aspects of dietary preparation and administration represented a requirement for attendance substantially in excess of that normally required by a child of the same age. I have therefore come to the conclusion that in respect of his consideration of the day condition of attention the DMP has misdirected himself and that his decision is erroneous in law.

9. As regards the day condition of supervision the DMP's evaluation is rendered difficult to follow through being intermingled with his ~~treatment of day attendance requirements. I consider however that there~~ is force in the criticism advanced on behalf of the claimant that the DMP has not adequately explained why in face of specialist medical evidence stressing the need for strict supervision at all times of the child's food consumption, the absence of which would obviously constitute a substantial danger within the meaning of section 35(1), he has concluded that the requirements for supervision are not substantially in excess of those normally required by a child of [REDACTED] age. Of course, as the DMP points out, all small children of [REDACTED] age require much supervision to avoid the risk of substantial danger but the supervision of food consumption required to avoid danger for [REDACTED] might be thought to be different in kind and intensity from the ordinary supervision of eating required of a normal 2 year old. At one point in paragraph 2 the DMP states "Her parents are, in fact, attempting to train her to recognise foods which cannot be consumed and I take the view that as [REDACTED] gets older her appreciation of areas of danger

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regarding her condition should be easier to control as she recognises the seriousness of her condition." This certainly suggests that the DMP may have been influenced in his evaluation of this factor by taking account of a probable future diminution in need for supervision. That is not relevant to an evaluation of the present position, although it would of course be relevant in any consideration of the period of an award. In all the circumstances, although not wishing to appear over-critical, I have come to the conclusion that the DMP's evaluation of ~~the~~ requirements in relation to the day condition of supervision is inadequately explained and does not comply with the requirements of a valid decision. I should add that criticisms were advanced of the DMP's approach to the applicability of the night conditions of attention and supervision but I am not persuaded that any error of law is disclosed in these respects.

10. The decision of the DMP must be set aside as erroneous in law for the reasons set forth above. It will fall to the Board either by itself or by a different DMP to reconsider the claimant's case. The appeal is allowed.

(signed) J G Mitchell

Commissioner

Date: 16 September 1986