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AA - Review Form

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SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: EDWARD LOUDEN ON BEHALF OF CHRISTOPHER LOUDEN

[ORAL HEARING]

1. My decision is that the determination on review dated 9 April 1991 given by a delegated medical practitioner (DMP) for and on behalf of the Attendance Allowance Board (the Board) is erroneous in law and is set aside. The decision which I give in its place is that the adverse decision of a DMP on behalf of the Board dated 25 June 1990 falls to be revised to the following effect:-

- (1) the inclusive period from 1 November 1989 to 17 August 1990 is a period during which the claimant's son Christopher is deemed to satisfy the "night" condition of attention under section 35(1)(b)(i) of the Social Security Act 1975 (now section 64(3)(a) of the Social Security Contributions and Benefits Act 1992) and regulation 5B of the Social Security (Attendance Allowance) (No. 2) Regulations 1975;
- (2) that the foregoing period is a period which was immediately preceded by a period of 6 months throughout which Christopher satisfied the "day" condition of attention under section 35(1)(a)(i) of the Social Security Act 1975 (now section 64(2)(a) of the 1992 Act); and
- (3) that the inclusive period from 18 August 1990 to 18 November 1990 is a period throughout which Christopher satisfied the above-mentioned "day" condition of attention.

I refer my decision to the adjudication officer who will determine the claimant's application for review and award benefit in accordance with it.

2. This is an appeal by the claimant with leave on a question of law against the above-mentioned determination on review dated 9 April 1991 in which the DMP reviewed (on any ground) but refused to revise the previous decision of a DMP dated 25 June 1990 that the claimant's son Christopher did not satisfy any of the day or night conditions of attendance allowance under section 35 of the Social Security Act 1975, as it then was. The appeal was dealt with at an oral hearing held before me on 1 July and 30 September 1992 at which the claimant, who attended in person, was represented by Mr Lynch, Welfare Rights Development Officer, Strathclyde Regional Council and the Secretary of State was represented by Mr D Cassidy acting as the solicitor in Scotland to the Department of Social Security. I am obliged to both representatives for their submissions.

3. The claimant's son Christopher, who was born on 24 December 1979, required treatment for progressive renal failure from about July 1987. There was a continuing deterioration in Christopher's renal function despite dietary and other treatment and from March 1989 he was subject to more stringent dietary restrictions and complex medication with frequent hospital checks. His condition eventually became such that he required continuous cycle peritoneal dialysis for which the claimant received instruction and which commenced on or about 1 November 1989. Christopher received dialysis every night in bed from 10.00 pm to 7.00 am. He remained on dialysis until 18 August 1990 when he was given a successful kidney transplant. A claim for attendance allowance was made by the claimant on Christopher's behalf on 5 November 1989. A DMP considered that Christopher did not qualify for attendance allowance and, as mentioned above, his determination was reviewed but not revised by the DMP whose determination on review was the subject of this appeal.

4. The basic statutory conditions applicable to attendance allowance contained in section 35(1) of the Social Security Act 1975 as in force at the material time have been adequately set out in the appeal papers. In terms of regulation 6 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 (S.I. 1975 No. 598) the requisite degree of attention, supervision etc. had, in the case of a child such as Christopher, to be substantially in excess of that normally required by a child of the same age and sex. Section 35(2) and (2A) of the Social Security Act 1975 provided as follows:-

"(2) Subject to the following provisions of this section, the period for which a person is entitled to an attendance allowance shall be that specified in a certificate issued in respect of him by the Attendance Allowance Board as being -

- (a) a period throughout which he has satisfied or is likely to satisfy the condition mentioned in subsection (1)(a) above or that mentioned in (1)(b), or both; and
- (b) a period preceded immediately, or within such period as may be prescribed, by one of not less than 6 months throughout which he satisfied, or is likely to satisfy, one or both of those conditions..

"(2A) For the purposes of subsection (2) above a person who suffers from renal failure and is undergoing such forms of treatment as may be prescribed shall, in such circumstances as may be prescribed, be deemed to satisfy or to be likely to satisfy one or both of those conditions."

5. Regulation 5B of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 provides as follows:-

"5B. - (1) In the case of a person suffering from renal failure, treatment by way of renal dialysis administered regularly for two or more sessions a week, in the course of which and as a result of which he requires from another person attention in connection with his bodily functions or supervision in order to avoid substantial danger to himself, is hereby prescribed under section 35(2A) of the Act (persons deemed to satisfy conditions for an allowance) to the extent indicated in paragraph (2)."

(2) In a period throughout which a person undergoes or is expected to undergo treatment prescribed by this regulation he shall be deemed to satisfy or to be likely to satisfy one of the two conditions mentioned in section 35(1) (day condition and night condition) for the purposes of -

- (a) if regulation 5C applies to him in the period in question, section 35(2)(b) (qualifying period), or
- (b) in any other case, section 35(2) (period for which an allowance is payable).

(3) Persons suffering from renal failure to whom this regulation applies include any person undergoing treatment by way of renal dialysis as an out-patient in a hospital or institution treated as a hospital, being treatment under the National Health Service Act 1977 or under the National Health Service (Scotland) Act 1978, where the attention or supervision required in respect of that treatment is not provided by a member of the staff of that hospital or institution."

6. Dealing with the question of Christopher's attendance requirements in connection with his treatment by dialysis the DMP made the following observations and findings in paragraphs 2, 5, 8 and 11 of his determination on review:-

"2. ... in your signed statement you stated that Christopher was having home dialysis. This was in the form of continual (sic) cycle peritoneal dialysis. You had to set up the machine for him and it was used for a continual period from 10pm until 7.30am the following morning. ...

5. ... I also accepted that [Christopher] needed the help described .. with the setting up of his dialysis equipment but it was my medical opinion that such attention was mainly required in the mornings and evenings and as such, could not be regarded as being frequent attention during the day that was substantially in excess of that normally required by a child of the same age and sex. ...

NIGHT ATTENTION

8. In the examining doctor's opinion, Christopher needed help once on one or 2 nights a week, taking 15 minutes at a time if his alarm system went off whilst he was dialysing. You stated in your signed statement that you have to get up when the alarm bell was activated and that this happened about once or twice a week on average. However, as there was no suggestion that he needed attention more than once in the same night, I consequently, found that he did not require repeated attention during the night, nor did I accept that attention for 15 minutes at a time constituted prolonged attention. ...

11. I have noted your comments and enclosures regarding the automatic eligibility for Attendance Allowance for persons who dialyse at home. I should advise you however, that although such provisions exist, they only relate to persons receiving haemodialysis or intermittent peritoneal dialysis. All other forms of dialysis are not subject to the deeming of the attention/supervision provisions and in these cases,

the normal conditions indicated above, need to be satisfied before a person can become eligible for Attendance Allowance."

7. It is apparent from the foregoing passages of his determination that the DMP considered that the deeming provisions for dialysis cases were applicable only to forms of dialysis other than continuous cycle peritoneal dialysis and that accordingly Christopher's requirements in connection with his dialysis treatment fell to be considered only in connection with the possible satisfaction of the statutory conditions of the allowance in ordinary cases. It was conceded by the Secretary of State in written submissions in response to a Commissioner's direction that there was no legal basis for the distinction alleged by the DMP in paragraph 11 of his determination between different types of dialysis. Mr Cassidy for the Secretary of State further accepted, on enquiry by me, that there was no basis either for a proposition substituted by the Secretary of State in those submissions that the effect of regulation 5B quoted above was that persons suffering from renal failure and receiving the treatment specified could qualify if as a result they required "a great deal of attention .. or supervision .." (My emphasis)

8. This is a matter of some importance. The provision in regulation 5B(1) merely refers to a requirement for "attention in connection with his bodily functions or supervision in order to avoid substantial danger to himself" without the qualifying requirement that the attention or supervision be "frequent", "prolonged", "repeated", or "continual" as the case may be. Mr Cassidy accepted that a requirement of relevant attention or supervision in connection with the dialysis treatment and going beyond something which was *de minimis* was all that was required. He also submitted that the extra requirement relative to children was inapplicable in a deeming case.

9. In my judgment the effect of regulation 5B(1) is that the deeming provision will not be available where the person undergoing dialysis is able to be fully independent in its administration but that where such a person requires in connection with that treatment a measure (*beyond de minimis*) of relevant attention or supervision from another person that will suffice to enable him to take benefit from the deeming provision. There is no exclusion of children from the potential benefit of the deeming provisions of regulation 5B and accordingly the same measure of attention or supervision in connection with the treatment will enable a child also to be deemed to satisfy one or other of the statutory conditions as otherwise modified in the case of children.

10. The DMP was clearly in error of law in his approach to the dialysis issue in the present case and in particular in asserting that the deeming provision could not apply to the dialysis treatment being undergone by the claimant's son. I accordingly set his decision aside as erroneous in law. I have decided that the information in the papers before me, which comes not only from the claimant but from a consultant paediatric nephrologist, a renal dietitian and a renal social worker, and which was supplemented by additional evidence given at both hearings before me, is sufficient to enable me to exercise the power now available to a Commissioner in accordance with regulation 23 of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 to give the decision which the DMP should have given. This does however require some additional findings of fact and the consideration of some further issues of mixed fact and law..

11. Christopher's history falls for attendance allowance purposes into 3 chapters. I propose to consider first the middle and perhaps most critical chapter, namely the period when Christopher was undergoing treatment by way of renal dialysis from the beginning of November 1989 up to 17 August 1990. As Christopher was in that period on renal dialysis every night from 10.00 pm to 7.00 am it is obvious that the deeming requirement of 2 or more sessions a week contained in regulation 5B(1) is satisfied. In connection with that treatment I accept that the claimant required to prepare and set up the dialysis machine each night, attach it to Christopher in bed, set it going and take readings. During the night on an average of about 2 nights a week Christopher required attention during the night when the machine alarm sounded giving warning of some malfunction (such as kinking of the catheter due to Christopher turning in bed). On such occasions the claimant required to reset and recalibrate the machine and calm Christopher down. At the end of each dialysis session the claimant required to detach the machine, removing the catheter from Christopher while he was still in bed, washing his peritoneum, weigh the claimant and recalibrate the machine and log the reading. It is obvious from the foregoing outline that very considerable attention in connection with Christopher's bodily functions was required within the meaning of section 35.

12. A question was however raised before me as to whether the attention required at the beginning and the end of the dialysis procedure fell to be attributed to the "day" or the "night". In terms of regulation 5B(2) the deeming provision can apply to one or other condition but not both. It might in theory be possible to "detach" some of the attention from the night-time treatment and ascribed it to the "day". I am not unmindful of the decision of The Divisional Court of the High Court in England in R v National Insurance Commissioner 1974 1WLR 1290 reported as the Appendix to R(A) 4/74 and also the subsequent reported decision R(A) 1/78 containing guidance on where to draw the line between "day" and "night". In my view however in a dialysis case it is both logical and consistent with the words and intent of regulation 5B to treat the essential attention required in the setting up and the discontinuing of dialysis as being so closely connected with the dialysis treatment that where dialysis takes place by day the relative attention should be regarded as being required "by day" and that where dialysis is undergone through the night the relative attention should be regarded as being required "at night". There is no difficulty on the facts of the present case in regarding the dialysis which took place between 10.00 pm and 7.00 am as dialysis at night and the evidence indicates that Christopher required to be in bed when attached to and detached from the dialysis machine. I conclude that the dialysis and the relative attention should be regarded as taking place "at night".

13. I hold that the requisite circumstances for the satisfaction of the deeming provisions of regulation 5B(1) are shown to be present in relation to the period from 1 November 1989 to 17 August 1990 so that Christopher falls to be regarded as satisfying the "night" condition of attention in that period. As regards the "day" conditions of attention and supervision during that period, the DMP accepted, and I agree, that Christopher was able to function independently in most respects by day but required help with his medication and help with the preparation and supervision of his medically required diet, although this was less drastic than in the pre-dialysis period. Christopher clearly required a measure of both attention and supervision by day but I accept the conclusion of the DMP that attention was not required frequently throughout the day nor was continual supervision required and that

although the attention and supervision so required must have been in excess of that required by a normal healthy boy of Christopher's age it was not substantially more so. Accordingly I hold that neither of the day conditions of attendance allowance can be regarded as satisfied during that period.

14. Attendance allowance is of course not payable, except in renewal cases, prior to the date of claim - section 35(4) - and the period for which it is payable requires to be preceded by a period of 6 months throughout which one or both of the conditions is satisfied, in terms of section 35(2). It is accordingly necessary next to consider whether Christopher required the relevant degree of attention or supervision by day or at night in the period of 6 months immediately before the date of his claim which practically coincides with the commencement of dialysis in November 1989. It was accepted by Mr Cassidy, correctly in my view, that an attendance condition satisfied in the qualifying period need not be the same as that satisfied in the award period, although it no doubt normally is. The evidence before me shows, and I so find, that Christopher's condition was deteriorating from March 1989 onwards and as a result he required regularly to be taken by the claimant to hospital for checks. He also required stringent attention to his diet by the claimant who was supplied with electronic scales by the hospital for this purpose. His special diet required to be prepared separately from the ordinary food of the remainder of the family and its composition and control were vital to his resistance to progressive renal failure. The claimant also had to make variations in the diet according to Christopher's blood chemistry. In addition attention was required in connection with a fairly bewildering variety of medication to be administered to Christopher, which was in addition being monitored and modified from time to time. At the end of this period when a decision to institute dialysis had been made the claimant and Christopher attended hospital for a few days whilst the claimant was made familiar with the necessary dialysis procedures. Looking to the attention required by Christopher by day in connection with his bodily functions during this period I am satisfied that there was a requirement for frequent attention throughout the day, being attention substantially more than would have been required by an ordinary boy of his age. There was clearly an appreciable measure of supervision also but it is unnecessary to consider that aspect. I am accordingly satisfied that the 6 months qualifying period for entitlement to the allowance can be regarded as having been met.

15. There remains the final chapter of Christopher's history for attendance allowance purposes, namely a post-operative period of some 3 months immediately after the successful transplant operation in August 1990. Although released from hospital after a few days Christopher required to be taken back to hospital by the claimant, at first every day, thereafter every second day and then with diminishing frequency, for the purpose of checking his condition and medication with particular regard to the risks of rejection of the transplant. In addition Christopher required attention and supervision at home over his complex medication and some continuing attention and supervision of his diet although the latter was now much less restricted. It is apparent that in this recuperation period very considerable attention, far beyond that required for a normal boy of Christopher's age, was required by Christopher by day and it was, very properly accepted by Mr Cassidy on behalf of the Secretary of State, and I agree, that the day condition of attention should be regarded as satisfied. It is accordingly unnecessary to consider the supervision aspect of Christopher's care.

16. For the foregoing reasons my substituted decision is as set forth in paragraph 1 above. I refer that decision to the adjudication officer for determination of the claimant's application for review in accordance therewith.

17. The appeal of the claimant is allowed.

(signed) J G Mitchell
Commissioner
Date: 9 October 1992