AA - supervision not only about risk of ~~sup~~ suicide but also other risks associated with depression

WMW/JOB Commissioner's File: CSA/68/89

SOCIAL SECURITY ACTS 1975 TO 1988

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

/ORAL HEARING/

---

1. I hold the determination by the Attendance Allowance Board dated 28 February 1989 to be in error of law. For that reason I set it aside and refer the case to the Board - section 106(2A) of the Social Security Act 1975.

2. This case came before me by way of an oral hearing at which the claimant was represented by Mr Chris Orr of the Social Work Department of Strathclyde Regional Council. The Secretary of State was represented by Mr David Cassidy, Solicitor, of the Office of Solicitor to the Secretary of State for Scotland. I am indebted to both for their helpful submissions.

3. This case has had an unfortunate history - at least from the point of view of its timetable. The application for attendance allowance was received in April and rejected in June of 1986. It is, of course, only a determination on a request for review that can be brought before me. That review was sought on 9 July. That it has taken nearly three years from date of application to an appealable determination must, on any view, have caused considerable worry and concern to the then claimant, and her husband who now is claimant on her behalf. By that I intend no criticism of the Board, but rather of the system. It seems tolerably clear that much of the delay was caused, in a sense perversely, by the present claimant's determination to fight, with considerable clarity, at each possible step and the Board's concern about the case as evidenced by their ultimately taking it to themselves for determination rather than leaving it with their delegate.

4. It will be convenient hereafter to refer to the claimant's wife as she was when the case started, namely as "the claimant".

5. The conditions laid down by section 35(1) of the Social Security Act 1975 have been set out under the head "medical conditions" as an appendix to the Board's determination. I need not, therefore, repeat them herein but, because it is the one with which I am particularly concerned, content myself with isolating the provisions relating to the day supervision condition as applicable to this case. They are -

"35(1) A person shall be entitled to an attendance allowance if ...

(a) [s] he is so severely disabled physically or mentally that, by day, [s] he requires from another person ...

.

.

(ii) continual supervision throughout the day in order to avoid substantial danger to [her] self ..."

Thus, in short, the claimant would only be entitled to the allowance if in order to avoid substantial danger to herself - that is for the purpose of avoiding such danger - continual supervision throughout the day is required - from her husband. And any substantial danger must not be too remote in risk; if it is it may reasonably be disregarded. Thus there are three questions in the proper consideration of the day supervision condition in this case; of what dangers was there a risk of occurrence to the claimant; were any of these properly to be called substantial and was any such risk proximate or remote. The hurdles are considerable and the assessments not easy. They are matters for the judgement of the Board in light of its medical expertise. I may only interfere - broadly - if I am satisfied that in their approach or in the sufficiency of their written determination they have erred in law. It is against that background that I return to the determination of the Board in this case. I have come to the view that there is an error of the sort first described.

6. The Board made a careful summary of the evidence. It is prefaced by a note that there had been "a history of suicide attempts, including drug overdoses and a cut arm." The summary notes that there was evidence from a doctor that powerful tranquilisers had to be dispensed by the husband. That doctor considered that the claimant needed watching as she was quite unstable at times. A consultant psychiatrist had expressed an opinion that the risk of an overdose could not be eliminated by locking away medication and that it was possible that the claimant would inflict self injury by another means if she were depressed. There was noted an incident when the claimant had left the house to be found in a dirty cellar and also another incident when she had been found trying to get out of hospital at 4 am. The husband was said to try to leave his wife alone only when she was asleep with the help of drugs. Another doctor stated that the claimant had bouts of depression when she became aggressive, dishevelled and rambling. And he also noted that the husband had been advised not to leave his wife alone - "as one never knows when these problems may return ...". All these reports appear to be talking of a time later than a course of treatment said to have elevated the claimant's mood.

7. The claimant had made a statement to the examining doctor that she felt agitated, tense and irritated, and was easily upset. She

had said that she was aggressive at times and cried a lot and that much of her day was spent sitting alone in her bedroom. She apparently still contemplated suicide at times, neglected her appearance and had not left home for some six months. The examining doctor accepted a theoretical risk of a further attempt at self injury but had opined that, at the date of his examination, such a risk was not then substantial. He felt that she could safely be left unsupervised for between one and two hours by day and expressed a view that she needed reassurance and moral support rather than true supervision. The husband at about that time had pointed out that his wife was never left for more than an hour and that he tried to arrange trips out when she was asleep. He saw to it that she took her medication and ensured that not too many tablets were available in the house at any one time.

8. The latest medical evidence before the Board, according to their summary, had pointed out that the claimant needed some degree of supervision as a result of being chronically depressed rather than as a result of a specific danger to herself. And the doctor providing that report had considered that, in the absence of supervision, self neglect would increase and, possibly, the risk of suicide.

9. The Board went on in a substantial passage to set out how they had considered all that evidence in regard to the day supervision condition. Having rehearsed certain parts of it again they said this, at paragraph 7.3 -

> "It is our clinical opinion that the medical evidence does not show that [the claimant] has been at risk of substantial danger at any time during the period under consideration. It shows rather that she needs someone to encourage her to look after herself, take her medication, give her support, comfort and reassurance, but this does not constitute supervision within the meaning of the Act. She does require supervision for activities such a bathing or going out in traffic, which could put her at risk of danger from her leg tremor, and access to her tablets should be controlled by, preferably, keeping them under lock and key. As her behaviour is described as compulsive, sensible precautions should be taken such as making access to sharp objects difficult, but it is doubtful whether a really determined suicide attempt could be prevented by continual supervision, although the risk could certainly be reduced. However, the weight of the evidence shows that [the claimant's] condition has not deteriorated to the point at which suicide is a relevant risk within the meaning of the Act. Were it to do so, it is likely that her medical advisers would arrange hospitalisation."

Then after noting that the husband found it difficult to understand why the claimant did not qualify when he had been advised not to leave her alone, the Board said -

> "However, as we have explained above, not leaving someone alone in the house for more than one hour is not necessarily the same as providing them with continual supervision in order to avoid substantial danger."

And then they go on to say that providing the support the claimant needs should prevent her condition deteriorating to a point when she was liable to do harm to herself or others. That they describe as "company and moral support." And they conclude that -

> "If [the claimant's] condition were to deteriorate to a point at which she was likely to cause herself harm, then she would require continual supervision within the meaning of the Act."

They then consider the risk of danger to others and dismiss that, quite rightly, as there was no evidence pointing in that direction.

10. The evidence before the Board, which I have quoted above largely by repeating their own wording, indicated three possible sources of danger for the claimant. One was, by neglect, under - or over - taking her prescribed drugs. The second was doing herself some physical, including drug induced, harm in the way of a suicide attempt - which is of course a risk different from that of suicide. The third source was absconding, as it were, and neglecting herself as evidenced by the two incidents when she ran away from home and tried to run away from hospital. And the evidence indicated, although it was for the Board to consider and determine, that any potential danger was at increased risk when the claimant was depressed. There was evidence one way and another as to whether the depression was increasing or not and whether it was, or whether it should have been regarded as, episodic or cyclical. These were also matters that the Board should have considered and assessed as part of their assessment of the risk of substantial danger. The next question was whether, separately or in combination, these potential sources posed a threat of substantial danger to the claimant. I assume from what the Board said in regard to what would happen were the claimant's condition to deteriorate to a point at which she was likely to cause herself harm - by which I would also understand them to mean again to attempt suicide - then they would regard at least that as a substantial danger - which then must, of course, be increased if the other potential sources are taken into account and, it may be, further so during bouts of depression.

11. It is in their approach to the assessment of any risk of substantial danger that I hold the Board to have erred in law. The first sentence of their paragraph 7.3, as quoted above, is a conclusion unobjectionable on its face. But it is what follows which

reveals the incorrect approach. Section 35 of the Act is concerned with what in the way of supervision a person requires, so that what is received must be discounted save as evidence tending to establish what is required - Nicholls LJ in the Moran case - now reported as the appendix to R(A)1/88, at p. 14/E. So, for the purpose both of determining what should be discounted as well as determining what is required it is necessary first to decide whether anything done for the claimant can properly be called "supervision". The Board have used the description "encouragement, support, comfort and reassurance" to what the husband provdes and have concluded that it was not "..supervision within the meaning of the Act". Of course the Act ascribes no particular meaning to the word; it is left as a matter of the ordinary sense of language. But that is subject to what was said in the Moran decision in endorsing in part and modifying in part what was said in R(A)1/83 by a Tribunal of Commissioners. In the latter "supervision" was said to involve a /relatively/ passive concept and they stated that its purpose was -

> "..to avoid substantial danger which may or may not in fact arise; so supervision may be precautionary and anticipatory, yet never result in intervention, or may be ancillary to and part of active assistance given on specific occasions..."

And then Nicholls LJ observed on that issue, at p.14/C of the appendix that -

> "..a person standing by to intervene in the event of an epileptic attack may, for that reason alone, be said to be exercising supervision. It is a question of fact and degree in each case."

Both Moran and R(A)1/83 were epilepsy cases. But the principles involved seem to be of general application. Applying them I see no reason why encouragement, support, comfort and reassurance can never be supervision; they may not, if properly assessed, be so in a particular case. Much will depend upon the detail of what is involved and its effect, i.e. does it go to prevent or minimise the set of depression or the likelihood of neglect and self-injury? If so then whether what is involved may be supervision is a matter of English usage, depending, as I have said, on the facts and the degree involved. But the issue has to be properly approached and reasoned. I conclude that the Board have gone too far too fast in deciding without more ado that encouragement and so on "does not constitute supervision within the meaning of the Act". That is the flaw in their determination.

12. I should add that I do not, for myself, understand how at paragraph 7.4 the Board have, as they claim, explained "above" that not leaving someone alone in the house for more than an hour is not necessarily the same as providing them with continual supervision. Bearing in mind, again, what was said in Moran, and indeed, in other cases, that supervision is not required to be continuous but only continual, it is not clear to me whether the Board accepted the evidence from the husband, which might be thought to be endorsed by

at least one of the doctors, that he only left his wife when she was asleep with the use of drugs. Again, it was for the Board to consider and determine, if need be, whether any supervision provided by the husband ceased to be continual in its provision simply because he absented himself for brief periods - the indication appears to be about an hour or so - and that especially if he only does so when his wife is in induced sleep. Their failure to do so is another error in law.

13. Mr Cassidy strove manfully to persuade me that it was necessary to avoid too chancery an approach to the Board's determination and that, viewing the matter properly and rather more objectively, it was clear that they had seen no risk of substantial danger arising. Certainly my approach should not and is not intended to be of a chancery nature and it is tolerably clear that the Board indeed concluded that they could see no risk of a substantial danger arising. But the problems, as it seems to me, are, first, that it is not clear that they have confined themselves to the relevant time - that is the period starting six months prior to the date of claim and ending, necessarily, at the date of the last medical report - since the evidence is silent as to any later time. The second problem, as I have endeavoured to explain it, is that I am satisfied that the Board have not properly approached the question whether any part of the husband's present activities should not properly be described as "supervision", and so discounted before any assessment of the risk of substantial danger and any determination whether its avoidance requires continual supervision - along the same lines. And I do rather consider that the emphasis upon a risk related to "suicide", which certainly is recorded in the evidence, required closer analysis for the risk with which the Board had to be concerned was any form of substantial danger to the claimant, which might be far short of any risk of actual suicide. Even between an attempt and a successful attempt there may be widely different degrees of risk and yet in the former substantial danger may lurk. Hence it was necessary and will be necessary for the Board to consider the physical dangers, which include drug related dangers, and not "suicide" as such.

14. I should add that the written submissions for the Secretary of State strongly supported by Mr Cassidy, appear to me equally to have mis-approached the issue. Were the question one of a risk of suicide I would have been inclined to agree with them; but for the reasons given above it is not the real question. One doctor in a report dated 27 October 1987 made the very point when he recounted as claimant's then recent history -

> "1985 - took overdose ..., later slashed left forearm by breaking drinking glass (when left alone). Psychiatrist thought impulsive action, but not suicidal ..."

15. I should note, briefly, two other matters which were the subject of submission to me. The first was that there had been a request for

an oral hearing which had not been properly dealt with by the Board and its chairman. Mr Orr analysed the correspondence concerned with care but I am not satisfied that what was mentioned therein was other than an indication of a desire to be heard at this, the appeal stage. I therefore do not think that the Board, or its chairman for the matter of that, can be criticised for not interpreting the passages upon which Mr Orr laid stress as amounting to a request that the Board provide an oral hearing.

16. And the other matter concerns the last sentence of paragraph 7.3 -

> "Were it to do so, it is likely that her medical advisers would arrange hospitalisation."

It was submitted by Mr Orr, in line with CA/527/1989, that to make any such assumption without giving the medical advisers an opportunity to indicate whether such a conclusion could properly be drawn amounted to an error in law. I agree with Mr Cassidy that it was unfortunate that the sentence was inserted and that it was something of a hostage to fortune. However it seems to me to be quite clear that in the context in which it occurs the Board were looking to the future, which was beyond the relevant time, in any case, and were certainly not making a deduction within the relevant time as was done in the case cited, where it was deduced, without evidence, that if there had been a serious risk of an attempt at self harm the individual would have been detained. That was held to be an error of law. I understand from submissions in other cases that the Secretary of State now so accepts.

17. The appeal succeeds.

(signed) W M Walker
Commissioner
Date: 20 November 1990