

**APPEAL FROM DECISION ON REVIEW OF
ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW**

Meaning of "continual supervision"

A claim for attendance allowance was made on behalf of a claimant. A medical practitioner acting on behalf of the Attendance Allowance Board decided that the claimant did not satisfy either of the day conditions or either of the night conditions in section 2(1) of the National Insurance Act 1972. The Attendance Allowance Board reviewed this decision. It decided that the day attention condition alone was satisfied. Application for leave to appeal was granted and the question at issue in the appeal was whether the Board correctly arrived at the conclusion that the claimant did not satisfy the night supervision condition in section 2(1)(b)(ii) of the National Insurance Act 1972.

Held that the decision was erroneous in point of law and should be set aside and the matter remitted for fresh consideration.

In the course of his decision considering issues raised on the appeal the Commissioner observed:—

(a) that the characteristic nature of "continual supervision" is overseeing or watching over considered with reference to its frequency or regularity of recurrence. The object of supervision is 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 it may be ancillary to and part of active assistance given on specific occasions to the claimant (paragraph 9).

(b) that if the claimant required the presence of someone in the house at all times at night so that someone was always available to supervise his activities on occasions when they might arise and on which he might need help, that requirement itself could be held to be a requirement for continual supervision (paragraph 9). In such circumstances the ability of a claimant to summon help when he needs it does not necessarily exclude the requirement for the provision of an overall anticipatory supervision, so that his calls for help may be answered when made, and he does not call in vain (paragraph 10).

(c) that the Board did not consider whether there was a requirement for continual supervision, which could be based on an overall need for someone to be nightly available in case calls should be made to deal with the unpredictable asthma attacks and the claimant's risks on the occasions of his toilet needs. As this aspect was not considered the claimant's requirement for continual supervision was dealt with on a necessarily limited view of the circumstances in which it might be found, and found to be required. This was a misdirection (paragraph 11).

1. This appeal pursuant to leave granted by a Commissioner on 17th July 1974 arises as follows. On 29th July 1972 attendance allowance was claimed on behalf of the claimant who suffers from cerebral palsy with severe spasticity and flexion deformities of both legs. He is also mentally retarded and is subject to unpredictable attacks of asthma. On 23rd August 1972 a medical practitioner on behalf of the Attendance Allowance Board ("the Board") decided that the claimant was not so severely disabled physically or mentally that he required attention or supervision to the extent specified in section 2 of the National Insurance Act 1972. Following an application for review another medical practitioner on behalf of the Board reviewed the determination of 23rd August 1972 on 22nd November 1972, but decided it should not be revised. Leave to appeal was granted by the Chief Commissioner, and on 1st August 1973 he decided that the review determination of 22nd November 1972 was erroneous in law. Accordingly the Board proceeded on 22nd January 1974 to review the original determination made by their delegate on 23rd August 1972 for the purpose of confirming or revising it, and it is from the decision made on 22nd January 1974 that this appeal now comes before me.

2. To revise the determination the Board had to be satisfied that at least one of the medical conditions set out in section 2(1) of the National Insurance Act 1972 (replacing section 4(2) of the National Insurance Act 1970) was satisfied, that is to say that the claimant is (a) 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) 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.

3. If, for an appropriate period, a day condition and a night condition are both satisfied, attendance allowance is at the higher weekly rate. Satisfaction of one of the day conditions or one of the night conditions qualifies for the lower weekly rate.

4. By their decision of 22nd January 1974 the Board accepted that the claimant was so severely disabled that he required frequent attention throughout the day in connection with his bodily functions, but since they found that neither of the night conditions was satisfied, a lower rate certificate only was issued. The question raised by the appeal is whether the conclusion of the Board that the night supervision condition in section 2(1)(b)(ii) of the National Insurance Act 1972 was not satisfied was correctly arrived at.

5. In this connection I bear in mind the functions entrusted to the Board by Parliament, and that the question of the right to the allowance is dependent on medical questions to be decided by the Board primarily an expert medical tribunal (*R. v. National Insurance Comr., Ex parte Secretary of State for Social Services* [1974] 1 W.L.R. 1290, D.C.). Questions of medical fact or opinion and medical conclusions therefrom are outside my province, and my concern is only whether the decision of the Board is erroneous on a question of law. If the inference drawn by the Board from the primary facts as found by them is based on or involves the application by them of an erroneous view of what the statutory language means, in my opinion the decision can be said to be erroneous in law.

6. The decision of the Board on the question whether the claimant satisfied the requirements of section 2(1)(b)(ii) of the Act is recorded as follows:—

“8. Turning to the question of [the claimant’s] need of night-time supervision, the first medical report says that he needs someone nearby every night and the second report indicates that he cannot be safely left unsupervised by night. In the latter report this is said to be because of the unpredictability of asthma attacks and the necessity for his mother to supervise the use of his inhaler when he has an attack, there being a danger that he might exceed the correct and safe dosage of inhalant. On the form of application for leave to appeal to the Commissioner, completed on her son’s behalf on 18.1.73, [Mrs. L.] also refers to the possibility of his falling should he need to go to the toilet during the night. We have already accepted that [the claimant] needs to be given his inhaler whenever he has an attack of asthma and that his mother remains in attendance until the attack has subsided and he is able to return to sleep. We take the view that, throughout such periods of attendance, [Mrs. L.] is also exercising supervision over her son’s use of the inhaler. In the normal course of events the prompt use of such an inhaler results in rapid relief of the asthmatic symptoms, and we would not expect any danger, whether immediate or in the long term, to arise from one being used, as in [the claimant’s] case, at intervals of about a week. There may, however, be some danger in the too-quickly repeated use of an inhaler should the initial application fail to produce the desired result immediately, as we accept, given [the claimant’s] mental condition, that it is necessary for the avoidance of this risk that he be supervised whenever he needs his inhaler. We also accept that he needs supervision, because of the risk of falling, on the occasions when he gets up to go to the toilet. We do not know how often this happens but, as previously mentioned, his mother has said that he usually sleeps well. In any event, there is no evidence to suggest that at night [the claimant] is likely to get himself or any other person into situations involving potential danger, except on the specific occasions we have just mentioned, i.e. when he has an attack of asthma or when he needs to visit the toilet, and there is no suggestion that on each of these occasions he is unable to summon assistance. We find, therefore, that the supervision [the claimant] requires does not amount to “continual supervision throughout the night” and conclude that he does not satisfy the condition in section 2(1)(b)(ii) of the Act.”

7. The Board found that the claimant required supervision at night to avoid situations of potential danger, but that such supervision did not amount to a requirement for continual supervision throughout the night. They observed that on the occasions when he required such supervision there was no suggestion that on each occasion the claimant was unable to summon assistance, and the submission on behalf of the Secretary of State is that the Board were able to conclude that the night supervision condition was not satisfied having regard (among other matters) to paragraph 3 of Commissioner’s Decision C.A. 7/73 (not reported).

8. The substance of paragraph 3 of Decision C.A. 7/73 as it affects this case lies in the following extract: “. . . a disabled person who has the physical and mental powers to summon help by means of voice or bell, when he or she needs it, does not require the kind of supervision contemplated in the National Insurance Act 1970 and its successor the National Insurance Act 1972.”

9. In my opinion the characteristic nature of "continual supervision" is overseeing or watching over considered with reference to its frequency or regularity of recurrence (see Decision C.A. 5/72 (not reported) paragraph 8). The object of supervision is 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 it may be ancillary to and part of active assistance given on specific occasions to the claimant. In this case the Board took the view that throughout the periods of her attendance the claimant's mother was exercising supervision over her son's activities to avoid danger at night, and that he required such supervision, but that his requirement did not amount to a need for continual supervision throughout the night.

10. The question for the Board was a question of the claimant's requirements. If he required the presence of his mother in the house at all times at night so that she was always available to supervise his activities on occasions when they might arise and on which he needed her help, that requirement itself could be held to be a requirement for continual supervision (see Decision R(A) 1/73 paragraph 15). In my opinion in such circumstances the ability of a claimant to summon help when he needs it does not necessarily exclude the requirement for the provision of an overall anticipatory supervision, so that his calls for help may be answered when made, and he does not call in vain.

11. The Board considered the specific occasions upon which attention and, as they found, supervision was given and required. They did not, as it seems to me, consider whether there was a requirement for continual supervision, which could be based on an overall need for the claimant's mother to be nightly available in case calls should be made for her services to deal with the unpredictable asthma attacks and the claimant's risks on the occasions of his toilet needs. As this aspect was not considered the claimant's requirement for continual supervision was dealt with on a necessarily limited view of the circumstances in which it might be found, and found to be required. In my view this was a misdirection.

12. I allow this appeal. The decision of 22nd January 1974 is set aside as erroneous in law and the matter remitted for fresh consideration.

(Signed) R. J. A. Temple,
Commissioner.
