

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

### The request for an oral hearing

1. The respondent has requested an oral hearing. I refuse this request. I find the submissions by both parties are clear and complete, and I do not consider that any useful purpose will be served by holding an oral hearing. I note that the appellant has not intimated any request for an oral hearing.

### My decision

2. The decision of the tribunal of 15 August 2006 is not erroneous in law. Accordingly I dismiss this appeal.

### The issue in this appeal

3. The respondent, who was born on 2 July 1948, has been pre-lingually profoundly deaf since the age of two years. He has been in receipt of the lower rate of the mobility component of a disability living allowance since 29 January 1997.
4. The respondent sought an increase in his disability living allowance on 22 August 2005. He was represented in the ensuing tribunal proceedings, and argued successfully before the tribunal on 15 August 2006 that there had been an official error in the determination of his entitlement in 1997 such that his entitlement to a disability living allowance should be reviewed from that date and revised to put in payment the lower rate of the mobility component and the middle rate of the care component of a disability living allowance from and including 29 January 1997 for an indefinite period.
5. The appellant considers that the tribunal has erred in law in determining that there was an official error in the decision of 8 August 1997 awarding benefit from 29 January 1997. The appeal comes before me by leave of a tribunal chairman.

### Did the tribunal err in law?

6. Let me clarify one aspect of the appellant's submission at the outset. The Secretary of State says that he does not have a copy of the record of proceedings of the tribunal hearing. That is not so. There is, among my documents, some eight and a half pages of such record, indicating that the tribunal undertook a careful investigation of the circumstances of this case. I observe that the Secretary of State has not sought to make any further observations on this matter in response to the respondent's observations at a time when the record of proceedings was available (even if it was not available when the grounds of appeal were drafted).

#### *What constitutes an official error?*

7. Regulation 3(5)(a) of the Decisions and Appeals Regulations provides that a decision of the Secretary of State under section 8 or 10 of the Social Security Act 1998 which arose from an official error may be revised at any time.
8. So far as relevant to this appeal, 'official error' is defined in regulation 1(3) as an error made by an officer of the Department acting as such which no person outside the Department caused or to which no person outside the Department materially contributed, but excludes any error which is shown to have been an error by virtue of a subsequent decision of a Commissioner or the court.
9. It is well established that an official error only arises where there are clear and obvious mistakes. An error by a decision maker (and formerly an adjudication officer) can

constitute an official error.<sup>1</sup> The onus is on the person claiming official error to establish that there has been such an error.

10. My attention has been drawn to CDLA/393/2006 . I agree that a proper approach to the question of whether there has been an official error is to consider whether an adjudication officer or, now, decision maker has made a decision that no reasonable person properly instructed as to the law could have made on the evidence before him. In looking at the original decision in CDLA/393/2006, the Commissioner indicates that there would be no official error 'if it was at least a possible reasonable decision on the evidence before the adjudication officer.' (at para. 10 of his decision).

11. In CDLA/393/2006 the Commissioner went on to consider whether a mere failure of proper standards where further enquiries were not made would constitute official error. Here the importance of considering whether a person outside the Department contributed to the error comes into play. A common sense approach is encouraged, which in many cases will result in a conclusion that the person completing a claim pack materially contributed to the error by not including all the information required. The Commissioner says,

I stress that in reaching that conclusion I am not thinking at all in terms of fault or blame. It is just an expression of the factual situation in the context of the restrictions that the legislation has put on the definition of official error. (para. 13).

#### *The tribunal's decision*

12. The tribunal's decision is well reasoned and clear. The Secretary of State says they got the law wrong. The tribunal's reasons for its decision show that it was considering whether there had been a clear and obvious mistake.

13. This was a case concerning a claimant who had been pre-lingually profoundly deaf since the age of two years. The tribunal makes the following findings of fact:

6. [The respondent] made his claim after the publicity over the case of Fairey, which was decided in 1997 and well publicised. He only has a small knowledge of English and communicates when possible by using British Sign Language and when not available by pointing and using his hands. He had managed over many years because his mother and sister were signers but regrettably they have died leaving his father as his only form of communication. His father did not know British Sign Language but over the years they had developed their own form of sign language which enabled them to communicate with each other. However [the respondent's] father suffered a stroke during the course of the last 12 months which prompted his application for a supersession which he made on 16<sup>th</sup> November 2005. ....

7. It was noticeable that within the proceedings [the respondent] had difficulty in communicating with the tribunal even though he had a BSL signer to assist him. ....

14. The tribunal also found as a fact that the Department had put the respondent's initial claim on hold pending the outcome of the Fairey case. The respondent's original claim pack is dated 23 June 1997. Further enquiries were made at the end of July. A decision was made on his claim on 8 August 1997, and benefit was then awarded with effect from 29 January 1997.

15. The tribunal makes appropriate findings of fact in relation to the respondent's care needs. The final two paragraphs of the decision sum up their reasoning:

12. The tribunal were aware that there had been an earlier supersession request which had been refused. This followed a periodic claim from completed by [the respondent] on 12 November 2003. This resulted in a report from [an examining medical practitioner] dated 13 February 2004. [The examining medical practitioner] in that report, strongly points out the difficulties [the

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<sup>1</sup> See generally the authorities cited at paragraph 2.335 in Volume III of Social Security Legislation 2006 and its Supplement.

respondent] has with communication and ... the decision was to leave [the respondent] with an award of lower rate mobility only. This, in the view of the tribunal, did not prevent the tribunal looking back to 1997 as it appeared that official error was not considered when that decision was made.

13. The tribunal accept that this is an unusual decision and that the ability to apply for a revision of a decision under the heading of official error will be very rare and will only be made in exceptional circumstances. This is a man who is pre-lingually profoundly deaf who is unable to lip-read and only has a very limited knowledge of English. Realistically he can only communicate by using British Sign language and even then with difficulty. His communication difficulties and his need for interpretation have been spelled out since the original award was made. The case of Fairey was well documented and its effect should have been within the Department's knowledge, if not ringing in their ears. ....

#### *The Secretary of State's arguments*

16. The appellant concedes that no written explanation of the 1997 decision awarding a disability living allowance is available, but goes on to argue that there is no evidence that the implications of the Fairey case were not taken into account. The Secretary of State argues that the tribunal have not pointed to specific evidence of a need for frequent attention throughout the day and therefore there cannot be any official error.
17. The Secretary of State further argues that there were further enquiries carried out, and these showed that the respondent's needs were being routinely met by members of the respondent's family.
18. The Secretary of State further argues that even after the 2004 enquiries, there was insufficient evidence to indicate a need for frequent attention throughout the day.
19. Finally, the Secretary of State concedes that in determining the supersession request of 22 August 2005 the decision maker may not have considered the respondent's interpretation needs since no reference is made to them in the explanation of the decision.

#### *The respondent's arguments*

20. The respondent emphasises that he is arguing that there was official error in the original decision in that there was no award at all of a care component, indicating that the decision in Fairey was not properly considered. He argues that it is not necessary to show that an official error would only arise if entitlement to the middle rate of the care component was the only proper award at that time.
21. The respondent argues that the proper application of the decision of the House of Lords in Fairey to the respondent's circumstances was the award of a care component, and points to evidence in the bundle before me which sustains that claim.
22. Finally, the respondent argues that the tribunal's decision to award the middle rate of the care component was fully justified on the evidence before them, including the evidence of the respondent in person.

#### *My conclusions*

23. I broadly prefer the arguments of the respondent.
24. This was an unusual case involving a pre-lingually profoundly deaf man who had claimed in response to publicity about the Fairey case, and whose claim had been put on one side pending consideration of the implications of the outcome of the appeal to the House of Lords in that case. Their judgment was delivered on 21 May 1997.
25. I have concluded that on the face of the original claim pack there was a clear case for the award of at least the lowest rate of the care component by reason of attention the respondent would have needed in respect of communication having regard to the

explanations of the needs of profoundly deaf people in Fairey (reported as R(A) 2/98). The adjudication officer should have awarded some care component of the mobility component on the basis of the claim pack and further information available as at the date of the decision. I do not consider that the tribunal can be said to have come to an incorrect conclusion on this basis.

26. Did a person outside the Department materially contribute to this official error? I think the tribunal were justified in concluding that no such issue arose in this case. The respondent has expressed his difficulties in a manner which is clear enough, and had responded to further enquiries to elaborate his needs.
27. It follows that I see no reason to criticise in any way the findings of fact of the tribunal on the respondent's need for frequent attention throughout the day in connection with his bodily in relation to any period in issue by reason of his need for interpretation in order to communicate.
28. There is one further issue which calls for comment. The Secretary of State refers to the respondent's needs being met by his father. The respondent objects to this. The respondent is right; the question is what attention needs a person reasonably requires, and the fact that a family member already meets some of those needs is irrelevant.
29. I suspect the confusion may arise because there is a distinction in relation to attention needs in relation to interpretation for people who are deaf. Regular communications within the home between the person who is deaf and another member of the family who has, for example, learned sign language to facilitate communication is not attention in the context of entitlement to a care component. This is simply the equivalent of normal conversations within the home. But when the family member provides interpretation in order to enable the person who is deaf to enjoy the normal incidents of daily life (such as, perhaps, explaining the plot of a television programme) that is attention in connection with bodily needs.
30. Most of the issues raised on this appeal relate to matters of fact which are within the judgment of the tribunal. As noted in CDLA/393/2006, provided that the tribunal asked itself the right questions (and I conclude that they did in this case), I can only interfere with its conclusions that there was an official error if satisfied that no reasonable tribunal properly instructed as to the law could have reached the conclusion the tribunal did.
31. This tribunal asked itself the right questions. It came to conclusions which I consider to be justified on the evidence before them, and it has written up its reasons for its decision, which, when read alongside a full and helpful record of the proceedings, shows how they have applied the law to the facts they found which results in the award of benefit to the respondent. There is accordingly no basis on which I can properly interfere with the tribunal's decision.
32. It follows that this appeal is dismissed.

(signed on the original)

**Robin C A White**  
**Deputy Commissioner**  
21 August 2007