

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal was erroneous in point of law. I set it aside and, in pursuance of the powers in that behalf contained in section 14(8)(a)(i) SSA 1998, I give the decision which I consider the tribunal should have given. That is that the claimant is entitled to the care component of DLA at the highest rate for the period 8.4.02 – 7.4.08. The duration of that period is dictated by the provisions of section 71(3) SSC&BA.

2. This is an appeal with leave granted by me from the decision of an appeal tribunal dated 17.9.02.

3. The claimant (d.o.b. 8.4.97) suffers from infantile autism, XYY chromosome disorder, and asthma. As such, it is accepted that he has extensive supervision needs at all times when he is awake. On renewal, he was awarded the mobility component at the lower rate and the care component only at the middle rate, for the comparatively lengthy period of 8.4.02 – 7.4.08. Previously, he had had an award of the care component at the highest rate 19.9.2000 – 7.4.2002.

4. I called for the papers concerning the original award to 7.4.2002. It would appear from them that he might be awake for 1½ hours in the night (135), and that he wakes and sometimes wanders in the night (153). The principal need stems from the fact that he invariably wakes at 5 a.m. and, thereafter, required continual supervision. The Special Needs Health Visitor, in her letter of 28.2.02, complains of an inconsistency between the original award and that under appeal, but it is clear from the claim forms that the earlier award did not depend exclusively on the apparently invariable habit of the claimant waking at 5 a.m, which the decision under appeal does.

5. The appeal in this case thus depends solely on whether it can be said, for the purposes of section 72(1)(c) SSC&BA, that the period between 5 a.m. and 7 a.m. is “night”.

6. There is the well-known dictum of Lord Widgery L.J. in R v. Nat Ins. Ex p Social Services 1974 1WLR 1290 at p.1296 about what “night” for the present purposes should mean. He said:

“Like the Commissioner I am not going to attempt to give any single definition of “night” for present purposes for the very good reason I do not think it can be done. The argument before us has been at one in a number of respects: both Mr Slynn and Mr Brown invite us to regard the night for the purpose of the sections being that period of inactivity or their principal period of inactivity through which each household goes in the dark hours, and to measure the beginning of the night from the time at which the household, as it were, closed down for the night. I would commend to boards dealing with this difficult question in future that they should look at the matter in that way.”

The Learned Judge then went on to say that it might be reasonable to say that, so far as a child was concerned, “night” began when the child is settled down for the night, but he emphasised that that was not the test. The test is when the household is closed up.

7. In his submissions of 23.7.03 to me the Secretary of State submits (121):

“It is clear from examining the facts of the case that [the claimant] and his mother begin their “day” at 5 a.m. On page 61, [the claimant’s] mother contends that ‘night time is the normal sleep time of the parent.’ It is apparent from the papers that the normal sleep time of [the claimant’s] mother is from between 9 p.m. to 11 p.m. until 5 a.m. This, for all practical purpose, is when her day begins. She does not retire back to bed after supervising [the claimant]... The question then becomes whether the fact that [the claimant] and his mother are awake means that [the household] can also be deemed to be awake. ...

“It is recognised in the case law that not all members of the ‘household’ must be awake and active in order for the ‘household’ to begin their day...

“There is a very strong argument that the ‘household’ is awake. Two of the four members are habitually awake and active at this time. It is also submitted that the ‘night’ would not begin if two members of the household were still habitually awake and active during the early part of the dark hours.”

8. I do not find this an easy question. The mother has to rise at 5 a.m. every morning, simply and solely because that is when the claimant wakes up and his supervision needs begin. She would not rise at that early hour of her own choice. The other two members of the household do not rise until 7 a.m. However, it seems to me a simplistic approach to apply some sort of mathematical formulation, as seems to have been suggested by the Secretary of State in his submission which I have quoted above. The plain fact of the matter is that, if the claimant did not get up at 5, neither would the mother. This early rising is dehors the household generally, and Lord Widgery CJ’s dictum which I have cited above speaks of “that principal period of inactivity through which each household goes in the dark hours...” The crucial part of his test is that the beginning of the night is to be measured from when the household closes down for the night, and it must follow that night ends when that process is reversed. In SLSS 2002 Vol.1 at p.148 the learned Editors, having set out Lord Widgery’s test commented as follows:

“While this definition seems to address itself to the habits of the particular household there is probably room for a more objective element to be applied so that, where, for example, the only other member of the household sits up late to perform the first act of attention before they retire, this should count as attention at night.”

I regard that as a sensible comment, but the corollary must also be that, when someone has to rise early to perform the first part of continual supervision before the household as a whole gets up that part is “night” for the purposes of section 72(1)(c). I, therefore, hold that, in the circumstances of this case, “night includes the period 5 a.m. to 7 a.m. and, accordingly, the claimant is entitled under s.72(1)(c)(ii), that period being prolonged. The mother has to be awake for that period in order to supervise the claimant, which otherwise she would not be. I would however generally exclude any period which can be considered comparatively insignificant, but I do not think that the period 5–7 a.m. is. Moreover, in the same way as Lord Widgery said that a child’s night might reasonably be said to begin when he was settled down for the night, so it might be reasonably said – as the Secretary of State in essence submits – that in this case the claimant’s day begins at 5 a.m. when he rises. But in the same way as Lord Widgery rejected that construction so far as the time when night began, so do I so far as when night ends in this household, and the claimant’s day begins. The test is when the household usually rises.

9. My decision is therefore as set out in paragraph 1 above.

**(Signed) J M Henty
Commissioner**

(Date) 6 October 2003