

* 72/98

WRB 147

MJG/TC/CW

- Care of birth mother
↳ look after baby
↳ mother does
- Help give birth
- Court - CDLA/16996/96
Approval; CSPLA 318/97 Disposal.

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/16129/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF A DISABILITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER GOODMAN

Claimant :

Tribunal :

Tribunal Case No :

1. I allow the claimant's appeal against the decision of the disability appeal tribunal dated 10 July 1996 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted disability appeal tribunal: Social Security Administration Act 1992, section 34.

2. This is an appeal to the Commissioner by the claimant, a woman born on 6 May 1963. The appeal is against the unanimous decision of a disability appeal tribunal, dated 10 July 1996, which dismissed the claimant's appeal from a decision of an adjudication officer refusing to review a decision of an earlier disability appeal tribunal (dated 6 February 1995) which had granted to the claimant the lower rate mobility component and lowest rate care component of Disability Living Allowance from 6 April 1992, for life. The application for review was on the ground that there had been a relevant change of circumstances in that the claimant had on 6 May 1995 given birth to a daughter. The tribunal of 10 July 1996 did not expressly deal with the review aspect of the case but it is now common ground between the parties that the birth of the daughter did constitute a relevant change of circumstances within section 30(2)(b) of the Social Security Administration Act 1992.

3. At the claimant's request the appeal was the subject of an oral hearing before me on 6 October 1998 at which the claimant was not present but was represented by Mr S Cox of Counsel. The adjudication officer was represented by Mr S Sriskandrajah of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Cox and Mr Sriskandrajah for their assistance to me at the hearing.

4. The question in this appeal is whether, as in this case, a blind mother who receives attention from another person or persons to assist the mother to care for her baby can successfully claim that that attention brings the claimant within those provisions of section 72(1) of the Social Security Contributions and Benefits Act 1992 that refer to a claimant who, by reason of severe disablement (physical or mental), requires from another person, "attention.. in connection with his [or her] bodily functions". In the present case the claimant contends that (i) she requires "such attention frequently throughout the day (section 72(1)(b)(i)) and (ii) at night she requires such attention which is "prolonged or repeated" (section 72(1)(c)(i)), with the result (as she asserts) that she is entitled to the highest rate care component. She already receives the lowest rate care component because she "..cannot prepare a cooked main meal.." (section 72(1)(c)(i)).

5. The case put to the disability appeal tribunal of 10 July 1996 was that the need of a mother to bond with her young baby and to look after the baby personally was a psychological need of the mother, which of itself constituted a "bodily function" of hers. The tribunal rightly, in my view, rejected that contention and Mr Cox does not now put his case in that way. The tribunal said in their reasons for decision,

"The tribunal have every sympathy with the difficulties faced by [the claimant] and her partner in rearing their child and they understand the argument put forward by [the claimant's] representative [a welfare rights officer] as to the psychological effect on her of perhaps not being fully able to do for her child what normally-sighted parents can do for their children. The criteria in the legislation however refer to the bodily functions of the claimant and in the view of the tribunal bodily functions does [sic] not encompass psychological effects. The tribunal accept [the claimant] cannot do for her child all the things she would wish to but hold that none of these activities in fact falls within the legislation which refers to assistance with the claimant's own bodily functions and not the bodily functions of a third person."

6. So far as it goes that reasoning is correct and it is not, as I understand it, disputed by Mr Cox or by Mr Sriskandrajah. However, they are both agreed that nevertheless the tribunal's decision was erroneous in law in that it did not go on to consider whether the assistance received by the claimant enabling the claimant herself personally to look after her baby daughter was attention to the claimant in the exercise of the bodily function of seeing. The tribunal did not refer to the decision of the House of Lords on this point in Mallinson v. Secretary of State for Social Security [1994] 1 W.L.R. 630, where it was held that the guidance that a blind claimant required in walking in unfamiliar surroundings could constitute attention in connection with the bodily function of seeing.

7. However, the parties are not agreed as to the directions that should be given to a new disability appeal tribunal on the question of whether or not the attention given to the mother to enable her personally to look after her baby could in law constitute "attention in connection with [her] bodily functions". The adjudication officer's case (both in a written submission of 25 March 1998 and in Mr Sriskandrajah's oral submissions at the hearing) is summarised in paragraph 12 of the written submission of 25 March 1998 as follows,

"I submit that the DAT correctly excluded from the claimant's attention needs the activities connected with

the care of her child. Attention in the context of [section 72(1) to the Social Security Contributions and Benefits Act 1992] is attention in connection with the claimant's own bodily functions, and not those of her child."

The adjudication officer cites in support a decision of Mr Commissioner May, on file CSDLA/314/97 (see paragraphs 13-15 below) where the learned Commissioner held that the assistance given to a blind mother in getting her children ready for school and in bathing, washing and dressing her children did not constitute "attention.. in connection with [her] bodily functions".

8. Mr Cox, on behalf of the claimant draws attention to a decision, to the contrary effect, of Mr Commissioner Sanders (on file CDLA/16996/96 - see below) which was referred to but dissented from by Mr Commissioner May in his above-cited decision. Mr Cox submits that the assistance given to a blind mother personally to care for and look after the personal requirements of her baby is to be regarded as attention to the mother in connection with her bodily function of seeing (see the Mallinson decision cited above) and that such attention is "in connection with" that bodily function being sufficiently intimate and reasonably required (tests which occur in the case law). He submits that the attention is not, as Mr Commissioner May held, too remote. As I am faced with two conflicting Commissioners' decisions, the rules as to precedent of Commissioners' decisions laid down by a Tribunal of Commissioners in R(I)12/75 (paragraphs 16-22) do not really assist, though I note that in paragraph 20 of that decision the Tribunal said, "...there is no obligation.. to prefer the earlier to the later or vice versa". To a certain extent, therefore, I treat this as a case of first impression. For the reasons given below, I conclude that the adjudication officer's submission (see paragraph 7 above) should be rejected and that that of Mr Cox should be accepted.

9. I note that, in the subsequent case of Cockburn v. Chief Adjudication Officer and Another; Secretary of State for Social Security v. Fairey (otherwise Halliday) [1997] 1 W.L.R. 799, the House of Lords held that in considering assistance given to a profoundly deaf person (the Fairey/Halliday case) it was right to include in the aggregate of attention required the provision of an interpreter to enable the claimant to carry out a reasonable level of social activity. At page 814 of the Report, Lord Slynn said,

"On the question of principle I reject the contention that the relevant attention must be essential or necessary for life and that attention must not be taken into account if it is merely desirable. The test, in my view, is whether the attention is reasonably required to enable the severely disabled person as far as reasonably

possible to live a normal life. He is not to be confined to doing only the things which totally deaf (or blind) people can do and provided with only such attention as keeps him alive in such a community." (My underlining).

10. At page 815 of the Report Lord Slynn after referring to a decision of a Northern Ireland Commissioner in decision 2/84(AA), said,

"In my opinion the yardstick of a 'normal life' is important; it is a better approach than adopting the test as to whether something is 'essential' or 'desirable'. Social life in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life. It is not in any way unreasonable that the severely disabled person should wish to be involved in them despite his disabilities. What is reasonable will depend on the age, sex, interests of the applicant and other circumstances. To take part in such activities sight and hearing are normally necessary and if they are impaired attention is required in connection with the bodily functions of seeing and hearing to enable a person to overcome his disabilities."

11. Applying those statements of the law, I conclude that if a blind person can successfully assert that assistance in seeing to enable him to undertake a "normal life" constitutes allowable "attention in connection with bodily functions", then certainly assistance given to a mother to enable her personally to look after her baby must be "in connection with" the bodily function of seeing and I accept Mr Cox's submission to that effect. Mr Cox cited to me a number of other passages from the Mallinson and Fairey decisions but I do not think it necessary to cite them in full. The essence of the matter is as stated above.

12. I ought, however, briefly to refer to the reasoning given by Mr. Commissioners Sanders and May in their decisions on file CDLA/16996/96 and CSDLA/314/97 respectively. Mr Sanders gave the earlier of the two decisions and at paragraph 6 said,

"In my view, attention in connection with the bodily function of seeing to enable a sight impaired person to deal with (to use a neutral expression) her very young children is properly capable of counting as qualifying attention. It has of course to be reasonably required..."

13. I consider that that is a correct statement of the law and I follow it. However, in his decision (on file CSDLA/314/97) Mr May declined to follow Mr Sanders' decision (to which he referred) and said (paragraphs 14 - 16),

"I am of the view that the whole thread of the authorities which are referred to above [i.e. the Mallinson, Cockburn and Fairey cases; R v. National Insurance Commissioner [1981] W.L.R. 1017 (Packer's case) and Woodling v. Secretary of State for Social Services [1984]] relate to attention in the statutory context being confined to the performance of such bodily functions as those which a fit man normally performs for himself. They all appear to relate to attention which provides a substitute for what the fit man does for himself. This case raises the proposition that it can also encompass what the fit man can do not only for and by himself but also in respect of the care of others who are disabled by reason of age [i.e. a baby] from carrying out the tasks referred to... I do not consider that the provisions of section 72 [of the Social Security Contributions and Benefits Act 1992] can be stretched that far. Such assistance is too remote."

14. The learned Commissioner then referred to the following statement of Lord Hope in the Cockburn case (at page 823 of the Report). Lord Hope said,

"The close connection which requires to be shown between the act and the bodily function will not in all cases depend on physical contact but.. a high degree of physical intimacy is required."

15. Commenting on that, Commissioner May said, (paragraph 15),

"That is of course what would be missing from any assistance that the claimant received from another to enable her to carry out the necessary tasks of caring for her children.. the intimacy has to exist between the claimant and the person giving the attention. In the situation posed in this case such intimacy, as there was, particularly in respect of bathing, washing and dressing, would be between the claimant and her children or the carer and the claimant's children depending on how the work is organised. ..such assistance as is asserted the claimant requires in respect of her children does not amount to the claimant's social functioning as envisaged in Fairey. I am satisfied that the activities referred to [in the findings of fact - i.e. getting the children ready for school and help with bathing, washing and dressing the children] are properly to be regarded as domestic duties.. they are related to essential aspects of daily living which a child cannot be left to do or is not wholly capable of doing for himself. I am satisfied that such tasks are of the same order as cooking, shopping and keeping the house clean. When looked upon in that way it is clear that the activities are too

remote from the bodily function of the claimant's sight. That conclusion is inescapable having regard to the quotation from the speech of Lord Hope.. it follows that I disagree with the conclusion reached by Mr Commissioner Sanders. His analysis does not coincide with mine."

16. I accept Mr Cox's submission that a mother's herself looking after her child cannot be regarded in the same category as that of domestic tasks. The reference by Mr. May to "cooking, shopping and keeping the house clean" is doubtless a reference to Lord Denning's categorisation of bodily functions in the Packer case (cited above). However, since then in Mallinson and in Fairey the House of Lords have emphasised that what must be looked at is not the product of the bodily functions but the actual bodily function itself. What I am concerned with here is the bodily function of seeing, not what seeing is employed to do. Nor, in the light of what was said in the Fairey case, can it be said, with respect, that assistance by the mother herself to the child (as distinct of course from any assistance rendered by another to the child) is "too remote" to constitute attention in connection with the claimant's own bodily functions. I ought to say that it may well be that the arguments that have been put to me at the hearing were not fully put to Mr Commissioner May. It would appear, moreover, that Mr Commissioner May was concerned not with a baby but with school age children. That may well constitute a distinction of fact.

17. In summary I conclude that such assistance as the present claimant receives from other persons to enable her to look after her young baby's personal requirements is assistance with the claimant's bodily function of seeing. The kind of assistance that might come within this category is set out in a letter dated 11 December 1995 from the claimant's welfare rights officer as follows,

"The sorts of areas that [the claimant] needs assistance with.. (involving physical, hands-on help) include.. -

1. Measuring feeds - [the claimant] has bottle fed [her daughter] from day one...
2. Dressing - important to ensure clothes secured, and cleanly. [The claimant] cannot see when clothes are dirty.
3. Changing nappies...
4. Bathing...
5. Supervision - as [the daughter] learns to crawl, and eventually walk, she will need someone to observe her at all times, when out of her pram, chair, play-pen. ..."

I leave to the new tribunal to decide as a question of fact for which of those activities the claimant receives assistance to enable her personally to look after her baby. The new tribunal will also need to decide for how long the claimant can reasonably be said to have a need for that attention and for how long, therefore, the period of any award should be. Mr Cox submitted to me at the hearing that any award of a care component should be for a number of years. That may possibly be so, but the needs of the child or the mother to look after the child will vary in quantity and quantum over the years and again these are matters to be left to the new tribunal. Mr Commissioner Sanders, in his above cited decision, referred only to "very young children."

18. The new tribunal will also need to deal with the above points, as summarised by Mr Cox in his written submission of 29 May 1998 (paragraph 23), as follows,

"..the new [disability appeal tribunal] be directed to:

- (a) establish the extent of the assistance with seeing which the claimant requires with all aspects of her life, including caring for her daughter and performing domestic duties;
- (b) include that assistance which is of a close, personal nature, recalling that assistance does not require touching (Mallinson per Lord Slynn..) or even constant presence (Cockburn Lords Goff and Clyde);
- (c) include assistance which is reasonably required to enable the claimant to live a normal life, having regard to (amongst other things) the type of activities which the claimant wishes to perform herself and the extent to which sighted people would perform those activities themselves;
- (d) assess whether the assistance which meets those conditions is required frequently throughout the day and/or is prolonged or repeated at night."

19. Subject to what is said below, I approve of those suggested directions to the new tribunal. It has to be borne in mind, however, that the emphasis throughout is on assistance reasonably required by the claimant herself in connection with her bodily function of seeing and any reference to "performing domestic duties" must be read in that context. The guidance given by Lord Denning in the Packer case when he said that performance of domestic duties was not itself the exercise of bodily functions is still the law.

20. I should mention that at the hearing before me on 6 October 1998 Mr Sriskandrajah, during the course of the hearing, asked for the opportunity to make at a future date a written submission on a number of other (unreported) Commissioners' decisions which had been supplied by Mr Cox with his Skeleton Argument. Those decisions were a decision of Mr Commissioner Rowland on file CDLA/264/94; a decision of Mr Commissioner Howell on file CDLA/8167/95 and a decision of Mr Commissioner Sanders on file CDLA/15444/96. None of those decisions related to the mother/baby situation though they did contain some general statements which tended to support Mr Cox's arguments. However, after I gave Mr Sriskandrajah a short adjournment of the hearing in order to enable him to familiarise himself with those decisions he stated that he withdrew his request for the opportunity to make a future written submission and that he was now happy for me to give my decision forthwith, which I have therefore done.

(Signed) M J Goodman
Commissioner

(Date) 13 October 1998