

CDLA 1621196

NEWCASTLE WELFARE RIGHTS SERVICE

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c/o Social Services, Sheriff Leas, Springfield Rd, Newcastle, NE5 3DS

F A X

DATE: 13-2-98 TIME: 3.30 PM

TO: MARTIN BARNES

FROM: CLIVE DAVIS PHONE: 0191 - 2864296
TIP Unit, NWRS FAX: 0191 - 2864282

Number of pages including this one 5

Urgent For your review Reply ASAP Please comment

Message THIS DECISION COULD MEAN THE DIFFERENCE BETWEEN A REFUSAL AND MID-CARE !

PLEASE TRY TO SQUEEZE IT IN THE NEXT BULLETIN.

13 February 1998

Dear

DEAF PEOPLE AND DL/AA important commissioners decision

I am enclosing a copy of unreported commissioners decision **CDLA/16211/1996**, which, in my view is as important as the Mallinson and Halliday judgements (!) - in that:

1. **"..any extra effort required of another person to initiate two way communication with a deaf person could constitute attention."** This could include for example tapping on the shoulder, waving, switching the light on and off. It reaffirms decisions CSA/83/90 and CSA/113/91 which pre date Mallinson and has always been one of the main ways to satisfy the frequency test - unless the deaf person lives alone on a desert island !
2. **"...where there are additional difficulties with two way communication ... then, whatever extra effort may be involved in assisting the claimant with communication may be taken into account"** (as attention).

Both these principles have been around for some time but have not been fully taken into account. Hopefully this decision will now clarify the situation once and for all.

Please see para. 1 of part B of the "pack" I produced and have recently updated. (if you want a "pack" please send an A4 sized SAE with 60p stamp to the above address. Mark your envelope "MADL8")

Please report or distribute this decision as widely and as soon as possible.

Yours faithfully

Clive Davis
Welfare Rights Officer

MADL8A

RAS/SH/13

Commissioner's File: CDLA/16211/1996

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

Name: [REDACTED] (Mrs)

Disability Appeal Tribunal: Leicester

Case No: [REDACTED]

1. This is an appeal by the adjudication officer against the decision of the Leicester disability appeal tribunal given on 21 June 1996. The tribunal decided that the claimant was entitled to lower rate mobility component and middle rate care component of disability living allowance from 26 June 1995 to 25 June 1992. The mobility component award is apparently not in issue.

2. The claimant, now in her late twenties, is prelingually deaf and dumb. She lives with her husband and their three children who, at the time of the tribunal's decision, were aged 6, 3 and 2. The husband speaks Bengali. The claimant had, when the tribunal heard the case, begun to learn British Sign Language. She can apparently lip read Bengali. The tribunal found as a fact that -

"On virtually every occasion before attempting limited communication the claimant's attention has to be attracted first before she is able to lip read what her children or others are saying."

In their reasons for their decision in relation to the care component the tribunal said -

"The factual situation here in the tribunal's judgment was distinguishable from the factual situation referred to by the Commissioner in CDLA/240/1994. In that case it had been accepted that "attention" indicated an element of service usually lacking in a two way conversation when

the parties are using sign language rather than speech but the Commissioner added that an interpreter is providing a service. Taking as a pure example the proceedings before the tribunal, the claimant's evidence was given only through the interpreter Mrs Roberts. Any attempts to communicate by way of lip reading was of course impossible because the claimant could only lip read Bengali. In the tribunal's judgment it therefore followed that on almost every occasion when the claimant needed to communicate or anyone needed to communicate with her, first of all her attention had to be attracted then even when there was lip reading the communication was so slow and difficult that there was an element of service as the Commissioner indicated in CDLA/240/1994 which would constitute attention in fact."

Those are the passages of the tribunal's decision to which the adjudication officer takes particular exception.

3. The adjudication officer first submitted that -

"11. It is my further submission that any effort the claimant herself has to make to attract the attention of someone with whom she wishes to communicate cannot be attention from another person in connection with the claimant's bodily functions and that the tribunal have erred in law in accepting that it is.

12. I submit that it is not sufficient explanation of the decision to say that on virtually every occasion that the claimant wishes to communicate she requires attention, where the evidence of the papers do not make clear what those occasions are or how often help is required. I accept that the claimant reasonably requires the assistance of a third person to talk to her children's teachers, or the doctor, or to learn a means of communication, but these essential communication needs are unlikely to amount to attention required frequently throughout the day."

In a later submission he said -

"4. I submit that Fairey is not authority for the proposition that attracting a deaf person's attention by touch, gesture, by switching lights on and off, or by other means, is capable of being attention in connection with the disabled person's bodily functions."

I do not agree with that last submission.

4. In CA/780/91 (Fairey) I said -

"But where the person with whom the claimant is in communication is reasonably skilled in the use of sign

language, I would not think it right to conclude that any extra effort involved in that method of communication would necessarily go towards satisfying the attention condition."

That part of the decision was, as the adjudication officer says, the subject of a cross appeal by the claimant to the Court of Appeal but that cross appeal was unanimously rejected and was expressly abandoned in the House of Lords. In my view the position is this. Communication is a bodily function for the purposes of the provisions in question. Assistance with that bodily function may count as qualifying attention. Where the claimant and another person are for example reasonably skilled in the use of sign language the fact that such method of communication may be somewhat more laborious than ordinary speech is not ordinarily a factor to be taken into account. But where there are additional difficulties with two-way communication because for example one of the parties is not adequately skilled in sign language then, whatever extra effort may be involved in assisting the claimant with communication may be taken into account. Furthermore, as was made clear in the Court of Appeal in Fairey, (and not contradicted in the House of Lords), any extra effort required of another person to initiate two-way communication with a deaf could constitute qualifying attention: see Glidewell LJ at page 160 of the case papers.

5. It follows that in my view the adjudication officer is wrong to submit that, on the facts of this case, the extra effort involved as between the claimant and another person in two-way communication between them should be ruled out. And, that being so, on the facts of this particular case it seems to me to follow that the tribunal did enough to establish entitlement when they said ... "it therefore followed that on almost every occasion when the claimant needed to communicate or anyone needed to communicate with her, first of all her attention had to be attracted then even when there was lip reading the communication was so slow and difficult ...".

6. The outcome is that I dismiss this appeal.

(Signed) R A Sanders
Commissioner

(Date) 16 December 1997