Commissioner's File: CDLA/3360/1995

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Disability Appeal Tribunal: Birkenhead

Case No: D/61/011/94/0170

[ORAL HEARING]

1. The claimant's appeal is allowed. The decision of the Birkenhead disability appeal tribunal dated 4 July 1994 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to a differently constituted disability appeal tribunal for determination in accordance with the directions given in paragraphs 18 to 23 below (Social Security Administration Act 1992, sections 23(7)(b) and 34(4)).

2. The claimant was born on 14 March 1967. She has been profoundly deaf since birth. She has not learned sign language. She was awarded the lower rate of the mobility component of disability living allowance (DLA) and the middle rate of the care component from 6 April 1992 to 25 March 1994. On 8 October 1993 she made a renewal claim for DLA.

3. In connection with that claim she was examined by an examining medical practitioner (EMP) on 13 December 1993. The statement of clinical findings was as follows:

> "I was unable to take a history from the claimant. She has a severe hearing loss which has been present since birth. She has high power hearing aids with minimal clear speech - did manage 'Happy Christmas'.
> Mother told me that she does manage sign language with her sister. Unfortunately the sister was absent.
> Mother reported that she has frequent 'dizzy' spells but I could not determine their nature or frequency.
> She was involved in a road traffic accident a few years ago when she stepped into path of car - attributed hearing loss.
> She demonstrated normal upper limbs.
> Lower limbs full range of movement apart from L
> She has nocturnal enur[illegible]sis which mother pre[illegible] getting her up 2 - 3 ti[illegible]. This i[illegible]

her and escorting her to and from toilet because of fear of falling downstairs.

She attended special school for the deaf. She has never worked. She can write a little but never reads.

Her mother told me that she can never be left on her own at home but I could not identify any reason for this apart from the hearing loss. This probably makes her feel insecure.

She seems bad-tempered ? through frustration. No history of violence."

In the section on mobility the EMP recorded that the claimant's hearing loss seemed to have put her at risk from traffic and that an episode of dizziness seemed to occur at least once on most days, but also recorded that she needed no guidance or supervision whilst walking out of doors on an unfamiliar route. In the section on care, the EMP mentioned mainly (apart from things with which the claimant needed no help) the night incontinence, her confusion when woken by her mother and the fact that the bathroom door was opposite the top of the stairs. He recorded the opinion that the claimant was fully mentally capable.

4. The papers were referred to a doctor of the Benefits Agency Medical Service (BAMS) for advice. The advice, dated 10 January 1994, was as follows:

"The EMP report shows that this young woman is fully mentally competent and capable of managing her own personal hygiene and tasks in the kitchen. Although she has some difficulty with speech and sign communication she is able to write and should be able to make herself understood in writing, both indoors and out. When walking out of doors she is well aware of traffic danger and knows to take due care to avoid traffic hazard.

I note the stated need for an escort to the toilet 2 - 3 times per night to avoid bed wetting. Restriction of fluid intake in the evening would reduce the need to empty the bladder during the night hours. If she were to go to the toilet immediately before settling to sleep she probably would not have to go again before morning.

Sleepwalking is also reported. This does not usually pose a risk. A protective gate at the top of the stairs would eliminate the perceived danger of falls."

5. On that basis the adjudication officer on 19 January 1994 decided that the claimant was not entitled to either component of DLA from 26 March 1994. An application for review was made on her behalf by the Welfare Benefits Advice Unit of Wirral Metropolitan Borough Council (Wirral WBAU). The letter of application succinctly sets out the case for the claimant at that stage:

"Care component
[The claimant] requires continual supervision throughout the day in order to avoid substantial danger to herself. She is profoundly deaf, she gets easily distracted and has frequent temper tantrums. It is unsafe for her to be left alone as she has left gas taps on and water running. She is unable to prepare a main meal without supervision.

[The claimant] also requires prolonged and repeated attention during the night. She suffers from night time bladder incontinence and requires to be woken two to three times every night to be taken to the toilet. Some nights there are unavoidable bed wetting incidents which require a change of bed clothes.

[The claimant] also requires another person to be awake at frequent intervals to watch over her to avoid substantial danger. She sleep walks every night and is in danger of falling down the stairs.

Mobility
[The claimant] is unable to follow an unfamiliar route without supervision. Due to her deafness she has little speech and also has poor literacy skills. She has very poor road sense and is at severe risk crossing roads."

6. The adjudication officer's decision on review was not to revise the adverse decision. Wirral WBAU appealed on the claimant's behalf. The claimant attended the hearing on 4 July 1994, where she was represented by Mr Atkinson of Wirral WBAU. The claimant's sister also attended and gave evidence about her propensity to fall without warning, perhaps three times a week and normally out of doors, and about her lack of fear of traffic. In addition to the points raised in the application for review, Mr Atkinson relied on the decision of the House of Lords in Mallinson v Secretary of State for Social Services in relation to the care component and submitted that help with communication amounted to attention with her bodily functions.

7. The appeal tribunal disallowed the appeal. Its findings of fact were as follows:

"[The claimant] demonstrates some disturbed behaviour as a result of her disability, but there is no evidence at all that she is mentally impaired.

Apart from her deafness, she has no physical disability."

Its reasons for decision were as follows:

"Mobility - [The claimant] has demonstrated a consistent unwillingness to learn rather than a specific disability (other of course than her deafness, which is fully accepted). For example, her sister has said that she did not improve her behaviour after her traffic accident. There appeared no reason

to prevent her taking greater care when she goes out, and she is now quite old enough to do so. Her claim for the lower rate mobility component was accordingly disallowed, under the provisions of section 73 of the Social Security Contributions and Benefits Act 1992. This conclusion was broadly reinforced by the findings of the doctor when he examined her on 13.12.93.

Care - Much the same considerations held good for this claim also. She should for example be able to cook adequately because her disability does not prevent her from doing so. She is quite old enough to appreciate any risks involved and mentally competent to do so. It cannot be accepted that it is necessary for another person to look after her at night. Again, she is quite able to look after herself, as attested again by her examining doctor. No entitlement under section 72 of the Act."

8. The claimant was granted leave to appeal from that decision by the appeal tribunal chairman. The application on her behalf for an oral hearing of the appeal was granted. At the oral hearing the claimant was represented by Mr Joe Collins of Wirral WBAU and the adjudication officer was represented by Mr Hugh James of the Office of the Solicitor to the Department of Social Security. I am grateful to both representatives for their assistance.

9. I deal first with one preliminary matter. The adjudication officer, in the written submission dated 30 July 1995, requested that the Commissioner's decision in the present case should be deferred until either leave to appeal to the House of Lords from the Court of Appeal's decision in Secretary of State for Social Security v Fairey (15 June 1995) was refused or the House of Lords had given its decision. Fairey concerned the question of what amounts to attention in connection with a bodily function for someone who is profoundly deaf, and in particular whether attention required to enable a claimant to carry out a reasonable level of social activity is included. Mr James renewed that request at the oral hearing and told me that leave to appeal to the House of Lords in Fairey had been granted in November 1995, but that the appeal was not expected to be heard before September 1996. I have concluded that I should not defer making my decision. It is not disputed that the appeal tribunal's decision has to be set aside because of errors on issues to which Fairey is irrelevant and that a rehearing by a new appeal tribunal is necessary. The points at issue in the present case are rather different from those which seem likely to be raised in Fairey. There is no reason to delay the process of referral to a new appeal tribunal.

10. I can deal fairly briefly with the main points on which I find that the appeal tribunal fell into error. Some further points of detail are dealt with in the directions to the new appeal tribunal. Since the adjudication officer's submission dated 30 July 1995 quotes extensively from the relevant legislation and decisions, I need not repeat those quotations

here.

11. First, the issue of whether, by reason of her deafness and the need for assistance with communication, the claimant reasonably required frequent attention in connection with her bodily functions was specifically put to the appeal tribunal by the claimant's representative. The appeal tribunal failed to deal with the issue at all. That is an error of law (R(I) 18/61). The adjudication officer was wrong in paragraphs 24 and 39 of the submission of 30 July 1995 to say that there was no evidence of any day-time attention needs and that Mallinson was irrelevant to the present case. Mr James agreed that the appeal tribunal should have made findings of fact on what needs for attention in connection with the bodily functions of hearing and speaking were reasonably required by the claimant.

12. Second, the appeal tribunal's findings on the extent of the claimant's disability were confused and left the claimant in doubt why she failed to satisfy the appeal tribunal. This point concerns the statement in the reasons for decision that the claimant had demonstrated a consistent unwillingness to learn rather than a specific disability. Mr Collins argued that that finding was perverse, in that there was no evidence to support it. Mr James disagreed, saying that there was evidence, in the EMP's statement that the claimant was fully mentally competent, on which the appeal tribunal was entitled to rely. I do not need to resolve that particular difference, because I am satisfied that there is an unexplained inconsistency in the appeal tribunal's approach. In its reasons for decision it suggests that it is not the claimant's disability which gives rise to any needs or limitations on her relevant abilities. That suggests that the appeal tribunal considered the disability to be simply deafness. In its findings of fact, the appeal tribunal found that the claimant demonstrated some disturbed behaviour as the result of her disability, although she was not mentally impaired. However, if disturbed behaviour results from a disablement such as deafness, there seems no reason on the face of it why needs stemming from that behaviour should not also be regarded as resulting from disablement. At the least, this was a matter on which the appeal tribunal was required to spell out its views in greater detail and with more clarity. I also have considerable doubt whether the specific point about unwillingness to learn as opposed to a disability had been raised in the course of the hearing before the appeal tribunal. If not, it was a breach of the principles of natural justice for the appeal tribunal to rely on the point in its decision without having given the claimant and her representative an opportunity to answer the point or possibly to seek further evidence (applying the principle stated by Lord Denning MR in R v Deputy Industrial Injuries Commissioner, ex parte Howarth, appendix to R(I) 14/68, mentioned in R(I) 2/91).

13. Third, in view of the previous paragraph, the appeal tribunal's conclusion on the need for night-time attention was also flawed. It was not enough simply to say that it was not necessary for another person to look after the claimant at night.

The appeal tribunal appeared to accept that the claimant's mother woke her up twice a night to take her to the toilet. That is prima facie repeated attention in connection with bodily functions, so as to satisfy section 72(1)(c)(i) of the Social Security Contributions and Benefits Act 1992. There was also a question of whether that attention was needed as a consequence of a physical or mental disablement. That question was addressed in the submissions made to the appeal tribunal on the claimant's behalf. The appeal tribunal did not explain why those submissions were rejected.

14. Fourth, for much the same reason, the appeal tribunal's conclusion on the lower rate of care component and cooking is also undermined. If one result of the physical disablement of deafness was an impairment of concentration or a liability to wander off, there seems no reason why that inability should not form part of the physical or mental disablement to be taken into account under section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992. If that inability prevented the claimant from carrying out the whole of the sequence of tasks necessary to preparing and cooking a main meal for herself, the conditions in section 72(1)(a)(ii) would be met. The appeal tribunal did not adequately explain why it rejected that conclusion.

15. Fifth, the appeal tribunal did not make findings of fact relating to the risk of falling and any need for supervision to avoid danger to herself. The propensity to fall had been specifically raised in the submissions made to the appeal tribunal and needed to be dealt with.

16. Sixth, the confusion about the results of the claimant's disability, identified in paragraph 12 above, affects the appeal tribunal's conclusion that the claimant did not qualify for the lower rate of the mobility component on the basis of requiring guidance or supervision to take advantage of the faculty of walking. It was not clear whether her lack of traffic sense was a result of her disablement. Nor did the appeal tribunal deal with the submission about the need for supervision out of doors because of the claimant's propensity to fall.

17. I do not need to say anything more about other points raised by the parties, for instance about whether there should have been findings of fact about the sleep-walking or whether, within the approach in paragraphs 15 and 16 of Commissioner's decision CM/20/1994, there had been a sufficient explanation of why the outcome of the renewal claim was different from that of the earlier claim on which an award had been made. The appeal tribunal's decision dated 4 July 1994 must be set as aside as erroneous in point of law. The appeal is referred to a differently constituted disability appeal tribunal for determination in accordance with the following directions.

Directions to the new appeal tribunal

18. There must be a complete rehearing on the evidence presented and submissions made to the new appeal tribunal. In coming to and

recording its decision the new appeal tribunal must take into account the points made above. The assessment of the evidence will be entirely a matter for the members of the new appeal tribunal. There are two legal points on which I need to give more specific directions.

19. The first is in relation to the care component and attention in connection with bodily functions. The new appeal tribunal must proceed on the basis that hearing and speaking are bodily functions. In Fairey, at page 18 of the transcript, Glidewell LJ (with whom Swinton Thomas LJ, but not Hobhouse LJ, agreed) said:

> "Mr Beloff, for the Secretary of State, accepts that the decision in Mallinson establishes that attention which enables a deaf person to understand what she would understand for herself if she could hear is attention in connection with the bodily function of hearing. I agree that this concession is the logical and correct effect of the decision of the majority in Mallinson."

I consider that, by the same token, attention which enables a deaf person to communicate what she would say for herself if she could hear and speak is attention in connection with the bodily function of speaking. I direct the new appeal tribunal to apply that approach, which was not in issue in the Court of Appeal in Fairey. What was in issue was the question of whether attention to enable the claimant to live a normal social life was to be included as attention which was reasonably required. That question does not appear to arise in the present case, but if it does arise on the rehearing before the new appeal tribunal, the approach of the majority in Fairey must be followed. If, before the new appeal tribunal makes its decision, the House of Lords gives its decision in Fairey, that decision must be followed in so far as it is inconsistent with anything else said in this paragraph.

20. The second legal point concerns the lower rate of the mobility component. The adjudication officer, in paragraphs 19 and 20 of the written submission dated 30 July 1995, relied on Commissioner's decision CDLA/757/1994 for the proposition that supervision claimed to avoid danger from falls or dizzy spells while walking out of doors is not relevant to section 73(1)(d) of the Social Security Contributions and Benefits Act 1992. In paragraph 12 of that decision the Commissioner did indeed say that where a person refuses, for fear of falling, to walk out of doors unless someone is at hand to provide supervision, such supervision is too remote for section 73(1)(d). Such supervision is not a pre-requisite to the person exercising the power of walking; it is an additional advantage making the walking less subject to risk. The person's choice is a matter of preference, not of necessity. The Commissioner wished to avoid a situation where supervision to avoid danger from falling could qualify a person both for the middle rate of the care component of DLA and for the lower rate of mobility component. Therefore he was not prepared to interpret "supervision" in section 73(1)(d) widely, so as to extend to the sorts of situations mentioned

21. I respectfully disagree with that approach, which seems to me to impose an artificial limitation on the ordinary meaning of "supervision" in its context in section 73(1)(d), rather than to avoid an over-wide interpretation of the word. In my view, contrary to what was said in paragraph 11 of CDLA/757/1994, supervision in such cases may rectify the position of someone whose walking is interrupted by a fall. By standing by to provide assistance the supervisor may enable the person concerned to continue walking or to return home safely. Nor should a person's unwillingness to walk out of doors on unfamiliar routes without such supervision be regarded necessarily as purely a matter of preference. Everything will turn on the circumstances of particular cases, but if the frequency of falls and the degree of danger or difficulty arising from a fall for the person concerned is such that it is reasonable for the person not to walk out of doors on unfamiliar routes without supervision by another person I do not see why that should not be taken into account under section 73(1)(d). There may be difficult issues of judgment about what degrees of risk render supervision reasonably required or about when a limitation on the walking which a person will undertake without supervision is such that it can be said that the person "cannot take advantage of" the faculty of walking. But those issues are to be resolved by the good sense of the adjudicating authorities. I take note of the point made by the Commissioner in CDLA/757/1994 that one condition, a propensity to fall, might provide a qualification for both the care component and the mobility component. However, where Parliament has laid down the conditions for the two components without any express provision for qualification for any level of one component to affect qualification for the other component, I do not think that it is for the Commissioner to impose an artificial limitation on the qualification for one component rather than the other.

22. Although I disagree with some statements in CDLA/757/1994 I may be required to follow them, on the principles laid down in R(I) 12/75. It is not entirely clear whether those statements are consistent with what was said in my earlier decision in CDLA/42/1994. I suspect not, but I need not pursue the point. They are certainly inconsistent with what was said by another Commissioner in CDLA/52/1994. Neither decision was referred to in CDLA/757/1994. In paragraph 6 of CDLA/52/1994 the Commissioner says that:

> "a person who cannot reasonably be expected to venture outside without supervision is a person who cannot take advantage of the faculty of walking outdoors without supervision from another person most of the time. As Mr Latter [counsel for the adjudication officer] submitted, it follows that, although section 73(1)(d), unlike section 72(1)(b)(ii) in respect of the care component, contains no specific reference to the need 'to avoid substantial danger to himself or others', such a need is relevant because it goes to the reasonableness of the claimant making use of his faculty of walking without supervision."

Where there is a difference in the opinions expressed in equally authoritative Commissioners' decisions I must choose between them. For the reasons given in the previous paragraph I do not follow the approach set out in CDLA/757/1994 and prefer that set out in CDLA/52/1994.

23. Accordingly, I direct the new appeal tribunal in the present case not to apply the approach set out in paragraphs 11 and 12 of CDLA/757/1994, but to apply the approach set out in paragraphs 21 and 22 above. I remind the new appeal tribunal of the need to make findings of fact about the claimant's alleged propensity to fall and how far any propensity results from a physical or mental disablement and about the claimant's alleged lack of traffic sense and how far that results from a physical or mental disablement.

(Signed) J Mesher
Commissioner

Date: 1 FEB 1996