



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLAJ7090/1999

SOCIAL SECURITY ACTS 1992-1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR DEPUTY COMMISSIONER K L KIRKWOOD

**Claimant :
Tribunal : Wolverhampton
Tribunal Case No : D/04/053/1999/00127**

1. My decision is that the decision of the disability appeal tribunal held at Wolverhampton on 9 June 1999 is erroneous in point of law and is therefore set aside. The claimant's case is referred to a differently constituted tribunal for reconsideration.

2. Background.

(a) It is not in dispute that the claimant has a condition known as Ushers Syndrome. That condition is characterised by a combination of deafness and partial visual loss. The claimant is registered as blind. She wears glasses and two hearing aids.

(b) The procedural history of the appellant's claims for disability living allowance and relating to this case is long and not uncomplicated. It is as follows:

(i) The claimant was awarded a disability living allowance from 22 February 1993 by a disability appeal tribunal on 24 June 1994. It was

awarded as follows -The mobility component for life from 22 February 1993

and the care

component at the lowest rate from 22 February 1993 to 26 May 1993 the middle rate from 27 May 1993 to 28 January 1998 and the lowest rate again for life from 29 January 1998. The increase to middle rate was made because the appellant required continual supervision throughout the day in order to avoid substantial danger to her son until he reached his 5th birthday.

(ii) Subsequently by a letter received on 23 April 1997 the claimant requested a review on the basis of a deterioration in her condition. A review claim pack was issued to her. In that claim pack she specified care and mobility needs. The awarding decision was reviewed but not revised. An in time review was sought but the decision was confirmed on 1 October 1997. Against that decision the claimant appealed. Her appeal was based on her claim that she satisfied the criteria for an award of the higher rate of mobility component. That is virtually the only issue which has been pursued since. This was based upon her loss of vision and deafness. A disability appeal tribunal heard her appeal on 15 July 1998. That tribunal dismissed her appeal and appeared to have done so on the basis that she could not be considered virtually unable to walk rather than because of her blindness and deafness. The claimant appealed that decision with leave of the chairman to a Commissioner. That was on the basis that the wrong criteria had been considered and that care was also in issue. This was the only reference to care component being relevant since the present appeal. The appeal was supported and on 3 January 1999 a Commissioner set aside the decision on a summary basis referring the matter for redetermination to another tribunal.

(iii) A new tribunal confirmed the hearing because of lack of medical evidence in respect of the degree of deafness suffered by the claimant. They directed that an audio metric report be obtained from a specialist Mr Paul Holiday. A report and copy audiogram was obtained and lodged. It was dated 8 May 1999 (pages 84 to 86 of the appeal papers). A different tribunal heard the adjourned

rehearing. It was confirmed that only higher rate mobility on the foregoing basis was in issue. The tribunal in effect dismissed the appellant's appeal leaving her award of disability living allowance unaltered.

(iv) The claimant applied for this decision to be set aside. That was refused on 29 October 1999 and she reapplied for leave to appeal to the Commissioner. Leave was granted and the appeal proceeded and now thereby comes before me.

3. The applicable law.

(a) The legislation

Section 73 of the Social Security Contributions and Benefits Act 1992 provides amongst other provisions that where a person is both blind and deaf for as long as that situation obtains, and providing that other prescribed conditions are satisfied that person is entitled to a higher rate of mobility component. The sub-section which deals with this matter in particular is sub-section (ii). The conditions are prescribed in regulation 12(2) of the Social Security (Disability Living Allowance) Regulations 1991 (as amended). That regulation states that for the purposes of section 73(2)(a) of the Act (Mobility Component for the Blind and Deaf) a person is taken to satisfy (a) the condition that he is blind only with the degree of disablement resulting from the loss of vision amounts to 100% and (b) the condition that he is deaf only where the degree of disablement resulting from the loss of hearing **when using any artificial aid which he habitually uses or which is suitable in his case** (my emphasis) amounts to not less than 80% on a scale where 100% represents absolute deafness. The segment which I have emphasised was inserted by S.I. 1994 No. 1779. For convenience and brevity the foregoing are referred to as the relevant statutory provisions and the amending statutory instrument respectively.

(b) The caselaw

The amending statutory instrument was passed following Commissioner's decision CDLA/192/1994 (reported as R(DLA)3/95). There is no indication given in the relevant statutory provisions as to how the degree of disablement is to be assessed. However, Schedule 2 of the Social Security (General Benefit) Regulations 1982 provides that 100% disablement is appropriate for loss of sight to such an extent as to render the claimant unable to perform any work for which eyesight is essential. Schedule 3 to the Social Security (Prescribed Diseases) Regulations 1985 sets out a test for establishing an assessment of 80% disablement for occupational deafness. In R(DLA)3/95 Commissioners said these tests should be used for the purposes of regulation 12(2) of the relevant statutory provisions. Before R(DLA)3/95 was decided an assessment of 80% for deafness was regarded as satisfied when the claimant was unable to hear a shout beyond 1 metre using both ears (with aids). This was tested by shouting an instruction or question just beyond 1 metre behind the claimant. Presumably that was to exclude the intrusion of lip reading into the exercise. I note that from page 446 (3.57) of Volume 1 - "Social Security Legislation 2000 - Non-Means Tested Benefits." I agree with the approach of the Commissioner in R(DLA)3/95. However the legislation in relation to deafness has now been changed making the criteria more exacting, by reference to the higher rate mobility

component of disability living allowance. The amending statutory instrument also inserted in regulation 12(2) of the relevant statutory provisions the requirement that the degree of disablement resulting from the loss of hearing was to be calculated when using any artificial aid which he habitually used or which is suitable in his case.

4. Grounds of Appeal.

There have been a number of submissions and counter-submissions. The sole issue emerging therefrom is whether the claimant satisfied the tests contained in the relevant statutory provisions as detailed above. The Secretary of State does not support the appeal. The claimant's grounds of appeal appear to be fourfold, namely:

- A. Failure to find adequate facts and give sufficient reasons for the decision and in particular failure to explain why it was not possible to use Mr Holiday's evidence.
- B. There was a breach of natural justice in failing to properly consider and weigh the evidence of Mr Holiday (this is probably part of ground A).
- C. The wrong legal tests were used in assessing the claimant's blindness and deafness and:
- D. That no person acting judicially or properly instructed as to the relative law could have reached the decision.

5. The Secretary of State's representative opposed the appeal, arguing that the amending statutory instrument meant that the audiometric test would not give an accurate assessment of the level of hearing which the claimant has with hearing aids, as such a test is carried out without aids. The tribunal had applied the correct test for assessment of deafness, namely the former shouting test mentioned above, and also the correct tests with regard to blindness though that was departed from later. He then submitted in his submission (at pages 113 to 114 of the appeal papers) that the criteria for registration as blind is the same as that applicable under the said General Benefit Regulations for an assessment of 100% disablement.

6. Reasons for Decision.

I now deal with the grounds of appeal in turn.

Ground A -insufficient facts and reasons.

I accept this ground. The tribunal have failed to state sufficient facts or explain their decision sufficiently to satisfy their statutory obligations. The tribunal record in paragraph 4 that though there was a detailed report from Mr Holiday it was not possible to use this to make a decision on the percentage of loss. The tribunal does not indicate why that was the case, whether that was because they were unable to interpret the audiogram or because of the effect of the amending statutory instrument. The previous tribunal had adjourned to obtain this evidence. In these circumstances the appellant was entitled to an explanation as to why it could not be used. At paragraph 5 of the tribunal record the claimant told the tribunal that with hearing aids she was able to hear close up, but that she could not hear most of what was

going on in the tribunal. They do not say they rejected that evidence but the chairman records in the record of proceedings "is hearing most of what is going on today" (page 88A of the appeal papers). It is not clear to me that the tribunal distinguished between the appellant understanding their communications as opposed to hearing what was said to her. In the record of proceedings of the tribunal of 15 July 1998 (pages 68C of the papers) it is recorded in line 4 "deafness 100% with lip reading". This item of evidence was before the tribunal but they made no comment on it. It is not clear if the tribunal considered this matter. The rule of thumb test of hearing a shout from over a metre away employed by the tribunal is carried out from behind a claimant in order to discount lip reading as a factor. The tribunal have not focused on that matter. In relation to blindness, at paragraph 6 the tribunal do not appear to have considered the evidence of the consultant ophthalmologist Mr Price (page 67 of the appeal papers) or if they did, state why they rejected that evidence or preferred other evidence in concluding that the statutory criterion was not satisfied. The Secretary of State concedes that that was an omission at page 113 of the appeal papers. I therefore have to hold that the tribunal fell considerably short of the statutory obligation with regard to facts and reasons they erred in law and for this reason alone the decision must be set aside.

7. Failure to apply the correct test for assessment of deafness and blindness

I also accept this ground of appeal. The tribunal do not seem to have applied the criteria laid down in R(DLA)3/95. With regard to the claimant's loss of vision they appear to me from their statement to have applied a stricter test. With regard to deafness the legislation has of course been altered, therefore the standard of assessment laid down in R(DLA)3/95 cannot now apply. However, it seems to me undesirable that, whilst the test for loss of sight follows that under the General Benefit Regulations, the test for deafness should be wholly divorced from the corresponding provisions under the Prescribed Diseases Regulations re occupational deafness. The amendment under regulation 12 (2B) of the relevant statutory provisions to the effect of inclusion of hearing aids requires that the standard of hearing loss should be attained with the use of hearing aids.

8. I do not need to comment further on the grounds of appeal.

9. Directions.

In setting the tribunal's decision aside as being erroneous in point of law and in referring the matter for determination by another tribunal I make the following directions for their assistance.

First, the new tribunal should confirm at the outset whether only the higher rate of mobility component is in issue under the relevant statutory provisions. I say this as there is some reference to the care component within the papers.

Second, with regard to the claimant's partial loss of vision the tribunal should follow what is said R(DLA)3/95 and apply the criteria for loss of vision. They will require to consider the ophthalmologist's evidence with the other evidence in the case.

Third, with regard to the appellant's deafness the tribunal should approach this in the following way viz (a) they should consider the terms of Mr Holiday's report and if necessary obtain further evidence or interpretation of the audiogram. They should then find the level of the appellant's hearing loss without the benefit of her hearing aids. (b) They should then determine to what extent if any the use of her hearing aids reduces her hearing loss. This is very likely to involve expert evidence, but that is for the tribunal to determine. It may be that

of necessity this matter will have to be determined on a broad basis. Assessment of her hearing loss with hearing aids should be calculated in the open air rather than in an enclosed environment, having regard to the fact that it is related to the mobility component of disability living allowance. The ability or inability to hear a shout beyond one metre using both ears with aids (but without sight of the person shouting) should not be regarded as conclusive in determining the matter.

Lastly if required to provide a full statement of reasons the new tribunal will ensure that it contains full findings on all relevant facts and indicates clearly what deductions or conclusions the tribunal have reached from these findings. It should also contain an explanation as to why any evidence has been rejected or not preferred.

10. It is regrettable that this case is remitted for determination afresh for a second time. It is particularly for this reason that I have given the foregoing detailed directions.

(Signed) K L Kirkwood
Deputy Commissioner

(Date) 31 July 2001