

Bullock 179  
(written)

**THE SOCIAL SECURITY COMMISSIONERS**

*Commissioner's Case No: CSA/322/03*

**SOCIAL SECURITY ACT 1998**

**APPEAL FROM THE GLASGOW APPEAL TRIBUNAL UPON A QUESTION OF  
LAW**

**DEPUTY COMMISSIONER: SIR CRISPIN AGNEW OF LOCHNAW BT QC**

*Appellant:*

*Respondent: Secretary of State*

*Tribunal: Glasgow*

*Tribunal Case No:*

## DECISION OF DEPUTY SOCIAL SECURITY COMMISSIONER

### Decision

1. I allow this appeal. I hold that the tribunal erred in law. I consider that I have sufficient material available to me to give the decision that the tribunal ought to have given.
2. My decision is that the claimant satisfies the night attendance condition in section 64(2)(b) of the Social Security Contributions and Benefits Act 1992 and is therefore entitled to the higher rate of attendance allowance.

### Background and legal issue

3. The decision maker awarded the claimant the lowest rate of attendance allowance, as the claimant required continual supervision throughout the day in order to avoid substantial danger to himself or others. The claimant appealed against the decision on the grounds that he should have been awarded the higher rate of attendance allowance, as he needed supervision during the night as well as throughout the day.
4. The relevant factual background, taken from the tribunal's findings in fact, is that the claimant is aged 81 and suffers from dementia. He lives alone. He has always had a pattern of having very little sleep for a maximum of 4 to 5 hours per night. He has always risen early, sometimes as early as 4.30 in the morning or even earlier. He often got up early and would go out walking. He had previously had an allotment and would often visit that allotment as early as 4.30 am. Once the claimant was up he spent a lot of time out of doors. At times he would become confused forgetting even his name, his destination or the purpose of his trip. There was no evidence that he required someone to be awake for the purpose of watching over him during his "night", albeit the night was substantially shorter than that of many people.
5. The claimant was granted leave to appeal to the Commissioner and in granting leave Mrs Commissioner Parker said:

"An issues arises whether an objective element should be applied to the definition of "night". If an applicant's "night" is very much shorter than those which are normal, and he is at risk in the period when he is awake and others are usually asleep, do these constitute "night" needs?"

### Submissions of the parties

6. The Secretary of State does not support the appeal. He supported the reasoning of the tribunal that:

"We were not, however, persuaded that the night condition was met. We had regard to *R v National Insurance Commissioner ex parte Secretary of State for Social Services* [1974] 1 WLR 1092 which was authority for the proposition that "night" was defined by reference to the habits of the particular household. It is clear that [the claimant] had always been someone who had very little sleep and rose extremely early. We did not consider that this was a condition peculiar to his disability. We were not persuaded on the balance of probabilities that the evidence disclosed that he was at substantial

danger during his "night" in the absence of someone being awake for purposes of watching over him".

The Secretary of State went on to submit:

"4.7 There was no evidence before the tribunal that suggested that the claimant was in substantial danger while he was asleep and required someone to be awake to watching (sic) over him, rather that the claimant required continual supervision when he was awake, which was from early in a morning when in most households people were still asleep."

7. The claimant's representative responded by referring to CDLA/3242/2003 at paragraph 13, where the Commissioner summarised the law on what is meant by "night" for the purposes of Social Security legislation.

### **Reasons for my decision**

8. I am of the opinion that the tribunal erred in law in making their determination on the basis of the claimant's "night", which they appear to have taken to be the period during which he was asleep. It is my opinion, that the word "night" in the legislation must have an objective content and not be restricted purely by the claimant's own particular sleep pattern.

9. The objective of the legislation is to provide a sum of money to pay for day needs and for night-time needs, when these are required. The legislation must have envisaged that the 24 hour day would be split into two reasonable parts, so that the carer on duty during the day would be reimbursed and so would the carer on duty during the night. Therefore without regard to authority, I would have held that day and night should be divided on an objective basis having regard not only to the habits of the claimant, but also to the expectations of the persons who were to provide the care that they should be remunerated.

10. In *R v National Insurance Commissioner ex parte Secretary of State for Social Services* [1974] 1 WLR 1092 Lord Widgery made clear that the purpose of the of the allowance was "that people who require such attendance also require extra money in order to obtain such attendance".

11. Section 64 of the 1992 Act refers to "the day attendance condition" and the "night attendance condition", making clear that what is being referred to is attendance by day or attendance at night. The night condition (b) refers to "another person to be awake ... for the purposes of watching over him". There is no mention of watching over him while he is asleep, so the requirement obviously has regard to the fact that the claimant may be awake at night and require supervision, while they are awake.

12. In *R v NI Commissioner* Lord Widgery went on to say:

"The purpose of the Act and the provision it seeks to make is not related to whether the sun is shining or not; it is related to the domestic routine of the house and the distinction between day and night in section 4 is no doubt made because the giving of attention to a sick or disabled person may be far more onerous at night, when the attendant has to get out of bed in the middle of his sleep, than it would be in the middle of the day when the house is alive and people are about and ready to respond to the call of the sufferer. That is why I think this

section distinguishes service by night from service by day. Therefore one must give a meaning to the words "night" and "day" which is consistent with that background.

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 section as being that period of inactivity, or that 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."

I note in particular Lord Widgery's reference to the giving of attention at night being more onerous when an attendant has to get out of bed in the middle of his sleep. I take from this approach that in deciding what is day and night in a household, regard must be had not only to what the claimant or household might do, but also to what a carer might also be doing .

13. In *CDLA/3242/2003* Mr Commissioner Jacobs, considering *R v NI Commissioner and R(A) 1/78*, said:

"My understanding of the law is this.

- Day and night are words that have a significance in indicating a division of a period of 24 hours.
- Day and night are determined for the household as whole, not individually for each member.
- In determining the precise point when night begins and ends, the routine of the household will be relevant for marginal purposes.
- But unusual or extreme household arrangements cannot override the core element contained in the words 'day' and 'night'.

14. There are two other recent decision, *CDLA/997/03* and *CDLA/2852/02*, which have considered "day" and "night". In *CDLA/997/03* the Commissioner had to consider a child who woke at 5.00 am everyday and remained awake. His mother got up at 5.00 am as well, but the other members of the household remained in bed until about 7.00 am. The Commissioner held that the mother would not have got up at that time, but for the child waking. Accordingly that time was the "dehors" of the rising time of the household generally and was accordingly night. In both these cases the Commissioners considered that there was an objective element to the word "night" whatever was the routine of the household.

15. The distinction in the present case is that the claimant lives alone, so he might be regarded as the "household". If so what is the routine of his household – the answer is sleeping for 4 to 5 hours and getting up early at about 4.30 am. For the reasons I have tried to highlight above, I do not consider that to be the correct approach. If the claimant did in fact have someone living with him, or for example could afford to pay for a carer, would that person consider themselves to be providing day or night care at 4.30 am. I am sure they would consider it to be night care, because they would have to get up from their sleep to provide that care. The position would be similar to the mother and child in *CDLA/997/03*. This involves an objective approach to the meaning of "night", where the routine of the

household is marginal for the purposes of determining the extent of the day or night. It cannot be right that a person living alone with abnormal sleeping habits, should not qualify for the night attendance condition, when the same person would qualify if he lived in a household with other persons, who had a more normal sleep pattern. I consider that it is within my judicial knowledge that a reasonably average household might consider night to be from about 11.00 pm to about 7.00 am.

16. It is clear from all the evidence that the claimant requires constant supervision while he is awake. This is accepted by the Secretary of State in his submission. The claimant goes out at about 4.30 am or when he gets up early for a walk or to visit his allotment. He can be confused and forgetful at this early hour. I am therefore of the opinion that he satisfies the night attendance condition from the time he wakes early [about 4.30 am] until the night ends in a normal household, which might reasonably be taken as about 7.00 am. If he wakes at 4.30 am and usually sleeps for 4 to 5 hours, then he probably goes to bed at about midnight. I would accept that that is probably, when his night begins – see *CDLA/2852/2002* where the Commissioner says at paragraph 9 that:

“... I do not think that going to bed at 11.30 pm or even 12.00 am ... is sufficiently late to fall into that exceptional category” [ie the category of waiting up late to give the first night time attendance].

17. For all these reasons I consider that the tribunal erred in law in holding that the claimant's “night” was only the time that he was asleep.

(signed)  
Sir Crispin Agnew of Lochnaw Bt QC  
Deputy Commissioner  
Date: 13 February 2004