

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/2268/1999

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 R J C ANGUS

Claimant : [REDACTED]
Appointee Mrs [REDACTED]

Tribunal : Nottingham - Maid Marion

Tribunal Case No : D/42/153/1998/00525

1. The decision of the Disability Appeal Tribunal dated 19 November 1998 is erroneous in law. I set that decision aside and, as empowered by section 14(8)(a)(ii) of the Social Security Act 1998, I substitute my own decision which is:-

1. The adjudication officer's decision of 5 September 1994 awarding the middle rate of the care component of Disability Living Allowance from 14 July 1994 to 13 July 1998 falls for review under section ~~25(1)(a)~~ of the Social Security Administration Act 1992. ^{30(2)(b)}

2. The decision on review is that the claimant is entitled to the middle rate of the care component of Disability Living Allowance from 14 July 1994 to 8 March 2001 and to the lower rate of the mobility component of that allowance from 9 March 1998 to 8 March 2001 (all dates included).

2. The claimant's appointee, his mother, appeals, with my leave and the support of the adjudication officer who wrote the submission dated 13 August 1999, against the tribunal's decision that the claimant is not entitled to an award of the highest rate of the care component or to either rate of the mobility component of Disability Living Allowance. The adjudication officer's functions have now been transferred to the Secretary of State by section 1(a) of the Social Security Act 1998.

3. The claimant was born 9 March 1993. He is profoundly deaf. On 5 September 1994 he was awarded the middle rate of the care component of Disability Living Allowance for the period from 14 July 1994 to 13 July 1998. On the approach of his fifth birthday his appointee applied for the awarding decision to be reviewed to include the mobility component of the allowance. An adjudication officer extended the period of the award of the middle rate care component to 8 March 2001 but refused to award the mobility component. A second adjudication officer confirmed that decision. The appointee appealed to the Disability Appeal Tribunal.

4. The tribunal decided that the claimant did not qualify for the highest rate of the care component or for either rate of the mobility component of Disability Living Allowance. The statement of the tribunal's findings in fact and reasons for its decision is in the following terms:-

"1. [The claimant] was born on 9-3-93. He attended the hearing with his parents. He wears hearing aids, which are taken out at nights before he goes to bed. It was pointed out on his behalf, that at nights, without the benefit of his hearing aids and when he wakes up he has night terrors. He also wakes up, after the household has

retired to bed at nights, and thinking it is morning, his mother then has to put him back to bed.

2. It was suggested on his behalf that [the claimant] was up 3 to 4 times every night, although his mother indicated in her oral evidence that sometimes it could be once or twice a night. In any event, the Tribunal accepted that [the claimant] does have to be calmed back to sleep, and especially so when he dreams of snakes. But in our view [the claimant's] behaviour was not outside the range of attention or watching over which the Tribunal considered to be substantially in excess of those needed by a person of [the claimant's] age. Section 72(6) of the 1992 Contributions and Benefits Act applied.

3. [The claimant] is a signing child and is described by his aunt as "an extremely bright and cheerful young boy and excels beyond his peer group in many ways". He has no apparent disruptive behaviour or severe learning disabilities and is able to walk normally. The lower rate mobility component is set out at page F of the Adjudication Officer's submission. It is accepted that his parent's would not allow him to take advantage of the walking faculty outdoors, because of his age. And the tribunal fully appreciates the inherent dangers of letting children play unattended and unsupervised in parks. It is also fully accepted that as [the claimant] likes routine he would need lots of reasons to deviate from ordinary domestic routines. He is, as indicated by the specialist speech therapist, [], an intelligent profoundly deaf little boy. But the Tribunal deemed the need for guidance and supervision was not substantially in excess of the requirement out of doors for a child [the claimant's] age. Children of his age have to be guided/supervised out of doors.

[The claimant] remains entitled to the middle rate care component.

CDLA/14307/1996 considered."

5. The appointee's ground for appealing the tribunal's decision to a Commissioner are that the tribunal has failed to apply the relevant statutory provisions correctly, has failed to give due consideration to the evidence as to the dangers to which the claimant would be exposed if he walked out of doors without supervision or guidance from another person and that the tribunal had not considered the extent to which the claimant's requirements for guidance or supervision when walking out of doors exceeded those of a child of similar age with normal hearing.

6. The chairman of the tribunal refused the application for leave to appeal to the Commissioner and then, presumably because of some administrative error, the application was put to a full-time chairman of tribunals' who granted leave. When the appeal papers were put to me I decided that the full-time chairman's grant of leave to appeal was ineffective because the application had already been determined by the tribunal chairman. I treated the appeal as an application for leave following the tribunal chairman's refusal and granted leave because the grounds of appeal stated by the appointee were arguable and that in any case given the difference of opinion between the two chairman, the appeal should be heard.

7. The adjudication officer, in his written submission of 13 August 1999, argues in support of the appeal that it is not clear from the statement of the tribunal's findings in fact and reasons for decision what guidance or supervision the tribunal found the claimant to require. It was necessary for the tribunal to make findings as to what the person providing the supervision or guidance would do for the claimant. As a result of the tribunal's failure to make those findings it is not clear whether the claimant's requirements are substantially in excess of those of a child of the same age as the claimant who has no hearing problem. I agree with the adjudication officer that it is not clear how the tribunal arrived at its conclusion that the claimant's need for supervision and guidance to enable him to make use of his faculty of walking out of doors is not in excess of those of a child of similar age with normal hearing.

8. I heard the appeal on 26 January 2000. The appointee, but not the claimant, was present. The appointee was represented by Mr P. Bartlett of The National Deaf Children's Society and the Secretary of State was represented by Mr J. Heath, of the Office of the Solicitor to the Secretary of State for Social Security. Mr Bartlett was assisted by a sign language interpreter, Mr D. Wolfenden. I am grateful to Mr Bartlett and Mr Heath for their careful submissions and to Mr Wolfenden for his assistance. I am grateful also to the appointee for the oral evidence which she provided and which has enabled me to make my own decision on the case.

9. In the course of the hearing Mr Bartlett said that the tribunal's decision on the care component, including its conclusion that there were no night time needs justifying an award of the highest rate of care component, was acceptable. Neither Mr Bartlett nor Mr Heath suggested that the claimant suffered from any disablement associated with behavioural difficulties which would have rendered him virtually unable to walk within the meaning of section 73(1)(a) or (1)(c) and (3) of the Social Security Contributions and Benefits Act 1992. Therefore, the only issue which I need to decide is whether or not paragraph (d) of section 73(1) as read with sub-section (4) applies. I had directed an oral hearing because I

anticipated that there might be difficult points as to the extent to which assistance given to a deaf person in his communication with others might amount to supervision within the meaning of sub paragraph (d) but, in the light of the oral evidence given by the appointee taken together with the evidence in the appeal papers, that is not a matter on which I need to come to any conclusion and I can, therefore, deal very shortly with the appeal.

10. The relevant provisions in section 73 of the Social Security Contributions and Benefits Act 1992 are the following:-

"(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the age of five and throughout which -

(a) - ; or

(b) -; or

(c) - or

(d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.",

"(4) For the purposes of this section in its application to a person for any period in which he is under the age of 16, the condition mentioned in subsection (1)(d) above shall not be taken to be satisfied unless -

(a) he requires substantially more guidance and supervision from another person than persons of his age in normal physical and mental health would require; or

(b) persons of his age in normal physical and mental health would not require such guidance or supervision.",

"(8) A person shall not be entitled to the mobility component for a period unless during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion.",

"(9) A person shall not be entitled to the mobility component of a disability living allowance unless -

(a) throughout -

(i) the period of three months immediately preceding the date on which the award of that component will begin; or

(ii) such other periods of three months as may be described, he has satisfied or is likely to satisfy one or other conditions mentioned in subsection (1) above; and

(b) he is likely to continue to satisfy one or other of those conditions throughout -

(i) the period of three months immediately preceding the date on which the award of that component will begin; or

(ii) such other periods of three months as may be described, he has satisfied or is likely to satisfy one or other condition mentioned in subsection (1) above; and

(b) he is likely to continue to satisfy one or other of those conditions throughout -

(i) the period of six months beginning with that date; or

(ii) -."

and

(11) The weekly rate of the mobility component payable to a person for each week in the period for which he is awarded that component shall be -

(a) the higher rate, if he falls within subsection (9) above by virtue of having satisfied or being likely to satisfy one or other of the conditions mentioned in subsection (1)(a), (b) and (c) above throughout both the period mentioned in paragraph (a) of subsection (9) above and that mentioned in paragraph (b) of that sub section; and

(b) the lower rate in any other case."

11. Mr Bartlett said that in the claimant's case the relevant need is supervision. The need is for constant supervision. He referred to Commissioner's decision CDLA/42/94 as authority for his view that supervision includes an adult accompanying a child outside to monitor how the child gets around and to be on standby in case of a need to intervene. He referred to the documentary evidence to the effect that the claimant cannot be

left alone because he would then be at very high risk from a wide variety of dangers. Paragraph (d) of section 73(1) refers to the supervision being required "most of the time". In this case the supervision is required all of the time. It exceeds the minimum required. In similar cases the argument has been put forward that a child who is not deaf requires some supervision. The claimant is different. He hears nothing, alarms, car horns, or other people. He cannot be recalled if he goes off. The monitor always needs to be within 2 metres - arms length. CDLA/42/94 establishes that supervision can be precautionary or anticipatory". There may be no requirement for intervention but standby or passive supervision can still be needed. R(A)1/73 states that the term "substantial danger" used in the legislation is not to be narrowly construed. A potential danger is enough.

12. Mr Heath said that he adhered to the adjudication officer's submission that the tribunal had made insufficient findings in fact on which to base its decision and had given insufficient reasons for its decision. He said that "supervision" is not defined either in section 73(1)(d) or in section 72 of the Act. The definitions are in case law. The adjudication officer had referred in his submission to R(A)3/74 which distinguishes between "attention" and "supervision". It was confirmed in the case of Moran v. the Secretary of State reported in the Times of 14 March 1987 (Court of Appeal) that the need for another person on standby to prevent a danger is enough to constitute a need for supervision. It was a question of fact and degree in each case. He submitted that that broad definition of "supervision" was applicable to both section 72 and 73(1)(d). Although section 73(1)(d) does not specify that supervision needs to be for the avoidance of substantial danger while section 72 does, that is not to say that the avoidance of substantial danger is not a relevant consideration under section 73(1)(d). The two provisions might in certain circumstances overlap.

13. Mr Heath said that there was no evidence to contradict the assertion that the claimant in this case needs constant supervision all the time. What amounts to taking advantage of the faculty of walking is a question of fact. Paragraph 24(k) and (1) of CDLA/42/94 is authority for the proposition that if there is a need for somebody to be on standby or monitoring the claimant without a history of past actual intervention there is supervision within the meaning of paragraph (d) of section 73(1) and that a need for reassurance is also a need for supervision within the meaning of the provision. Referring to paragraph 8 of the adjudication officer's submission Mr Heath said that he thought that the point that the adjudication officer was making was that difficulty in communication would not alone amount to a need for supervision but, in Mr Heath's view, that did not necessarily defeat the claim in this case.

14. As regards the difference between the claimant's needs for supervision when walking out of doors and, those of a child of the same age with normal hearing, Mr Heath said that the appointee's case is that the claimant needs substantially more supervision than a child with normal hearing and that he is not excluded from entitlement by virtue of subsection (4)(a) of section 73. The alternative exclusor enacted in subparagraph (b) of that subsection would, in Mr Heath's view, apply because a healthy five year old requires guidance and supervision and Mr Heath's, instructions are as in the adjudication officer's submission.

15. The appointee said that she has a four year old daughter with normal hearing who responds to verbal instructions given from a distance whereas the claimant does not. The claimant is unaware of dangers from, for example, dogs but cannot be verbally warned. When he goes with a party of children to a local children's amusement park where instructions are given to the children over loud speakers she has to be with the claimant and relay the loud speaker instructions to him. Sometimes she has to go into the enclosed play structure where he is out of sight to bring him out in accordance with the loud speaker instructions. She must always be close to him and in a position where either she can touch him or he can see her and make eye contact.

16. I do not need to go into the case law relevant to this appeal. It is well established, as both Mr Bartlett and Mr Heath have argued, that a need for somebody to be on standby to intervene to avoid danger to a claimant is supervision within the meaning of section 73(1)(d). Even without the documentary evidence in the bundle and the oral evidence given by the appointee it is clear that a child who is profoundly deaf, will be at risk of physical injury from dangers which a child with normal hearing would avoid without the need for any adult intervention. For example, he will not hear dangers approaching from behind such as another child on a skateboard, other children running or warnings from somebody on a bicycle. The danger is compounded because frequently somebody approaching the claimant from behind in one of those ways and thinking that he is steering well clear of the claimant will be unaware that the claimant can not hear and is liable to step into his path. I am satisfied, therefore, that there is a constant need for there to be somebody in close attendance on the claimant to "watch his back" and ensure that he does not suffer injury, either because he cannot hear or because others do not realise that he cannot hear. That, in my view, amounts to supervision within the meaning of paragraph (d) of section 73(1) and that without which the claimant is not able to exercise his faculty of walking out of doors.

17. A 5 year old child in normal health can be warned and directed by voice from a distance without the need for a supervisor to stay within touching distance or maintain eye contact with him. He can be allowed to make short journeys on foot on traffic free routes which are familiar to him and overlooked from a distance by adults, for example to a neighbour's house. I am satisfied, therefore, that the close and constant supervision required by the claimant when out of doors is substantially more than that which would be required by a child of the same age with normal hearing. I have substituted my own decision for that of the tribunal. That substitute decision is, of course, a review decision, the ground for review being that at the date of application for review it was anticipated that the claimant would attain 5 years of age on 9 March 1998.

18. For the foregoing reasons the appointee's appeal succeeds and my decision is in paragraph 1 above.

(Signed) R J C Angus
Commissioner

(Date) 24 February 2000