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SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Disability Appeal Tribunal: Glasgow

Case No: D/51/131/93/2128

[ORAL HEARING]

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1. This claimant's appeal succeeds. I hold the decision of the appeal tribunal dated 18 April 1994 to be erroneous in point of law and accordingly set it aside. I remit the case to the tribunal for determination afresh in light of the guidance which follows.

2. I directed a hearing in this case. At it the claimant was represented by Mr A Nimmo of the Dalmarnock Initiative, Glasgow, and the adjudication officer by Mr J S Bevan, Advocate, instructed by the Solicitor in Scotland to the Secretary of State for Social Security. I am indebted to both for the care with which they made their submissions.

3. The case arose out of an application by his mother on behalf of a boy aged 3 at the time of the application, 4 at the time of the tribunal hearing and now aged 5, for a disability living allowance in respect of the care component. It has been clear throughout that the mobility component was not in question. Accordingly I say no more about it.

4. The alleged disabilities in this case were hyperactivity and asthma. It was claimed that the former required constant attention and that the latter gave rise to dangerous attacks. Help was said then to be needed to use inhalers. There was also mention of a need to apply creams for a skin condition, incontinence during asthmatic attacks which, at least at night, led to a need to change bed clothes at least once per night and for assistance to position the boy due to the attacks. Finally there was mention of a requirement to monitor his food to avoid certain products. The general practitioner in her report indicated that the creams were required because of eczema. Hyperactivity was also mentioned but that was related to a behaviour disorder due to lack of "control boundaries". The asthmatic attacks were described as infrequent. An adjudication officer held that that information did not satisfy the statutory conditions and, on review, another adjudication officer came to a similar view. The claimant appealed to the tribunal.

5. The chairman's notes of evidence indicate that in addition to the foregoing problems the tribunal were told that the child was liable to asthma attacks every 4 hours of the day and night. The mother would be up 3 nights out of 7. The boy was liable to incontinence when coughing.

He had eczema and used a variety of skin preparations. In light of all the evidence the tribunal recorded as their findings of fact this:-

> "The tribunal accepted that [the boy] had problems, but these did not appear to be substantially greater than the problems faced with other 3 year olds and they were of course only considering the care component of Disability Living Allowance. The tribunal did not consider that [the boy's] needs brought him within the requirements of the Act.".

They refused the appeal and gave as their reasons this:-

> "The tribunal considered the picture as drawn by [the boy's mother and representative] but were particularly influenced by the report of [the general practitioner]. So far as law is concerned, the tribunal took into account the Social Security Administration Act 1992, section 30, the Social Security Contributions and Benefits Act 1992, section 71 and 72.".

The claimant now again appeals, with leave of a Commissioner.

6. The grounds of appeal and the observations of the adjudication officer now concerned are at one to the effect that the facts were inadequately found and the reasons do not really explain what the tribunal made of the evidence. The matter is perhaps best focused by the adjudication officer's submission that whereas there was evidence that the child required help for dressing, bathing, toileting, taking medication and general supervision, the tribunal have not indicated what care needs they accepted nor why they found, as they did, that the needs in question were not greatly in excess of that of a normal child of the same age and sex. Indeed that was their only finding of fact. They recorded that they were particularly influenced by the report of the general practitioner but, as is pointed out for the claimant, that report indicated that supervision and attention needs were greatly in excess of normal. I accept all these criticisms. It seems to me that the tribunal have essentially failed to proceed logically by determining such disabilities as this child suffered from and then determining what, if any, attention or supervision was required in regard thereto and then finally assessing whether in sum that produced requirements substantially in excess of that required by a boy of the same age. That will be the fundamental task of the new tribunal. Were that all to the matter, however, there would not have been need for a hearing.

7. I directed a hearing in this case because one of the grounds of appeal sought to raise the possible applicability of the doctrine annunciated in R(A)1/91, namely that the frequency and type of washing of clothes and bed clothes might be relevant when considering the attention required in connection with a child's bodily functions within the then in force section 35 of the Social Security Act 1975. That contained the same wording as is now in section 72(1)(b) and (c) of the Social Security Contributions and Benefits Act 1992. The contention seemed to be that in consequence of the eczema and its treatment there arose such a need in this case. Had that been all to the appeal I would not have been inclined to criticise the tribunal since, apart from the eczema and the need for application of certain preparations, there was no evidence tending to show that there was any consequent excess of quantity, or speciality in nature, of the washing required. However, since the case had to go back I thought it right to receive submissions on the issue in order to be able to give the new tribunal such guidance as might be. The adjudication officer's attitude in her written submission to the Commissioner was that R(A)1/91 had effectively been struck down by certain higher authority, in particular Mallinson v The Secretary of State for Social Security. I drew attention also to a recent decision by my brother

Commissioner in CSA/35/93. Since the issue was one purely of law and raised by the adjudication officer I thought it right to invite Mr Bevan to make his submissions first. That was readily agreed to.

8. It is appropriate next to set out the statutory provisions. As already noted the germane wording is constant between the Social Security Act 1975 and the Contributions and Benefits Act 1992. I refer only to the latter. Entitlement to the care component of a disability living allowance in prescribed in section 72. Sub-section (1)(b) and (c) provide that there is entitlement for any period throughout which the individual:-

> "(b) ... is so severely disabled physically or mentally that, by day, he requires from another person -
>
> (i) frequent attention throughout the day in connection with his bodily function; or
>
> (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others;
>
> (c) he is so severely disabled physically or mentally that, at night, -
>
> (i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or
>
> (ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.".

Then there is a particular further provision regarding those under the age of 16 at sub-section (6) whereby it is also required that such a claimant have the requirements just described:-

> "(i) ... substantially in excess of the normal requirements of persons of his age; or
>
> (ii) he has substantial requirements of any such description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have.".

The latter provision would not appear to apply. Those provisions are also added to one further main provision which can lead to the care component at section 72(1)(a)(i). Thereby it is required that the individual be so severely disabled physically or mentally that:-

> " (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods) ...".

The issue with which I am now concerned does not relate to the supervision conditions. But it does centre upon the phrase "in connection with his bodily functions" in respect of any or each

of the three attention conditions. Prior to the introduction of disability living allowance only the conditions in section 72(1)(b) and (c) existed. I have no doubt, however, that the phrase falls to be interpreted in each context in the same way having regard to the structure of the three relevant provisions. Mr Bevan's starting point in attacking R(A)1/91 was to refer to paragraph 7. Therein it was noted that in that case there was a contention that washing of clothing and bedding, no matter how complex, could not be regarded as sufficiently intimate and proximate to constitute attention "in connection with bodily functions". That contention had been founded upon a decision by the Court of Appeal - R v National Insurance Commissioner ex parte Secretary of State for Social Services [1981] 2 ALL ER 738. That case is known as the "Packer" case. It is also reported as the appendix to R(A)2/80. The disability in that case was senility and deafness. The attention said to be required was washing and cooking. The Commissioner held that cooking was a competent form of attention. That proceeded upon the basis that eating was the relevant "bodily function". The issue then before the Court of Appeal was to whether cooking was too remote from eating to be considered as attention "in connection with" it. The Master of the Rolls (Lord Denning) focused his conclusion by holding:-

> "... that ordinary domestic duties such as shopping, cooking meals, making tea or coffee, laying the table or tray, carrying it into the room, making the bed or filling the hot water bottle, do not qualify as "attention in connection with the bodily functions" of the disabled person. But that duties that are out of the ordinary - doing for the disabled person what a normal person would do for himself - such as cutting up food, lifting the cup to the mouth, helping to dress or undress or at the toilet - all do qualify as "attention in connection with the bodily functions of the disabled person."

Dunn LJ endorsed certain words of Mr Commissioner Monroe in CA/60/74 where he said:-

> "I consider that the words of the section referred to a person who needs the relevant degree of attention in connection with the performance of his bodily functions and there directed primarily to those functions which the fit man normally persons for himself.".

Dunn LJ went on to say:-

> "Domestic duties such as cooking, housework and the like do not constitute attention within [the then relevant section] ...".

O'Connor LJ focused also on a possible distinction in regard to cooking where a special diet, as opposed to normal or ordinary cooking was concerned, and said that he did:-

> "... not think it right to make any such distinctions. I think that cooking is too remote from the proximity that "attention in connection with a bodily function" necessarily requires [.Cutting] up food for a person and/or feeding it to a person are clearly within the words. Shopping for food is equally clearly not within the words. The line must be drawn somewhere and I think work in the kitchen is outside the ambit of the section.".

I note that all three of the judges referred to section 37 of the then in force 1975 Act and its provision for an invalid care allowance where, as they took it, someone was looking after a relative and doing the domestic work. I am not myself sure how far that weighed with the judges as inhibiting a wider interpretation for "attention in connection with a bodily function": but, as Mr Nimmo correctly pointed out, that allowance did require as a condition precedent some award

of an attendance allowance and could not be entirely taken as independent of it. In that particular case, because there was satisfaction of the attention condition by night, there was there no problem about qualification for section 37. But where "attention" by day is the only matter under consideration the position may well be different. Now in R(A)1/91 Mr Commissioner Reith accepted the effect of the passages referred to about cooking and its remoteness from the bodily function of eating. He then went on to say that, having regard to the principles concerned, he had to hold:-

> "... that the normal washing of cloths and bedclothes are not sufficiently connected with a persons bodily functions to constitute attention in connection with the persons bodily functions ...".

But he then went on to say:-

> "In my opinion the Court of Appeal in the said decision mentioned above did not lay down that the preparation and cooking of food can never be relevant to the attention condition in said section 35 [of the 1975 Act]. A person may suffer from a disability necessitating such involved and complex preparation in cooking of food which may well in my view render these matters relevant to the attention condition in section 35. That appears to have been accepted by the DMP in the case involving a child suffering from phenylketonuria (PKU) - see decision R(A)1/87.".

In the course of his decision in R(A)1/87 the delegated medical practitioner (DMP) who had given the first level adjudication decision, had stated "I recognise that [G's] food requires special selection, precise weighing and measuring before it is prepared and cooked. As such, this action effectively forms part of the overall treatment of his condition and I accept that this particular aspect of attention is required in connection with his bodily functions." Mr Commissioner Reith went on to say that he was:-

> "... of the opinion that a similar position arises in regard to the washing of clothes and bedclothes. As already stated the normal washing of clothes and bedclothes, and of course children's clothes need frequent washing, are doubtless not relevant to attention condition. Nevertheless the frequency and type of washing of clothes and bedclothes may be in certain cases be relevant to the attention condition. In the present case the very severe skin disability suffered by the child in question involved the frequent application of ointment and the profuse flaking of skin etc demands not only very frequent washing of clothes and bedclothes but also the hand washing of clothes.".

He went on to point out that the DMP had held that washing of clothes and bedclothes could *never* be relevant when considering the attention condition. However he made clear that he was not prepared to accede to that and concluded that the washing of such items could in certain cases constitute attention connection with bodily functions:-

> "... if, for instance, the abnormal amount of laundry changes are regarded as required as part of the overall treatment of the person's condition.".

Upon that approach he went on to refer the case back for reconsideration in light of what he had opined. Mr Bevan's fundamental point was that Mr Commissioner Reith had not been justified in coming to that view given the "Packer" decision. I note that "Packer" does not appear to have

been referred to in R(A)1/87; indeed the possible relationship between the precise operations required to prepare the food as required and the function of feeding had been conceded.

9. Mr Bevan founded also upon Mallinson v Secretary of State for Social Security [1994] I WLR 630 and in re Woodling [Woodling v Secretary of State for Social Services [1984] 1 WLR 348]. Both of these were cases determined by the House of Lords. In the latter the disabled person was unable to lift heavy objects with the result that she could not do her own cooking. Accordingly the issue that arose was as to whether attention in cooking or assisting in the cooking counted for the purposes of the provision for attendance allowance about attention in connection with bodily functions. In effect the case was almost an appeal against "Packer". Lord Bridge of Harwich, who gave the leading speech, observed, at page 352, first that the language of the section did not to his mind fit a situation where the only physical disablement involved prevented an individual from preparing his own meals. But then, upon a closer analysis, he doubted if matters could be better expressed than the passage already quoted from the decision of Mr Commissioner Monroe in 1974 (paragraph 8 above). He observed that that criterion had the merit of being clear and easily applied. Nonetheless, it does continue to give rise to some difficulty.

10. In the most recent authority, Mallinson, the disability in question was blindness and the attention sought to qualify was assistance in walking out of doors in unfamiliar surroundings. The House held that such was indeed attention in connection with a bodily function and in the course of their determination applied, with approval, both Packer and the Woodling decision. In Mallinson Lord Woolf gave the leading speech, and I note that he gave the original decision in Woodling. He largely endorsed the views of Lord Denning MR as to where the dividing line fell in matters of feeding. He commended a passage from the judgement of Dunn LJ in "Packer" where, before regarding authority, he had said:-

> "To my mind the word "functions" in its physiological or bodily sense connotes the normal actions of any organs or set of organs of the body, and so the attention must be in connection with such normal action. The word "attention" itself indicates something more than personal service, something involving care, consideration and vigilance for the person being attended. The very word suggests a service of a close and intimate nature."

Lord Woolf then pointed out that the service and any contact involved need not be physical: there could be spoken contact. He endorsed the words of Mr Commissioner Monroe already cited and approved that "attention" denotes a concept of some personal service of an active nature, such as helping the disabled person to wash or eat.".

Towards the end of his speech he gave the now well known questions which may be taken as a general guide in such cases:-

" (1) Has the claimant a serious disability?

(2) If so, what bodily functions does it impair?

(3) Does he reasonably require attention in connection with those functions?

(4) Is that attention frequent?".

11. Whilst these authorities may seem to repeat much the same material, it is clear that there has to be a line drawn somewhere and Mr Bevan's submission was, having regard to the sequence of the authorities, that the line had been driven closer and tighter to the actual bodily functions involved. In CA/124/93 an elderly person had required attention in connection with dressing and because of wandering and incontinence. There then arose sharply the issue of normal or abnormal amounts of laundry. The contention in that case was that laundry or soiled sheets and clothing was sufficiently "intimate" and there was sufficient personal contact to come within the definition approved by the Court of Appeal in Packer and subsequently in Mallinson. It was therein also submitted that R(A)1/91 had been wrongly decided. The test was not whether laundry was an ordinary domestic chore in the circumstances. Mr Commissioner Heald rejected the attempt to found upon R(A)1/91 and especially the attempt to pray in aid a contrast between ordinary and out of the ordinary. He said that:-

> "The passages as cited above show that what in fact was being compared by the Court of Appeal was, on the one hand, necessary chores which are normally done by a particular member of the family and without personal or intimate connection with the claimant and, on the other hand, those that were out of the ordinary because, although normally done by one person for his own benefit, had by reason of a disability, to be done by some other person, and that that was the extraordinary element in the situation.".

He concluded that:-

> "Clearly, it cannot be said that doing laundry, of whatever volume, must be intimate, or personal, or needs to be done in the presence of the disabled person. Argument to the same effect was in fact put forward in Packer's case by counsel appointed by the Court and expressly rejected in both the judgments of Dunn LJ and O'Connor LJ. The arguments as set out in their judgments in the report referred to above.".

The decision in Mallinson had also been put before Mr Commissioner Heald.

12. Finally Mr Bevan referred to CSA/35/93. That was the case of an adult who required daily tar oil treatment which led to a more frequent than normal washing requirement for underwear, pyjamas - and for all I know bedclothes. The underlying disability was psoriasis. Mr Commissioner May, followed Lord Justice Woolf in Mallinson at page 306 where he suggested that it was preferable to focus upon the function which was primarily impaired and then go on to determine the consequences. The Commissioner felt that without there being a finding that some impairment of the claimant's bodily function prevented him from doing the laundry for himself additional washing could not qualify. Although R(A)1/91 was cited to him he noted that it related to a 9 year old child and was, given his own approach to the particular appeal before him, disinclined to make any obiter observations thereon.

13. Mr Nimmo sought to demonstrate the close connection between a child's waste disposal and the consequent laundry by emphasising what could be involved. He developed that to cover even adults by reference to what was required to deal with certain persons suffering from communicable diseases. But his approach seemed to rest upon a subsumption that there was some injustice to the disabled if the laundry could not be allowed. That approach, of course, is not really helpful when seeking to discover the precise meaning of the phraseology of the section.

14. Nonetheless I start from a position long accepted in attendance allowance cases, that in incontinence situations removal of soiled bedding or clothing, when necessary by another, is competent to count as "attention in connection with the bodily function of waste disposal" if the claimant - especially a child - is unable to do that for himself. Whilst it may not be strictly "waste disposal", there is a sufficient identity between what was involved in CSA/35/93 and the present claimant's eczema as to bring them within a possible area of concern.

15. I now draw together my conclusions, for this case, upon the phrase "in connection with bodily functions". Given that the removal of any clothing/bedding consequent upon the medication related to this child's eczema or consequent upon his incontinence counts as attention, the question that then arises is at what stage does that cease to be connected with his bodily functions? At root the question is when is the connection broken so that whatever is then being done is part of a more or less normal operation. Looking to the other side of the coin, as it were, of intake: shopping and cooking do not count but there becomes the necessary intimate connection with the function of eating at least once the food requires to be specially dealt with whether by some meticulous preparation as part of a treatment, or at table by being cut up. On the other hand, given the history of the ready acceptance of such operations for attendance allowance purposes, it cannot now be suggested that removal of soiled bedding or clothing could not count. The connection is then sufficiently intimate. I accept that the corollary to what I have said about feeding means that by the stage purely of washing, laundry properly so called, the connection may well be broken. I reserve my opinion as to the position of any specialised laundry process, particularly if it be shewn to be part of some treatment. But it must remain an open question, I consider, whether anything in between and which requires to be done can be within the connection. I conclude that the removal of certain types of soil, for example from bedding or clothing could so count. But once any such extraordinary treatment has been carried out so that there remains only straightforward laundry that is too far removed, as I understand the principles laid down in the authorities. Accordingly the new tribunal will require to consider whether there is any such procedure or process as just described involved in this case before determining whether they can take that into account as attention to be summed up before determining whether the statutory condition is satisfied. I note, with some satisfaction, that what I have said does not appear to be at variance with the principles enunciated in CA/124/93. In paragraph 8 Mr Commissioner Heald appears to consider that a process between the removal of bedding or clothing and the actual washing may count as attention in connection with a bodily function.

16. There is one further matter to which I should advert. In none of the cases cited to me apart from the feeding case, was a young child involved. The extra qualification must be attended to in that regard. That concerns, of course, the frequency with which bedding or clothing has to be removed for laundry, and any intervening treatment. I do not consider that it gives any guidance as to the correct interpretation of the phrase "in connection with his bodily functions". I accept that, to look at Lord Denning's test, a child will never, or only extremely rarely, do his own laundry. I think, rather that the test as it has since been developed comes to considers whether operations, cutting up food, or treating soil, or as it may be in this case eradicating waste or treatment chemicals from clothing or bedding, are of themselves unusual and so in that sense "extra-ordinary" matters which have to be done. They are not part of what is normally done for *any* person, whether by himself or by others. Laundry is normally done by or for people; soil removal, for example, is extraordinary and not normally done by or for people. In that sense *only* can a test be enunciated dependent upon the contrast between ordinary

and extra-ordinary. That I take to be the simplest form of the test as it has resulted from the authorities.

(signed) W M Walker
Commissioner
Date: 17 July 1995