



62/00

THE SOCIAL SECURITY COMMISSIONERS

*Commissioner's Case No: CSDLA/646/99*

SOCIAL SECURITY ADMINISTRATION ACT 1992  
SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

DEPUTY COMMISSIONER: J G MITCHELL QC

*Appellant:*

*Respondent: Secretary of State*

*Tribunal: Edinburgh*

*Tribunal Case No: D/051/091/1994/0601*

## DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the disability appeal tribunal dated 3 December 1997 is erroneous in law and is set aside. The claimant's case is referred to another tribunal for reconsideration in accordance with the directions given below.
2. This is an appeal by the claimant with leave on a question of law against the above mentioned tribunal decision. The claimant requested an oral hearing of his appeal but the appeal is supported by the Secretary of State's representative and having considered the case I am able to allow the appeal without the necessity of a hearing. In these circumstances I am satisfied that the claimant's case can properly be disposed of in that way and I therefore refuse the request for a hearing.
3. This case has an unfortunate and rather confused history. The claimant, who was born on 12 August 1937 and who is registered blind, was in receipt of the lower rate of the mobility component of disability living allowance and the lowest rate of the care component of the allowance under a decision awarding him that benefit from and including 29 June 1992. The claimant has a history of eye trouble. In 1965 he suffered a right-sided retinal detachment which was successfully repaired, but by the mid-1980's he had developed bilateral chorio-retinal degeneration. In 1986 he suffered a left vitreous haemorrhage and by 1996 had poor sight with the risk of chronic glaucoma. He requested a review of his entitlement to disability living allowance on 24 May 1994, claiming an increased need for help to get about when out of doors or shopping and assistance to have letters read to and written for him. An adjudication officer considered that the decision of the Court in Mallinson v The Secretary of State for Social Security 1994 1 WLR 630 HL, constituted a relevant change of circumstances warranting review of the claimant's award of benefit. The adjudication officer however refused to revise the award by a decision dated 18 July 1994 and another adjudication officer reached the same conclusion on 25 August 1994 on a further review on any ground under section 30(1) of the Social Security Administration Act 1992. The claimant then appealed to a disability appeal tribunal who disallowed his appeal on 31 January 1995. On appeal against that decision the Commissioner by a decision dated 2 August 1996 set aside the tribunal's decision and referred the case for rehearing by another tribunal, directing that the case await the outcome of Secretary of State v Fairey, which was subsequently decided by the House of Lords and reported with Cockburn v The Chief Adjudication Officer 1997 1 WLR 799.
4. The claimant had in the meantime submitted a fresh claim in March 1996 which, given his existing award, was correctly treated as a request for review. The further review procedures which followed made however no alteration to the claimant's award and I do not find it necessary to say anything further about these procedures.
5. On 3 December 1997 another disability appeal tribunal reheard the claimant's appeal. The tribunal decided that the claimant's existing award reflected his proper entitlement to disability living allowance and refused the appeal. There was thereafter an application for set aside of that decision which caused considerable delay before being rejected in February 1999. The claimant's application for leave to appeal to a Commissioner on a question of law was eventually granted by a Commissioner in November 1999 having been refused by the

tribunal chairman. The present appeal accordingly is one by the claimant against the decision of the disability appeal tribunal of 3 December 1997.

6. The claimant's grounds of appeal relate largely to his claimed needs for attention by day and an allegation that the evidence on these was not fully considered by the tribunal. The Secretary of State's representative has submitted that the decision of the tribunal is erroneous in law principally by reason of defective findings and reasons to explain and justify the tribunal's conclusion on the aspects and level of the claimant's requirements for attention by day in connection with his defective bodily function of sight. I agree with the Secretary of State's representative in this respect.

7. However there is a prior matter to which the tribunal have failed to refer. There is no mention by the tribunal of the basis of their consideration of the decision which was under appeal before them. That decision was of course technically the decision of an adjudication officer made under section 30(1) of the Social Security Administration Act 1992 as long ago as 25 August 1994 which in turn had reviewed "on any ground" but refused to revise the adjudication officer's previous decision of 18 July 1994. The latter decision was itself technically erroneous because the effect of the decision of the House of Lords in Mallinson was not, as held by the adjudication officer, to constitute a relevant change of circumstances in terms of section 30(2)(b) of the Administration Act 1992 but was to declare what the correct interpretation of the law governing disability living allowance should have been found to be from the outset. In my judgment the statutory ground of review for error of law under section 30(2)(d) remained applicable notwithstanding the partial statutory fiction involved in the limitation provisions of section 69 of the Administration Act to which reference is made below. The case of Mallinson was of relevance in the consideration of the care component of the allowance in holding that guidance given to a blind person in outdoor walking constituted "attention" in connection with the bodily function of seeing. The need for such help had been recognised as relevant by the reviewing adjudication officer in July 1994. Mallinson however was also relevant in affirming that the reference in section 72 of the Social Security Contributions and Benefits Act 1992 to what a person "requires" was to be construed as what a person "reasonably requires". This, as was, I think, subsequently recognised by the adjudication officer in the "on any ground" review in August 1994, opened the door to a consideration of the relevance of a claimant's reasonable requirements for attention from another person in a social context which the claimant had raised in a limited way by his reference to the need for assistance in reading and writing letters. The previous disregard of this element therefore led to an error of law in terms of section 30(2)(d) of the Administration Act affording a relevant ground for review of the awarding decision. It was, logically, for the tribunal to satisfy themselves regarding the correct ground for review of the claimant's existing award of benefit before considering the impact of such ground of review on the merits of the claimant's case.

8. In addition in my judgment the tribunal have failed to demonstrate that the claimant's claimed needs as summarised in the tribunal's findings were adequately taken into account when considering not only the question whether those needs amounted to a requirement "for a significant portion of the day" in terms of the existing award under section 72(1)(a)(i) of the Social Security Contributions and Benefits Act 1992 but also whether they were sufficient to amount to a requirement for "frequent attention throughout the day" in terms of section 72(1)(b)(i). Thus in my judgment the tribunal have failed to explain to the claimant

why his repeated needs for attention in the course of a day did not constitute a requirement for "frequent attention throughout the day", as there stipulated, entitling the claimant to the middle rate of the care component of the allowance rather than the lowest rate. In addition the tribunal appear to have rejected some further claimed needs without explanation.

9. For the foregoing reasons the decision of the tribunal is in my judgment erroneous in law and must be set aside. The claimant's case is referred to another tribunal for reconsideration. In that connection the tribunal should note and record the correct ground of review opening the door to reconsideration of the claimant's award as mentioned above. On the merits of the case the new tribunal will require to reconsider the quantum of the claimant's relevant, ie reasonable, needs for attention from another person by day in connection with his defective eyesight. In that respect the tribunal will require carefully to reconsider the question whether the claimant's variety of direct, medical and social needs throughout a day do not amount to a reasonable requirement for "frequent attention throughout the day" for the purposes of the middle rate of the care component. They should not for instance necessarily assume that assistance required by the claimant in connection with his clothing would only be required on one occasion each day. Much will depend upon the evidence before them. The guidance contained on page 25 of the 1998 edition of "Medical and Disability Appeal Tribunals: The Legislation", based on the various decisions there referred to, may well be helpful to the tribunal in this regard. At the end of the day however the ultimate conclusion will be essentially one of fact for the new tribunal.

10. If and so far as the new tribunal hold that the claimant's social needs are decisive in justifying an overall conclusion that the claimant has established a requirement for frequent attention throughout the day for the purposes of the middle rate of the care component they will require to bear in mind the impact of the statutory provisions limiting the scope of review on review following an erroneous decision. The relevant provisions of section 69 of the Social Security Administration Act 1992 were amended by paragraph 6 of Schedule 6 to the Social Security Act 1998 and were thereafter superseded as regards disability living allowance by section 27 of the 1998 Act with effect from 18 October 1999. On 20 April 2000 I gave a direction to the Secretary of State to make a further submission on the potential impact of these provisions in the present case. The response from the Secretary of State's representative was received on 8 June 2000. The claimant's representative has agreed with that submission and as I also am in almost total agreement with it I consider that it will be most helpful to the new tribunal to quote virtually the whole of that submission, as follows:-

#### **"Response to direction**

1. This submission is made in response to the Commissioner's direction dated 20.4.00 in which he asks for a submission on a number of points involving a potential limitation on the effects of review in this case.

2. I propose to deal with the last point first, as I submit that whether section 69 of the Administration Act or section 27 of the Social Security Act applies depends on it. This is, what is the relevant determination in this case? The claimant's initial request for review was made on 24.5.94, and it is the outcome of that request which is the crux of this case. Did the decision awarding benefit, apparently made upon 13.7.92, fall to be revised on a review for error of law? The request was made after the

determination of Mallinson v Secretary of State, handed down on 21.4.94, and before the Commissioner's decision in CA/780/91, dated 14.10.94. As the Court of Appeal and the House of Lords in Secretary of State v Fairey upheld that decision, the date of the relevant determination is the Commissioner's decision, rather than later.

3. Assuming that .....  
.....a higher rate of the care component is .... considered appropriate, a further question then arises. Did the error of law arise from failure to consider the needs identified in Mallinson, or in Fairey? The answer to that question is also critical. It may be that the needs for help walking outdoors are insufficient to warrant a revision of the awarding decision. That, at least, is what the previous tribunals have found. It may equally be the case that needs for help with social activities are also insufficient to warrant an award of a higher rate. But there is a possibility that both needs together may justify such an increase. If that should prove to be the case, I submit that the decision would fall to be revised because of Fairey, as it was only from that point that needs were sufficient to warrant such a revision.

4. That debate permits me to put my submissions on the other questions of the Commissioner in a real context. Looking at the position as it would have been before the Social Security Act 1998 was brought into force, the question of whether section 69 of the Administration Act applied to limit the effect of the review would then arise. If the needs identified under Mallinson were sufficient to make a higher award, I submit that section 69 could apply, because the decision fell to be revised on a review in consequence of that relevant determination. But if it fell to be revised because of Fairey, then section 69 would not apply. This is because the review was requested before that relevant determination. It was held in CAO v Woods that where a review was requested before a relevant determination, section 69 could not apply.

5. The effect of Woods was reversed by paragraph 6 of Schedule 6 to the 1998 Act, which inserted words into section 69 to the effect that it continued to apply whether the review was requested before or after the relevant determination. Section 27 of the 1998 Act is in similar terms. Section 69 ceased to have effect from 18.10.99 for the purposes of DLA by virtue of Schedule 1 to Commencement Order No 11, and section 27 was brought into force on the same day. Moreover, any decision of an adjudication officer is treated as a decision by the Secretary of State under section 8 of the 1998 Act by virtue of paragraphs 4 and 6 of Schedule 16. This might appear to have the effect that, were a new tribunal to find the decision of 13.7.92 erroneous in law by virtue of Mallinson or Fairey, the limitation in section 27 would apply. However, I submit that this is not the case. As was held in CIB/213/99, the 1998 Act and Commencement Orders cannot rewrite history. At the time of the review request, the unamended form of section was in force. I therefore submit, for the reasons given by the Commissioner in CIB/213/99, that it continues to apply if appropriate for the purposes of this case.

6. That would mean that, should the tribunal find that the decision of 13.7.92 fell to be revised on a review for error of law because of Mallinson, arrears would be payable from 21.4.92. Should the revision be because of Fairey, arrears would be

payable from the date of claim, 29.6.92. There is no question of any change in the claimant's level of needs throughout the period at issue."

11. As mentioned above I am in agreement with the conclusions in the above submission which should be applied by the new tribunal in their reconsideration of the case. I would observe only that the statement in the last sentence of that submission that there is no question of any change in the claimant's level of needs throughout the "period at issue" should be read as meaning, as I think was intended by the writer, to refer to the level of needs in the period between the decisions in Mallinson and Fairey. I say that because I note that the claimant has contended in the course of his appeal that his needs have since continued to increase through further deterioration of his eyesight. The tribunal will bear in mind that having regard to the date of the claimant's original appeal to a tribunal the limitation upon a tribunal's consideration of an appeal under section 12(8)(b) of the Social Security Act 1998 will not apply. In accordance with the decision of the Commissioner in CIB/213/1999 and for the reasons there given, they will carry their consideration of the claimant's appeal down to the date of their hearing.

12. The appeal of the claimant is allowed.

(Signed)  
J G MITCHELL QC  
Deputy Commissioner  
Date: 15 August 2000