THE SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *3 /99

(Commissioner's File Nos.: CSDLA/867/97 and CSDLA/840/97)

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so as to arrive by 12 March **1999**

3/99

Commissioner's Case No: CSDLA//867/97
CSDLA/840/97

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the disability appeal tribunal given at Edinburgh on 5 June 1997 is erroneous on a point of law. I set it aside. I remit the case to a freshly constituted disability appeal tribunal for a rehearing.

2. In this case the claimant and the adjudication officer have presented separate appeals against the decision of the disability appeal tribunal referred to in paragraph 1. An oral hearing of these appeals was heard on 9 and continued to 27 November 1998. Miss Willens of the City of Edinburgh Council appeared on behalf of the claimant. The adjudication officer was represented by Mr Bevan, Advocate instructed by Miss Aitken of the Office of the Solicitor to the Secretary of State for Scotland.

3. The claimant made a claim for disability living allowance on 31 May 1996. An adverse decision was made in respect of that claim on 10 June 1996. Thereafter another adjudication officer reviewed that decision but decided that he could not revise it so as to award benefit. That decision is recorded on pages 78 to 81 of the bundle.

4. The claimant appealed to a disability appeal tribunal. Her appeal was successful in respect that the tribunal found that the claimant was entitled to the lowest rate of the care component and the lower rate of the mobility component from 31 May 1996 to 31 May 2006. As the statement of material facts and reasons for the tribunal's decision is relatively short I consider that it would be advantageous to set these out in full. The findings in fact were as follows:

> "1. The appellant claimed Disability Living Allowance on 31 May 1996. Her date of birth is 3 March 1970.
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> 2. The appellant is profoundly deaf and cannot speak. She accustomed to communicate with a signing interpreter.
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> 3. The appellant in consequence of this condition, has need of assistance in regard to communication, and in use and control of text phone, visual doorbell, and smoke alarm. In addition she requires help to achieve a reasonable degree of social activity including swimming, and other recreational activities. She also requires help for communication when shopping for food or for clothes. The input of care amounts to about 60 minutes each day.
>
> 4. The appellant is able to proceed on foot for a reasonable distance; however due to her condition she is subject to inability to communicate with others in unfamiliar surroundings, such that she is only able to go in such surroundings with guidance from another person, to deal with enquiry about destinations and route."

The reasons given for the decision were as follows:

> The tribunal note and consider the whole scheduled evidence, and in particular the reports from Edinburgh and East of Scotland Society for the Deaf, page 62 etc. In addition the oral evidence was considered. The tribunal note and apply the House of

Lords Decision in Halliday (Fairey), dated 21 May 1997. The relevant excerpt from the leading judgement on this issue, by Lord Slynn of Hadley, is annexed.

Based on this evidence the tribunal accept that there are care requirements made out on the evidence available at today's hearing, for the matter of help with bodily functions (communication) for a significant portion of the day. In this regard, we take the view that the input is intermittent. This does not in fact amount to a frequent level of care throughout the day. For example, communication in regard [sic] shopping for food may be required on one or more days in the week, as the appellant is shopping for herself; communication in regard to shopping for clothes will be required, but is not likely to occur on balance more frequently than once in a while, when clothes are required, whether this is once per week or once per month, or otherwise. The appellant on her own evidence for most of the time has a reasonable walking ability and thus cannot be described as virtually unable to walk. However, it is accepted that due to the consequences of her deafness, the appellant qualifies for lower mobility."

5. The adjudication officer has appealed to the Commissioner on the basis that the tribunal erred in law in respect of their decision in respect of the lower rate of the mobility component. The claimant has appealed in relation to the tribunal's decision in respect of a decision on the care component. I am satisfied that in one respect the tribunal's decision erred in law in relation to both the care and mobility components. The tribunal fixed a limit on their award of both components without setting out the basis upon which they did so thus an error in law on these grounds is demonstrated.

6. I propose to deal first with the adjudication officer's appeal in respect of the mobility component. It can be seen from perusal of the tribunal's findings in fact that the basis upon which it was said by the tribunal that the claimant satisfied the conditions for the lower rate of the mobility component was that due to her inability to communicate with others in unfamiliar surroundings, in the context of the disabilities found by the tribunal in finding 2, the claimant is only able to go into such surroundings with guidance from another person to deal with enquiries about destinations and route. The basis upon which the tribunal is said to have erred in law is contained in paragraph 5 of a written submission to the Commissioner which is in the following terms:

"5. I submit that looking at the tribunal's reasons for their decision (shown above), the tribunal appear to have based their decision on the claimant's difficulties with communication. In Commissioner's decision CDLA/11491/95 the Commissioner held that -

> *"Saying, as the tribunal did, that the claimant needs help with communication "when walking in unfamiliar surroundings" is not the same as saying that she needs that help so as to be able to take advantage of the faculty of walking. The tribunal have applied the wrong test."*

In Commissioner's decision CDLA/240/94 the Commissioner rejected the argument that asking for directions indicated a need for supervision within the terms of section 73(1)(d) -

> *"Accordingly, I reject Mr Perlic's submission an agree with Mr Prosser that an inability to ask for directions does not, by itself, demonstrate a need for supervision within the terms of section 73(1)(d) of the 1992 Act."*

In Commissioner's decision CDLA/206/94 the Commissioner confirmed that guidance or supervision must be required to take advantage of the faculty of walking -

> *"Mr H sought to introduce the need for guidance or supervision if the claimant had to catch a bus, go shopping or if someone spoke to him. These, to my mind, have nothing to do with the claimant's ability to take advantage of his faculty of walking. Accordingly, I direct the new tribunal on this matter to concentrate only upon the extent to which the claimant may require guidance or supervision through becoming lost, confused or disorientated and whether that would be required "most of the time" that he was walking on an unfamiliar route."*

I submit that the only guidance the tribunal found the claimant needed is with making enquiries about destinations and her route. Taking into account the three aforementioned Commissioner's decisions, I respectfully submit that the tribunal's decision is erroneous in law because they have misdirected themselves in awarding lower rate mobility component, apparently based on the claimant's inability to communicate."

That was the basis of Mr Bevan's submission to me.

7. In seeking to have the appeal dismissed Miss Willens referred me to what was said by the Commissioner in paragraph 12 of CDLA/14307/96. The Commissioner said:

> "In that decision (at paragraph 11) the Commissioner accepted a submission on behalf of the adjudication officer "that an inability to ask for directions does not, by itself, demonstrate a need for supervision". That may well be so but of course sub-paragraph (d) of section 73(1) refers also to "guidance". I would have thought that that particularly applied to the need to ask for directions. Mrs Payne on behalf of the claimant pointed out that, because of the indistinct speech of the claimant, a stranger being asked for directions would not understand and might even think that the claimant was inebriated."

8. I dealt with that passage by Commissioner Goodman in CSDLA/223/98 (starred decision 66/98) in which I said:

> "However I have some difficulty with that passage. It seems to me that the guidance being referred to in the statute is not the guidance of a passing stranger of whom directions are asked but rather that of a guide who accompanies the claimant and without whose guidance the claimant cannot exercise the faculty of walking, in the context of the statutory parameters. The suggestion which appears to be being made by the Commissioner is that the section may be satisfied if the claimant is unable or finds it difficult by reason of her deafness to communicate with a stranger so as to ask for directions when walking out of doors in unfamiliar routes. It appears to be being

> postulated that in these circumstances that if she had a guide to ask for guidance from a stranger then that would remedy incapacity in respect of her ability to walk and thus enable her to take advantage of that faculty. For myself I do not see how a person accompanying the claimant asking a stranger for directions on an unfamiliar route could be said to be giving guidance to the claimant. It is rather more in the way of the person with the claimant providing her with a substitute method of communication with a third party. On any proper view it is not guidance."

9. It follows from that that I am satisfied that the adjudication officer has demonstrated an error in law on the part of the tribunal in relation to the basis of their award of the lower rate of the mobility component. Indeed later on in the submission, Miss Willens herself conceded that merely asking for directions does not satisfy the test. These circumstances I hold that the tribunal erred in law in respect of an award of the lower rate of the mobility component. I set that decision aside on that basis.

10. Miss Willens however submitted that there was evidence before the tribunal that the claimant satisfied the conditions for the lower rate of the mobility component upon another basis. In the claim pack the claimant said in answer to the question as to why she needed someone with her when she was out of doors:

> "Cannot hear someone follow me danger."

On page 20 she said:

> "If I have a danger and need someone to tell me."

In a written submission at page 84 it was said:

> "[The claimant] is often afraid when outdoors in unfamiliar routes and would derive reassurance from the presence of another person.
>
> CDLA/42/94 is relevant here, in particular "(K) supervision, in the context of 73(1)(d) means accompanying the claimant or the circumstances for signs of a need to intervene ... (1). The fact that the claimant derives reassurance from the presence of the other person does not prevent action ... from being guidance or supervision."
>
> CDLA/14307/96 is also relevant
> "If a fear of being attacked, or attacks of panic on getting lost, are a consequence which a person of reasonable firmness would suffer from profound deafness (and I can well imagine this to be so), then the fear and panic are legitimately to be taken into account in deciding whether or not a person needs guidance or supervision in order to take advantage of the faculty of walking".

11. Despite the fact that the claimant's letter of appeal indicated that the basis upon which she had appealed against the adjudication officer's review decision was that she required supervision or guidance for most of the time on unfamiliar routes to assist her through the required communications when using public transport and to ask for directions if walking the issue of fear and fear of danger was placed before the tribunal. The fact that they did not deal

with this submission results in their decision being erroneous in law for that reason also. I should however perhaps add that I do not consider that the evidence of fear and fear of danger presented to the tribunal would have entitled them to hold that the claimant satisfied the conditions for the allowance. The adjudication officer in a supplementary submission to the Commissioner said:

> "There is no indication that the claimant suffers from any disablement other than her deafness and no indication that she suffers from any form of mental disablement."

12. In order to bring her within the ambit of section 73(1)(d) there would require to be a link between fear or a fear of danger when out of doors and a mental disablement. It is not the physical disablement itself which gives rise to the claimant's asserted inability to walk out of doors on unfamiliar routes on her own. It is a fear which she says she has by virtue of the physical disability which is said to bring her within the statutory condition. That in my view will not do as the foundation because in my view the statute is expressed so that the link between the disablement and the inability to take advantage of the faculty of walking must be direct. Indeed I do not understand Mr Commissioner Goodman in CDLA/14307/96 was postulating such a proposition. In paragraph 17 of that decision immediately prior to the passage quoted in paragraph 5 of the claimant's representative's submission at page 84 quoted in paragraph 10:

> "Section 73(1)(d) of the 1992 Act refers not only to severe physical disablement but to severe mental disablement."

However in the case he determined there did not appear to be any evidence of finding mental disablement and that is the position in the instant case. Accordingly in my view his views were expressed upon the assumption that the fear experienced by the claimant in the case he was deciding was in consequence of a severe mental disablement in respect of which there was no evidence. It follows that in these circumstances I find myself in disagreement with his views.

13. Miss Willens also submitted that there was no necessity for the disablement to be the sole cause of the limitation. She referred in that connection to paragraph 20 of CDLA/42/94 where Mr Commissioner Mesher said in paragraph 20:

> "What is required is that the need for guidance or supervision must be linked to the limits on the claimant's ability to take advantage of the faculty of walking imposed, wholly or in combination with other causes, by her physical or mental disablement."

It does not seem to me that the language of the statute allows for the introduction of the causes other than the severe physical or mental disablement to be taken into account along with a physical or mental disablement to enable the statutory test to be satisfied. Thus if the effect of reliance on that passage by Miss Willens is the suggestion that although the fear and fear of danger that the claimant is asserted to have is not caused by virtue of a mental disablement and is not related directly to the physical disablement it can still be taken into account I do not agree with that as I consider that the statutory provision is quite clear.

14. In relation to the care component both the claimant and the adjudication officer asserted in the appeal that the tribunal decision erred in law in the decision they reached. Miss Willens on behalf of the claimant submitted that the claimant satisfied the conditions for the middle rate of the care component and that this was asserted before the tribunal. She submitted that the tribunal had given inadequate reasons for the decision which they reached. In making the findings in fact in relation to the attention required the tribunal had omitted to deal with the attention it was said was required in respect of the carrying out of social conversation. The tribunal had also failed to deal with her difficulties in respect of comprehending and using written English. It was accepted by the adjudication officer that the tribunal made insufficient findings in fact regarding the attention required by the claimant and whether that attention is reasonably required. She also submitted:

> "9. The tribunal also found that the claimant needs help with the control of a text phone, visual doorbell and smoke alarm (page 89). However in the claim pack the claimant said she needed help to buy such equipment (page 50). It is not clear from the tribunal's findings and reasons therefore exactly what attention she would need from another person in order to use such items, given that they are designed for use by someone with a hearing difficulty."

15. I am satisfied that both the claimant and the adjudication officer have demonstrated that the tribunal have erred in law. I accept the submission made by the adjudication officer in paragraph 9 of the original submission in the appeal quoted above. I also accept that the tribunal have given inadequate reasons for their decision in respect that they have not addressed all the issues which were placed before them particularly in relation to the claimant's literacy and social conversation.

16. I am also satisfied that the tribunal erred in law by identifying the bodily function impaired by the claimant's disability of deafness as being communication. In my view communication is not a bodily function.

17. The attention conditions of section 72(1) of the Social Security (Contributions and Benefits) Act 1992 are dependent upon the claimant being so severely disabled physically or mentally that he requires from another person attention in connection with his bodily functions for the requisite period set out in subsections 1(a)(i), (b)(i) and (c)(i).

18. What has caused considerable difficulty in applying these statutory provisions to cases such as the present has been the question as to what "bodily functions" are. Perusal of the authorities demonstrates that there have been 2 distinct strands of opinion. These strands have frequently overlapped in the judicial application of the statutory provisions and the situation has accordingly become blurred.

19. The 2 strands I think were best summarised in the same case:

> "In Regina v National Insurance Commissioner, ex parte Secretary of State for Social Services [1981] 2 All ER Lord Denning MR said at page 741:-
>
> > "Bodily functions' include breathing, hearing, seeing, eating, drinking, walking, sitting, sleeping, getting in or out of bed, dressing, undressing,

> eliminating waste products - and the like - all of which an ordinary person - who is not suffering from any disability - does for himself.""

On the other hand at 742 Dunn L.J. 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 actions."

20. It is clear when considering Lord Denning's list of what bodily functions include he has not only included what are properly functions in their physiological or bodily sense denoting the normal actions of any organ or set of organs of a body which was Dunn L.J.'s definition but also activities which are performed by virtue of the proper operation of bodily functions but which in themselves were not bodily functions.

21. This was recognised by Lord Slynn of Hadley in his speech in Cockburn v the Chief Adjudication Officer and another and the Secretary of State for Social Security v Fairey (also known as Halliday) 1997 3 All ER 844 at 852 where he said in respect of the list set out by Lord Denning MR:

> "I would not myself regard all of these as separate bodily functions. Thus walking, sitting, getting in and out of bed, dressing and undressing are not, in my view, functions in themselves. They are actions done by organs of the body, the limbs, fulfilling their function of movement."

The passage I have quoted from Dunn L.J. above was thereafter quoted with approval. The analysis made by Lord Slynn of Hadley which I have quoted above appears, upon perusal of the other speeches in the case to have had approval of the other members of the House who sat on the appeal.

22. I thus reach the conclusion that communication is an activity along the lines of walking, sitting, getting in and out of bed, dressing and undressing. It is something which is achieved by bodily functions such as hearing, seeing, speaking and movement. It was pointed out to me by Miss Willens that communication had been accepted as a bodily function judicially in cases which she cited to me. Indeed in his speech in Fairey Lord Slynn had said:

> "Before Mr Commissioner Sanders it was not in issue, in the light of the decision of your Lordship's House in *Mallinson*, that the attention required because of a claimant's hearing loss is or may be attention in connection with the bodily function of hearing or communication. The question was taken to be whether she reasonably require frequent attention throughout the day in connection with such bodily functions."

Miss Willens pointed out that in the Court of Appeal in the case of Fairey, communication appears to have been accepted as a bodily function by virtue of the acceptance of what was said by Commissioner Sanders. However it is to be noted that Mr Commissioner Sanders did say that it was not in question that "hearing or communication" is a bodily function. Indeed

that was the phrase which was repeated by Lord Slynn in his speech. However the decision in the case of Fairey proceeded upon the basis that the bodily function impaired was hearing and the suggestion that communication is a bodily function does not fit with the definition of bodily functions which was given in Fairey. Indeed Lord Slynn said at page 859:

> "If the bodily function is not working properly that produces the disability which makes it necessary to provide attention. The attention is provided by removing or reducing the disability to enable the bodily function to operate or in some cases to provide a substitute for it. In the present case the bodily function is hearing, the disability is the inability to hear."

Thus by virtue of the conclusion which I have reached the tribunal's decision errs in law on these grounds also.

23. The case goes before a freshly constituted tribunal and there are difficult issues in law in respect of the care component which I require to give directions upon. I do so with this caveat that it will be open to the parties to lead such a fresh evidence as they see fit in addition to the evidence which is already contained in the papers.

24. In the summary the claimant's disability in this case is that she is prelingually deaf. There are it would appear various consequences which follow thereon. First, and most obviously, she cannot hear. Secondly, it is asserted that she has a severe impairment in speech and that it is difficult to understand her speech. That it is said is linked to her prelingual deafness. Thirdly, her literacy is impaired in consequence of her prelingual deafness.

25. In consequence of these disablements and difficulties Miss Willen listed the areas in which the claimant required the services of another.

First it was said that service was required in initiating conversation because of the extra effort involved;

Second there was the reception and translation into British sign language of what a hearing person who didn't understand British sign language said to the claimant;

Third there was the translation of what the claimant said to the person he was having the conversation with by her interpreter;

Fourth there was the translation of film and television speech;

Fifth there was the translation of written text.

26. Obviously the freshly constituted tribunal will require to inquire into and make findings in respect of the comprehensibility of the claimant's speech and the extent to which her literacy is impaired. There does seem to be some contradiction by the claimant in relation to the latter. I refer in that connection to pages 47 and 48 of the claim pack.

27. In respect of the use of an interpreter for the second, third and fourth activities referred to above, there is no doubt following on the decision in Fairey that services by another in respect of these activities could constitute attention in connection with the claimant's bodily functions of hearing and speech. As Lord Slynn puts it:

> "The provision of an 'interpreter' to use sign language is therefore capable of providing 'attention' within the meaning of the section."

He does however caution that it must still be reasonably required both in its purpose and frequency he says at page 860:

> "How much attention is reasonably required and how frequently it is required are questions of fact for the adjudicating officer."

But then further goes on to say:

> "The Commissioner, however, did not err in law, and the majority in the Court of Appeal were correct in law to uphold his decision that it was right to include in the aggregate of attention that is reasonably required 'such attention as may enable the claimant to carry out a reasonable level of social activity'."

The freshly constituted tribunal should approach the case in this way.

28. The difficult issue in this case is related to the claimant's literacy. Mr Bevan submitted that in respect of reading the claimant had no impairment of sight and that she could see what was written. The difficulties that were asserted related to her ability to read what she saw. It was Mr Bevan's submission that reading is a cognitive function and that accordingly it could not fall within the statutory provision which related to attention in connection with bodily functions. He referred me to a supplementary written submission by an adjudication officer where it was said:

> "..... any help given to the claimant is help with the cognitive, or mental, process of interpreting what she sees on the page. In CA/022/93 the Commissioner held that
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> > "6. "Bodily functions" ... refers primarily to physical functions, although the need for attention with them may of course arise out of a mental rather than a physical disability."
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> There is no indication in the papers that the claimant is mentally disabled or of anything other than normal intelligence. In the same decision the Commissioner went on to hold that attention given in connection with the cognitive functions of the brain is unrelated to physical functions, even though the brain is an organ of the body. This approach was adopted in CSA/389/97 in which the Commissioner held that
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> > 23. First I am inclined to the view that the Commissioner in CA/022/93 was correct when he considered that the statutory definition did not include attention given in connection with the cognitive and other functions of the brain unrelated to physical functions even although the brain is an organ and is

> part of the body. I propose to follow him for it seems to me that what is a state of mind cannot fit comfortably into the statutory definition.
>
> I submit that reading is not a bodily function, it is a cognitive function of the brain."

Mr Bevan reiterated that submission and further submitted that any asserted disability in respect of literacy suffered by the claimant was related to her cognitive function being impaired so that she was unable to interpret what was on the page.

29. Miss Willens on the other hand submitted that the impaired bodily function of hearing was what gave rise to the lack of the acquisition of literacy on the part of the claimant. She submitted that it was similar to the use of speech and language in respect that speaking was not merely the physical act of using lungs, vocal chords and tongue to project words but was also related to the cognitive function of what was to be said. She submitted a letter from the University of Wolverhampton School of Languages and European Studies in which it was said:

> "Briefly, the link between prelingual deafness and the acquisition of literacy has undeniably been confirmed time and time again."

It was also said that the opinions expressed by the Court in the Court of Appeal in Fairey implied a recognition that cognitive difficulties associated with the ability to communicate were also included. In particular she was referring to what was said by Lord Justice Glidewell where he notes:

> "Mr Beloff, for the Secretary of State, accepts that the decision in *Mallinson* establishes that attention which enables a deaf person to understand what she would understand herself if she could hear is attention in connection with the bodily function of hearing. I agree that this concession is the logical and correct effect of the decision of the majority in *Mallinson*."

30. I am persuaded that whilst the ability to acquire literacy skills may be severely impaired by prelingual deafness it does not follow that assistance with the interpretation of the written word amounts to attention in connection with the bodily function of hearing. That is because in my view the adjudication officer and Mr Bevan are correct when they submit that the interpretation by the claimant of what is on the written page is related to the cognitive function being able to interpret writing rather than the bodily function of hearing. Cognitive functions for the reasons set out in the authorities quoted by the adjudication officer in his supplementary submission do not count. While the attractive argument of Miss Willens in relation to speech demonstrates that a bodily function may operate in conjunction with a cognitive function in relation to a particular activity, such as the cognitive function of determining what to say and the bodily function of actually saying it, that does not mean that what is properly identified as a cognitive rather than a bodily function should be included for consideration in the application of the statutory conditions for the care component of disability living allowance. The freshly constituted tribunal must in these circumstances approach the case in this way.

31. In relation to the mobility component the freshly constituted tribunal should follow the approach which is implicit from the content of this decision.

32. Both appeals succeed.

(signed)
D J MAY QC
Commissioner
Date: 15 December 1998