SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CSDLA/1095/1999

Starred Decision No: 99/00

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DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the disability appeal tribunal given at Dundee on 17 March 1999 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted appeal tribunal for a rehearing.

2. This case came before me for an oral hearing on 4 October 2000. The claimant was represented by Mr Mackie, a Welfare Rights Officer of the Perth & Kinross Council. The Secretary of State was represented by Mr Bartos, Advocate, instructed by Miss Miller, Solicitor, of the Office of the Solicitor to the Advocate General. I indicated at the end of the hearing I would give a written decision in due course. On 9 October 2000 I heard another appeal in CSDLA/443/00 in which similar issues arose. An adjournment was sought by Mr Brodie in that case to enable him to obtain further instructions on the issue of "attention in connection with bodily functions". I granted the adjournment and as the same issues were pertinent to this appeal indicated that I wished further submissions in this case also. I heard further submissions in both cases on 6 November 2000.

3. The claimant in this case was born on 19 February 1985. In respect of a claim for disability living allowance made on 21 August 1996 he was awarded the lower rate of the mobility component and the middle rate of the care component from 21 August 1996 to 20 August 1998. In an appeal to a disability appeal tribunal the claimant was awarded the lower rate of the mobility component from 21 August 1998 to 18 February 2001. No award was made in respect of the care component. The claimant has appealed against the decision of the tribunal. The Secretary of State has supported the claimant's appeal and in a submission of support indicated that he would accept a decision without reasons. I am satisfied that the tribunal's decision erred in law and must be set aside. The findings and reasons given by the tribunal are quite clearly inadequate in respect that the findings in respect of his disability are inadequate and there is an insufficient factual foundation to support the decision that has been made both in respect of the mobility component and the care component. Further, in respect of the award of the mobility component the tribunal have not set out the basis upon which they restricted the award of the mobility component.

4. I would in the normal course of events have been prepared to give a decision without reasons. However, in the peculiar circumstances of this case I wished to be addressed on the appropriate directions I should give to the freshly constituted tribunal.

5. In relation to the care component it is asserted that the claimant satisfies the conditions for the daytime supervision requirements and the night time attention requirement. In respect of the day time supervision requirement the tribunal whose decision I have set aside had made a finding that the claimant has been knocked down by vehicles in the road on three occasions and that his road sense is not improving and that they accepted the claimant's propensity to wander when out alone is a danger to himself and that there is a requirement of supervision. However, in applying the test for someone under the age of 16 the tribunal found that whilst the attention may be in excess of the normal requirements of a person of his age they were not substantially in excess. The basis for that view is not made clear and is one of the reasons why I have set the decision aside. The fresh tribunal will, in the context of their findings of mental or physical disablement, require to apply these findings to the other evidence to see whether or not the claimant satisfies the statutory supervision conditions. As the claimant is under the age of 16 they must do so in the context of section 72(6) of the Social Security Administration Act 1992. In applying the test the tribunal must address the

criteria set out by a Tribunal of Commissioners in R(A)1/83 (which are conveniently summarised in paragraph 11 of R(A)3/89).

6. The tribunal found that the claimant sometimes wets his bed during the night. The evidence before the tribunal whose decision I have set aside was somewhat limited. It is apparent from the claim pack which gave rise to the initial award in 1996 that the claimant suffers from what is described as "a cross lateral incontinence". That is not referred to in the renewal claim pack. In a submission before the Commissioner but which was not before the tribunal, this was sought to be explained. I refer in that connection to page 166 of the bundle. Quite clearly this matter is important in respect that bed-wetting or enuresis has been found in fact in some cases not to be a physical or mental disability and accordingly the conditions for the allowance could not be satisfied. I refer in that connection to CSDLA/531/00. It is apparent from what is said at page 166, the source for which according to the claimant's representative came from medical staff at Ninewells Hospital, that the matter is complex and may require evidence before any finding in respect of disability can be made. In these circumstances it appears to me that it will be necessary that the claimant be medically examined and in that connection I refer to section 20 of the Social Security Act 1998 and the Social Security and Child Support (Decision and Appeals) Regulations 1999 regulation 41. There also seems to be some evidence that the claimant suffers from a general mental disability. The tribunal whose decision I have set aside found that he had what is described as "learning difficulties". Whether that supports a finding of mental disablement and if it does to what extent is not clear. A medical examination can no doubt provide the necessary evidence.

7. In the event that the tribunal determine that the claimant does suffer from a physical or mental disability the question for the night time allowance is whether he requires from another person prolonged or repeated attention in connection with his bodily functions always bearing in mind as he is under 16 the qualification contained in section 72(6).

8. The issue is then for the tribunal to identify the bodily function impaired which in this case may on the information before me not be his bladder but may be related to the physical operation of his brain (rather than a cognitive function). That will be a matter for the tribunal to determine.

9. The question may arise as to whether any consequences upon the claimant urinating in bed can count as attention in connection with bodily functions. It is clear from the leading authority on the subject, namely Cockburn v The Chief Adjudication Officer and another [1997] 3 All ER 844 that there are limits to the extent to which such consequences if they otherwise amounted to attention in connection with bodily functions could fall within the statutory parameters. These parameters were set out by 4 out of the 5 members of the House which determined that appeal before them, Lord Slynn being the dissenting member. However, the special feature of Cockburn was that the claimant there was impaired in respect of two bodily functions, namely urinating and the movement of her body and limbs due to arthritis. In reaching a conclusion in that case the members of the House were divided in respect of which bodily function gave rise to a reasonable requirement for attention. Lord Goff at page 847 said –

> "I would regard these as cases in which, by reason of her disability, i.e. arthritis, she needs attention in connection with her bodily function of urinating, that being a bodily function which a fit person (one who does not suffer from arthritis) can perform without assistance."

At page 848 he went on to say:

> "It follows that, in the case of Mrs Cockburn, the question has to be asked whether the service in question is sufficiently personal to constitute part of 'frequent attention throughout the day in connection with [Mrs Cockburn's] bodily functions', on the basis that her disability is arthritis, and her relevant bodily function is urination. In my opinion, in the case of an unfortunate woman who because of her arthritis cannot cope with her incontinence, the services of changing her clothes or her bedlinen and remaking her bed, even (as part of the same operation) rinsing out the soiled clothing removed from her, are sufficiently personal to fall within the section. But taking her laundry away to be washed transcends personal attention of that kind; and it follows that, as I have said, [the claimant's] appeal must be dismissed."

Lord Mustill said at page 849 said:-

> "(3) Assume now that the applicant does not manage to get to the lavatory in time and needs help to change his or her clothes and put things straight. I think it quite a small step to say that here the help is given in connection with a bodily malfunction which, as I have said, I would equate with a bodily function. And if this is right the same must be the case with the changing of bedclothes and nightwear and other tasks."

He then went on to say at page 850:-

> "There are cases where it is better to concentrate on the words themselves, in the context of the actual dispute. In my opinion this is one. I see here a sufficient continuity between the applicant's incontinence and the presence of the other person to deal with the consequences on the spot to satisfy this section. If the other person had been asked why she spent an hour or so in the flat she would say that she had gone to help out with the applicant's bladder problem."

The effect of these speeches is that there does not have to be a direct connection between the disability and the bodily function impaired.

Lord Hope of Craighead on the other hand took a somewhat different approach. He said at page 867 –

> "There are two bodily functions involved in Mrs Cockburn's case. The first is that of urinating. Her disability in regard to that function is her incontinence. But she does not require assistance in the performance of the function or urinating. Her problem is that she cannot cope with the consequences of her incontinence due to her arthritis. The assistance which she requires is in connection with the other bodily function, which is that of moving her limbs".

He then went on to set out in his view the correct analysis –

> "She does not require attention in connection with the performance of the bodily function of urinating, but the fact that she is incontinent of urine increases her need for attention in connection with the other bodily functions which I have described."

10. Lord Clyde in his speech said that –

> "So far as the appeal in the case of Mrs Cockburn is concerned I consider that it should be dismissed for the reasons given by my noble and learned friend Lord Hope of Craighead whose speech I have had the opportunity of reading in draft."

It thus appears to me that Lord Clyde was accepting the analysis of Lord Hope.

11. Lord Slynn of Hadley in his speech set out the general principles which had been applied in Mallinson v Secretary of State for Social Security [1994] 2 All ER 295 as to what "attention in connection with bodily functions encompassed. He said at pages 854 and 855:-

> "Lord Woolf approved the distinction drawn by Nicholls LJ in *Moran v Secretary of State for Social Services* [1987] CA Transcript 244 that 'attention' denotes a concept of some personal service of an active nature whereas 'supervision' denotes a more passive concept, the person watching and being able to intervene only if necessary. He accepted that guiding was an active role involving personal qualities necessary to constitute 'attention' and said ([1994] 2 All ER 295 at 305, [1994] 1 WLR 630 at 640):
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> > 'The only attention which can be given to a person "in connection with" a sight handicap is to provide the assistance to enable that person to do what he could physically do for himself if he had sight.'
>
> Lord Woolf considered that it did not cease to be attention in connection with a bodily function if the disability prevented totally the exercise of that function and added ([1994] 2 All ER 295 at 306, [1994] 1 WLR 630 at 640):
>
> > 'The attention is in connection with the bodily function if it provides a substitute method of providing what the bodily function would provide if it were not totally or partially impaired.'
>
> The fact that with experience a person learned to cope with his disability so that less attention was required did not change the nature of the disability or the attention. It might affect the question whether the attention was needed frequently during the day. Lord Templeman and Lord Browne-Wilkinson agreed with his reasoning.
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> Lord Lloyd of Berwick, dissenting, with whom Lord Mustill agreed, considered that walking was the relevant bodily function and that what was required in that case was supervision and not attention; that since Mr Mallinson could move about in familiar surroundings he was limited to claiming in respect of walking about in unfamiliar surroundings (see [1994] 2 All ER 295 at 314-315, [1994] 1 WLR 630 at 648-649). That Lord Lloyd of Berwick found too vague and imprecise to count as a separate

bodily function. He rejected the argument that seeing was a bodily function which a person 'performed'.

It is, however, the majority view as to the meaning of 'attention in connection with' which must be accepted. That the attention required must be 'reasonably' required was stated in *R v Secretary of State for Social Services, ex p Connolly* [1986] 2 All ER 998, [1986] 1 WLR 421 and has not since been questioned.

The issues in Mrs Cockburn's case are thus different. In her case it seems to me that two bodily functions have to be considered. The first one is urination. Her disability is that she does not and cannot urinate in a controlled way. The second bodily function is the movement of the limbs, the legs but more particularly the hands and arms. Her disability in that respect is that she cannot use them for the purposes of adequately cleaning herself, changing and cleaning the clothes she wears and the sheets in which she sleeps. The acts claimed to constitute the attention which is required throughout the day in connection with her bodily functions are the cleaning of her body, the changing and cleaning of her clothes and sheets.

There is no question here as to whether these are essential or desirable. Her daughter's evidence, accepted by the tribunal makes it plain that they are essential. They are in any event required as part of normal life.

It is not in my view arguable, and has not been argued, that the cleaning of the body of a person who is incontinent is not "attention in connection with bodily functions, even if the need for cleaning results from a disability. Apart from helping to put in place incontinence pads in clothing there is no attention more closely connected to this particular bodily function."

Lord Slynn of course dissented from the other members of the House in respect of the principal issue. It is further not clear on my reading of his speech which bodily functions he considers require attention that is to say is it urinating or the use of her limbs or both. Mr Brodie submitted that his approach was consistent with Lords Goff and Mustill which concession I am prepared to accept.

12. It is however unfortunate that the majority of the House reached the conclusion that they did on two separate approaches, with the dissenting member, in relation to what impaired bodily function attention was required in respect of, having in effect supported the view reached by Lords Goff and Mustill.

13. The Inner House in the recent case of Margaret Stewart on behalf of Isaac McPhee against The Advocate General for Scotland issued on 10 May 2000 and recorded at pages 172 to 180 in respect of a child who was suffering from enuresis, without determining whether enuresis was a disablement or not, expressed their view on the issue.

14. In the opinion of the Court it is noted that –

"Mr Mitchell, for the appellant, submitted that the Commissioner had erred in law in his decision on the point now in issue. In particular, the Commissioner sought as the basis for his decision to found on a passage in the speech of Lord Hope of Craighead in the case of *Cockburn v Chief Adjudication Officer and another* [1997] 1 W.L.R.

> 799 (H.L.), overlooking the fact that the other four judges in the case adopted a different and wider approach than that of Lord Hope in the passage founded upon by the Commissioner. Furthermore, the Commissioner wrongly attributed as relating to the case of *Cockburn* a passage in Lord Slynn's speech which related to a deafness case which the House heard at the same time as the case of *Cockburn.* In the result, Mr Dewar, for the respondent, stated that he could not challenge what Mr Mitchell submitted about the Commissioner misdirecting himself in relation to the case of *Cockburn* and he conceded that the Commissioner had erred in law and that the appeal should be allowed and the case remitted to the Tribunal for a rehearing of the application. In this situation, our Opinion on the matter can be stated more shortly than would otherwise be appropriate."

The Inner House then went on to quote from passages in Cockburn at pages 177 to 179 of the bundle. It will however be noted that in error part of a speech attributed to Lord Clyde was in fact made by Lord Hope and that on the relevant issue Lord Clyde supported Lord Hope's analysis.

15. The Inner House went on to say –

> "In our opinion, therefore, the Commissioner was clearly wrong in excluding as irrelevant as a matter of law attention provided following upon completion of the bodily function of urinating simply because the attention did not assist in the actual bodily function of urinating. We agree with the observations of Lord Goff, Lord Mustill, Lord Slynn and Lord Clyde in their speeches in the *Cockburn* case in the passages which we have quoted. Whether attention provided following completion of the bodily function of urinating will qualify as relevant is any particular case is a matter for consideration of the circumstances of the case under reference to the statutory requirements as a whole. The *Cockburn* case illustrates this point."

16. Mr Brodie in the event submitted that the effect of that case was limited and that it is to Cockburn one must turn for guidance. I accept that submission.

17. In the circumstances it is difficult for me when substantial fact finding about the nature of the claimant's disability has yet to be determined to give clear directions. The best I can do in the circumstances is to direct the tribunal once they have made their findings in respect of disablement and the bodily functions of the claimant which are impaired is to apply Cockburn. Mr Brodie accepted that if cross lateral incontinence of urine was found to be the impaired bodily function then if the claimant reasonably required cleaning and removal of clothing (which the parameters set out by Cockburn) by virtue of a mental disability or even just his age then this could constitute attention in connection with his bodily function of urinating. This was based on the views of Lords Goff, Mustill and Slynn. In these circumstances I direct the tribunal accordingly. If the case had been one of enuresis the solution would have been likely to have been simple in respect that there would be no disability. The circumstances of this case are complicated both by the potential nature of the disability giving rise to the claimant's problems with urinating and an apparent more general mental disability.

18. In the event that the tribunal reached the conclusion that there is attention in connection with an impaired bodily function, they must also determine whether or not such attention is reasonably required and do so in the context of section 72(6).

19. In respect of the lower rate of the mobility component, the tribunal will again have to apply the statutory criteria in the context of the disabilities found and, as the claimant is under the age of 16, section 73(4) of the Social Security Contributions and Benefits Act 1992.

20. The appeal succeeds.

(signed)
D J MAY QC
Commissioner
Date: 10 November 2000