PLH/TEMP/1

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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DETERMINATION ON REVIEW OF THE ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I hold that the determination given on 21 October 1991 by the delegated medical practitioner ("DMP") reviewing this claim for attendance allowance on behalf of the Attendance Allowance Board was erroneous in law. The determination must therefore be set aside and the case is remitted for further adjudication in accordance with the directions given below.

2. The claim is made on behalf of the claimant's daughter ("C") who is now aged 12 and was born profoundly deaf. Unhappily her hearing disability is permanent and she still has difficulty hearing and communicating despite the use of powerful hearing aids. She has however learned to speak well and relies on lip reading with people with whom she is familiar. A good picture of her problems and of the care and help she has needed is given in the statement dated 5 January 1991 supplied by her parents. It is no doubt due in great measure to their practical attitude as well as to the special care she has had from her teachers that C has turned out to be the lively, fit and popular young lady described in the latest medical report dated 23 May 1991 and the report from her school dated 3 January 1991.

3. The appeal arises out of the rejection on 8 November 1990 of the claim for renewal of C's attendance allowance made on 12 September 1990. The allowance had originally been awarded on 27 July 1982 for a period up to C's 8th birthday, and renewed on 29 September 1986 up to the age of 12. It had been awarded throughout on the ground of C's special need because of her disability for supervision during the daytime, to avoid substantial danger to her. She had not been found to satisfy any of the other statutory conditions for special attention during the daytime, or for attention or supervision at night; and an application by her mother in late 1986 for the allowance to be increased to the higher rate because of C's needs during the

night was rejected, following a medical examination, in a reasoned decision given by a DMP on behalf of the Board on 11 August 1987. The application by C's mother on 12 September 1990 for the renewal of the allowance, then still current at the lower rate, stated that C's needs for attention and or supervision had not changed since she was last examined for attendance allowance. The renewal claim was rejected on 8 November 1990 after a fresh medical examination. This rejection was confirmed on review on 21 October 1991 by a different DMP after considering further information and reports supplied by C's parents and others on her behalf, and the report of a further medical examination carried out on 23 May 1991. This appeal is brought with the leave of the Commissioner against the decision of 21 October 1991 on the ground that it was erroneous in law.

4. The grounds of appeal on behalf of C dated 16 January 1992 contend that the DMP was in error in basing himself on generalised assumptions about children suffering from C's condition, rather than identifying the specific needs of C herself, in making his decision that she did not satisfy the daytime attention or supervision conditions. (These conditions under the former section 35(1) Social Security Act 1975 as applicable to a child under 16 are annexed to the DMP's written decision and I will not repeat them here.) The grounds of appeal are supplemented in a reply dated 14 July 1992 with the further point that the help C needs in communicating with other people, by lip-reading or otherwise amounts to a need for frequent attention from the people with whom she is speaking so that the 'attention' condition is satisfied. The Secretary of State in a submission dated 16 June 1992 does not support any of these grounds, but nevertheless contends that the decision should be set aside on the ground that the failure to supply C's parents with a copy of their own original claim and an associated medical report on C, dating from April and July 1982, amounted to a breach of natural justice.

5. I am not satisfied there was in fact a breach of natural justice here. There would of course have been one if the DMP giving the decision in October 1991 had taken into account any material documents which had not been supplied to C's parents, or on which they had not had the opportunity to comment. But contrary to what the Secretary of State suggests in paragraph 6 of his submission there is no indication so far as I can see that the DMP did in fact have before him or take into account any documents beyond those he actually referred to in paragraph 1 of his decision. These do not include the original 1982 medical report, even though the 1987 decision, to which he did refer, contains a reference to it. It would no doubt have been preferable if he had looked at it so as to see the complete history; but in view of the lapse of time I doubt if he would have found it of any significant assistance in his task of assessing the up to date position, and I do not think its absence invalidates his decision.

6. I must therefore consider the grounds raised in the claimant's notice of appeal. In my judgment the criticism of the DMP's treatment of the question of C's daytime supervision needs is well founded. In paragraph 7 of his decision he dealt with them as follows:

> "7. You referred to domestic dangers, but example and guidance in a deaf child's early years teach appreciation of potential danger and generally speaking, they are no more prone to hazards in the home than other children. You also referred to the danger of traffic, but having considered the problem of traffic hazards, I did not accept that this was a matter calling for continual supervision to the extent prescribed by the 1975 Social Security Act. It was my opinion that profoundly deaf children, particularly children deaf from birth, learned to compensate for their deafness by the greater use of visual appreciation. Indeed, they generally had a greater awareness of the dangers to which their disability exposed them than would have been expected of a child with normal hearing. In the absence of evidence to the contrary, I concluded that this may well apply in C's case and I did not accept that the day supervision condition was satisfied." [Emphasis added].

7. It is of course for the DMP to apply his own medical judgment, experience and good sense to the facts of each case in arriving at his decision whether the statutory conditions are satisfied. But the judgment that has to be made must always relate to the specific needs of the particular claimant and be based on his or her individual circumstances, not on generalisations: cf. the summary quoted with approval in R v. Secretary of State ex p Connolly [1986] 1 WLR 421, 424. The paragraph I have quoted from the DMP's decision appears to me to rely too much on generalisation from experience and not enough on focusing that experience on the facts of the individual case. In consequence, in my judgment, the DMP has failed to make an adequate finding on a question he plainly (and in my view rightly) regarded as relevant, namely the degree to which C herself had been able to compensate for her deafness by bringing her other senses to bear, so as to be able to cope with everyday dangers better. Indeed it is plain from the words I have underlined ("...may well apply...") that he has not managed to make a clear finding at all on what the actual facts in 'C's case were. In my view, his findings and the statement of his reasoning on this issue are insufficient, and the decision must therefore be set aside as erroneous in law: cf. R(A) 1/72.

8. For the sake of completeness I would add that I do not think the same criticism can be made of the DMP's decision on C's daytime attention needs, where (in paragraphs 4 and 5) the DMP does appear to me to focus his general observation so as to take account of the evidence about C's individual circumstances and abilities, and to reach a conclusion that was open to him on the

facts. I therefore reject the grounds of appeal relating to this issue.

9. I also reject the further contention raised in the reply that the DMP must, in effect, have been in error in law if he did not accept that C's need for help in lip-reading amounted by itself to a need for attention satisfying the statutory conditions. There can I think be no doubt that a need for help from a third person to act as interpreter for a person with difficulties hearing or speaking can count as "attention" in connection with those functions. I think there is considerable doubt whether the other party to a two-way conversation can be described as giving such attention simply by having to speak loudly or more clearly, use sign language or listen more attentively for the reply. But however that may be it cannot be correct as a matter of law that a person with hearing difficulties that make communication slow or difficult must automatically satisfy the statutory condition for day attention just because a normal person likes and expects to communicate with other human beings on frequent occasions throughout a day. In each case, in my view, there is a judgment of fact and degree to be made. It was one for the DMP to make, and I can find no error of law in the way he went about the task in this case.

10. In the result the appeal is allowed on the ground explained in paragraph 7 above, and the determination of 21 October 1991 is set aside. This is not a case in which I consider I should make the final decision on the claim myself and I accordingly refer the case for second-tier adjudication in accordance with regulation 23(2)(b) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 S.I. No. 2891. I direct that the adjudication officer should before making his fresh determination, review the whole of the evidence and material in the case starting with the original claim in 1982, and that there should be an opportunity for C's parents or their representatives to see and comment on all the documents back to that date if they wish to do so.

(Signed) P L Howell
Deputy Commissioner

Dated: 16 March 1993