

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON
A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Rebecca Murray

[ORAL HEARING]

1. R. H, now 19 years old, was born deaf. She communicates mainly by signing. I think she can lip read to some extent and I understand she can speak a little but not sufficiently well or with sufficient confidence to enable her to rely on her speech ability. She was awarded an attendance allowance at the lower rate for about 8 years, the last certificate expiring in June 1986. I am not sure what happened about attendance allowance between that date and 10 November 1988 when a new claim was made on R.'s behalf. That claim was rejected and the rejection was eventually confirmed by a determination on review dated 3 October 1989. R.'s mother now appeals to the Commissioner against that determination. At the oral hearing R. and her mother, who both attended, were very ably represented by Ms Jill Jones of The National Deaf Children's Society. The adjudication officer was represented by Mr L. Loveday of Central Adjudication Services.

2. Mr Loveday accepted that this case was indistinguishable from CSA/113/91 in which the Commissioner decided that a congenitally deaf boy satisfied the day attention condition, at least until he turned 16, because of the attention required for the purpose of communication. Accordingly Mr Loveday agreed that Rebecca had satisfied the day attention condition from at least 6 months before the date of her last claim until 16 August 1990 when she was 16 and I give, by way of interim decision, in substitution for the determination dated 3 October 1989, my decision to that effect. This interim decision is referred to an adjudication officer who will determine R.'s application for review, for the period to which I have referred, in accordance with it.

3. Mr Loveday did not accept that R. satisfied the day attention condition after she was 16. Ms Jones contends to the contrary. It was, so far as I was able to understand the submission, Mr Loveday's view that once turned 16 a profoundly deaf person, while possibly requiring at least the same level of

attention in connection with communication as such a person would require before that age, no longer had the same need for communication. Communication beyond 16 was more a matter of choice than necessity. That is a point that has not been dealt with in the written submissions nor, as far as I know, has it ever been considered in any of the cases. It was accordingly agreed that I should adjourn the hearing, in relation to the period commencing with the date of R 's 16th birthday, for further submissions on both sides. Ms Jones is to make her further written submissions within two months and Mr Loveday will reply within 30 days. I will then consider whether the oral hearing needs to be resumed.

(Signed) R A Sanders
Commissioner

Date: 8 October 1993

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DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

[[ORAL HEARING]]

1. At the resumed hearing of this appeal the claimant, now 20 years old, was represented by Ms J. Jones of the National Deaf Children's Society. The Secretary of State was represented by Mr J.R. McManus of Counsel. Ms Jones had not known that Counsel would appear against her and was concerned lest she and her client should be at a disadvantage. In the event she elected to proceed and very ably put her client's case.

2. It was conceded on behalf of the Secretary of State at the last hearing that the Attendance Allowance Board through its delegated medical practitioner had, on review, erred in law by not having considered the amount of attention required by this profoundly deaf claimant in order to achieve a sufficient level of communication. It was also then accepted that the case was indistinguishable from CSA/113/91 in which the Commissioner had decided that a congenitally deaf boy satisfied the day attention condition, at least until he turned 16, because of the attention required for the purpose of communication. It followed that this claimant had satisfied the day attention condition for an award of attendance allowance (or, as it is now known, the care component of disability living allowance) from at least 6 months before the date of her last claim until 16 August 1990, when she was 16, and I gave an interim decision to that effect. The resumed hearing concerned entitlement after that date. The resumption had been postponed at the request of the Secretary of State pending the outcome in the House of Lords of Mallinson v Secretary of State for Social Security (Judgment 21 April 1994) and then for written submissions as to the effect of that case on this. What emerges is that it is not in issue 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; there is nothing in Mallinson inconsistent with CSA/113/91 or my interim decision in this case.

3. Attendance allowance as such has been abolished except for those over 65. For those under 65 attendance allowance has been

replaced by the so-called care component of disability living allowance: see section 72(1) of the Social Security Contributions and Benefits Act 1992 which provides that -

"(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which -

(a) he is 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); or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients; or

(b) he 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 functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(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."

There are three different rates of payment depending on which of those conditions is satisfied. The first issue in this case is whether the claimant satisfies the condition imposed by section 72(1)(b)(i). That condition is identical to the day attention condition in the old attendance allowance. If the claimant does not satisfy that condition then it is no doubt open to consideration whether she might be entitled to the lowest rate of the care component by virtue of satisfying section 72(1)(a).

4. As I have said, it is not in question that hearing or communication is a bodily function. What is for determination

in this case is whether the claimant, since she turned 16, requires frequent attention throughout the day in connection with those bodily functions. "Requires" in section 72(1)(b)(i) means "reasonably requires": see Regina v Social Security Commissioner, ex parte Connolly [1986] 1 WLR 421 and R(A) 3/86.

5. The claimant's principal means of communication is by sign language; she has, I understand, a certain limited ability to vocalise her language and to lip read. Ms Jones made the point, which did not appear to be challenged, that because of her profound deafness, the claimant's ability to use language was relatively poor so that she would have that disadvantage whatever means of communication was employed, and also in respect of reading and writing. Though I do not doubt the point in general terms, I am not sure that there is any actual evidence for it in this case in relation to this claimant.

6. The claimant's family are apparently proficient in sign language and I gather that, when the claimant is with them, signing is the usual method of communication. In CA/249/92 the Deputy Commissioner, dealing with the case of a profoundly deaf 12 year old, said -

"9. I also reject the further contention raised in the reply that the DMP must, in effect, have been in error of 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."

I entirely agree with that statement. It may follow that when the claimant is with someone with whom she can communicate by sign language, for example when she is with her family, she is not receiving attention which would be taken into account for the purpose of satisfying section 72(b)(i). It is I think different or may be different in the case of a child when the evidence is that the child requires attention in order to develop or learn a means of communication.

7. There are situations when no doubt the claimant must have an interpreter. She cannot of course depend on her family always being available or on the chance presence of some other person

who can use sign language. So, for example, when she attended a course to become, as she did, a qualified nursery nurse, she had an interpreter. And one can speculate as to other circumstances where an interpreter would be required. That might well be the case if she had to spend time in hospital, or at the dentist's or doctor's or if for some other reason she had to go to or be in unfamiliar surroundings or with quite unfamiliar people. She works as a teacher in school, assisting, as I understand it, with the education of a deaf child or children. There is no interpreter but I was told that some of her colleagues had made the effort to learn some elementary sign language.

8. Dr M , a consultant psychiatrist, says in a recent report on the claimant that -

" ... R has a limited ability to communicate using the written word or speech and therefore is dependent on others in communicating with hearing people. In this context, the word independence is important. This word needs to be viewed in the context as meaning the ability to communicate independently. R cannot communicate independently with hearing people. Natural gesture and body language which hearing people may recognise, cannot be considered expressive language. Most hearing people do not use sign language, and their use of gesture and body language can only allow for the most rudimentary and basic communication. Furthermore, the frustration that is part of any such communication process, diminishes the natural ability of people to communicate with each other.

A statement has been made that the amount of attention R requires from hearing people will decrease after the age of 16. In my opinion, the amount of attention R requires will actually increase as she becomes older. She will be placed in a position of responsibility, have greater expectations of her role in society and a greater need for attention in respect of functional communication. There will be increased demands made on her and she will not be allowed to function in the child mode, but will be expected to function in the adult mode. Her occupation will make greater demands on her, and the older she becomes as she takes on the responsibilities of adulthood, including possibly parenthood, she will be exposed to much more spoken language, than she has been previously, i.e. in the home or the school. It is also important to recognise that if R has not internalised English language, it will be very difficult for her to lip-read or communicate using the written word. (Refer to my earlier paragraph on this matter.)

Finally, it is important to note that communication is not perceived as a luxury, but as a basic human function. It is not only a necessity, it is the basis of human existence. Without communication, it is impossible for human beings to be able to relate to each other, learn,

develop social and individual skills, and it is my opinion that cognitive development can be restricted without communication. R views herself as being disabled because she has difficulties in communication with hearing people. This may be different from the perceptions of other deaf people who do not view themselves as being disabled, but see themselves as being part of a cultural and linguistic minority. What is important is R has communication needs that cannot easily be met without the use of interpreters. She is thus dependent on others to communicate effectively with people in the hearing world. These needs will increase as time goes on. Her perception of herself and her disabilities are crucial to this claim, as she is disadvantaged through no fault of her own."

Those passages are in part directed to the point, made at least at one time on behalf of the Secretary of State, that as she gets older the claimant's communication needs would become fewer. There is also raised the question, by Dr M... 's reference to social skills, whether it could be said and to what extent the claimant reasonably requires assistance or attention to enable her to live a normal social life. Ms Jones pointed out that because of her communication problems the claimant was in effect compelled to spend most of what I might call her social time with other deaf people. Other normal social activities such as going to the cinema or the theatre, travelling, visiting museums etc. were in effect closed to profoundly deaf people. Mr McManus submitted in effect that while that may very well be true such "quality of life" pursuits could not be regarded as essential and it could not be said that attention in respect of them was reasonably required.

9. In R(A) 3/89 the Commissioner said (paragraphs 13 to 14), in relation to the supervision rather than the attention condition, that -

"However, a Commissioner went on in paragraph 7 to state:

'7. There could undoubtedly be an element of difficulty about the DMP's approach in relation to a disabled person, who, without, in any way behaving unreasonably, naturally sought to lead as normal and independent a life as possible ... Although this possibility is raised by the claimant's contentions and the observations of the Secretary of State's representative in reply it is not one which upon the particular evidence before him, the DMP was obliged to deal with.'

That case clearly turned upon the evidence; but the Commissioner made it clear that the position might have been different where a disabled claimant sought to lead as normal and independent a life as possible. In CA/145/1986 the Commissioner said in paragraph 5;

'Further in the absence of any mental impairment the

DMP was satisfied the claimant should be aware of the limitations imposed on her by her disablement, having the ability to adjust her lifestyle to minimise the risk of falling or bumping into objects when mobile and wisely refrain from attempting those domestic duties which might be thought to involve an element of danger ... In my judgment the DMP has not suggested that the claimant should change her lifestyle dramatically to avoid the risk of a fall or other potentially hazardous situation.'

Those cases merely emphasise that, in the final analysis, each case must depend on its particular facts. I have, since the oral hearing, had my attention drawn to the recent decision in CSA/4/19987 where the Commissioner said at paragraph 2:

' ... If she [the claimant] is at risk of falling and indeed there is evidence that she has fallen it is simply not enough to say, as the DMP does, that she should take precautions and undertake only those activities which are within the limits imposed by her disability. Is he suggesting that when she has fallen she has been engaged in activities she should not sensibly have undertaken? Is she not to move from her chair without assistance? Is she expected to remain chairbound until assistance is available? If whenever she moves from her chair she needs supervision why does that not satisfy the condition?'

I respectfully adopt and apply those observations."

And Ms Jones drew attention to the decision of the Northern Ireland Commissioner, case reference 2/84(AA), in which the Commissioner said -

"I consider that an applicant [for attendance allowance] is entitled to lead as normal a life as possible consistent with his or her disability and that it is not legitimate to expect such a person to restrict his or her normal activities so as to lessen the need for attention."

10. As it seems to me, this claimant, now 20 years old, has coped exceptionally well with her considerable disability. She has attained a professional qualification and is able to undertake employment in her chosen profession. There are circumstances when she undoubtedly needs special assistance or attention to overcome her communication problems. But where the person with whom the claimant is in communication is reasonably skilled in the use of sign language I would not think it right to conclude that any extra effort involved in that method of communication would necessarily go towards satisfying the attention condition. With regard to social activities, I think Mr McManus was wrong to rule them out altogether. It cannot of course be denied that deafness is a considerable disability and probably no amount of assistance or attention will put a

profoundly deaf person in the same position as one with good hearing. Even if, say, an interpreter were always to accompany the claimant, which I would hardly imagine would be desirable, she would not be free of disability. I take the view following, as it seems to me, the approach in the last few cases to which I have referred that it is 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; it may be of course that various social activities that are open to hearing people would not become more accessible to a deaf person whatever additional assistance or attention was given.

11. The DMP's decision on review which is the subject of this appeal was set aside by my interim decision. I had hoped to be able to give a final decision in this case, subject of course to appeal. But I have come to the conclusion that I do not really have sufficient evidence of the attention reasonably required by this claimant in respect of the kinds of matters to which I have referred as opposed to generalities about the needs of deaf people. What is reasonably required is a question of fact. That is very much the province of the adjudicating authorities below and, in accordance with regulation 23(2)(b) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 I refer the case to an adjudication officer for what is called second-tier adjudication. The adjudication officer must determine the amount of attention reasonably required by the claimant throughout the day and its frequency and in doing so should have regard to the matters mentioned above. It may be useful if the adjudication officer were to be provided with a day to day account of the claimant's various activities directed at showing what attention the claimant is said to require, and its frequency taking account of course of the fact that the adjudication officer has to determine entitlement in this case from when the claimant turned 16. And it will presumably be necessary, if the claimant fails on the main issue, for the adjudication officer to consider whether she might be entitled to the lowest rate of the care component. If there is to be an award for a period since the claimant turned 16, as to which I express no view, the period of such award will have to be determined. This is the sort of case which, as it seems to me, needs to be looked at from time to time as the claimant attains greater maturity and takes on, if she does, further responsibilities. So any award should, I would think, be for a limited period.

(Signed) R A Sanders
Commissioner

Date: 14 October 1994