- Meaning of Halliday
- Did not affect normal life
Courts must be in connection with bodily function

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CA/1141/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

Claimant:
Tribunal: *Birmingham*
Tribunal's Case No:

Decision:

1. My decision is as follows. It is given under sections 23(7)(b) and 34(4) of the Social Security Administration Act 1992.

1.1 The decision of the Birmingham Disability Appeal Tribunal held on 2nd October 1996 is erroneous in point of law: see paragraph 32 below.

1.2 Accordingly I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted tribunal for determination.

1.3 I direct the Disability Appeal Tribunal that rehears this case to conduct a complete rehearing and, in particular:

The tribunal shall first determine the period over which it has jurisdiction.

(i) The tribunal's jurisdiction begins on the date of claim: 6th July 1995.

(ii) In order to determine the date on which the tribunal's jurisdiction ends, the tribunal must establish whether the claimant has made any subsequent claim for Attendance Allowance. If such a claim has been made and has been adjudicated upon, the tribunal's jurisdiction runs down to the effective date of that decision. Otherwise, it runs down to the date of the rehearing. The adjudication officer should inform the tribunal, either by way of an additional submission or through the presenting officer at the rehearing, whether any subsequent claim has been made and, if so, the decision given on it and the effective date of that decision.

Having determined the period of its jurisdiction, the tribunal shall determine whether at any time within its jurisdiction the claimant satisfied the conditions of entitlement to either rate of Attendance Allowance, and in particular the tribunal shall have regard to the guidance in paragraphs 30 and 33 to 36 below.

Adjudication history of the case

2. This is an appeal to a Commissioner against the decision of the tribunal brought by the claimant with the leave of a Commissioner. The adjudication officer supports the appeal.

3. The claimant's claim for Attendance Allowance was made on 6th July 1995. In the claim pack, the claimant asserted difficulties with personal care. She also reported falls. The diagnosis of the claimant's GP was macular degeneration. The adjudication officer refused the claim in July 1995.

4. In January 1996, the claimant applied for a review of the decision. As the application for a review was made more than three months after the date of the decision on the claim, the review was carried out under section 30(2) of the Social Security Administration Act 1992 with the result that the decision under review could only be altered if it fell within one of a limited number of grounds. The grounds most likely to arise are (i) that the officer who made the decision was mistaken or ignorant of some material fact or (ii) that there has been a change of circumstances (for example, some improvement or deterioration in the claimant's disablement) since the decision was made. The adjudication officer did not find any grounds to alter the decision awarding benefit.

5. An application for a review of this decision was made in April 1996. As the application was made within three months of the decision, the review was carried out under section 30(1) of the 1992 Act, which allows the decision to be reviewed on any grounds. In law the effect of the claimant's application was to require the reconsideration of the earlier decision completely afresh. As the decision being reviewed was a decision which had required grounds to be shown, the officer, and eventually the tribunal, had to consider afresh whether there were grounds to review.

6. A different adjudication officer reviewed the decision, but did not revise it so as to alter the claimant's entitlement to Attendance Allowance.

7. The claimant appealed against the decision given by the adjudication officer on the section 30(1) review. The claimant attended and gave evidence at the hearing of her appeal. She was accompanied by a representative from Social Services.

8. The tribunal confirmed the decision under appeal.

The submissions on the appeal

9. The grounds of appeal argue that the tribunal failed to take into account a number of matters that made attention reasonably necessary in order for the claimant to walk out of doors. The adjudication officer submits to the Commissioner that the tribunal failed to consider the full range of the claimant's attention needs in a normal day and to take account of a reasonable level of social activity.

Mallinson and Fairey

10. The grounds of appeal and the adjudication officer's submission to the Commissioner refer to the decisions of the House of Lords in the cases of Mallinson v. Secretary of State for Social Security [1994] 2 All England Law Reports 295 and Cockburn v. Chief Adjudication Officer and Secretary of State for Social Security v. Fairey (also known as Halliday) decided and reported together at [1997] 3 All England Reports 844. I shall refer to these cases as Mallinson and Fairey respectively.

11. The latter decision was given on 21st May 1997. As the tribunal hearing was held almost 8 months before, the tribunal was not aware of the precise terms in which the House of Lords would formulate the law. Nonetheless, the law as formulated

applied retrospectively and the tribunal's decision must be considered in the light of it.

12. Mallinson and Fairey are not talismen that only need to be brandished in order to produce an award of Attendance Allowance. On examination, each case decided only a very narrow issue and did so in restricted terms. As decisions of the House of Lords, there can be no question but that they are binding on me as a Commissioner. The question is: what is their meaning and effect?

What Mallinson decided

13. Mallinson decided that seeing was a bodily function and that helping a claimant to know when and where to walk when out of doors could constitute attention in connection with that bodily function for the purposes of determining entitlement to benefit.

14. Following the analysis of Lord Woolf in Mallinson (at pages 305-307), the relevant bodily function in the case before me in that of seeing, although the impairment of that bodily function impedes the claimant in the performance of activities that involve other of her bodily functions, particularly the use of her lower limbs for walking and the use of her upper limbs.

15. Following the analyses of Lord Woolf in Mallinson (at page 306) and of Lord Slynn in Fairey (at page 859), the claimant in the case before me has a bodily function (seeing) that is impaired, giving rise to a disability (impaired sight), and attention is needed to remove or reduce the disability or to provide a substitute for it. The question arises: what in the circumstances of the claimant's case constitutes attention?

Attention in connection with bodily functions

16. Attention in connection with a bodily function has been narrowly and restrictively defined. The authorities contain differently phrased attempts to provide guidance on what does and does not fall within the proper meaning of those words. I do not set them out; they are well known and are quoted in both Mallinson and Fairey. It would be wrong to treat those different formulations as words of a statute to be analysed minutely. I read them as merely varying attempts to encapsulate the same idea.

17. The starting point is that attention in connection with bodily functions covers help given to alleviate or overcome the consequences of the disability arising from the lack or impairment of a bodily function. Not all help is included.

18. The first limitation on the help that is included is that the help must be help with doing something which fit persons would normally do for themselves and would not expect or allow anyone else to do for them or to assist them in doing: see Lords Goff and Hope in Fairey (pages 847 and 868-869 respectively). An obvious example is cleaning after using the toilet. This test has been formulated in objective terms and provides a uniform standard. It does not depend on what a particular individual would

expect or allow by way of assistance, nor does it depend on what would be normal in a particular household. See the decision of the Commissioner in CSDLA/281/1996, paragraph 15.

19. The second limitation is that the help must be reasonably required. The word "reasonably" both extends and restricts the scope of the word "required".

(a) It extends the scope of the word "required" so that the test is not one of necessity. Thus, the help need not be medically required: see the decision of the Commissioner in R(A) 3/86, paragraph 6.

(b) It limits the scope of the word "required" by imposing a condition that there must be a reasonable need for the help "required". This limiting function is seen in the cases where Commissioners have held it relevant to consider whether there are means by which a claimant could avoid a need for attention in connection with bodily functions or for supervision. It is also recognised in the leading speeches in both cases. In Mallinson, Lord Woolf (at page 307) saw the condition that the help be reasonably required as a means of excluding from consideration

> "extreme situations where a blind person would require assistance which is unlikely to have been intended to qualify ...."

In Fairey, Lord Slynn (at page 859) accepted that the provision of an interpreter for someone with impaired hearing could amount to attention, but added:

> "It must still be reasonably required both in its purpose and in its frequency."

20. As was pointed out in the decision of the Commissioner in CDLA/267/1994, paragraph 4, the word "reasonably" does not remove all force from the word "required". That statement was made in the context of the Court of Appeal decision in Fairey, but remains valid following the decision of the House of Lords.

What Fairey decided

21. The lack or impairment of a bodily function can lead to a need for help in a variety of contexts. The loss of an arm, for example, may lead to difficulties with dressing, personal hygiene, cooking, housework, shopping, education, training, work and with some social or domestic activities. The contexts in which the help given counts as attention in connection with a bodily function are not limited to those matters of domestic survival. The contexts to be taken into account were set by Fairey. Lord Slynn (at page 860) said:

> "The test, in my view, is whether the attention is reasonably required to enable the severely disabled person as far as reasonably possible to lead a normal life."

22. Lord Slynn (at page 860) recognised that a normal life could include a social life and that the standard of what was normal would vary from case to case.

> "Social life in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life. ... What is reasonable will depend on the age, sex, interests of the applicant and other circumstances."

23. The test is very narrowly drawn. In addition to the "reasonably required" condition referred to in paragraph 19 above, it is necessary to decide what constitutes a "normal life" for the particular claimant and how far it is "reasonably possible" for the claimant to lead such a life. Lord Slynn (at page 860) also confirmed as correct in law the statement by the Commissioner in that case that the attention reasonably required could include

> "such attention as may enable the claimant to carry out a reasonable level of social activity".

That passage again uses the word "reasonable".

24. The context in which attention in connection with bodily functions may be taken into account may include in an appropriate case cooking, shopping, or other domestic duties: see the decisions of the Commissioners in CDLA/267/1994, paragraph 5 and CDLA/3711/1995, paragraph 4. Those decisions are consistent with the terms of the test formulated by Lord Slynn.

What Mallinson and Fairey did not decide

25. It is important to appreciate what Mallinson and Fairey did not decide.

26. In neither case did the House of Lords have before it the relevant factual questions relating to entitlement to benefit. The House in Mallinson did not have before it, and did not discuss or decide, the frequency with which attention was reasonably required in relation to walking or any other activity: see Lord Woolf (at page 305). The House in Fairey did not have before it, and did not discuss or decide, what help was reasonably required in that case: see Lords Slynn (at page 860) and Clyde (at page 869). Those were matters of fact that were to be decided elsewhere. All the House of Lords did in each case was to lay down the test to be applied. It is not possible to draw conclusions from these cases about the extent of attention that may be required on the application of the law they lay down.

27. Fairey decided the context within which attention in connection with bodily functions would be relevant. It did not decide that any help given in the context of trying to lead a normal life constituted attention in connection with bodily functions.

28. As emphasised in paragraph 23 above, the test is narrowly drawn. Commissioners have held that the law does not provide that

> "a claimant must be placed as nearly as possible in the position of a person without disability"

or that

> "all the help a blind person reasonably needs in the course of trying to lead as 'normal' a life as possible counts as attention and therefore towards getting the benefit."

See CDLA/267/1994, paragraph 4 and CDLA/8167/1995, paragraph 16 respectively. Those statements are consistent with the narrow terms of the test set out by Lord Slynn. I respectfully agree with them. The former decision was given following the Court of Appeal's decision in Fairey, but it is equally applicable to the House of Lords' decision.

29. Moreover, Fairey did not override the need for the help to constitute attention in connection with a bodily function. It is always necessary, regardless of the context in which the help would be needed, for it to satisfy the test set out above: see the decision of the Commissioner in CSDLA/281/1996, paragraph 15.

The overall effect of the tests

30. In CDLA/8167/1995, paragraph 20, the Commissioner set out his view of the combined effect of the limitations on what constitutes attention in connection with a bodily function and on the contexts within which such attention may be taken into account by saying that they limited the scope of the relevant inquiry to

> "the relatively mundane everyday aspects of functioning as a human being in ordinary life".

I take no exception to this statement when viewed as an attempt to summarise the likely effect of the application of the law in a particular case or in the general run of cases. However, tribunals are less likely to fall into error if they apply the tests as formulated elsewhere in more detail. I so direct the tribunal that rehears this case.

The tribunal's decision

31. The tribunal's decision is not to be criticised for failing to apply as subsequently elaborated. However, this cannot prevent it being erroneous in law.

32. As regards attention in connection with bodily functions, the tribunal's findings of fact show that it concentrated on the activities that the claimant undertook. It did not investigate the extent to which attention might reasonably be required in order to enable her as far as reasonably possible to live a normal life. It did not tackle the issues and value judgments arising for decision under the law as formulated in

Fairey. This may have limited the extent to which it took account of attention in context of walking out of doors under Mallinson. I notice that the tribunal found that the claimant had "stopped going to the cinema or to the local church tea dance about 4 years ago" and that that more or less coincided with the onset of her disability. It may be that the change in her activities was not a matter of choice or of adjustment to her advancing years, but a direct consequence of her deteriorating eyesight. Participating in those activities may form part of what in the claimant's case is a normal life.

33. As it is likely that the claimant's vision will have further deteriorated by the time of the rehearing of her appeal, the tribunal that rehears this case must investigate the timing, nature and extent of that deterioration in order to determine whether the conditions of entitlement to Attendance Allowance were satisfied at any time within its jurisdiction. The tribunal must also bear in mind that when a person with normal sight begins to lose her vision there is a period of adjustment that may justify an award of Attendance Allowance for a fixed period. Gradual deterioration may have the effect of prolonging the time taken to adjust. Age may also hamper the process. These are matters of fact for the tribunal to determine.

34. It is a matter of fact for the tribunal to decide what help, if any, constitutes attention in connection with the claimant's boldily functions and, if so, how frequently it is reasonably required: see Lord Slynn in Fairey at page 860. However, the tribunal may find helpful the examples given by the Commissioner in CDLA/8167/1995, paragraph 18.

35. As regards supervision on account of the reported falls, the tribunal concluded that there was "insufficient evidence to indicate a propensity to fall". That conclusion is unassailable in law on the evidence before the tribunal. However, the matter will be decided afresh by the tribunal that rehears this case on the basis of the evidence and argument available at the time of the rehearing.

Grounds for review

36. As the decision under appeal to the tribunal is a review of a decision given under section 30(2) of the Social Security Administration Act 1992, the tribunal must identify grounds for review if an award of Attendance Allowance is to be made. The tribunal's decision before me does not refer to grounds for review. However, as the tribunal's conclusion was that the conditions of entitlement were not satisfied, it followed that there were no grounds for review. The question was, therefore, dealt with in substance if not in form and the tribunal's decision is not erroneous in law on this count.

Conclusion

37. The tribunal's decision is erroneous in law and must be set aside. I cannot give the decision which the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal in order to determine whether at any time within the period of the tribunal's jurisdiction the

claimant was entitled to either rate of Attendance Allowance. The tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions in paragraph 1.3 above. As my jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the tribunal on the law to apply.

Signed: **Edward Jacobs**
Commissioner

Date: **30th October 1998**