SUPPLEMENTARY BENEFITS ACT 1976

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987 REGULATIONS 24(1)

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Paragraph 3 Line 7 Insert: Cannot prepared a cooked main meal for himself if he has the

(Signed) M.J. Goodman
Commissioner

(Date) 24 October 1994

Commissioner's File: CDLA/058/1993
Region: Leeds

CPAG

94/94

MJG/SH/4

Commissioner's File: CDLA/058/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the disability appeal tribunal dated 5 July 1993 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted disability appeal tribunal: Social Security Administration Act 1992, section 34.

2. This is an appeal to the Commissioner by the claimant, a man born on 22 April 1945. The appeal is against the unanimous decision of a disability appeal tribunal dated 5 July 1993, which dismissed the claimant's appeal against a decision of the adjudication officer (notified on 7 November 1992) to the effect that the claimant was "not entitled to Disability Living Allowance". The appeal was the subject of an oral hearing before me on 1 September 1994, at which the claimant was not present but was represented by Mr D Thomas of the Child Poverty Action Group. The adjudication officer was represented by Ms J Smith of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Thomas and to Ms Smith for their assistance to me at the hearing.

3. I have set the tribunal's decision aside because I accept the concurring submissions of Mr Thomas and Ms Smith that the tribunal's decision was erroneous in law, in that its findings of fact and reasons for decision did not adequately deal with the qualifying condition under section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992 that a claimant

ingredients". It is clear that the tribunal's findings of fact and reasons for decision, though in all other respects completed in exemplary and careful detail, did not deal adequately with this particular point and I must therefore set the tribunal's decision aside on that ground. I should also note at this point that Mr Thomas indicated at the hearing that he wished to make some criticism of that part of the tribunal's decision that dealt with the "mobility component" under section 73 of the 1992 Act. It was agreed that, as I was setting the tribunal's decision aside in any event, I would not go into this matter as there was an important issue of law to be decided in regard to the care component (see below) and that the claimant or those representing him would deal with the relevant matters relating to the mobility component before the new tribunal who will be hearing this case.

4. The important question of law to which I refer arises from the provision of section 72(1)(a)(i) of the 1992 Act, dealing with another qualifying condition for the lower rate care component, namely that a claimant "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)". There was no doubt in the present case that the claimant did require attention from another person in connection with his bodily functions but the issue was whether he required that attention "for a significant portion of the day".

5. On this point in their reasons for decision the tribunal said,

> "In total, we took the view that though [the claimant] requires attention throughout the day in connection with his bodily functions; that need for attention is less frequent and protracted than the regulations envisaged. Indeed, we did not consider that the frequency or duration of the care he receives quite constitutes that of 'a significant proportion of the day'."

I should note that in fact there is no definition of the expression "significant portion of the day" either in the 1992 Act itself or elsewhere eg. in any Regulations. The reference by the tribunal to "regulations" must have been a slip.

6. In written grounds of appeal dated 18 August 1993 the claimant's representative said, in connection with the phrase "significant portion of the day",

> ".. we feel that the tribunal made an error of law in that a clear guidance from a Government Spokesman has been ignored. This guidance is about defining a term in the legislation when attention is needed for 'a significant portion of the day' in order to qualify for the lower rate of the Care Component under the 'limited attention needs' rule. As there is no strict legal definition of the term 'significant portion of the day' it is submitted that an

official guidance on this issue must be taken from the Department of Social Security. A Government Spokesman has said in the debate on this provision in the House of Lords [House of Lords Debates, Hansard, 25th March 1991, Col. 884] that a 'significant portion of the day' was 'an hour or thereabouts' ... furthermore, whilst 'significant' could be interpreted as 'important' or 'worthy of consideration' in relation to the length of the day, it is also relevant in the context of the care component to focus on the purpose of the benefit and the effect on a carer in providing the necessary care. The time it actually takes to give a disabled person all the help they need is just one part of the picture. The timing or pattern of that help is also relevant. Bearing in mind the policy and intention behind this particular rule it should be possible to pass the 'limited attention' test even though it would take less than an hour in all to give the help one needs. ... It is submitted that the term 'significant portion of the day' should be interpreted in the right context. All the relevant factors such as the nature, timing etc of care must be borne in mind when considering what the word 'significant' means. [It is submitted] that the tribunal made a decision based on an interpretation which obviously conflicts with the policy intention behind this rule."

7. In a direction dated 11 May 1994 I stated,

> "I shall wish to hear legal argument on whether this is an appropriate case for reference to Hansard."

That was of course a reference to the recent decision of the House of Lords in Pepper v. Hart [1993] A.C. 593 (also reported at [1993] 1 All ER 42). In that case it was held (to quote from the headnote to the Appeal Cases report),

> "... that, subject to any question of Parliamentary privilege, the rule excluding reference to Parliamentary material as an aid to statutory construction should be relaxed so as to permit such reference where (a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied upon were clear."

8. It was held by a Tribunal of Commissioners in R(M)1/83 para.20) that the Courts' rule forbidding reference in all circumstances to Hansard as an aid to statutory construction applied equally to the Social Security Commissioners. It follows, therefore, that before using the statement in Hansard (referred to in the claimant's grounds of appeal) as an aid to construction in this case, I must be satisfied that the criteria outlined in Pepper v. Hart apply here. However, at the hearing

on 1 September 1994 before me Mr Thomas concurred with Ms Smith in submitting to me that in the present circumstances this was not an appropriate case, under the rules in Pepper v. Hart, for reference to Hansard. Having given this matter my own independent consideration I equally conclude that that is so and that I should not refer to the extract from Hansard. In Pepper v. Hart [1993] A.C. 593 at 634, Lord Browne-Wilkinson said,

> "In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In a case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

9. In my judgment, there is not present in the phrase "significant portion of the day" in section 72(1)(a)(i) of the 1992 Act any language, which to quote Lord Browne Wilkinson, "is ambiguous or obscure or the literal meaning of which leads to an absurdity". The phrase "significant portion of the day" is no different from many others in social security legislation which have some degree of generality but that is not the same as saying that there is some ambiguity in the phrase. It was not suggested, nor could it be, that the language was obscure or that its literal meaning could lead to an absurdity. I therefore accept the concurring submissions of Mr Thomas and Ms Smith that I am not permitted to use the extract from Hansard above referred to as an aid to construction in this case. Neither of course is the new tribunal that rehears this case allowed to do so.

10. Mr Thomas then addressed me on the general meaning of the phrase "significant portion of the day", in the course of which address he developed the arguments which had been put in writing in the original grounds of appeal (see paragraph 6 above). In particular he argued that the word "significant" could mean significant either in length of time or, despite the shortness of time, significant in its importance. He cited one of the definitions in the Shorter Oxford English Dictionary of the word "significant" as meaning "important, notable; consequential." He adopted phraseology which I suggested to him. namely that he was arguing that the attention in connection with bodily functions could be "significant" either in quality or in quantum. Ms Smith contended that, because of the words following "significant" portion of the day" i.e. "whether during a single period or a number of periods)", "significant" could mean significant only in length of time, though she did hazard that the length of time in question could be, as she put it, "a minimum of an hour". I would not dissent from that.

11. I do not however accept Mr Thomas' submission that it is not just a question of the length of time taken but also the importance of the act or acts or care. Mr Thomas suggested for example that, although it only took a short time to assist a disabled claimant to get out of bed in the morning, that nevertheless of itself could constitute "a significant portion of the day" because of its very importance. A claimant, he said, could not begin to start daily living until he had got out of bed. In this context Mr Thomas drew attention to the statement of Lord Bridge in the House of Lords decision in Re Woodling, reported as Appendix 2 to R(A) 2/80 where at page 4 of the Appendix Lord Bridge said, speaking of attendance allowance,

> "Again, it seems a reasonable inference that the policy of the enactment was to provide a financial incentive to encourage families or friends to undertake the difficult and sometimes distasteful task of caring within the home for those who are so severely disabled that they must otherwise become a charge on some public institution."

12. Mr Thomas submitted that that dictum demonstrates that it was the quality as well as the quantum of attention that must be taken into account. However I do not consider that anything more than the length of time in the day can be taken into account under the expression "a significant portion of the day" since the whole tenor of that phrase refers to time. That is reinforced by the fact that it is then followed by the words "(whether during a single period or a number of periods)".

13. The new tribunal will need to have regard to what I have said above about construing the expression "significant portion of the day". What decision they ultimately come to on that matter is a question of fact for them after they have reheard the case and heard all the necessary evidence. My having allowed the appeal in this case on the ground of inadequacy of reasons by the original tribunal is no indication of any view by me, one way or the other as to what the ultimate result of the claimant's appeal for disability living allowance should be.

(Signed) M.J. Goodman
Commissioner

(Date) 26 September 1994