

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/131/01

Starred Decision No: 92/01

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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's File No: CDLA 131/01

SOCIAL SECURITY ACTS 1992-1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: P L Howell QC

26 July 2001

Claimant : Martin Geoffrey Foster
Claim for : Disability Living Allowance
Tribunal : Taunton
Tribunal Case Ref: U/03/206/2000/00149
Tribunal date : 30 May 2000

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[ORAL HEARING]

1. In this appeal against the refusal of the low rate of disability living allowance care component to a person suffering from Asperger's disorder there was in my judgment no error of law in the decision of the appeal tribunal sitting at Taunton on 30 May 2000 as recorded in the statement of reasons sent to the parties on 17 July 2000, and the claimant's appeal against it is therefore dismissed.

2. I held an oral hearing of this appeal which had been requested on his behalf. He did not appear but was represented by Andrew Powell, a project officer for the National Autistic Society who has been assisting the claimant with his difficulties, and represented him at the tribunal hearing by which time he had known the claimant for something over six months. Huw James, solicitor, appeared for the Secretary of State.

3. The claimant is a man now aged 34 who made a claim for disability living allowance in April 1999 in which he said:

"I suffer from Asperger syndrome which is a mild form of autism. This is a disability which affects the way I communicate and also interact with other people. It is reflected in difficulty in social relationships (at times) and a need to follow routines in life and work. I have not been prescribed any medicines, tablets or other treatment for my Asperger syndrome disability (Asperger). I currently see a clinical psychologist on a regular basis (Dr. C Williams)."

4. In the remainder of the form he wrote "not applicable" in response to all of the questions asking for what practical help he needed with mobility and his everyday needs, with the exception of the answers on pages 31, 33 and 34 of the appeal file indicating that because of his Asperger syndrome he needed someone with him or at the end of a telephone for "help with my emotions", for reassurance with unexpected problems which could make him anxious and panicky, and difficulties with understanding

instructions, with unfamiliar people, places or situations. The form, which appears to have been completed by the claimant himself, concluded

"I have difficulty with social relationships and also a lack of imagination to a degree. Please find enclosed the National Autistic Society leaflet which explains my condition, and the reasons for my problem."

5. The form demonstrates the claimant to be intelligent, well able to express himself and have a good insight into the nature of his own condition. As the tribunal later discovered and found as a fact, he has a university degree, a diploma in court procedure and had a job in the magistrates' courts for five years. There was no medical evidence submitted in support of the application and the only supporting statement was one by his mother dated 13 May 1999 at page 98 which said

"he has been unable to get employment because of his lack of communicating skills and difficulty with social relationships. He needs my help with everyday living problems to enable him to lead as independent a life as possible."

but omitted any mention of his previous employment and the fact that he had successfully completed a university degree course.

6. The only medical evidence of any kind put before the tribunal to explain the actual practical effects of the claimant's condition in terms of his ability to cope with everyday living for himself was a short letter from the consultant clinical psychologist dated 20 September 1999 at page 44 which said:

"Mr Foster has asked that I write to you in regard to his application for the lower rate of disability living allowance. He has been known to me for 12 years following a referral for assessment and diagnosis from his doctor. I have diagnosed that Mr Foster has Asperger syndrome which is a variant of an autistic spectrum disorder. This significantly affects his social interaction and ability to maintain independence. He has worked very hard to achieve relative independence but still requires input from his mother to monitor his behaviour and provide reassurance and emotional support. It is for that reason that I believe that some discretion should be experienced in applying the DEA criteria and I support his application for review."

7. It is significant that in that report Dr. Williams makes no mention of any practical difficulties with ability to communicate. The diagnostic criteria for "Asperger's Disorder" in general medical use specify as features of this particular condition before the diagnosis can be given that there is *no* clinically significant general delay in language, and *no* clinically significant delay in cognitive development or in the development of age-appropriate self-help skills: in these respects the condition is differentiated from Autistic Disorder. As I understand it and as appears to be borne out by the evidence in this case, the particular problem that adults with this condition experience is with what is described as "empathy and modulation of social interaction", in other words being aware of what other people may be thinking and feeling, and moderating what one says and does in response.

8. The only other written evidence presented to the tribunal was a document from the National Autistic Society at pages 50A-50H, giving general information "to whom it may concern" about the nature and causes of autism and Asperger's syndrome; though as Mr Powell very fairly conceded this general information from the London office of his organisation was not of great assistance in the present context as it fails altogether to distinguish the practical effects of the two conditions.

9. At the tribunal on 30 May 2000 the claimant himself, his mother and Mr Powell all appeared, gave oral evidence and made submissions about the claimant's condition. It is apparent from the chairman's record of proceedings at pages 52 to 59 of the appeal file that a most careful consideration was given to the relevant issues in the case in the course of the hearing, and a full opportunity for evidence and submissions both by the claimant and on his behalf. As Mr Powell explained to me, it was not an easy hearing for him to conduct as representative, since for a large part of the time the claimant and his mother were arguing and disagreeing with one another over the true extent of his disabilities; the claimant maintaining that he could manage things for himself except in the respects already indicated where he needed support and reassurance, and his mother maintaining both to him and to the tribunal, with the support of Mr Powell, that this was over-optimistic and he really needed more help.

10. The tribunal statement of reasons records summarily, but so far as I can see entirely fairly and accurately, the substance of the evidence given both by and on behalf of the claimant on the relevant issues of what help and supervision he really needed. Taking into account that evidence, the tribunal concluded that none of the statutory conditions for an award of disability living allowance were met, and accordingly dismissed the appeal, for reasons they stated as follows:

"Facts found and reasons for decision. Mr Foster suffers from Asperger's syndrome which in the words of the NAS document affect communication, social interaction and imagination. However he told us that he leads a very full social life, he lives alone and fully self-cares, is satisfactorily doing a work placement scheme and for 5 years had a demanding job at the magistrates courts. In response to every question on the claim form in relation to both walking, unfamiliar routes and care needs he wrote 'not applicable'. It is those questions which seek to focus the issues of needs. Dr. Williams, a consultant clinical psychiatrist, document 47, 20 September 1999 says that 'some discretion should be used in applying the Disability Living Allowance criteria.' The Disability Appeal Tribunal has no such discretion. The relevant issue raised for Mr Foster is that assistance in training in communication, social interaction and imagination is assistance in connection with bodily functions. The disability appeal tribunal know of no Commissioner's decision which supports this proposition and cannot agree with it. The decision in *Mallinson v Secretary of State* [1994] 1 WLR 630 and related cases indicates that assistance with social matters in the case of blindness is given to supplement the missing bodily function of seeing. Mr Foster has no missing bodily function. He has told us that he is fully mobile, fully self-caring both day and night and can take himself to unfamiliar places. Indeed, on his evidence we cannot hold that even his social skills are so impaired as to require frequent attention throughout the day or for a significant portion of the day from another person as he has told us that he lives a full social life and lives alone in a self-sufficient way."

11. Against that decision the claimant appeals on grounds put forward on his behalf by Mr Powell in the written notice of appeal at pages 66 to 67, amplified by him with further written material and oral argument before me. In conjunction with the appeal Mr Powell has also submitted two further letters dated 20 July and 10 August 2000 from GPs on behalf of the claimant and his mother, but those were not before the tribunal and are thus of no relevance to what I have to decide.

12. The two major grounds put forward by Mr Powell for challenging the tribunal's decision were first that they misdirected themselves, alternatively failed adequately to address the relevant issues and thus failed to provide the claimant with an adequately reasoned decision, on the issue of whether his difficulties with social interaction should have been accepted as giving rise to a need for attention for at least a significant portion of the day in connection with his bodily functions, in particular communication. In the first place it was said that communication should itself be viewed as a bodily function for this purpose, not merely as an activity making use of other functions as the Secretary of State contended in the written submission dated 28 February 2001 at pages 74 to 76. Alternatively if that was wrong the help the claimant was alleged by his mother and Mr Powell to need in his dealings with other people should have been taken as attention required in connection with his bodily function of speaking. The nature of this help as explained by Mr Powell to the tribunal was that the claimant "is optimistic, he needed to develop social skills such as not talking too loudly, too close or overtalking, he needed to 'learn to read people'."

13. In my judgment the tribunal were correct to reject this line of argument, as it goes far beyond the established scope of "attention in connection with bodily functions" as that has been interpreted for the purposes of these provisions. While not disputing that communication may better be described as an activity rather than a bodily function so far as it is necessary to draw a semantic line between the two, I think it preferable to construe the phrase "attention in connection with bodily functions" as a whole and by reference to its practical application, as it seems to me Lord Denning did in the judgment in *R v National Insurance Commissioner ex p Secretary of State* [1981] 1 WLR 1017, 1022 (the *Packer* case), which is normally taken as the starting point for an analysis of the decisions in this area.

14. As the tribunal correctly recorded, the reason why a deaf or blind person may be able to have the help he needs in communicating with other people taken into account as qualifying him for this benefit is that he needs that help because of some bodily function that is not working properly or is absent. The tribunal found that not to be the

case with this claimant, and that finding appears to me incontrovertible: it was not in fact challenged at all by Mr Powell. If a person is in fact able to communicate with other people for themselves without assistance, it is in my judgment too far removed from the bodily functions involved in communicating to say that they satisfy the statutory conditions because they are or may be different from other people in the messages or ideas they do or do not wish to communicate, or the uses to which they do or do not put their ability to communicate in terms of establishing relationships, empathy or modulation of behaviour and interaction with other people. Still less does it seem to me arguable that a need for help with what are referred to as "communication skills" in the employment sphere, namely an ability to marshal and deploy relevant ideas and persuade others to one's point of view (which was one of the aspects put forward here) can be matters taken into account as "attention in connection with bodily functions" for the very limited purposes of these disability benefit criteria.

15. The second main ground sought to be argued by Mr Powell was that the tribunal had given insufficient consideration to the evidence and submissions he and the claimant's mother had given to the tribunal, in particular where this suggested that the claimant himself was presenting an over-optimistic view and that his actual needs for help were greater. At the hearing before me, Mr Powell for the first time added to this a submission that the tribunal had failed to give the claimant's case a fair hearing, by reason of having spent too much time listening to the claimant himself instead of to his mother and Mr Powell as his representative; and that a procedure should have been adopted where submissions and information were taken from them separately, possibly in the absence of the claimant himself so that they could speak more freely. However he acknowledged that at the hearing itself he had made no application for anything of the kind to be done, nor had he given any indication to the tribunal that there was any further information or submissions that he wished to place before the tribunal on the claimant's behalf before the hearing was concluded. He said nevertheless that the tribunal ought to have been more aware of the nature of this particular condition, and ought not to have based themselves on the claimant's own evidence to the extent they did.

16. In my judgment, Mr James was right in saying that such submissions, whether made at the proper time or not, were completely unarguable. The assessment of the evidence before the tribunal was a matter for them and there is no ground for suggesting that the evidence and submissions by Mr Powell and the claimant's mother suggesting more extensive needs for help, which the tribunal specifically recorded both in the record of proceedings and in their statement of reasons, were not duly taken into account. It is common ground that the claimant himself had no lack of intelligence or understanding,

and the totality of the evidence given to and recorded by the tribunal plainly justified the conclusion they reached. Indeed I would go further and hold, as Mr James submitted, that the tribunal reached the only possible conclusion any reasonable tribunal could have reached on this evidence. It showed plainly that no need for attention meeting the statutory criteria for any level of disability living allowance was established.

17. I specifically reject the submission that there can have been any question of a breach of natural justice in the tribunal not having divined for itself that there might be further information the claimant's mother or his representative would have wished or felt able to give the tribunal more freely if some different procedure had been adopted, not allowing the claimant to speak for himself, when this was never at any point raised either before or during the hearing.

18. For those reasons, I dismiss this appeal.

(Signed)

P L Howell
Commissioner
26 July 2001