

Higher Rate Mob. Component —  
'Severely Mentally Impaired' (As defined)  
Assessment Done by Counsel C.P.A.G. ★ 60/95

DGR/SH/13

Commissioner's File: CDLA/156/1994

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. My decision is that the decision of the disability appeal tribunal ("DAT") given on 29 October 1993 is erroneous in point of law, and accordingly I set it aside. As I consider it expedient to make fresh findings of fact and to give such decision as I consider appropriate in the light of them, I further decide that the claimant does not fall within section 73(3)(a), and consequently is not entitled to the mobility component of disability living allowance at the higher rate.

2. The claimant asked for an oral hearing, a request which was acceded to. At the hearing the claimant, who was not present, was represented by Mr C Morris-Coole of Counsel instructed by Mr J Claremont, solicitor, whilst the adjudication officer appeared by Mr Lewis Varley of the Solicitor's Office of the Department of Social Security. I am indebted to both of them for their submissions.

3. The question for determination by the tribunal was whether the claimant was entitled to the mobility component of disability living allowance at the higher rate. She had already been awarded it at the lower rate. In order to succeed the claimant had to bring herself within section 73(3)(a) of the Social Security Contributions and Benefits Act 1992, i.e. she had to show that she was "severely mentally impaired". What constitutes this condition for the purposes of the aforesaid section is defined in regulation 12(5) of the Social Security (Disability Living Allowance) Regulations 1991 [S.I. 1991 No. 2890] which reads as follows:-

" 12. (5) A person falls within subsection 3(a) of section [73 of the Social Security Contributions and Benefits Act 1992] (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning."

It was not in dispute before the tribunal that the claimant satisfied this provision, provided she could be said to be suffering "from a state of arrested development or incomplete physical development of the brain". In the event, the tribunal, upholding the decision of the adjudication officer, decided that, as the claimant was suffering from Alzheimer's disease and this was a degenerative condition arising after the brain had developed fully, she was not suffering from "a state of arrested development or incomplete physical development of the brain", with the result that her claim for mobility component at the higher rate must fail.

4. Both Mr Morris-Coole and Mr Varley produced expert witnesses, whose medical reports were exchanged prior to the hearing. Both experts confirmed their opinions in their oral evidence, and under examination, cross-examination and re-examination, whilst explaining and clarifying what they had stated in their written reports, they did not, I think, in any material respect depart therefrom.

5. Mr Morris-Coole's contention was essentially that the human brain in normal circumstances continues to develop throughout life, but that in the case of someone suffering from Alzheimer's disease such development was cut short, and therefore he could be considered to be suffering from "a state of arrested development or incomplete physical development of the brain" within regulation 12(5). He relied on the evidence of Dr. Martin N Rossor. Mr Varley's immediate rejoinder was that, if this contention was right, then regulation 12(5) covered everyone whose mental condition resulted in severe impairment of intelligence and social functioning. For if the brain continued to develop throughout life, its development was necessarily always incomplete. The effect of this was to render the limitation contained in regulation 2(5) wholly meaningless, and as presumably the restriction imposed by the provision was intended to have some force, Mr Morris-Coole's construction must necessarily be misconceived.

6. Mr Varley refused to accept that the brain did develop throughout life. He contended that it reached maturity at a specified time, and, after that there was no further development. Any subsequent changes were in the nature of a deterioration of the brain. On this aspect of the case, the evidence of the experts was, of course, crucial.

7. Dr. Rossor, who held the following medical qualifications, namely MA, MB, B Chir, MRCP, MD and FRCP and was a consultant in neurology at the National Hospital for Neurology and

Neurosurgery, Queen Square, London, at St Mary's Hospital, Paddington and the West London Ophthalmic Hospital, was the author of numerous papers on Alzheimer's disease and related dementias and, he informed me, spent some 30% to 40% of his clinical and research time studying this particular branch of medicine. I should also say that the expert called by Mr Varley, Professor David C Taylor readily conceded that Dr. Rossor had a greater specialised knowledge of Alzheimer's disease than he had, his own experience being of a wider nature and directed more to neuropsychiatry. He held the medical qualifications of MB., BS., MD, MSc, FRCP, FRC Psych. and D.P.M. (London), was formerly a consultant in development medicine and clinical lecturer in psychiatry in the University of Oxford, a Professor of Child and Adolescent Psychiatry in the University of Manchester (and latterly Head of its School of Psychiatry and Behavioural Sciences), and was currently visiting Professor of Paediatric Neuropsychiatry at The Institute of Child Health and Great Ormond Street Hospital NHS Trust. Dr. Rossor accepted that, in the case of each individual, there was a time when the brain achieved its maximum size and weight, and that in that sense there was no further development. However, he contended that the neural network of the brain continued to be remodelled throughout life. Although cells once lost could not be replaced, this was not true of "processes" and connections (synapses) which were physical links between one cell and another. Although cells could not be replaced, these processes and connections could in some instances be renewed. However, in the case of someone suffering from Alzheimer's disease, such replacement was no longer possible.

8. I asked Dr. Rossor whether this remodelling of the processes and connections was really a repair of the brain rather than a development. Dr. Rossor found difficulty with the question, and emphasised that this whole area of medicine was at the very frontiers of knowledge, and that it was difficult to be dogmatic. However, Dr. Rossor went on to point out that, throughout life, the brain was subject to alterations (to use a neutral word) which were capable of physical identification. He gave as an example the case of someone who decided to take up the learning of a language. The acquisition of this skill would be reflected in a change to the brain structure. I would at this point mention that when the matter was put to Professor Taylor, the latter was somewhat sceptical that any such change could ever be physically observed. In particular, he found it difficult to see how any change, if there was one, as the result of learning a language could be identified. In his view, the brain was always the subject matter of change in the sense that we were always acquiring more knowledge, although simultaneously we were losing it. Life would be intolerable if we remembered every single thing. We were constantly jettisoning information as well as taking it on. He doubted that the brain had an infinite capacity for absorption of facts, although it had a most remarkable capacity in this respect. The brain changed but did not develop.

9. I asked Dr. Rossor whether the changes in the brain reflecting the acquisition of new skills really represented the exercise of the brain, not its development. Using Dr. Rossor's

own analogy set out in his report, I asked whether the acquisition of a new skill was analogous to proving a computer with new software. Although more information was disseminated as a result, the computer itself, i.e. the hardware, remained unchanged. The computer was merely used to better effect. It did not become a better computer. Again Dr. Rossor found this question extremely difficult to answer and was very hesitant, but in the end he felt that the acquisition of a new skill was rather more the development of the brain than its mere exercise.

10. On the matters that I had raised with Dr. Rossor, Professor Taylor's approach was wholly different. As regards the remodelling of processes and connections, he pointed out that such activity might not necessarily improve the brain. The new processes and connections might not link with the correct cells, with detrimental effect on the functioning of the brain. Sometimes a deficiency might be made good, but there was no guarantee that this would necessarily be the case, but in any event there was no development of the brain. As regards the changes in the brain reflecting the acquisition of new skills, in so far as they could be identified at all - and Professor Taylor seemed to me to be expressing some scepticism in this direction - they were not developments. In Professor Taylor's view the human brain, like all parts of the human anatomy, reached by a certain age - in most cases in the late twenties - its full development, and thereafter regrettably it must, like all physical attributes, deteriorate. Man was an animal, and biologically he was programmed to reach full development in all physical respects, and then to reproduce his own species and safeguard his young until they themselves were able to look after themselves. Admittedly, in the case of man he also enjoyed a rich cultural life which by his abilities he had brought into existence. This distinguished him from all other animals. However, he was still essentially a biological being, who at a certain point in time reached physical maturity. Therefore the brain attained full development in the case of each individual by a specified time which was invariably before the age of 30. There could be no question of any further development. The best that could be hoped for was that the inevitable deterioration with declining years would not significantly impair the overall functionability of the brain. Unfortunately, in the case of suffers from Alzheimer's disease the deterioration was disastrous, with a consequential loss of the quality of life.

11. I now return to consideration of the words of regulation 12(5). Manifestly, the qualification therein contained was meant to limit the benefit to certain classes of persons. Those classes are those who suffer from arrested development or incomplete physical development of the brain. I invited Mr Varley to say what those terms were supposed to mean to medical men, and having consulted Professor Taylor he informed me that where a child's brain failed to grow in the proper way, and this could be physically seen, then there was an "arrested development". Where, however on examination of a child's brain there was nothing which appeared to be physically wrong with it,

but the function of the brain was nevertheless deficient, then it was said that there was an "incomplete physical development". What was missing was not apparent physically, but the consequences of the deficiency were only too apparent. (This analysis was subsequently confirmed by Professor Taylor in his oral evidence.)

12. It is difficult to see how a person suffering from Alzheimer's disease could fall within either of the relevant terms as just defined. It was not in dispute as between the medical witnesses that Alzheimer's disease caused a gradual but inevitable loss of brain cells, so that it eroded an already developed brain. Mr Morris-Coole endeavoured to avoid this difficulty by suggesting that, as the brain continually developed throughout life, and the sufferer from Alzheimer's disease could not take advantage of this development, his condition arose from "incomplete physical development" of the brain. But does the brain develop throughout life?

13. On the medical evidence, I am not satisfied that it does. I prefer the approach of Professor Taylor, that the brain, like all physical attributes of a human being, reaches a point of ultimate development, and goes no further. Dr. Rossor admitted that modern researches were at the very frontiers of knowledge in this field, and was not prepared to say with unequivocal conviction that the brain could develop throughout life by reason of the acquisition of new skills. Although he was inclined to take the view that, on balance, such was the case, he did so with no complete confidence, and on the balance of probability I am satisfied that it has not yet been established that the brain develops after it has achieved its maximum size and weight. I consider that, in so far as the brain changes to reflect the acquisition of new skills, this is but the exercise of the brain, not its further development. The brain is equivalent to the "hardware", and although its function may be improved by the introduction of "software", the hardware is constant and cannot be improved. Moreover the removal of processes and connections would seem to me to be in the nature of repairs to and maintenance of the brain rather than its development. It follows that, if the brain cannot be developed after it has achieved its maximum size and weight, there can be no question of a sufferer from Alzheimer's disease being subject to "incomplete physical development of the brain". I am reinforced in this conclusion by the fact that any other view would result in there being no restriction imposed by regulation 12(5). Everyone by definition would during his life have a brain which could never be said to have been completely developed, and the restriction of regulation 12(5) would be meaningless, something which should only be accepted if no other interpretation were possible.

14. For completeness, I should mention that Mr Morris-Coole laid great stress on the rules of construction, and in particular urged me to not to construe the relevant statutory provisions so as to exclude one particular class of persons, namely sufferers from Alzheimer's disease. Exclusion should only operate where the relevant words clearly so required. However, in the present

case it is not a matter really of exclusion. It is a question of how far a particular benefit should be conferred. The legislature has decided to allow the benefit in prescribed circumstances, and I have to determine the ambit of those circumstances. This is not a case where the relevant benefit has been conferred on everyone suffering from "severe impairment of intelligence and social functioning", and then there is an exclusion clause depriving of the benefit certain classes of persons. The words of regulation 12(5) confer the benefit on the classes there stated which simply do not extend to sufferers from Alzheimer's disease. Mr Morris-Coole also stressed the need to apply the concept of justice in construing the relevant regulation. This is a dangerous approach in social security legislation. Social security legislation is not Divinely imposed, but consists of an arbitrary set of rules devised by Parliament conferring on certain classes of persons benefits in prescribed circumstances. The legislature has to take into account the cost to the public purse, and has to make a balanced judgment as to how far the bounty of the State shall extend. The concept of morality or justice has little place in this jurisdiction. Concepts of morality and justice are relevant to the political decision authorising the legislation. But once that legislation has taken statutory form, the alleged rights and wrongs of it, and the way it operates in respect of different persons or different classes of persons, are not matters for the adjudicating authorities. They are obliged to apply the relevant legislation as enacted. In practice, any person who considers that he should receive a particular benefit, but owing to the wording of the relevant statutory provision or provisions is excluded, is apt to plead injustice.

15. It follows from what has been said above that a sufferer from Alzheimer's disease does not satisfy regulation 12(5), and as a result he is not entitled to the mobility allowance at the higher rate. Unfortunately, the tribunal failed to explain the position with sufficient particularity, and I must on that ground set aside their decision as being erroneous in point of law. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently determine the matter myself, and finally dispose of the appeal.

16. Accordingly, my decision is as set out in paragraph 1.

(Signed) D.G. Rice  
Commissioner

(Date) **20 JUL 1995**