Consider Given on lower Rate Care & Mobility Components — Deaf Person: Need for Interpretation Relevant to Lower Rate Mobility — Inability to Read (i.e. Lack [1] of Skill) Relevant for Test Case Test

WMW/JMT/T/CH **Commissioner's File:** CDLA/206/94

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Disability Appeal Tribunal: [redacted]

Case No: [redacted]

ORAL HEARING

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1. This adjudication officer's appeal succeeds. I hold the tribunal decision of 20 December 1993 to be erroneous in point of law and accordingly set it aside. I refer the case to the tribunal for determination afresh in light of the guidance which follows.

2. This case came before me at a hearing at which the adjudication officer was represented by Miss Laura J Dunlop, Advocate, instructed by the Solicitor in Scotland to the Department of Social Security, and the claimant was represented by Mr Terry Harris of the Citizens Advice Bureau, Stockton-on-Tees, Cleveland. I am indebted to both for their careful submissions.

3. I heard this case together with that on file CSDLA/29/94 because it was thought that each raised for consideration and determination a question about the scope and meaning of the phrase "a significant portion of the day" as occurring in Section 72(1)(a)(i) of the Social Security Contributions and Benefits Act 1992. In the event such a common point was rejected by the parties' representatives. I was not entirely convinced that that was correct. Nevertheless I give a separate decision in respect of each case.

4. This claimant sought a disability living allowance in July 1993. On the claim form he indicated that his problems were with hearing, language, learning and that he needed someone to keep an eye on him. The questions relevant for the mobility component were not completed; those for the care component were completed. The questions answered focused on the alleged need for someone to keep an eye on the claimant because he could hurt himself and might not realise when there was danger. That was said to be virtually continuous and the basis for it was the claimant's deafness. It was said that he could not understand anyone talking to him nor could he hear a noise indicative of danger. It was further said that he could not read "very hard forms". He also had a speech problem. He suffered from a blackout about once year but knew about it in advance. His wife had to attend to him then. The claimant had become deaf through meningitis when one year old. There were the usual supporting statements. An adjudication officer considered the matter and refused the application. Following upon a request for a review the adverse decision thereon was appealed to the tribunal.

not suggested at any stage of this case to be relevant and so I say no more about them. Section 73(1)(d) provides that a person shall be entitled to the mobility component if -

> "he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time."

It is clear from the tribunal's finding of fact number 3 that it was only that provision which the tribunal had in mind. Their reasons confirm my conclusions as to the particular statutory provisions relevant to the case.

8. Miss Dunlop encapsulated the adjudication officer's contentions in respect of the care component branch of the case as being that the tribunal had made insufficient findings, possibly because of insufficient evidence or insufficient enquiry in exercise of their inquisitorial jurisdiction, as to the amount or amounts of time during which attention was required from his wife to assist the claimant with the function of communication - that is to say the bodily functions of hearing and speaking and then, further, whether the totality of time thus found amounted to a "significant portion of the day". Following CA/249/92 it was accepted, and I accept, that someone like this claimant who is deaf - and perhaps even more where he is also apparently inarticulate - will require attention in connection with the bodily functions involved in those activities. But, as the Commissioner in that case said -

> ".... it cannot be correct as a matter of law that a person with [such] difficulties .... must automatically satisfy the statutory conditions for day attention .... In each case, in my view, there is a judgment (sic) of fact and degree to be made."

This is also my view. The tribunal have made no findings of fact or even a general assessment of the amount of time involved in attention as a result of the communication problems from which he suffers. It is not enough to jump straight to the conclusion, as recorded in finding of fact 2, that in effect the statutory requirement is satisfied. The time concerned as a portion of the day must first be assessed, albeit not necessarily in a precise mathematical way but in a way at least sufficient to convey to those reading the decision how the tribunal have assessed the time involved as relating to a portion of the day, and the basis therefor. Strictly, it is a matter of secondary finding from what has then been made out whether that "portion" falls to be regarded as "significant". I agree with the submission, reinforced as it is by decision on file CDLA/58/93 where in it was held that it is only the time involved that requires to be assessed and not the significance or otherwise of what is being done to or for the claimant. I would add that it equally does not matter whether that significance is greater or lesser when viewed subjectively or objectively. The test is related to a day and I would regard that in contradistinction to "the night". In other parts of Section 72, in particular in sub-section (1)(b) as against (c) that distinction is made explicit. At paragraph 10 of said decision the Commissioner indicated that he did not dissent from the proposition that significant could mean at least an hour.

9. In CSDLA/29/94 Miss Dunlop argued that if what was required was a totalling up of hours then the word would more likely have been "period", albeit that that word is used in the provision within parenthesis. She submitted that "portion" tended to demonstrate or indicate a search for a percentage or fraction of a day being the result of an assessment of a single period of a number of periods. I am attracted by that concept not least because it seems to me to make the tribunal task in such cases rather simpler.

5. The tribunal unanimously found the claimant entitled to a disability living allowance composed of both the care and the mobility components. The former was found in respect of the lowest rate and the latter at the lower rate. The award was made from the date of claim. The tribunal's findings of fact were these -

> "1. Appellant is 33 years of age and is profoundly deaf and he is inarticulate.
>
> 2. Although he needs no help either by day or night in connection with other bodily functions, he has severe communication problems and needs help from his wife for a significant portion of the day in connection with these problems.
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> 3. He is also in need of guidance or supervision when walking out of doors, although he would be able to use routes with which he was familiar without such guidance or supervision."

The reasons for decision were given thus -

> "1. Tribunal applied the law as set out in the submission.
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> 2. Although there are no other day or night needs, it is clear that appellant has severe communication problems and that during the day he needs attention from his wife for a significant portion of the day in connection with these. Although he can walk to the nearest paper shop and along other routes with which he is familiar, his lack of ability to communicate and to understand what is being said to him means that he needs guidance or supervision when walking out of doors."

The adjudication officer then sought, and in due course was given by a Commissioner, leave to appeal.

6. The lowest rate of the care component is appropriate in terms of Section 72(4)(c) where only some part of sub-section (1) is satisfied. That sub-section provides -

> "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; ....."

It is clear from the tribunal's finding of fact number 2 that they were holding Section 72(1)(a)(i) only to have been satisfied.

7. The lower rate of the mobility component of the allowance, in terms of Section 73(11)(b) of the 1992 Act, is appropriate only where a claimant satisfies the conditions set out in sub-section (1)(d) thereof or the conditions set out in sub-sections (2) or (3) thereof. The latter were

10. In light of that consideration I therefore direct the new tribunal that they do not require to set down a precise number of occasions or determine the number of minutes for each during which the attention in question is required and then total them up. What they require to do is to obtain evidence as to the sort of pattern in a normal or average day and then make a finding of fact specifying the percentage, or the fraction, of that period during which this household is normally awake and active - that is during the day and then to say whether they assess that as being "significant". I doubt if there is any further guidance that can be given because it must be very much a matter for a tribunal applying their common sense and understanding of the English language to make the determination. I would only add that I do not necessarily think that if such a period is determined not to be significant that that means that it has to be determined as being "insignificant".

11. Miss Dunlop's submission in respect of the adjudication officer's contentions on the mobility component branch of the case can I think be summed up as a failure by the tribunal to make a connection in both findings and reasons between the disabilities of this claimant and how the statutory provision came to be satisfied. Their finding number 3 recorded only a need for "guidance or supervision when walking out of doors" on unfamiliar routes. The evidence referred to an inability to appreciate traffic noise or accept guidance when proffered or even to request that if uncertain as to how to proceed. The error is repeated in the reason where it is said that the claimant needed guidance or supervision when walking out of doors. The point is that attention in this regard must be concentrated upon the unfamiliar routes and whether the claimant is unable to take advantage of his walking ability out of doors thereon "without guidance or supervision *most of the time*." The amount of time, again, has not been assessed although I would not expect a tribunal to do more than provide the sort of assessment referred to in respect of the care component. The reasoning is deficient, also, because it is not clear that the tribunal concentrated upon the position in regard to unfamiliar routes. A dispute of fact arose between Miss Dunlop and Mr Harris when she suggested that the claimant was able to see and so would only require guidance or supervision on unfamiliar routes when lost or uncertain of how to proceed and, even then, he could see and so would have been able to read signs and other indications of guidance such as street names. Mr Harris pointed out that the claimant can hardly read. There is no finding about that by the tribunal and it is not clear to me that the only passage in the evidence - "he can read simple words, but not things like forms" - supports Mr Harris' position rather than that of Miss Dunlop. The new tribunal may require to go into the claimant's ability to obtain guidance when uncertain how to proceed on unfamiliar routes out of doors with some care. Mr Harris sought to introduce the need for guidance or supervision if the claimant had to catch a bus, go shopping or if someone spoke to him. These, to my mind, have nothing to do with the claimant's ability to take advantage of his faculty of walking. Accordingly, I direct the new tribunal on this matter to concentrate only upon the extent to which the claimant may require guidance or supervision through becoming lost, confused or disorientated and whether that would be required "most of the time" that he was *walking* on an unfamiliar route.

12. There is, finally, a speciality in respect of the question of "supervision". As Mr Harris pointed out it may be that supervision may be needed without anything active being done. One is familiar with the position of those subjected to fits where supervision may be required in order to avoid danger although nothing active will be done until the onset of a fit. The claimant's fits clearly do not bring this concept into play. In my view the concept of "supervision" in this context sits ill with the idea of interpretation which is effectively what the claimant's wife would be doing. I therefore direct the new tribunal that what they require to assess is the need for guidance rather than supervision. By guidance, of course, I am referring to the interpretative faculty. I rather suspect that the tribunal, applying their common sense, will be able to deal with

this matter very much more briefly and expeditiously than it has taken me to set out the arguments and conclusions.

13. There is a further matter concerning what Mr Harris introduced about the claimant's inability to read. Miss Dunlop, properly, queried whether that was a physical disability. Unless there is to be some evidence about the claimant's sight being deficient then there would not be a physical disablement and so nothing relevant to ground any qualification for the mobility component.

14. For the reasons set out above I have held the tribunal decision to be erroneous in point of law. The new tribunal will follow the guidance as so set out. In addition I should draw to attention that there was before the whole tribunal, and not dealt with, contentions about the claimant's inability to prepare a cooked main meal for himself. It should have been dealt with and it may also not long delay the new tribunal. The allegation seems to have been that the claimant's inability to read is what prevented him following any instructions about cooking a main meal. But, again, unless there is something physically wrong with his eyesight or there is at root a mental disability, the lack of reading skill is irrelevant. It is the physical or mental disability that must disable the individual from preparing a cooked main meal given the ingredients, not a lack of skill however essential that may be. It is not a question, as the claimant and his wife in their written submissions to the tribunal, seem to have assumed, whether help is needed but it is whether help is required *because of a severe physical or mental disability* from preparing the meal. As to what is involved in consideration of the "meal" the tribunal may obtain guidance from paragraph 8 et seq of CDLA/85/94.

(signed) W M Walker
Commissioner
Date: 6 March 1995