

DLA - Deaf Claimant - 3 - with Commissioner's
2 - with not; Miss. Component - General
Not Announced for Deaf Claimant Area to
Mr

MR/SH/4

Commissioner's File: CDLA/240/1994

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992
CLAIM FOR DISABILITY LIVING ALLOWANCE
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Geoffrey Herbert

Appeal Tribunal: Derby

Case No: D/41/051/93/0205

1. I allow the claimant's appeal. The decision of the Derby disability appeal tribunal dated 15 December 1993 is erroneous in point of law. I set that decision aside and I refer the case to a differently constituted tribunal for determination.

2. The claimant is profoundly deaf. By a majority, the tribunal found that he was not entitled to either component of disability living allowance. The dissenting member was of the view that the claimant satisfied the conditions for entitlement to the middle rate of the care component but did not satisfy the conditions for entitlement to either rate of the mobility component. The claimant now appeals with the leave of the tribunal chairman.

3. In the written submissions, it was common ground, and I accept, that the tribunal's decision is erroneous in point of law because the reasons given for the decision are inadequate. It had been the claimant's case that he frequently needed assistance when communicating with other people and that he qualified for a disability living allowance on that ground. The tribunal did not make any finding as to whether the claimant needed such assistance and, if so, the extent to which such assistance was reasonably required. It may well be the case that the majority of the tribunal felt that any such assistance could not be relevant. If so, they were wrong in the light of the subsequent decisions of the House of Lords in Mallinson v. Secretary of State for Social Security [1994] 1 WLR 630 and of a Commissioner in CA/780/91. In any event, the tribunal's decision is erroneous in point of law because the chairman did not record reasons for their decision which were sufficiently detailed to show that they had correctly applied the law as he was required to do by regulation 26E(5)(b) of the Social Security (Adjudication)

Regulations 1986.

4. Although it was common ground that the case should be referred to a differently constituted tribunal, the claimant's representative asked for an oral hearing because he wished me to give guidance to the tribunal which would be of general application in cases concerning profoundly deaf claimants. I acceded to that request and held an oral hearing at which the claimant was represented by Mr Mark Perlic of the Welfare Rights Service of Derbyshire County Council and the adjudication officer was represented by Mr Anthony Prosser of Counsel, instructed by the solicitor to the Departments of Social Security and Health. I was greatly assisted by both representatives and also by the fact that, between the date on which I directed the oral hearing and the date on which the hearing took place, other Commissioners issued decisions covering much of the relevant ground. My decision can therefore be relatively brief.

Care component

5. In CA/780/91, the Commissioner dealt at some length with the issues arising on a claim for the care component in respect of a deaf child. Mr Prosser invited me to follow that decision. He did not alter that stance when I told him - to his surprise - that the Chief Adjudication Officer had been granted leave to appeal against the decision. Mr Perlic also asked me to follow that decision but with one important reservation. In CA/780/91, the Commissioner said, at paragraph 6:-

" 6. The claimant's family are apparently proficient in sign language and I gather that, when the claimant is with them, signing is the usual method of communication. In CA/249/92 the Deputy Commissioner, dealing with the case of a profoundly deaf 12 year old, said -

'9. I also reject the further contention raised in the reply that the DMP must, in effect, have been in error of law if he did not accept that C's need for help in lip-reading amounted by itself to a need for attention satisfying the statutory conditions. There can I think be no doubt that a need for help from a third person to act as interpreter for a person with difficulties hearing or speaking can count as "attention" in connection with those functions. I think there is considerable doubt whether the other party to a two-way conversation can be described as giving such attention simply by having to speak loudly or more clearly, use sign language or listen more attentively for the reply. But however that may be it cannot be correct as a matter of law that a person with hearing difficulties that make communication slow or difficult must automatically satisfy the statutory condition for day attention just because a normal person likes and expects to communicate with other human beings on frequent occasions throughout the day. In each case, in my

view, there is a judgment of fact and degree to be made.'

I entirely agree with that statement. It may follow that when the claimant is with someone with whom she can communicate by sign language, for example when she is with her family, she is not receiving attention which would be taken into account for the purpose of satisfying section 72(b)(i). It is I think different or may be different in the case of a child when the evidence is that the child requires attention in order to develop or learn a means of communication."

Mr Perlic argued that, whenever a person assists a deaf claimant by using sign language, that person is providing attention in connection with a bodily function, whether he or she is acting as an interpreter or whether he or she is merely the other party to a two-way conversation. I do not accept that submission. The word "attention" connotes an element of service which is usually lacking in a two-way conversation when the parties are merely using signing rather than speech as the medium for communication. On the other hand, an interpreter is providing a service.

6. Mr Perlic drew attention to the tentative terms in which the Commissioner expressed his view in CA/780/91. I do not say that taking part in a two-way conversation with a disabled claimant can never be attention. It is conceivable that communication is so slow and difficult that there will be an element of service in it. I also accept, as did the Commissioner in CA/780/91, that a person may give attention when helping a child (or an adult) to develop or learn a means of communication. However, as a general rule, I do not consider that a person is providing attention when communicating with a deaf claimant by means of reasonably fluent signing.

7. I do not consider that there is anything else I can usefully add to what was said in CA/780/91. In considering the claimant's entitlement to the care component, the tribunal should have regard to what the Commissioner said in that case as well as to my comments above.

Mobility component

8. It was not suggested that the claimant's deafness was relevant to entitlement to the higher rate of the mobility component but I was asked to give guidance as to its relevance to the lower rate to which a person may be entitled 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" (see section 73(1)(d) of the Social Security Contributions and Benefits Act 1992).

Mr Perlic accepted that it could not be said that a deaf person required guidance most of the time in order to take advantage of his ability to walk but he argued that such a person might require supervision because it might be necessary to be accompanied by someone who could act as an interpreter in the event of the claimant getting lost. He also referred to the difficulties a deaf person faces when trying to public transport but he accepted that that was not material because section 73(1)(d) is concerned with the claimant's ability to take advantage of the faculty of walking.

9. I accept that a deaf person who gets lost may need to obtain directions and may have difficulty doing so without an interpreter. I also accept that one cannot foresee when that need would arise and I can therefore understand the desirability of a deaf person being accompanied on complicated journeys. However, I agree with the Commissioner who, in CDLA/42/94, held that:-

"section 73(1)(d) is manifestly not intended to assist a physically disabled claimant who is able to walk and is able to walk a sufficient distance at a sufficient speed in a sufficient manner not to be virtually unable to walk on the test provided by regulation 12(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991 where the limits on a claimant's walking ability do not stem from an absence of guidance or supervision."

An inability to undertake particularly complicated journeys is therefore not sufficient..

10. Furthermore, accompanying someone is not the same as supervision. In the same case, at paragraphs 18 and 19, the Commissioner said:-

"... the notion of being ready to give assistance implies a degree of monitoring or watching over or listening out such that the person supervising is able to detect signs of need. Supervision may be passive by nature, but it is not constituted by mere presence. In the context of the care component of DLA and of attendance allowance it implies sufficient monitoring to be able to detect signs of a need for assistance.

19. Translating that approach, disregarding for the moment the "continual" element, to the context of section 73(1)(d) produces the result that there is supervision of a claimant's walking when another person is accompanying the claimant and is watching over her, in the sense of monitoring her physical or mental or emotional state for signs of something that might require some more positive action by the person to enable or encourage the claimant to continue walking or monitoring the route ahead for obstacles, dangers or places or situations which might upset or disquiet the claimant or otherwise affect her adversely. Such monitoring is supervision even though it

never results in the need for more positive action. Such action, which might still be essentially precautionary, can also come within the meaning of supervision. The sorts of things I have in mind here are encouraging, persuading or cajoling the claimant, or providing distraction from possibly alarming situations by conversation. I stress again that these are merely examples of what in my view comes within the ordinary meaning of "supervision" and I am not purporting to give a definition to be applied mechanically to all cases. In different circumstances other kinds of action may be supervision."

The Commissioner summarised his view at paragraph 22(k):-

"Supervision, in the context of section 73(1)(d), means accompanying the claimant and at the least monitoring the claimant or the circumstances for signs of a need to intervene so as to prevent the claimant's ability to take advantage of the fact of the faculty of walking being comprised."

I respectively agree with all that the Commissioner said on that issue. It is consistent with the view expressed in Moran v. Secretary of State for Social Services (reported as an Appendix to R(A) 1/88) by Nicholls LJ. He said:-

"A person who is in the same room or another room in the same house or in a nearby property and keeps himself available to be called by such a sufferer, in person or by bell or by telephone, may not be exercising 'supervision' over the sufferer. It will all depend upon the particular facts of the case."

That is binding authority for the proposition that mere presence does not amount to supervision.

11. Accordingly, I reject Mr Perlic's submissions and agree with Mr Prosser that an inability to ask for directions does not, by itself, demonstrate a need for supervision within the terms of section 73(1)(d) of the 1992 Act. The tribunal to whom this case is now referred must consider the claimant's entitlement to the mobility component in the light of the views I have expressed above.

(Signed) M. Rowland
Commissioner
(Date) 2 February 1995