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THE COURT SERVICE

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Our Ref.: CDLA/1061/1999

Mr S Wright
Child Poverty Action Group
94 White Lion Street
London N1 9PF

1 March 2002

Dear Mr. Wright,

Claimant: Mrs. Shirley Durrant
2 Haversham Close
Weston-Super-Mare
BS22 8JS

Enclosed is a copy of a correction to the Commissioner's decision sent to you on 26th September 2001 .

Yours sincerely,

MRS F ANWARI
For the Secretary

Enc.

File No: CDLA/1061/1999
(DURRANT, Shirley)

CORRECTION NOTICE

This Correction Notice is made in pursuance of the power in regulation 30(1) Commissioners' Procedure Regulations 1999 and with the concurrence of the claimant and the Secretary of State. The following paragraph 1(a) is substituted for paragraph 1(a) of the decision signed by me on 7 September 2001.

> "(a) The decision by the tribunal concerning the refusal to award the care component at the lowest rate under section 72(a)(i) SSC & BA was not erroneous in point of law in so far as it construed "day" in the way the tribunal did – for reasons see Ground of Appeal 1 below (paras 9-15) – but was in error of law in failing sufficiently to address the needs of the claimant during the day for the purposes of that paragraph including the question of any help/attention reasonably required with her lower clothing while going to the toilet. On that point, I therefore set the decision of the tribunal aside and remit that part of the case for re-hearing by a differently constituted tribunal at the same time as the rehearing directed by sub para (b) below."

Signed: J M Henty
Commissioner

Date: 28 February 2002

1. My decision is that:

(a) the decision by the Tribunal concerning the refusal to award the care component at the lowest rate under s.72(a)(i) SSC & BA was not erroneous in point of law and the appeal so far as that point of the Tribunal's decision is concerned is dismissed;

(b) the decision of the Tribunal concerning the refusal to award the care component at the lower rate under s.72(1)(a)(ii), was erroneous in point of law. I set that decision aside and remit that part of the case for re-hearing by a differently constituted Tribunal; and

(c) as agreed between the parties, there was no valid review concerning the life award of the mobility component either on 23.2.98 or 12.5.98 (or on any other date) under S.32(4) Administration Act 1992 and the Tribunal were in breach of s.33(6) with the consequence that that award has continued ever since and will continue unless and until it is validly determined.

2. This is an appeal by the claimant from the decision of a DAT dated 19.10.98, with leave granted by the chairman.

3. The claimant suffers from back problems, asthma and depression. She made a claim for DLA on 29.12.94.

(i) On 26.1.95, the AO awarded her the mobility component at the higher rate for life from 29.12.94, but no award of the care component.

(ii) There were then several unsuccessful reviews and, as of 22.2.98, the AO withdrew the life award of the mobility component. A review request was received on 12.3.98 and, on 12.5.98, the AO reinstated the award of the mobility component at the higher rate, but only for the period 20.2.98 to 12.2.99, and again disallowed the care component.

(iii) From that, the claimant appealed to the Tribunal, who upheld the decision of the AO on 12.5.97, but extended the award of the mobility component to a period of four years, it then becoming due for revision as from 19.11.2001. Again no award of the care component was made.

(iv) The appeal from the Tribunal was first considered by Mr Deputy Commissioner Warren, who identified the principal question, with which I am faced on this appeal, in his direction of 28.2.2000 (168), and I can do no better than set out part of that direction here, as it encapsulates the problem with admirable lucidity:

> "2. In this case, the appellant had some day time attention needs. The tribunal also found that she had some night time attention needs. But neither of these in the judgment of the tribunal, were sufficient to satisfy the day or night conditions leading to middle rate care.

"3. In considering section 72(1)(a)(i), the tribunal appears to have considered only the day time needs.

"4. Was the tribunal correct in law to reflect the traditional daytime/night time split in section 72(1)(b)(c), when considering section 72(1)(a)? Or should the tribunal have taken "significant portion of the day" as referring to a period of 24 hours thus requiring the tribunal to aggregate all the care required when taking its overall view?"

The Deputy Commissioner then came to the conclusion that the point had been decided adversely to the claimant in CDLA/5419/1999 (circulated under 46/00). But it then appeared that there had been a previous – and contrary – decision by another Deputy Commissioner in CDLA/1463/1999, which had not been in fact been cited in CDLA/5419/1999. There was thus a direct conflict of authority and, following a direction by the Chief Commissioner, the parties agreed that the decision, signed, but not issued, by Deputy Commissioner Warren, should not be issued and there should be an oral hearing to determine the question.

4. (i) The oral hearing was assigned to Mr Commissioner Levenson for decision, but, following his indisposition, it was assigned to me. I held the hearing on 23.5.2001. The claimant was represented by Mr Stewart Wright of the CPAG, and the Secretary of State by Ms Natalie Lieven, of Counsel. I am profoundly grateful to them both, and I was afforded the unaccustomed luxury - unaccustomed that is to say to the Commissioners – of being provided by Mr Wright with a most helpful skeleton argument. I am fully aware that the point of principle involved could have serious repercussions, and it is very possible that the controversy will not stop with me.

(ii) I would add that at the same time as I heard the appeal in this case, I also heard the appeal in CDLA/4166/1999, where the identical point, raised in Ground 1 of this appeal, arose, and the claimant's representative in CDLA/4166/9999 expressed himself content to reply on Mr Wright to present the legal argument on that point, thus avoiding unnecessary duplication of representation.

5. There are basically three grounds of appeal:

(1) The main ground is what is meant by "day" in section 72(1)(a)(i) SSC & BA;
(2) The tribunal erred in its approach on whether the claimant could satisfy the cooking test in section 72(1)(a)(ii); and
(3) The tribunal erred in law, in effect, in removing the life time award made from 29.12.94, since they did not consider and apply section 32(4) and/or 33(6) of the AA 1992 as interpreted by the Court of Appeal in Ashraf (2.12.99).

6. It would be convenient if I were to deal with grounds (2) and (3) first.

7. Ground of appeal 2

What the tribunal actually said in this respect was:

"In considering whether the appellant is able to prepare and cook a main meal for herself, we accept she has some difficulty in bending and reaching upwards. However, we note that she does not avail herself of a perching stool. We are not

unmindful of the decision in the CDLA/85/94, but it seems to us that she should be able to cook a main meal for herself if she uses a perching stool and light saucepans and pots."

(a) As I understand it, both Mr Wright and Ms Lieven are agreed in one respect, namely that, while suggesting the use of a perching stool, the tribunal did not go on, as they should have done, to consider the reasonableness of the suggestion, or how effective it might be, given the claimant's undoubted back problems.

(b) Mr Wright had a further point, namely that, given the tribunal accepted the claimant had difficulties in bending and reaching, they should – as with the perching stool - have gone on and investigated her possible difficulties assuming that the kitchen had "normal reasonable facilities". This point was clarified by Mr Wright in reply and, so far as I can see, there is no very great dissension now between him and Miss Lieven. In the same way as the tribunal ought to have investigated the reasonableness and effectiveness of a perching stool, it can reasonably be said of them that they should have also investigated the claimant's disabilities in relation to any aspects relevant to her condition in a normal sort of kitchen.

I therefore accept this ground of appeal.

8. Ground of appeal 3

Both sides are agreed. The result is that there was no valid review on 23.2.98 or 12.5.98 (or any other date) under section 32(4) and the tribunal were in breach of section 33(6). The result is that the life award of the mobility component at the higher rate made, as from 29.12.94, continues untouched.

9. Ground of appeal 1 – What is meant by "Day" in Section 72(1)(a)(i) SSC&BA

I will set out the provisions of the subsection as relevant for present purposes.

"(1) ... a person shall be entitled to a care component of a disability living allowance for any period throughout which –

(a) he is so severely disabled and physically or mentally that –

(i) he requires in connection with bodily functions attention from another person for a significant portion of the day...;

or

(ii) he cannot prepare a cooked main meal for himself if he had the ingredients; or

(iii) he is so severely disabled physically or mentally that by day he requires from another person –

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(iii) he is so severely disabled physically or mentally that, at night, -

(i) he requires from another person prolonged or repeated attention...etc"

I would add that an award of (a) attracts the lowest level of benefit, that under (b) or (c) the middle rate of benefit and, if a claimant satisfies both (b) and (c), the highest rate of benefit.

The origins of the provisions contained in paras (b) and (c) are to be found in section 4 of the National Insurance (Old Persons' and Widows' Pensions and Attendance Allowance) Act 1970, the material part of which provided as follows:

> "...a person shall be entitled to an attendance allowance...if...(a) he is so severely disabled physically or mentally that he requires from another person in connection with his bodily functions, frequent attentions throughout the day and prolonged or repeated attention during the night..."

The claimant, under that provision, was required to satisfy both daytime and nightime criteria. This is the legislation which the Court of Appeal considered in R v. National Insurance Commissioner ex parte Secretary of State 1974 1W2R 1240.

In considering what was meant by "night" Widgery L C J said, in that case, at p 1296C:-

> "The word "night" is used loosely to describe the latter part of the day. It would be entirely wrong, in my judgment, when considering section 4 of the 1970 Act, to give "night" the sort of "sunset to sunrise" meaning to which I have referred. The purpose of the Act and the provision it seeks to make is not related to whether the sun is shining or not; it is related to the domestic routine of the house, and the distinction between day and night in section 4 is no doubt made because the giving of attention to a sick or disabled person may be far more onerous at night, when the attendant has to get out of bed in the middle of his sleep, than it would be in the middle of the day when the house is alive and people are about and ready to respond to the call of the sufferer."

The Court, then, went on to ascribe the meaning in that sense to the words "night" and "day" respectively and, in this decision, when I refer to "daytime" and "nightime" I mean a reference to those terms as so ascribed.

In passing, I would note that to my mind the cooking test in section 72(1)(a)(ii) essentially envisages a daytime and not a nightime activity.

10. Paras (b) and (c) of s.72(1) are now in the alternative, and can first be found in section 35(1) or the 1975 Act. Para (a) had not then emerged, and was first introduced by section 1 Disability Living and Working Allowances Act 1991 as a new section 37B of the 1975 Act. It continues in the same form today as section 72(1) of the 1992 Act. The first commentary

in the standard text books on the subsection, as amended, that I can find is in the 1995 edition of Rowland thus:

> "Para (a) contains the conditions for the new lowest rate of the care component of DLA and, being concerned with attendance needs during the day, is intended as a less stringent alternative to para (b)(i)."

That is basically reproduced in the commentary to the new volume 1 SSL 2000.

11. I now come to the conflict of authority and, so far as I can see, it was in CDLA/1463/1999 that anyone first put forward a construction on s.71(1)(a) that "the day" in the expression "a significant portion of the day" did not mean just daytime, but any part of the 24 hour day. I appreciate the fact that, if a view has been taken of a particular matter over a period of time, it does not mean to say that view is necessarily right, and cannot now be discarded: but, on the other hand, that view is accorded some measure of authority the longer it stands, and the longer it is held by the more people, the more its authority will grow. While this "principle" is perhaps little more really than a straw in the wind, it has nevertheless been, on my understanding, that the generally held view is that "day" means "daytime".

12. The first authority is CDLA/1463/1999, dated 4.2.2000, where the Deputy Commissioner said at para 6:

> "Finally, in relation to the lowest rate of the care component, in my view the night time attention needs to be taken into account, as it does in relation to attention by day if it occurs before the parents retired to bed. Although a distinction is drawn between day and night in section 72(1)(d)(c)...that is by the use of the words "by day" and "at night". Because attention and supervision required to be given at night are more demanding on the person required to give the attention or supervision than when the same attention and supervision are required to be given during the day, the requirements for night time attendance or supervision are less. However, that does not mean that "a significant potion of the day", the expression used in section 72(1)(a) in relation to qualifying for the lowest rate of benefit, excludes the night for consideration. I can see no logical reasons for treating night time cares more demanding for the purpose of the middle and highest rate, and excluding it entirely when dealing with the lowest rate. In my view, the day in this context means the whole day of 24 hours."

The second authority dated 29.6.2000 is CDLA/5419/1999 were the Commissioner said at paragragh 5:

> "Mr Atkinson's first submission on this appeal was that the tribunal had erred in excluding night time requirements from consideration under section 72(1)(a)(i). He accepted that, for the purposes of section 72(1)(b), the phrase "by day" meant the opposite of the phrase "at night" used in section 72(1)(c) and that "day" and "night" for those purposes had the meanings attributable to them in Regina v National Insurance Commissioner Ex Parte Secretary of State for Social Services [1974] 1WLR 1290...However, he submitted that the phrase "by day" in paragraph (b) naturally imported a narrower meaning than the phrase "the day" in paragraph (a)(i) and that, as a matter of construction, there was nothing strange about a word having a broader meaning in the first

of two paragraphs of the same section and the same word in the second of those paragraphs. He further submitted that there was no reason why night time requirements that were not sufficiently extensive to fall within paragraph (c) should be excluded from consideration altogether which would be the effect if they did not fall within paragraph (a)(i). I do not accept those submissions. It seems to me to be quite inconceivable that the draftsman of the Disability Living Allowance and Disability Working Allowance Act 1991 should have used the word "day" in what is now section 72 of the 1992 Act in two different senses in the same subsection and it is perfectly plain that he or she intended the word to have the same meaning as had already been given to the word to what was then section 35 of the Social Security Act 1975. Nor does there appear to be any anomaly in leaving out of account altogether night time requirements that are too slight to fall within paragraph (c)."

I would add that the first appeal was dealt with on paper, but, in the second, the Commissioner did have the benefit of an oral hearing.

13. Mr Wright emphasises that (a) was an entirely new benefit awarded at a new rate. He accepts that in (b) and (c) "by day" and "by night" had the meanings assigned to those terms by the Court of Appeal respectively i.e. daytime and night-time. That does not, however, mean to say that the same definition is to be ascribed to "day" in (a). While (b) and (c) may be in contra-distinction to each other, there is no reason why (a) should be so limited. If this is an alternative to mid-rate benefit in (b) or (c) it is illogical to limit (a) to "day-time" only. Why should the lower rate be so restricted? "Significant" is to be assessed in relation in terms to the hours awake. This can lead to an arbitrary result and "could lead to two different claimants with the exact same quantum of attention over a calendar day of 24 hours being differently assessed under s.72(1)(a)(i), with one claimant satisfying the "significant portion" because his/her (awake and active) day is shorter but the other failing to satisfy the test (on the exact same quantum of attention) because her/his (awake and active) day is "significantly longer". (Mr Wright's submission para 6(iii)).

Miss Lieven broadly speaking put forward the opposite view.

14. I will now set out what to my mind are be relevant considerations.

(i) The construction proposed by Mr Wright disturbs the accepted learning of the meaning "day", accepted, that is, until the Deputy Commissioner decided CDLA/1463/1999 on 4.2.2000, although, even after that date, the decision appears to have been little known and it was not cited to the Commissioner in CDLA/5419/1999. It only came to light at a late stage in the present appeal. This must, however, be read subject to my comments in para 11 above.

(ii) In general, the same word in the same section is normally to be taken to have the same meaning, but that is not a hard and fast rule and it all boils down to a question of context. However, the expression in para (a) "a significant portion of the day" is not the same as "by day", especially when used in connection with the expression "throughout the day". Mr Commissioner Rowland in CDLA/5419/1999 para 7 said he thought it "quite inconceivable that the draftsman ... should have used the word 'day' in what is now section 72 of the 1992 Act in two different senses in the same sub-section and it is perfectly

plain that he or she intended the word to have the same meaning as had already been given to the word in what was then section 35 of the Social Security Act 1975." That dictum could thus be distinguished or at any rate read subject to some qualification. On the other hand, as I have pointed out above, para (a)(ii) seems to be essentially a daytime activity. When one goes to bed, one does not normally get up again to prepare a cooked main meal. By, as it were, by contagion, one might thus reasonably expect (a)(i) to relate to daytime activites also.

(ii) The primary meaning of "day" in the OED is the period between the rising and the setting of the sun, though I accept close, on its heels, is the secondary meaning of a period of 24 hours.

(iv) A significant consideration, in my view, is that put forward by Mr Wright, which I have endeavoured to set out in para 12 above, name the para (a) is a new benefit awarded at a new rate, and it is illogical to limit it by reference to para (b). Against this, however, it can be said that, while this argument might hold water were para (a) a true alternative, the argument loses some of its force when it is viewed as an additional benefit at a new rate. It is to be construed in the whole context of section 72.

(v) If the construction for which Mr Wright contends was intended, it could have been simply achieved by substituting "period" for "portion of the day."

(vi) Lastly, "Daytime" seems to me to be the more natural meaning to be ascribed to "day" in all the circumstances.

15. Weighing up all those points, I have concluded that in para (1)(a)(i) "day" in the expression "a significant portion of the day" relates to day time in the sense I have used it in this decision.

16. But, virtually at the doors of the court, Mr Wright and I were presented with a part of a document, which, I was told, was a White Paper entitled, "The Way Ahead – Benefits for Disabled People", and this late disclosure was in spite of Mr Commissioner Levenson's direction of 1.1.2001. Mr Wright then made a muted protest, but gallantly dealt with the point on his feet and submitted that, even if the *Pepper v. Hart* sort of principle were relevant, it could not apply in this case as the White Paper was no more than an expression of intention. After the hearing, I reconsidered the position and issued a Direction inviting further submissions as to the admissibility and relevance of that Paper. This direction was made by me on 11.6.2001 in not only CDLA/4166/1999 but also in this case and can be found as document 189 in the file. However, in error, it was not then sent out by the Registry but only sent out later. On behalf of the Registry I apologise for the oversight. In any event, the material part of the direction ran as follows:

"1. Shortly before the hearing on 23.5.2001, I was handed a copy document entitle "The Way Ahead – Benefits for Disabled People". Could the Secretary of State please confirm the status of this document i.e. was it a White Paper or what? Could I have a copy of the whole document?

"2. At the hearing, Mr Wright made a muted protest, similarly having been presented with the document at the doors of the Court despite Mr Commissioner Levenson's direction of 1.1.2001.

"3. I do not wish to place the claimant at any possible disadvantage, and she is therefore at liberty to make any further submissions thereon as she might wish, including in particular submissions as to the principles upon which such a paper may be admissible and the purposes for which it is. In *Pepper v. Hart* 1993 AC 593 Lord Browne-Wilkinson at p.630G sets forth the principle that White Papers etc. could "be looked at for the purpose of ascertaining the mischief which the statute is intended to cure but nor for the purposes of discovering the words used by Parliament to effect such a cure". The ratio of that case is however perhaps wider, as put at p.634B-E that "Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure". Does that also cover a White Paper? But be that as it may, at the hearing Mr Wright submitted to me that this document would fail "the *Pepper v. Hart*" test as it goes to the intention only, and the principle therefore would not apply, even though there might be an ambiguity. However, are not all White Papers, to a lesser or greater degree expressions of intention only?"

17. The Secretary of State and Mr Wright have responded to that direction for which I am most grateful and, while, in view of what I have decided, the point does not now strictly arise, I think I should, out of courtesy, briefly consider it.

18. Mr Wright submits firstly that his client is entitled to ask why the Secretary of State needed any further time to consider the legal basis for the admissibility of the Paper, and, in view of the tenor of the Secretary of State's submissions before the Tribunal hearing took place, I can sympathise with that submission. However, the point has arisen, it is an important point and it would be quite wrong were I now to limit argument.

19. The whole document now appears at pps.197/267. It is clearly a White Paper, introducing the new disability benefit – disability living allowance. Under the heading "New Disability Allowance" it is stated:

> "4.10 For new claimants whose disability begins before age 65, the Government proposes to introduce a new benefit, the Disability Allowance. It will extend help to less severely disabled people, and will also subsume the help currently provided through AA and Mob A. ...
>
> "4.12 The initial rate of the care component – set at £10 – will be awarded to people who need help with self-care during the day but less frequently than those who currently qualify for AA. People who have care needs only at the beginning and end of the day, for example, but who are otherwise able to take care of themselves will for the first time be able to receive help ..."

An award of AA was qualified, of course, as to whether a claimant required daytime or nightime attention. It, follows that the new rate is designed along similar lines but to cater for those whose care needs, while significant, do not meet the conditions in section 35(1)(a)(i) of the 1975 Act. But this begs the question as to what is meant "during the day." The reference

to needs at the beginning and end of the day are not, in my view, such as to settle the issue raised by the ambiguity, and certainly not within the principle of certainty of meaning as indicated in the speeches in Pepper v. Hart (sapra) of especially Lords Bridge and Browne-Wilkinson.

> "The initial rate of the care component [ie. para (1)(a)(i)] – set at £10 – will be awarded to people who need help with self-care during the day but less frequently than those who currently qualify for AA" – ie. those who will qualify under para (1)(b)(i).

The Secretary of State relied principally on para 4.12 and I cannot myself see any other passage in the White Paper which throws any useful light, either one way or the other, on the problem presented. Despite the arguments of Mr Wright, in his further submission of 27.7.2001 paras 21/22, it seems to me that "day" in the paragraph means "daytime" in the sense I have ascribed to it and that para envisages benefits which are only required during the day time for, if a 24 hour period was intended, why make any reference to "during the day" at all, and, as I have pointed out, the reference to AA is to para (b)(i). Para (a)(i) is, to my mind, intimately connected and tied in to para (b)(i).

19. It seems to me that I am entitled to look at the White Paper to perceive "the mischief" that the White Paper is designed to cover. See per Lord Reid in Black-Clawson International v. Papierwerke Waldhof-Aschaffenburg 1975AC 591, at p.614B. The mischief I perceive from the White Paper is that a less stringent, benefit was lacking. If one assumes there is an ambiguity in the legislation, having identified the mischief, it seems to be perilously close to saying that the use of the White Paper, in Lord Browne-Wilkinson's words in Pepper v. Hart at p.630 G, is "for the purpose of discovering the meaning of the words used by Parliament to effect such cure" [of the mischief] and is not therefore admissible for that purpose. I confess I find part of his speech at p.635 E difficult to reconcile, but if the point arose, which in view of what I have decided above on construction it does not, I would have been inclined to accept Mr Wright's submission on this point.

20. Accordingly, my decision is as set out in para 1 above.

(Signed) J M Henty
Commissioner

(Date) 7.IX.2001