JBM/SH/10

Need for Appointee for Child DLA Claim

Commissioner's File: CDLA/1326/1995

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR DISABILITY LIVING ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Daniel J. Goodwin

M. Goodwin (Appointee)

Appeal Tribunal: Preston

Case No: D/61/071/94/0106

1. My decision is that the decision of the Preston Disability Appeal Tribunal (hereinafter called DAT) dated 12 September 1994 is erroneous in point of law. Accordingly I set it aside and remit the case for rehearing to a differently constituted DAT.

2. This is an appeal by the claimant to the Commissioner with the leave of the tribunal chairman against the decision of the DAT in respect of the decision of the adjudication officer first involved in these appeals.

3. The facts of the case are dealt with in the written submission of the adjudication officer first involved in these appeals and opportunity to comment has been vouchsafed thereon and on that submission and I have the observations dated 16 October 1995 which are in broad agreement with those set out in the submission referred to immediately above both in regard to the errors of law and to the submission to another differently constituted DAT. No useful purpose is to be served by my setting out these matters afresh here.

4. The relevant statutory provisions are sections 72 and 73 of the Social Security Contributions and Benefits Act 1992 and regulation 26(5) of the Social Security (Adjudication) Regulations 1986. I would however add that regulation 26E(5) is now re-enacted and consolidated in what is now regulation 29(5) of the Social Security (Adjudication) Regulations 1995.

Guidance afforded by the decisions of the Commissioner is referred to in paragraph 2 of the submission dated 30 June 1995.

5. In my judgment the decision of the DAT is erroneous in point of law. I say at once that I accept the submission dated 30 June 1995 of the adjudication officer now involved in these appeals as rightly made - it is accepted as such in the observations referred to above which are dated 16 October 1995 and nothing is to be gained by my pursuing those issues afresh here. Suffice it to say that I accept as part of my judgment that submission - however there is a major procedural issue to which neither the adjudication officer first involved in these appeals nor the DAT nor the adjudication officer now involved in these appeals have adverted. The heading of the submission is reminiscent of the now defunct Attendance Allowance Statutory Provisions in that the heading is "Margaret Goodwin OBO Daniel Joseph Goodwin". Regulation 43 of the Social Security (Claims and Payments) Regulations 1986 (which is a mandatory provision containing the word "shall") has not been dealt with. Under regulation 43 where a child is involved (the date of birth of the claimant here is given as "6.5.82" in the submission of the adjudication officer first involved in these appeals) regulation 43 provides that an appointment should be made by the Secretary of State. In the absence of such an appointment the Commissioner would to my mind be fully justified in dismissing the appeal as a nullity. The proceedings are not in order and I cannot see that a valid claim to disability allowance has been made. Regulation 43 is differently worded to regulation 30 (which deals with a person unable to deal with their own affairs) - regulation 30 has the word "may" - regulation 43 is mandatory. In any event I have never been persuaded that paragraph 8 of decision R(SB) 9/84 is correct - how can a person unable to deal with their own affairs be able to make a claim - by definition such a person is incapable. Nevertheless I am prepared to deal with this appeal de bene esse and to treat it as an error of law issue involving remission but with the proviso that the appointment issue is fully dealt with prior to remission. In all cases where regulation 43 applies a copy of the relevant appointment should be contained in the case papers.

6. My decision is as set out in paragraph 1 of this decision. I direct that the newly appointed DAT as the arbiters of fact in rehearing the case shall pay particular attention to all the aspects to which I have referred in paragraph 5 above of this decision. Further they should consider carefully the exact wording of the relevant statutory provisions and make and record their findings on all the material facts and give reasons for their decision. All issues of fact are at large before the newly appointed DAT. I would only add that it was a further error of law for the DAT not to in accordance with their inquisitorial function deal with the appointment issue.

7. Accordingly on the basis aforesaid the appeal is allowed.

(Signed) J.B. Morcom
Commissioner

(Date) 15 APR 1996

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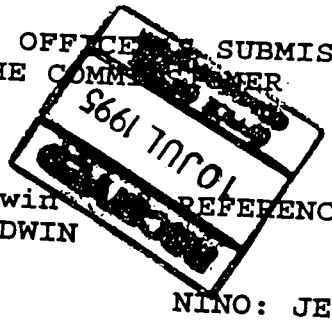
ADJUDICATION OFFICER'S SUBMISSION
TO THE COMMISSIONER



NAME OF CLAIMANT: Margaret Goodwin REFERENCE NO: CDLA/1326/95
obo Daniel Joseph GOODWIN

APPEAL TRIBUNAL: PRESTON NINO: JE563937B

BENEFIT: DISABILITY LIVING ALLOWANCE DATE OF DECISION: 12/9/94

TYPE OF CASE: Conditions of Entitlement - deaf child

1. The claimant appeals with leave of the tribunal chairman against the unanimous decision of the Preston Disability Appeal Tribunal dated 12/9/94 (pages T73 - T74).

2. The following statutory provisions and authorities are relevant to this case:

2.1 Sections 72 and 73 of the Social Security Contributions and Benefits Act 1992 ("the C+B Act");

2.2 Regulation 26E of the Social Security (Adjudication) Regulations 1986 ("the Adjudication Regs");

2.3 Unreported Commissioners' decisions CSA/83/90, CSA/113/91, CM/20/94 (*12/95), C12/92(AA) (Northern Ireland).

3. The question before the tribunal was whether the claimant satisfied the conditions of entitlement for the care and mobility components of disability living allowance (DLA) as provided by sections 72 and 73 of the C+B Act. The unanimous decision of the tribunal was

"Appeal disallowed.

[the claimant] is not entitled to either the Care or Mobility Components of Disability Living Allowance."

4. The claim for DLA received on 9/12/93 (pages T11 - T48) was a renewal claim from 7.5.94. The claimant, who at that date was 12 years old, suffered from severe sensori neural hearing loss, which had also effected a significant delay in his language development and communication skills. It was reported that the claimant needed someone with him when walking out of doors as he was unable to hear dangers and would have difficulty communicating with strangers. The claimant was able to attend to his daily self care routine independently, however it was indicated that supervision was required during the day as the claimant was unable to hear warnings. It was also stated that he needed help in the maintenance of his hearing aids and equipment. The claim for DLA was rejected by the adjudication officer on 6/1/94. Following a request on 25/1/94 (page T49), the decision was reviewed but not revised by a different adjudication officer (pages T51 and T52). An appeal to the Disability Appeal Tribunal was lodged on 5/5/94 (page T53).

5. The claimant's mother is now appealing to the Commissioner contending that the decision of the tribunal is erroneous in law. The essence of the appeal is that the tribunal have failed to consider the additional attention required to allow the claimant to communicate. Decisions C12/92 and CSA/83/90 are cited - The Commissioner in C12/92 supports the view of the former Attendance Allowance Board that attention with deafness, speech and communication is attention in connection with bodily functions. CSA/83/90 is on equivalent terms to CSA/113/91, which is referred to below. The appeal is supported to the extent shown in my submission below.

6. It is my submission that in the case of a deaf child, the attention in connection with their ability to communicate is to be determined by considering not the degree of communication which can be achieved, but the amount of attention required in order to achieve it. In the instant case, there was evidence before the tribunal that the claimant could communicate to a certain extent. The tribunal were therefore required to consider the assistance given to the claimant in order for him to communicate. I draw support for this from unreported Commissioner' decision CSA/113/91 in which the Commissioner held

> "... the question is not to be determined by the degree of communication that can be achieved but by the amount of attention required in order to achieve it. And the evidence before the DMP clearly indicated that attention was required on virtually every occasion that communication was to be had with the child. That is because, on account of his deafness, it was necessary to go and make some form of visual contact in order to commence communication at all..... The DMP has not considered that aspect of the day attention condition, and given the evidence before him, it is clear that he should have considered it. That is an error of law..."

7. It was described that even when the claimant was wearing his hearing aids, his attention could only be attracted by being in the same room. In the letter dated 13/6/94 (pages T63 - T64), the Social worker states

> "....Every time during the day that anyone wishes to communicate with [the claimant] they always have to go into the same room as him. You cannot call him from another room. You then have to get his attention by either waving in his vision or physically touching him...."

8. The tribunal appear to accept that extra "first contact" attention is required when communicating with the claimant. In their findings they state

> "[the claimant] could attend to all his bodily functions unaided but his mother did have to spend more time communicating with him due to his hearing loss but the tribunal on the evidence did not accept that this attention was continually throughout the day or for a significant portion of the day....."

9. It is my submission that the tribunal have failed to make findings in respect of the frequency at which or length of time over which first contact attention is required (from any person, not just the claimant's

mother) when communicating with the claimant during the day. I therefore submit that their conclusion that the attention is not "continual" of "significant" is unsustainable on the evidence and findings available.

10. I further submit that the tribunal have deviated from the statutory language when determining whether the claimant required "frequent" attention. The error was repeated in the reasons, the tribunal stating that

> "....the tribunal on the balance of probabilities were not satisfied that this attention was given continually or for a significant portion of the day...." *[emphasis added]*

11. In the absence of a proper statement of facts and reasons, it is not altogether clear that the correct test in section 72(1)(b)(i) of the C+B Act was applied, and accordingly, the decision of the tribunal falls to be erroneous in law for that reason also.

2. Turning to the "supervision test" in section 72(i)(b)(ii), both the claimant's mother and the tribunal appear to agree that the risk of substantial danger resulting from the claimant's inability to hear a smoke alarm was too remote to consider. It is my submission however, that the reasoning of the tribunal on this point is confusing. The tribunal state in their findings

> "....although [the claimant] had a severe hearing loss, the tribunal found that in the home no more significant supervision was required than in the case of a child of his age with full hearing. Any dangers eg not hearing the smoke alarm had to be considered remote and were not substantial because of the presence of an adult in the house...."

13. It is my submission that the first sentence is a conclusion on the level of supervision required by the claimant and not a finding upon which such a conclusion should have been based. It is therefore unclear exactly how the claimant's circumstances and requirements were considered and how the conclusion that any supervision was not substantially in excess of the norm was arrived at.

14. It is therefore my submission that the tribunal have failed to make adequate findings of fact and failed to give adequate reasons for the decision, and have thereby erred in law in that they are in breach of regulation 26E(5) of the Adjudication Regs which provides

> **26E**--(5) The chairman of a disability appeal tribunal shall in each case--
>
> (a) .....;and
>
> (b) shall include in such record a statement of the reasons for the decision, including findings on all questions of fact material to the decision, and
>
> (c) .....

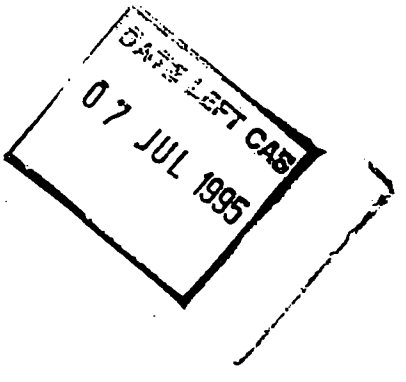
15. For completeness, the appeal on 12/9/94 was concerned with the renewal of benefit following a previous favourable decision. In CM/20/94, the Commissioner explained the requirements of the tribunal

decision in renewal cases where benefit has been discontinued and held that

> "In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision....should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow....that they will be in breach of regulation 26E(5) and in error of law."

I respectfully submit that as the findings of fact in the decision of the tribunal in the instant case are deficient, it is impossible to infer as to why the tribunal reached a different decision to that on t previous claim. Furthermore, there is no clear explanation as to why the determination on the renewal differs from the previous decision. I therefore submit that in accordance with CM/20/94, the decision of the tribunal is in breach of regulation 26E(5) of the Adjudication Regs for this reason also.

16. Should the Commissioner accept my submission, I respectfully request that he set aside the decision of the tribunal and remit the case for rehearing before a differently constituted tribunal, with directions for its determination.



D P Eland

Adjudication Officer

30 June 1995