

SOCIAL SECURITY ACTS 1992 TO 1998

Bulletin 158

APPEAL FROM A DISABILITY APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Tribunal: Central London Disability Appeal Tribunal

Case No:

1. This is an appeal by the claimant with the leave of a commissioner from a decision of the Central London Disability Appeal Tribunal given on 12 December 1997 that the claimant was not entitled to an award of the mobility or care component of disability living allowance. In so finding the tribunal upheld the decision of an adjudication officer given on 9 October 1996 and the decision of the reviewing adjudication officer on 31 December 1996. No oral hearing has been requested by the claimant's appointee or representative, and I am satisfied that I can determine this appeal without such a hearing. For the reasons given below, this appeal is allowed, the decision of the tribunal is set aside and the case is remitted to a new tribunal to be determined in accordance with the directions given below. As the appeal to the tribunal was brought before 21 May 1998, the down to the date of the decision principle will apply, and the new tribunal will have to determine the case down to the earlier of the date of its decision or of the commencement of any period covered by a later decision on a similar claim by the claimant.

2. The claimant was born in November 1985, and his father acts as his appointee. He suffers from X-linked agammaglobulinaemia (Bruton's Disease), as a result of which he has a lifelong requirement for immunoglobulin replacement therapy and a lifelong risk from infection even on optimal treatment. According to the medical report from his consultant immunologist at pp.76-77, he suffers from intercurrent bacterial infection from time to time and needs to be monitored closely. He is also affected by erythema nodosum (painful reddish/purple lumps on his shins). The consultant immunologist also states that the claimant was, on the surface, in good health, but stressed that the genetic disorder placed a great strain on his family and necessitated much greater vigilance by his parents than would be required for normal children, and that the demands (both practical and emotional) of performing home immunoglobulin therapy should not be underestimated.

3. A letter from the general secretary of the Primary Immunodeficiency Association dated 5 September 1996 states that the claimant has little or no immune system or protection against infection, and that this lays him open to infections with which his peers will cope without any difficulty. He contends that the claimant must be supervised at all times during the day to make sure that he does not come into contact with infections which could threaten his life; that his teachers are aware of this and accept him for ordinary full time education on the basis that someone must be available at all times to respond if his health deteriorates (eg, if he becomes feverish) or if a child at school has a potentially dangerous infection; and that he requires continual supervision throughout the day in order to avoid substantial danger to himself which is substantially in excess of that normally required by children who have complete immune systems.

3. There is no suggestion that the claimant has any claim to the mobility component of the disability living allowance.

4. The claimant's father attended the hearing before the tribunal, but does not appear to have given evidence. The claimant was represented by a Ms Jackson of the Primary Immunodeficiency Association. The details of the care and supervision actually received by the claimant appear from the file to be:

- a. 15 minutes per day in relation to washing and bathing (p.23);
- b. 2 minutes per day administering ointments to his eyes (p.28);
- c. 3-4 hours once every 3 weeks administering home therapy of sandoglobulin and taking a blood test before the infusion (p.28);
- d. Thoroughly cleaning and disinfecting cuts and abrasions when they occur due to the increased risks of infections - there is no evidence as to how often this occurs or how long it takes (p.31);
- e. Keeping the claimant away from people with serious infections - it is not clear what this involves - and supervising him so as to be able to intervene if necessary (p.31);
- f. Bathing the claimant and changing his bedclothes 1 to 3 nights a week when he wets his bed, taking 15 minutes on each occasion (p.34), although I note that this would seem to have gone down to once every 4-5 months in submissions at p.80;
- g. Further unspecified supervision was said to be required when he had an infection. It is unclear how often this was, but his attendance record at school was said to be generally good, and colds and cuts, although causing him to miss one or other of swimming and PE, do not seem to have kept him away from school (p.80).

5. In my view the tribunal erred in law in that in considering the lowest rate of the care component it took into account only a, b and c above (p.82). It seems likely that the attention required for d. above is significantly greater than in the case on children

without the claimant's problems, where the average graze or cut might get wiped down and a perhaps have a plaster stuck on it. The tribunal ought to have enquired how often such cuts and abrasions occurred and what extra care was involved in order to see whether to take them into account. Similar comments apply to e, and to any special attention the claimant might require when suffering from an infection. If he was especially prone to infections and required extra care when suffering from them, then that care would need to be taken into account.

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 retire to bed. Although a distinction is drawn between day and night in section 72(1)(b) and (c) of the Social Security Contributions and Benefits Act 1992, that is by 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 attention or supervision are less. However, that does not mean that "a significant portion of the day", the expression used in section 72(1)(a) in relation to qualifying for the lowest rate of benefit, excludes the night from consideration. I can see no logical reason for treating night time care as more demanding for the purpose of the middle and highest rates, 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.

7. It follows that in my view the tribunal erred in law in limiting their consideration in relation to the lowest rate of the care component to the three items of attention listed by them. Although the other instances to which I have referred do not occur every day, and some may be very occasional, the whole picture needs to be looked at to enable the tribunal to come to an overall conclusion, taking into account that there are some days in which the attention required will be significantly greater than on others. In relation to each question of attention and of supervision the tribunal should take a broad view over a period and ask whether the words of the statute apply to the facts as found by them.

8. At least in relation to the lowest rate of the care component it seems to me that a closer investigation of the facts could reveal that taking an overall view, and taking into account all the areas where extra attention is needed above that normally required by a boy of the claimant's age from time to time, he did require the requisite attention for a significant portion of the day. That, however, will be a matter for the new tribunal, and will depend on the evidence before it, and I should not be taken to be indicating any views on the likely outcome of the new hearing.

9. While I am unable at present to see any basis on which it could be said that the tribunal erred in law in relation to the attention and supervision required for the middle rate of the care component on the basis of the sometimes limited evidence before it as to how the supervision provided was substantially in excess of the normal requirements of persons of his age, it will be for the new tribunal to decide those issues on the evidence before it, bearing in mind that attention or supervision may be substantially in excess of that normally required either by virtue of the time over which it is required or

by virtue of the quality or degree of attention or supervision which is required
(CA/92/92, para.5).

10. Accordingly, this appeal is allowed and the case is remitted to a new tribunal as set
out in paragraph 1 of this decision.

(signed)

Michael Mark
Deputy Commissioner

4 February 2000