

1. This is an appeal by the adjudication officer against the decision of the Doncaster social security appeal tribunal given on 22 January 1998. The tribunal decided that the claimant was entitled to the mobility component of disability living allowance at the lower rate from 10 April 1997 for life; she was not however entitled to the care component.

2. At the oral hearing of this appeal the adjudication officer was represented by Mr Heath. Mr Griffiths represented the claimant. That hearing was followed immediately by the Daniel case (see CDLA/1457/98). The two cases concerned more or less the same issues.

3. The tribunal concluded, with regard to the mobility component, that the claimant satisfied the conditions in section 73(1)(d) of the Social Security Contributions & Benefits Act 1992 which reads -

"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."

As to that the tribunal said -

"We think that the crucial fact here is that Mrs Freeman has been deaf since birth and has no speech at all. Her understanding of written English as we know it is extremely limited although she can understand simple words. This enables her to go and do familiar shopping and to read some subtitles on television.

However although she does go out to places which are familiar to her we accept that she would not be able to go to places which were unfamiliar because of her lack of communication skills. She might be able to write down a simple word to show to someone if she were to be lost but she cannot lip read and would not be at all certain of being able to understand any reply. As a matter of fact she is always accompanied when she goes to strange places and we think that this is a requirement."

The adjudication officer's case is, essentially (as stated in the written submissions), that the tribunal failed to make "...findings to determine what it is that the person accompanying the claimant does that enables her to take advantage of the faculty [of walking] and thus determine whether that amounts to either guidance or supervision". There is, as I think Mr Griffiths for the claimant came to agree, substance in that contention.

4. The tribunal's findings of fact and the reasons they gave for their decision are vague as to what guidance or supervision the tribunal had in mind in determining whether the claimant could take advantage of her walking ability, and as to why, as the tribunal asserted, the claimant requires to be accompanied "when she goes to strange places". Furthermore, the tribunal referred to the claimant's communication problems, arising from her profound deafness, but did not seem to address the question posed by the words "most of the time" in section 73(1)(d).

5. With regard to the care component, Mr Heath made the point that the tribunal seemed not to have understood that communication (the ability to hear and understand and to speak) is a bodily function. That is because they said, in their Summary of Grounds -

"Mrs Freeman stays at home. Her husband is profoundly deaf as is the appellant. She has no useful speech and uses sign language. She has no disabilities or illnesses apart from her deafness. She can read simple words and can understand subtitles on T.V. programmes. She can attend to all bodily functions. Her need is with communication."

I think it is also the case that they did not take account of the claimant's reasonable social or leisure needs in accordance with the principles established by the House of Lords in the Fairey case.

6. So there is no doubt that, for the reasons to which I have referred, the tribunal's decision is erroneous in law. I accordingly allow this appeal, set aside the tribunal's decision and remit the case for rehearing by a differently constituted tribunal.

7. The new tribunal will of course consider both the care and the mobility components. With regard to the latter, both Mr Heath and Mr Griffiths referred to the many decisions of Commissioners and made the point that there appeared to be inconsistencies, particularly concerning the meaning in section 73(1)(d) of "guidance". I doubt if it is useful for me to traverse the cases to show or try to explain the differences both of substance and of emphasis. That is because I agree, as I think most Commissioners have, with what was said in CDLA/42/94 (paragraph 22(d) to (l)) as follows -

"(d) The claimant meets the conditions of section 73(1)(d) if she is unable to take advantage of the faculty of walking even with guidance or supervision from another person, if the limits imposed on her ability by her physical or mental disablement are such as in their nature could be alleviated by guidance or supervision from another person.

(e) The claimant meets the conditions of section 73(1)(d) if she is only able to take advantage of the faculty of walking with guidance or supervision from another person.

(f) The claimant meets the conditions of section 73(1)(d) although she does not fall within point (d) or (e) all of the time, providing that she falls within one or other of those points most of the time.

(g) The question of what amounts to taking advantage of the faculty of walking is a question of fact for the adjudication officer or the disability appeal tribunal.

(h) Only limits on the ability to take advantage of the faculty which result to some extent from the claimant's physical or mental disablement may be taken into account.

(i) The meaning of guidance or supervision must be considered within the context of action which is aimed at enabling the claimant to take advantage of the faculty of walking despite the limits imposed by her physical or mental condition. It is not a condition that guidance or supervision should be necessary to avoid a risk of danger to the claimant or others.

(j) Guidance means the action of directing or leading. It may, for example, be constituted by physically directing or leading the claimant or by oral direction, persuasion or suggestion.

(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 faculty of walking being comprised. Other, more active, measures may also amount to supervision. The monitoring does not cease to fail within the meaning of supervision by reason only that intervention by the person accompanying the claimant has not in the past actually been necessary.

(l) The fact that the claimant derives reassurance from the presence of the other person does not prevent action which would otherwise fall within point (j) or (k) from being guidance or supervision."

8. To those points I would add these. First, if a claimant satisfies the supervision condition relating to the care component (i.e. supervision to avoid substantial danger) she may well satisfy the supervision condition in section 73(1)(d) (which does not involve the avoidance of danger); the two are not mutually exclusive. Second, and consistently I think with

the approach (in relation to the care component) of the House of Lords in the Mallinson case, a claimant is not to be held not to satisfy section 73(1)(d) because no amount of guidance or supervision would enable her to take advantage of the faculty of walking. Third, the proposition, at paragraph 11 of CDLA/240/94 that "...an inability to ask for directions does not, by itself, demonstrate a need for supervision..." has I think been over extensively relied on. I think the words "by itself" probably underline the point that section 73(1)(d) has the requirement of "most of the time". And it seems to be overlooked that the proposition relates to supervision and not to guidance. For those reasons I agree with the Commissioner in CDLA/14307/96 (paragraph 12) when he said -

"In that decision (at paragraph 11) the Commissioner accepted a submission on behalf of the adjudication officer 'that an inability to ask for directions does not, by itself, demonstrate a need for supervision'. That may well be so but of course sub paragraph (d) of section 73(1) refers also to 'guidance'. I would have thought that that particularly applied to the need to ask for directions. Mrs Payne on behalf of the claimant pointed out that, because of the indistinct speech of the claimant, a stranger being asked for directions would not understand..."

So, in my view, while asking for directions is unlikely to satisfy the "most of the time" condition, there is no reason in principle why it should not be brought into account in determining the issue of "guidance". CDLA/14307/96 was criticised in CSDLA/223/98; I prefer the former to the latter.

(Signed) R A Sanders
Commissioner

(Date) 17 May 1999