

CDLA/1983/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the appeal tribunal (the tribunal) erred in law in its decision given on 19 April 2006 under Registration No. U/06/071/2006/00147. Under section 14 (8) of the Social Security Act 1998, I set aside the tribunal's decision and remit the case for rehearing by a differently constituted tribunal.

2. The claimant is a girl born on 27 December 1990 whose appointee is her mother. On 8 August 2005, she claimed both components of disability living allowance on the grounds that she has a learning disability – dyslexia - and behavioural problems. Reports were received from the claimant's educational psychologist, school and consultant paediatrician. The claim was refused on the grounds that:

“Medical evidence indicates [the claimant] has moderate learning difficulties. Her speech development is good. I accept she may not be able to read bus, train or street signs however she could ask for help if necessary.”

3. Through her mother, the claimant appealed. The decision was reconsidered but not revised and the appeal proceeded. Further medical evidence was submitted from the Consultant Community Paediatrician, which referred to the claimant having moved to a school for children with learning disabilities some time after he had last seen her in May 2005 (page 94).

4. The tribunal was held on 19 April 2006, the claimant's mother being present and represented. The tribunal dismissed the appeal, recording on the decision notice:

“The tribunal was not satisfied that the appellant reasonably required attention in connection with any bodily functions. The tribunal accepts that the appellant suffers from dyslexia and has a reading age considerably below that of a child of her age but she is able to see and hear and communicate verbally. The tribunal decided not to adjourn to enable the representative to produce authority in support of his assertion that the attention which the appellant receives to improve her reading skills was attention in connection with a bodily function.”

5. The claimant appealed with leave of the chairman on the grounds that the tribunal had raised the point that the attention requirements claimed by the claimant were not in connection with any bodily function at the hearing and this point had not been raised in argument by the Secretary of State. The claimant's representative had then requested an adjournment to produce authority on the point and the tribunal's failure to grant an adjournment amounted to a breach of natural justice. The case on which the representative wished to rely was CDLA/395/2005 where the Commissioner had stated:

"20..... Both parties gave evidence about, and addressed, wider issues about dyslexia and disability living allowance. This arose from the tribunal's parting comment that:

"we do not accept that the functions of reading and writing are bodily functions."

That is neither part of the tribunal decision nor necessary to it. Indeed, the tribunal took the pragmatic approach of assuming the opposite in the decision it took. As the point was a ground of appeal and addressed fully before me, I add that I agree with Mr Moore that the tribunal erred in so far as it made this statement as a statement of law. As the Commissioner said in CDLA/1420/2004:

"If a person with dyslexia reasonably requires assistance from another person to read labels of instructions on tins, packets, etc when shopping or cooking, it seems to me that that is attention in connection with the bodily function of seeing. It seems to me that bodily function includes not just making out the shapes of letters or words, but also making sense of what those shapes signify. It does not matter that "communication" is an activity, not a bodily function (see Commissioner's decision R(DLA) 3/03) ..."

And in CDLA/2680/2001 the Commissioner agreed with both parties that a tribunal that found as a statement of law that dyslexia generally was neither a physical disability nor a mental disability was wrong in law."

6. The tribunal stated at paragraph 6 of its statement of reasons that:-

"[it] did not feel that the extra help which the claimant had to improve her reading amounted to attention in connection with any bodily function. Her reading is not as good as it should be for someone of her age and this is as a result of the dyslexia ... [T]he extra attention she received in school to enable her to cope with the dyslexia did not, in the opinion of the tribunal, amount to attention in connection with a bodily function. This was an educational issue and the school was providing help".

The claimant submits as her second ground of appeal that these findings amount to an error of law in view of the decision in CDLA/395/2005.

7. Thirdly, the tribunal stated at paragraph 5 of the statement that:

"[it] felt that the wishes of the [claimant] to travel with a friend did not seem outside the scope of normal behaviour for a child of the [claimant's] age such as to merit an award of the lower rate of the mobility component."

The claimant's mother gave evidence to the tribunal of her daughter's problems reading bus numbers and destinations, street signs and timetables, giving examples. The claimant submits that insufficient findings of fact were made on this point.

8. Case management directions were issued by another Commissioner before the case was transferred to me.

9. The Secretary of State's representative supports the appeal. On the first ground, the question of adjournment, he points out that the decision of the Court of Appeal in *Carpenter v Secretary of State for Work and Pensions* [2003 EWCA Civ 33] (reported as R(IB) 6/03) deals with the issue of whether a tribunal errs in law if it refuses to adjourn an appeal hearing. At paragraph 14 the court held that a decision not to adjourn is not in itself appealable. However at paragraph 23, it was held that a refusal to adjourn can, depending on the reasons given for it, make the tribunal's decision on the claimant's appeal erroneous in law. In this case, the only reference to adjournment is in the decision notice which I have repeated above at paragraph 4 above, and no reason was given. The request involved a fundamental aspect of the appeal. I accept that the tribunal erred in failing to explain why it did not consider it appropriate to adjourn.

10. I am giving a fuller decision because of the point on which the claimant's representative requested an adjournment, the second ground of appeal - whether the extra attention required by the claimant was an educational issue or attention with a bodily function. On this point the Secretary of State's representative initially submitted that:-

"15.... the assistance with seeing as described in CDLA/1420/2004 and CDLA/395/2005 relates to the claimant reasonably requiring assistance to read a specific written item when shopping or cooking and is distinct from extra help to assist the claimant to improve her general reading skills to which the tribunal refer [as] at pages 106 of the bundle. The tribunal decided that the help given at the school to help the claimant to improve her reading skills could not be taken into account as a reasonable need for attention in connection with her bodily functions for the purposes of her entitlement to the care component of DLA.

16. I therefore submit that as the help the claimant receives can be distinguished from the attention with the bodily function of seeing referred to in CDLA/1420/2004 and CDLA/395/2005 the tribunal did not err in law in deciding that the assistance the claimant receives at school to improve her reading skills did not entitle her to the care component of DLA."

11. That approach was roundly condemned in the claimant's representative's observations in response as "mere sophistry". He referred to the extract from CDLA/1420/2004 repeated in the extract from CDLA/395/2005 set out above in paragraph 5 and continued:

"5. In our view it would be absurd to use that passage as authority for the proposition that attention in connection with the bodily function of seeing was only applicable in the context of shopping or cooking. Seeing is seeing irrespective of what the object of sight is. The Commissioner having already disposed of the appeal is attempting, in this part of his decision, to establish the point that someone with dyslexia is someone with an impaired bodily

function who may require attention in connection with it. He then identifies the impaired bodily function as seeing.

6. This view is supported by the fact that the Commissioner then goes on to say (at paragraph 23) '(i)t is necessary to look at the specific disablements, if any, described as a general labour of dyslexia, or associated with it, in a particular case. Only then can it be decided whether bodily functions are affected. And it is necessary to look at the actual needs said to arise from the disablement. The label 'dyslexia' by itself does not entitle the claimant to say she or he is so disabled as to reasonably require help such that the allowance is payable equally, it does not enable a tribunal simply to say that a claimant is not entitled. The tribunal must look at the disablement reflected by the use of that label and at the actual reasonable needs of the claimant because of those disablements."

In further support of his submission that educational needs fall to be taken into account the claimant's representative cited the decision in CDLA/3737/2002. There the Commissioner indicated that following *Secretary of State v Fairey* [1997] 1 WLR 799 (reported as R(A) 2/98) (where it was held by the House of Lords that the yardstick of a normal life is important), if assistance to undertake a reasonable level of social activity can satisfy the criteria for an award of the care component of disability living allowance, then assistance in order to enable a child to be educated efficiently must be able to do so. CDLA/3737/2002 involved a child suffering from a sight problem.

12. A Tribunal of Commissioners then decided CSDLA/133/2005 (to be reported as R(DLA) 1/07) holding that:

"39.....[E]ven if an activity cannot of itself be properly described as a bodily function...recourse will then have to be had to the discrete bodily functions which are involved in the activity and the extent to which they are impaired, and particularly as to whether any of them are so impaired that assistance to the level of any of the provisions of section 72 [of the Social Security Contributions and Benefits Act 1992] is required in respect of the disablement".

I offered the parties the opportunity to make further submissions in the light of that decision. The Secretary of State has responded that in the light of that decision he submits the tribunal failed to deal adequately with the question of the claimant's possible entitlement to the care component.

13. The Secretary of State also submits that the Commissioner's decision in CSDLA/427/2006, which disagreed with the decisions in CDLA/395/2005 and CDLA/1420/2004, is relevant. In CSDLA/427/2006 the Commissioner also pointed out that R(DLA) 1/04 does not support the proposition basic to this appeal, that assistance with educational needs can amount to attention with the bodily function of seeing, given that the point was not considered by the Court of Appeal in its decision in that case. The Commissioner held that the educational requirement of learning to read and write for someone with dyslexia is not receiving attention in connection with the bodily function of seeing and said:

“8.It does not seem to me that interpretation of writing has anything to do with the bodily function of seeing. I can, for example, see Japanese or Arabic script but I cannot interpret it because I have never learned it.....The interpretation is learned through education. For someone with dyslexia the education process is more complex but it is education nonetheless....

9.Disability living allowance is not a form of publicly funded compensation for being disabled. It is a recognition of the additional cost of care of those who are disabled. When taken in that context it can be seen that additional educational requirements for the purpose of learning to read and write are of an entirely different nature to attention in connection with an impaired bodily function....”

14. The response on behalf of the claimant reinforces the earlier submissions that the attention required to interpret the written word is attention in connection with the bodily function of seeing, or alternatively, if that is incorrect, relying on the decision in CSDLA/133/2005 that the functions of the brain are included within the term ‘bodily functions’. If the ability to see and interpret the written word is impaired because the brain is impaired then attention required for such an activity is attention in connection with the proper functioning of the brain.

15. As a result of reviewing the case law and submissions I gave further directions in which I observed:

“2. In decisions such as CDLA/1420/2004, CDLA/395/2005 it has been considered that dyslexia affects the bodily function of “seeing”. In CSDLA/427/2006 the Commissioner also proceeded on this basis. [See paragraph 12 above].

3. It would appear to me that dyslexia does not arise from a problem with the bodily function of seeing, but from the inability of the brain of a person with dyslexia to process the information it has received. That information enables a person without dyslexia to read, and in some cases, to write. The Tribunal of Commissioners in CSDLA/133/2005 held that functions of the brain are included within the term “bodily functions”.

4. The question which is then to be addressed is as to how then does disablement flow from the inability of a person with dyslexia to process written information to enable him or her to read and/or write, and what help is reasonably required to overcome that deficiency.”

16. As it happened, almost immediately thereafter another Commissioner gave a decision in CDLA/3204/2006, a case also involving a girl with dyslexia, in which he also considered what I may call the ‘traditional’ approach of describing dyslexia as linked to the bodily function of seeing, identifying four stages in the process of seeing, of which the last, that of interpretation, may be appropriate to dyslexia – that is, the dyslexic person sees, but cannot interpret, the information. He said:

“16. It is usual to identify the bodily function as that of seeing, sight or vision: see Mr Commissioner Mesher in *CDLA/1420/2004* at paragraph 11. We speak of seeing as a composite activity. I say that I can ‘see’ what is on the computer screen as I type this decision. Everyone understands what that means, but it consists of a number of separate but related stages. My seeing the screen can be analysed into at least four stages; an impairment and a resulting disablement can occur at any of these stages. First, there is the reception stage. The light rays from the screen must penetrate into my eye and reach the retina. The light may be prevented from penetrating my eye, for example by a cataract. Or it may be prevented from focusing on my retina, for example by degeneration of the macula. Second, there is the transmission stage. The information received at the retina must be transmitted to my brain along the optic nerve. This may be disrupted, for example by damage to the nerve caused by glaucoma. Third, there is the construction stage. The information received by my brain has to be interpreted in order to create the image that I am seeing. As I understand it, sight always involves this interpretative process; the light rays detected by the retina always require the brain to interpret them to create the image that we see. The optic nerve does not simply transmit an image. It transmits information from which an image is constructed by the brain. Fourth, there is the interpretation stage. Once the information has registered as an image, the brain has to use that image. It cannot do so unless it can recognise the images as words with meanings individually and in the context of sentences. No doubt, this process of seeing the computer screen could be further subdivided. I may also have distinguished between stages that are not severable. For example, the processes of construction and interpretation may be more interwoven than my analysis allows.

17. I believe that dyslexia operates at the fourth stage, although this must be subject to any evidence before the tribunal and the knowledge of the tribunal’s medically qualified panel member. I do not consider that it matters whether this is considered as part of the bodily function of seeing or part of the bodily function of the brain. What matters is substance, not labels. The tribunal must identify a bodily function in connection with which the claimant receives assistance through special attention at school, her attendance at the Dyslexia Institute, from her mother at home and anything else that the tribunal identifies from the evidence. The use of labels must not mislead the tribunal in that task”.

It follows that the Commissioner also disagreed with the comments made in paragraphs 8 and 9 of *CSDLA/427/2006* set out above.

17. The Secretary of State has naturally referred to *CDLA/3204/2006* in his support of the proposition contained in my Direction. As it is submitted that the tribunal’s decision should be set aside in any event and the case remitted, and the claimant’s representative supports this proposal, there is little to be gained by asking for his further submissions on the point, with consequent further delay.

18. I accept the Commissioner’s overall analysis in *CDLA/3204/2006* and that, ultimately, it may not matter whether dyslexia is considered as part of the bodily function of seeing or alternatively as part of the bodily function of the brain and what

matters is substance, not labels. In the light of R (DLA) 3/06, this must be so. Provided a claimant is disabled physically or mentally, it is whether the extent of the disablement is such that the claimant reasonably requires assistance with a bodily function which is fundamental, not the existence of a diagnosis. Following CSDLA/133/2005 the functions of the brain are included within the term 'bodily function'. Although I understand how case law has developed in which dyslexia has been considered to be a problem with the bodily function of seeing, nonetheless, on the basis of medical information currently available, the dyslexic (unless otherwise suffering from an independent sight problem), does not have difficulties with seeing, but the problem arises from the brain's inability to process the written information which the eyes *have* seen. As I suggested in my Direction, the question which is then to be addressed is how disablement flows from the inability of a person with dyslexia to process written information to enable him or her to read and/or write (or deal with other difficulties which are also on occasion associated with dyslexia), what help is reasonably required to overcome that deficiency or those deficiencies and whether it is such as to satisfy the criteria for an award of any rate of the care component of disability living allowance.

19. Paragraph 17 of CDLA/3204/2006 identifies aspects which were relevant in that case, and some of which, certainly as to the help the claimant receives both at school and at home, will be relevant in this case. There may be others specific to this claimant. The new tribunal must address whether the attention which the claimant reasonably requires as a result of her disablement is sufficiently intimate to amount to attention in connection with the bodily function of the brain. For example, in disability living allowance cases in respect of the care component, help required with housework is considered to be too remote to qualify as attention with a bodily function, whilst attention required with dressing and undressing is considered to be attention which may qualify, (subject to satisfaction of the other criteria for an award of disability living allowance) although the root cause of either difficulty may stem from disablement of an arm or hand. Depending on the facts of each case, attention given to assist a somewhat slow reader, whilst reasonably required, may be too remote, as being primarily concerned with education, but the teaching of basic reading and writing skills, where the attention is reasonably required because of a claimant's dyslexia, may qualify as attention in connection with a bodily function, subject to the claimant satisfying the other criteria for an award provided in section 72(a) or (b) of the Social Security Contributions and Benefits Act 1992. Each tribunal will need to make appropriate findings of fact.

20. The claimant and her representatives may wish to consider whether it would be helpful to obtain further detailed evidence on the extent of the attention reasonably required by the claimant in connection with her dyslexia and other problems at the date of the decision appealed against.

21. The third ground of appeal is that the tribunal made inadequate findings of fact in connection with the lower rate of the mobility component, that is whether the claimant required guidance or supervision when walking on unfamiliar routes that was substantially in excess of the requirements of 14 year old children in normal physical and mental health. The Secretary of State's representative submits, and overall I accept, that the tribunal limited its findings to how the claimant coped with travelling to school, a route with which she was familiar. The tribunal was

understandably pleased to hear that the claimant had coped well with an untoward incident on her regular school journey, but its findings are not clear, at least to me, on whether it considered that she would be able to cope with travelling on unfamiliar routes without guidance or supervision, subject to the provisions of section 73(4) of the Social Security Contributions and Benefits Act 1992. As noted in paragraph 2 above, the original decision maker accepted that the claimant might not be able to read signs, but concluded that the claimant could ask for help if necessary. The tribunal made no finding on this point. The point was made at the tribunal hearing that the claimant preferred to travel with a friend, but the tribunal considered this to be within the bounds of normality for a 14 year old girl. I have no quarrel with that finding, but in my view the tribunal did not say clearly whether it considered it was simply the claimant's preference or fundamental to her ability to use unfamiliar routes. The new tribunal which rehears the case should consider the extent to which the claimant would have been able to cope with routes which were unfamiliar to her at 16 November 2005, taking into account section 74(3).

22. The new tribunal must conduct a hearing on the issues arising in connection with both components of disability living allowance. It must make and record full clear findings of fact on all necessary points with reasons for its acceptance of the evidence which is preferred and for the rejection of the other evidence. It should not apply CSDLA/427/2006. That decision is dated only one week after the decision in CSDLA/133/2005 was given and the Commissioner in CSDLA/427/2006 made no reference to it.

23. The new tribunal must not take account of circumstances which did not obtain at the date of the decision appealed against, but must take account of any evidence which came into existence after that date but which relates to circumstances as at that date. If the claimant is minded to submit further evidence, she will appreciate that this must relate to the extent of her disablement at 16 November 2005, and not at the date of any report given.

24. In connection with the care component, the parties will appreciate that notwithstanding that it is now established that functions of the brain are included within the terms "bodily functions", and dyslexia is a problem with the functions of the brain, not with seeing, this claimant, as any other, must establish that such problems as she had at the date of the decision appealed against gave rise to a reasonable requirement for attention with her bodily functions to such an extent that she falls within any of the provisions of sections 72 of the Social Security Contributions and Benefits Act 1992, and/or in connection with her mobility within section 73 of the Act.

25. I note that the claimant became 16 on 27 December 2006.

26. The claimant will also appreciate that my decision is limited to matters of law; the new tribunal will make its decision on the evidence available to it including oral evidence at the tribunal rehearing. The decision may not be different or more helpful to her.

27. For the reasons stated, the claimant's appeal succeeds. My decision is set out in paragraph 1 and my guidance in paragraphs 18 to 25. My directions, general though they are, may be varied by a district chairman if appropriate.

(Signed on the Original)

**E A Jupp
Commissioner**

25 April 2007