

SMT for Uign
note BSA 01/00

- 'extreme' = ordinary word
- another person can 'watch over'
more than 1 other person

WMB
150?

Commissioner's File : CDLA/2054/1998

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

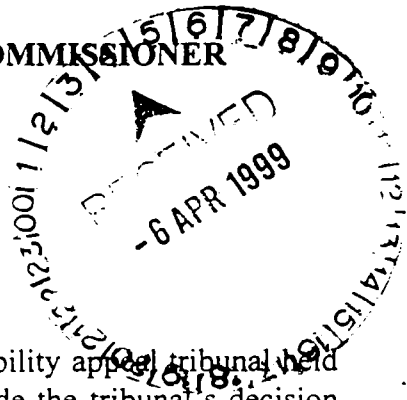
APPEAL FROM DECISION OF DISABILITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE DEPUTY SOCIAL SECURITY COMMISSIONER

Name :

Disability Appeal Tribunal : Durham

Case No : D/12/041/97/0351



1. My decision is that the decision of the Durham disability appeal tribunal held on 20 January 1998 is erroneous in point of law. I set aside the tribunal's decision and refer the case for rehearing before a differently constituted tribunal.

2. This is an appeal against the decision of the Durham disability appeal tribunal dismissing the claimant's appeal against the refusal of the adjudication officer to award him the mobility component of disability living allowance at the higher rate. The claimant is mentally retarded as a result of a chromosomal defect and has been found to be entitled to the care component of disability living allowance at the highest rate and to the mobility component at the lower rate. However, the tribunal rejected the claimant's claim to the mobility component at the higher rate under section 73(3) of the Social Security Contributions and Benefits Act 1992 because they found that, although the claimant is severely mentally impaired within section 73(3)(a), he does not display "severe behavioural problems" within section 73(3)(b), as provided for by regulation 12(7) of the Social Security (Disability Living Allowance) Regulations 1991:

"A person falls within subsection (3)(b) of section 73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which-

(a) is extreme,

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake."

4. The claimant lives in a house with two other handicapped people, where 24 hour care is provided by, on average, two carers. The Tribunal found that the

claimant had engaged in disruptive behaviour, but held that that behaviour did not fall within regulation 12(7) for the following reasons:

“None of the evidence supplied by (the claimant’s general practitioner) indicated that the appellant’s behaviour was extreme.

The evidence of Mr Scott (the claimant’s carer), who was best placed to indicate problems to the Tribunal, was that the appellant was given to tantrums and that there had been one or two occasions when there had been problems outside in the nature of threats to a member of the public and minimal contact with a member of the public when no action had been taken, and all that had been required was for Mr Scott to get hold of the appellant’s arm to stop him causing further complications.

Within the home the appellant had on one or two occasions smashed cups by dropping them on the floor deliberately and on one occasion only he had attempted to damage his wardrobe door. The intervention on these occasions by way of stopping him was minimal and certainly did not extend to the degree of restraint contemplated within the Regulations.

The Tribunal noted that although any incidents were noted and clearly had to be recorded no such written evidence was produced to the Tribunal and Mr Scott was unable to recollect any other occasions than he had mentioned in his evidence.

A further indication that his behaviour was far below that contemplated in the Regulations was that according to Mrs Lackie (the Home Leader) the appellant “isn’t written up for physical restraint in the notes” and she actually confirmed to the Tribunal that those in charge of him did not have authority to physically restrain him. This indicated to the Tribunal that his behaviour was not extreme.

There was no evidence that the appellant regularly required another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another or damage to property because of the infrequent nature of the problems described and because of the lack of evidence of any physical restraint being carried out upon the appellant.

The Tribunal were satisfied on the evidence that on the majority of occasions the behaviour of the appellant was such that it was predictable to Mr Scott who indicated that the appellant usually caused problems when he was frustrated and was unable to get his own way, hence the dropping of cups, etc. The Tribunal were not satisfied that his behaviour was so unpredictable that he required another person to be present and watching over him whenever he was awake and in fact on the evidence before it of two carers to three persons was manifestly obvious that this was not possible nor was it being done with regard to the appellant.”

5. I agree with the claimant’s representative, supported in this respect by the adjudication officer now concerned, that the tribunal erred in law in holding that, by taking hold of the claimant’s arm, “to stop him causing further complications”, the claimant’s carer did not “physically restrain” him, within the meaning of regulation 12(7)(b). The type of physical restraint contemplated by regulation 12(7) is, in my view, apparent from a consideration of the type of claimant to which the provision applies. By virtue of regulation 12(5) a claimant is only severely mentally impaired if he “suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning”. Such a claimant will often be beyond the reach of the spoken word and may need to be prevented from doing or coming to harm by physical contact, though

without the need for significant physical force. It is the need for restraint by such physical contact which is, in my view, the spring-board of entitlement, and I consider that physical contact which is necessary and effective to prevent a claimant from causing injury, or damage to property, amounts to physical restraint, irrespective of the degree of force which is needed to achieve that result.

6. I also agree with the claimant's representative and with the adjudication officer now concerned that the tribunal erred in law in holding that the claimant's disruptive behaviour was not unpredictable because his carer could predict that such behaviour would happen when the claimant became frustrated and could not get his own way. Paragraph (c) of regulation 12(7) deals with with the need for a person to be present and to watch over a claimant whenever the claimant is awake, and the fact that disruptive behaviour is generally preceded by a claimant becoming frustrated will not make such a presence any less necessary if the occasions when the claimant becomes frustrated cannot themselves be predicted.

7. I therefore allow the appeal and refer the case for rehearing before a differently constituted tribunal. The tribunal should note the following:

a. The word "extreme" is an ordinary English word, connoting behaviour which is wholly out of the ordinary. However, the claim is for the mobility component of disability living allowance and it is the claimant's behaviour when taking advantage of the faculty of mobility, generally outside the home environment, which needs to be considered;

b. The word "regularly" requires the tribunal to consider how often physical intervention is required, with a view to deciding whether the claimant's condition is such as to require intervention and physical restraint (in the sense described above) in the ordinary course of events;

c. "Requires" means "reasonably requires"-see R(A)3/86 and Mallinson v Secretary of State for Social Services [1994] 1 WLR 630. There is no requirement that physical injury or damage to property would inevitably result without physical intervention, but the purpose of providing for such intervention must be to prevent such injury or damage from occurring;

d. "Watching over" requires that the carer be awake and available to intervene, but the carer does not have to be actually watching the claimant all the time. The tribunal in this case found that two carers could not watch over three residents, but I see no reason why a single carer cannot "watch over" more than one person, provided that the carer remains in a position to intervene when necessary.

8. The claimant also appeals on the ground of inadequacy of reasons, but I agree with the adjudication officer now concerned that the tribunal's statement of its reasons satisfied the standard laid down in Kitchen and others v Secretary of State for Social Services The Times 14 September 1993. I therefore reject this ground of appeal.

(Signed)

**E A L Bano
Deputy Commissioner**

(Dated)

22 March 1999