



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/3204/2006

Kira Lewis and the Secretary of State for Work and Pensions

APPEAL AGAINST A DECISION OF AN APPEAL TRIBUNAL

DECISION OF MR COMMISSIONER JACOBS

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(b) of the Social Security Act 1998:

I SET ASIDE the decision of the Cardiff appeal tribunal, held on 26 June 2006 under reference U/03/188/2006/01568, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT that tribunal to conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the 1998 Act, any other issues that merit consideration. In particular:

The appeal tribunal must investigate and determine the claimant's entitlement to a disability living allowance on and from 17 December 2005 (the date when the claim was made) in accordance with my directions below. The appeal tribunal must not take account of circumstances that were not obtaining during the period from the date of claim to the date of the decision under appeal (13 February 2006): see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

The history of the case

2. The claimant was born on 5 May 1997. She claimed and appealed through her mother, who is her appointee. They have been represented, before the tribunal and the Commissioner, by the Speakeasy Advice Centre in Cardiff.
3. I will concentrate on her dyslexia, but the tribunal at the rehearing must deal with all the claimant's disablement from any cause.
4. The claim was made on 17 December 2005. According to the claim pack, the claimant: cannot read; has poor pronunciation of some words and sounds; says she hears sounds back to front; has memory loss and short memory span; cannot follow instructions and worries a lot, is withdrawn and lacks confidence; lacks co-ordination, stumbles and is prone to accidents; has problems with fine movements in dealing with buttons and zips; lacks colour co-ordination; and has no concept of time or of day and night. In terms of help, she goes to the Dyslexia Centre once a week and could go twice a week if her mother could afford it. They play memory and speech games both before and after school for as long as they can. These were recommended by the Centre and have been beneficial. The claimant's GP had said that this was not a medical problem and told the appointee to discuss the matter with the school.
5. There is in evidence an assessment by the Dyslexia Institute. The claimant's general abilities were assessed at average or, for one element, above average. But her score for reading was low and for spelling was below average. The assessor commented that, in view of the discrepancy between the scores for general ability and those for reading and spelling, the claimant was likely to have a specific rather than a general learning disability. There is also in evidence a teaching agreement which contains a psychological assessment summary. At the claimant's chronological age of 8:04, her reading age was 6:06 and her spelling age was 7:00.

That reflects the same relative ability for those activities shown in the assessment by the Dyslexia Institute. The report from the school does not take matters further.

6. The decision-maker refused the claim and the appointee exercised the right of appeal. The representative produced a report from the Service for Specific Learning Difficulties, which contains a variety of test results. The claimant scored above average for letterchains (indicates visual motor skills), average for receptive vocabulary, below average for single word reading and sentence reading, and low average for wordchains (word recognition) and spelling.

7. The tribunal heard evidence from the appointee, but dismissed the appeal. It decided that the claimant 'may need extra help, but it is not substantially in excess of the normal requirements of an 8 year old.'

8. I gave leave to appeal on the grounds set out in the application for leave, which were that the tribunal had failed to apply Commissioners' decisions correctly and had failed to deal properly or at all with the evidence on the claimant's specific learning difficulties.

9. The Secretary of State has supported the appeal on the ground that the tribunal did not make sufficient findings or give sufficient explanation on the additional assistance that the claimant received from her mother before and after school. In view of the Secretary of State's support, I will concentrate not on what the tribunal did wrong but on how the tribunal should approach the law at the rehearing.

10. The claimant's representative has asked for an oral hearing. I refuse that request. I consider that the law is sufficiently clear for me to give directions for the rehearing without the need for oral argument. In accordance with the usual practice, the rehearing will be by way of oral hearing.

Directions for the rehearing

11. The mobility component at the higher rate is not appropriate to the claimant's circumstances. There is perhaps an argument to be made on the lower rate, but the representative has not pursued it. He has argued for the care component at the lowest or middle rate on the basis of attention in connection with bodily functions. There is no evidence to support the highest rate. I will limit what I say to the care component, but that does not preclude the representative from presenting an argument on the mobility component at the rehearing.

12. In order to qualify for an award, the claimant must satisfy the basic conditions of entitlement that apply to all claimants: section 72(1)(a)(i) and (b)(i) of the Social Security Contributions and Benefits Act 1992. And, in view of her age, she must also satisfy one of the age qualification conditions in section 72(6)(b). I do not need to set out that legislation. The tribunal and the claimant's representative will be familiar with it.

13. In identifying the attention that is reasonably required, the tribunal must take into account that the claimant is entitled to lead, as far as reasonably possible, a normal life. That was decided by the House of Lords in *Secretary of State for Social Security v Fairey* reported as *R(A) 2/98*.

14. As Mr Commissioner Williams has pointed out, a diagnosis of dyslexia is neither a bar nor a passport to a disability living allowance: *CDLA/0395/2005* at paragraph 23. What the tribunal must first identify the claimant's disablement and then assess the attention that she reasonably requires in order to overcome or ameliorate the effects of that disablement.

15. It is not difficult to identify the claimant's disablement. Disablement involves a restriction on activity and the restriction in the claimant's case is her inability to read and write appropriately for her age. Nor is it difficult to identify the assistance that the claimant requires in order to improve her reading and writing skills. The difficulty is to relate this assistance to the legal criteria for an award, which require the assistance to be attention in connection with a bodily function. What is that bodily function?

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.

18. If the attention that the claimant receives is in connection with a function of the brain, that is a bodily function for the purposes of disability living allowance. See the decision of the Tribunal of Commissioners in *CSDLA/0133/2005* at paragraph 13.

19. The attention that the claimant receives is given partly in the course of her education at school, partly at the Dyslexia Centre and partly at home. It is irrelevant where or by whom the

attention is given. The legal test is: what attention does the claimant reasonably require? It may be reasonably required even if it is not being given, for example because the appointee cannot afford to pay for it or because the school does not have the staff or facilities to provide it. And the fact that it is given does not necessarily mean that it is reasonably required; it is only evidence of this.

20. Attention that is reasonably required as part of the claimant's school education can be taken into account: see Mr Commissioner Turnbull in *CDLA/3737/2002* at paragraph 10. (The Commissioner gave leave to appeal to the Court of Appeal on this issue, but the Court of Appeal declined to hear the appeal as the Secretary of State had not presented the arguments to the Commissioner: *Secretary of State for Work and Pensions v Hughes* reported as *R(DLA) 1/04*.)

21. In *CSDLA/0427/2006*, Mr Commissioner May said:

'9. I should perhaps add that in my view educational provision at school is on any view outwith the scope of the statutory provisions. The cost of disability living allowance is derived from public funds as is the educational provision that the claimant enjoys. The cost of such educational provision will encompass such special measures as are needed to meet the educational requirements of the claimant. To encompass educational provision within the scope of attention would, in these circumstances, result in the public purse paying twice for the same thing. That cannot be what Parliament intended. Disability living allowance is not a form of publicly funded compensation for being disabled. It is a recognition of the additional cost of care for those who are disabled. When taken in that context it can be seen that additional educational requirements for the purpose of learning to reach and write are of an entirely different nature to attention in connection with an impaired bodily function. ...'

I respectfully disagree and direct the tribunal not to apply those remarks. Specifically on this case, the evidence shows that the claimant's needs have to be paid for in part by her mother. More generally and more importantly, there are many overlaps in public funding. There are overlaps within disability living allowance that allow double counting between the mobility component and the care component. The House of Lords so decided in *Mallinson v Secretary of State* reported as part of *R(A) 3/94* as did the Tribunal of Commissioners in *R(DLA) 4/01*. And there are overlaps between disability living allowance and other sources of funding. Just to take two examples, the provision of meals on wheels overlaps with the cooked main meal test in the care component and the provision of free travel passes overlaps with the mobility component. If Parliament intends to prevent a double cost on public funds, it says so. To take an example, the Social Security (Disability Living Allowance) Regulations 1991 contains a number of detailed provisions to prevent payment of a disability living allowance while a claimant is being cared for in a hospital or being accommodated at public expense.

22. In the same decision, Mr Commissioner May also 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. Every child initially can see writing but cannot interpret it. The interpretation is learned through education. For someone with dyslexia the education process is more complex and difficult but it is simply education nonetheless. ...'

Again with respect I disagree and direct the tribunal not to apply those remarks. There is a difference between my inability to understand Japanese and Arabic scripts and the claimant's inability to understand English script because of her dyslexia. The difference is between ignorance and disablement. I cannot understand Japanese and Arabic scripts because I have never learnt them. But the claimant's inability to understand English script is a disablement arising from an impairment in function. Education can help overcome both ignorance and dyslexia. However, its function in each case is different. Ability to learn varies from topic to topic and from person to person. Someone does not qualify for a disability living allowance on account of having no aptitude for languages or being slow at picking up geometry. These are not disablements for the purposes of disability living allowance because they fall within the natural range of variation in ability. They do not arise from a physical or mental impairment. The claimant's dyslexia is an impairment of the function of the brain. Education helps children to read and write. For children without dyslexia, it removes their ignorance. For children with dyslexia, it helps to overcome their disablement.

Disposal

23. I allow the appeal, set aside the tribunal's decision and direct a rehearing in accordance with the directions I have given.

**Signed on original
on 25 January 2007**

**Edward Jacobs
Commissioner**