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THE SOCIAL SECURITY COMMISSIONERS

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ACT 1998

Commissioner's Case No.: CDLA/4149/2003

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: MARK ROWLAND

Claimant:	**Tia Godbold (a child)**
Tribunal:	**Birmingham**
Tribunal Date:	**7 April 2003**
Tribunal Register No:	**U/04/024/2002/03923**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is unsuccessful. I set aside the decision of the Birmingham appeal tribunal dated 7 April 2003 but substitute the decision the tribunal should have given, which is to the same practical effect. The claimant is not entitled to disability living allowance from 6 September 2001 because she was not suffering from physical or mental disablement. This decision is effective for the period from that date to 26 May 2003.

REASONS

2. Section 72(1) and (6) of the Social Security Contributions and Benefits Act 1992 provides:-

> "(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which –
>
> (a) he is so severely disabled physically or mentally that –
>
> (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or
>
> (ii) he cannot prepare a cooked main meal for himself oif he has the ingredients; or
>
> (b) he is so severely disabled physically or mentally that, by day, he requires fro another person –
>
> (i) frequent attention throughout the day in connection with his bodily functions; or
>
> (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or
>
> (c) he is so severely disabled physically or mentally that, at night, -
>
> (i) he requires form another person prolonged or repeated attention in connection with his bodily functions; or
>
> (ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.
>
> ...
>
> (6) For the purposes of this section in its application to a person for any period which he is under the age of 16 –
>
> (a) sub-paragraph (ii) of subsection (1)(a) above shall be omitted; and
>
> (b) neither the condition mentioned in sub-paragraph (i) of that paragraph nor any of the conditions mentioned in subsection (1)(b) and (c) above shall be taken to be satisfied unless-
>
> (i) he has requirements of a description mentioned in subsection (1)(a), (b) or (c) above substantially in excess of the normal requirements of persons of his age; or
>
> (ii) he has substantial requirements of any such description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have.

..."

3. The claimant was born on 23 August 1995 and so she was aged six when her grandmother submitted a claim for disability living allowance on her behalf on 6 September 2001. She suffered from constipation and encopresis (faecal soiling). In the light of a report from her class teacher saying that she was unaware that the claimant had a problem and that the claimant went to the toilet quite regularly while at school without needing any help, the Secretary of State disallowed the claim on 18 December 2001. The claimant was still aged six. Her grandmother lodged an appeal, supported by a social worker who said that she incurred additional expenses, including laundry costs and the purchase of nappies, and that the claimant required "considerably more care around personal hygiene than other children of her age". The first of those points was an irrelevant consideration but the second was not and was consistent with the statement in the claim form that the claimant required bathing each time she soiled herself which was up to four times a day. The claim form also said that the claimant had to wear nappies at night because she was incontinent of urine and needed a bath each morning for that reason. The claimant was said to require help twice a night, every night, for 30 minutes on each occasion but no further information was provided as to the nature of the help that was required. When the case first came before a tribunal, it was adjourned for medical evidence to be obtained. The evidence supplied by a consultant physician referred only to the constipation and encopresis and said that dietary and fluid advice had been given, that lactulose and senna had been prescribed and that encouragement had been given to the claimant to visit the toilet at set times and to try to open her bowels on the toilet. A psychologist referred only to the encopresis and mentioned the medication and a "behavioural programme". He said that "encopresis is a chronic problem and it is likely that it will take at least a year to resolve if successful" and added that "parents find it a difficult problem to cope with because of the demands on washing and cleaning and the need for constant supervision". When the case came back before the tribunal, the appeal was dismissed.

4. The tribunal's reasoning is set out in the decision notice and in the admirably clear statement of reasons subsequently provided by the chairman. In relation to the encopresis, the tribunal did not accept that the frequency of the soiling was as great as was suggested to them by the claimant's grandmother but they did accept that the claimant soiled herself each day and occasionally at night. They also accepted that the claimant suffered from nocturnal enuresis. In relation to the causes of the problems, the chairman's statement says:-

> "10. {The claimant's] grandmother confirmed that it was true that [the claimant] did not soil or wet when she was at school, and also that she was all right when she was on school trips. To our mind this rules out completely the possibility of there being any physical organic basis to the soiling and wetting.
>
> "11. The tribunal would draw a distinction between any wetting and soiling which happens at night, while the child is asleep, and that which happens by day and is under the child's conscious control. At the date of claim, and the date of decision, [the claimant] was approaching the upper limit of what could be considered the normal range of development in children in terms of remaining dry at night. Becoming dry at night covers a continuum. Some children will be dry at night as early as 2 years old, and others, who have no physical or mental health problem which could explain their late development in this area, will not be continent at night until 6 or 7 years old and

sometimes older. At the date of decision, [the claimant] was just under 6 years and 4 months of age, and we do not think it could be said in respect of the nocturnal enuresis that she had needs significantly in excess of those of another child of the same age, as she is still at that age within the normal continuum of development of control. That is not necessarily the case as [the claimant] gets older, and for that reason, as noted in the tribunal's decision notice, it might be appropriate for her grandmother at some point to make a further claim should [the claimant's] problems at night persist.

"12. However, in respect of [the claimant's] day-time problems, which are under her conscious control, we are satisfied that the problem is wholly behavioural in origin. Mr Beckett, [the claimant's grandmother's representative from the Birmingham Tribunal Unit], felt that the school report saying there was no behavioural disorder pointed to a different conclusion. However, we interpreted the evidence differently. The child who is rebellious, unco-operative and difficult to control at all times – including when at school – may well be suffering from some mental health problem. The child who causes no problem at school, but engages in soiling at home, is engaged in an emotional interchange with her carer. Encopresis, in a child with no physical or mental health disorder, is an emotional statement made by the child."

5. The claimant, who is again represented by Mr Beckett, now appeals against the tribunal's decision with my leave. I am told that a further claim made on 27 May 2003 was disallowed on 24 June 2003 and that the disallowance was not challenged. A third claim made on 17 October 2003 was also disallowed by the Secretary of State but, on appeal, a tribunal awarded the middle rate of the care component of disability living allowance for two years from the date of claim.

6. The claimant's first ground of appeal is that the tribunal erroneously recorded the claimant's grandmother's evidence with regard to soiling when she had in fact said that it occurred on at least five nights a week and that dealing with it took about 30 minutes. The chairman's note of evidence actually says:-

"wets bed every night.
needs washing every morning because smell of urine – 5 nights out of 7.
This is diarrhoea as well.
Takes ½ hour to wash her."

The statement of reasons shows, at paragraph 13, that the tribunal regarded "the account of night-time soiling following 3 copious episodes during the afternoon and evening" as "implausible" but the decision notice shows that they did accept that there was "occasional faecal soiling at night". It is clear that the chairman did not record the evidence erroneously and, more importantly, that the tribunal did not misunderstand the evidence. The tribunal simply did not accept that the claimant required attention at night in connection with faecal soiling as frequently as was claimed.

7. The second ground of appeal has more substance to it. At paragraph 3.15.4 of the *Disability Handbook*, published on behalf of the former Benefits Agency, it is stated that, at the age of three years, it can be expected that a child "is toilet trained by day and, in most cases, by night". Mr Beckett, on behalf of the claimant's grandmother, submits that the tribunal interpreted the law incorrectly in having regard to the fact that some children would

be bedwetting at the age of six when most would not. He refers to CA/92/92, in which I considered the provisions of section 35(1) of the Social Security Act 1975, as modified in respect of children by regulation 6 of the Social Security (Attendance Allowance) (No.2) Regulations 1975. With regard to what would now be section 72(6)(b)(i) of the 1992 Act, I said, at paragraph 9 of my decision:-

> "... Children vary considerably in their requirements for attention and supervision, particularly when they are young. At any age, there is a range of requirements for attention or supervision. It is significant that the legislation does not speak of attention or supervision substantially in excess of that which would be required by the particular child being considered were he not physically or mentally disabled. So that, if it were possible to ascribe tantrums to frustration arising out of a disability, that would not be enough for the child unless the attention or supervision was substantially in excess of that normally required by a child of that age and sex. It seems to me that the legislation contemplates a yardstick of an average child, neither particularly bright or well behaved nor particularly dull or badly behaved, and then the attention or supervision required by the child whose case is being considered must be judged to decide whether it is 'substantially' more than would normally be required by the average child. That, I think, comes to much the same thing as saying that the attention or supervision required must be substantially more than that normally required by *most* children, which is the way the delegated medical practitioner put it in paragraph 4 of his decision in this case. Attention or supervision is not to be regarded as 'substantially' in excess of that normally required unless it is outside the whole range of attention that would normally be required by the average child. However, it need not necessarily be substantially in excess of that which would be required by a particularly dull or badly behaved, but not physically or mentally disabled, child. I appreciate that all this is pitched at a fairly theoretical level and that there may be significant evidential problems and problems of judgement in individual cases, but it seems desirable to provide some sort of theoretical framework within which the present case can be considered."

8. In that case, the delegated medical practitioner had said, when dealing with the child's day-time requirements for attention in paragraph 4 of his decision:-

> "I recognised from the evidence that because of his medical condition, [Nicholas] was suffering a slight developmental delay which caused him to have the attention needs of a child approximately 6 months younger than himself. However, bearing in mind that all children of his very young age required a great deal of attention, I did not consider that his attention needs as described by the examining doctor were substantially in excess of most children of his age. Consequently, it was my medical opinion that this condition was not satisfied."

I held that, in that paragraph, his approach to the law was correct but that his decision was flawed because he had adopted the inadequate findings of the examining medical practitioner.

9. However, when dealing with night-time attention needs, the delegated medical practitioner had said:-

> "I accepted that [Nicholas] was given the attention described, but many 2 year olds have disturbed nights and needed to be reassured and tended in this way. As such, it was my medical opinion that his night attention needs were not substantially in excess of that normally required by a child of the same age and sex. It was accordingly my medical opinion that this condition was not satisfied."

I said, at paragraph 17 of my decision:-

> "I take the view that that discloses an error of law. To say that *many* children of a particular age need attention at night is not the same as saying that such attention is normally required by children of that age. If Nicholas requires substantially more attention at night than most children, attendance allowance could be payable in respect of him. The fact that many children of a particular age require prolonged or repeated attention at night does not mean that attendance allowance may not be payable in respect of those children of the same age for whom it could be shown that such requirement for attention arises from physical or mental disablement. It does of course mean that the authorities will be slow to accept that physical or mental disablement is the cause of the requirement for attention in the absence of fairly clear evidence to that effect. ..."

10. The word "most" is no more part of the statutory terminology than the word "many" and it is wrong to draw from my decision the implication that the comparison to be carried out for the purposes of section 72(6)(b)(i) of the 1992 Act must be between the claimant's needs and those of a simple arithmetical majority of children. The word in the legislation is "normal" and requirements may be normal notwithstanding that fewer than half the total number of children have them. However, there comes a point where the proportion of children who have the requirements is so small that the requirements can no longer be said to be normal, even though the total number of children affected may still be quite substantial. It is important to bear in mind that, in section 72(6)(b)(i), "normal" describes "requirements" and not "child". This is in contrast to section 72(6)(b)(ii), where the word "normal" describes "physical and mental health". Section 76(2)(b)(ii) applies only where no child of the claimant's age in normal physical and mental health would have the same type of requirements as the claimant. It must also be remembered that section 72(6) comes into play only where it is accepted that the child suffers from physical or mental disablement and, as a result, has attention or supervision requirements sufficient to satisfy at least one of the conditions of section 72(1). Thus, before one gets to section 72(6), section 72(1) (excluding section 72(1)(a)(ii)) must be found to apply. Section 72(6) imposes an additional condition for children, not an alternative condition.

11. The necessity of considering section 72(1) first is the basis of the submission of Mr Warren Benton, on behalf of the Secretary of State. He argues:-

> "In respect of the enuresis the tribunal's decision is to the effect that there is ... no underlying mental or physical condition. The tribunal state that children develop control through the night at different stages some as young as 2 but others much later. The tribunal's reasoning therefore is that the enuresis is a development issue in that the claimant has not developed nocturnal bladder control.

"The tribunal confuse the matter by stating that the claimant is within the normal continuum of development control but this may change later. In the absence of any mental or physical disability there can be no entitlement to DLA whether the claimant is or is not within the normal development continuum. The tribunal has earlier accepted that some children do not gain control until 7 years or longer.

"As there is no evidence or suggestion that the claimant has any underlying physical or mental disabling condition there can be no entitlement to DLA in this case."

12. Mr Beckett replies to the effect that the implication of paragraph 11 of the statement of reasons for the tribunal's decision is that they found that the claimant's night-time incontinence was a disablement capable of giving rise to entitlement to disability living allowance and he refers me to CSDLA/555/01. Otherwise, he says, the tribunal would not have drawn the distinction they did between day-time and night-time incontinence and would not have suggested the possibility of a future claim.

13. I agree with both parties that the tribunal's reasoning is flawed but I find the tribunal's conclusion nonetheless understandable. It is clear from the language used in the statement of reasons that the tribunal had section 72(6)(b)(i) in mind. I am inclined to agree with Mr Beckett that, if that provision was relevant, the tribunal applied the wrong test because relatively few six year olds suffer regularly from nocturnal enuresis, but I also agree with Mr Benton that section 72(6)(b)(i) did not have to be considered in this case.

14. The approach taken in CSDLA/555/01 is that, in order to determine whether attention requirements arising out of enuresis are relevant to entitlement to disability living allowance, it is necessary to ascertain whether or not the enuresis is caused by physical or mental disablement within the scope of section 72(1). In other words, the enuresis is not itself such disablement but it may be a symptom of it (see in particular paragraphs 27 and 30 of CSDLA/555/01). I respectfully agree with that approach and it was the approach taken by the tribunal in the present case.

15. The tribunal excluded physical disablement as a cause of the enuresis for reasons given in paragraph 10 of the statement of reasons. I agree with Mr Beckett that the tribunal then appear to have accepted that the night-time incontinence was due to mental disablement and to have gone on to consider section 72(6)(b)(i). However, there was no explanation for the apparent acceptance that the claimant was suffering from mental disablement and I agree with Mr Benton that the matters to which the tribunal gave consideration actually implied a finding that the claimant was not suffering from mental disablement. This is because the fact that a significant number of children aged six without physical or mental disablement suffer from enuresis is an important factor to be taken into account when considering the likelihood of the claimant's enuresis being due to such disablement. I note the letter dated 23 March 2004 in which a consultant clinical psychologist says that he "would not be able to give a coherent opinion on whether she has a physical or mental condition, as these are terms I would not use when assessing or intervening with a child and their family" and I accept that, for doctors, the clear distinctions required by lawyers may not be useful. However, it seems plain that a young child's inability to perform functions due to immaturity is not disablement within the scope of section 72(1) and so, where there is no identifiable physical problem in an older child, it is necessary to distinguish between unexceptional developmental delay and delay due

to some mental disorder, even though there may often be no clear dividing line between the two and any distinction may be of limited practical use to the medical profession.

16. In my view, the tribunal's reasoning should have been along the following lines:-

> Although it is not normal for six year olds to suffer from nocturnal enuresis, it does happen in a significant number of cases where there is no physical or mental disablement and in those circumstances, given also the lack of any other evidence of physical or mental disablement, it is not established that the nocturnal enuresis is caused by any physical or mental disablement in this claimant's case. However, if the problem persists, there will be a greater reason to suspect that there is physical or mental disablement and there should then be further investigation and a claim for benefit may be justified.

It will be seen that I do not accept Mr Benton's implied submission that the tribunal erred in suggesting that a claim in the future might be appropriate.

17. In my judgment, therefore, the tribunal's conclusion was the correct one, given their findings of fact. I must nonetheless set aside their decision because the basis upon which it was made was wrong and that might be material if there is ever an application for supersession. I have considered whether I should refer the case to another tribunal in the light of the recent decision awarding disability living allowance, which implies a finding that the claimant is now suffering from physical or mental disablement and suggests that there may possibly now be evidence that she was suffering from such disablement in 2001. However, I have decided not to do so because the tribunal's conclusion was the only one they could properly have reached on the evidence before them and there was no evidence available at the time of the hearing that was not before them and could have been provided to them. Moreover, even if the nocturnal enuresis could be ascribed to mental disablement, it is fairly clear that the problem did not at the time of the Secretary of State's decision give rise to sufficient attention needs to justify an award of disability living allowance. The evidence is that the enuresis was dealt with by the claimant sleeping in nappies (which distinguishes this case from CSDLA/555/01) and being bathed in the morning. The use of nappies may not be a practical or effective expedient for an older child but was reasonable when the claimant was aged six. There is no reason why a child in nappies should usually need attention at night in connection with enuresis. It may well be the case that the claimant did occasionally require attention at night in connection with enuresis when there was some substantial leakage from nappies or in connection with an atypical episode of faecal soiling, but such occasional attention is not a sufficient basis for entitlement to benefit. Putting a child in nappies when she goes to bed and bathing her in the morning are activities to be taken into account as day-time attention but do not amount to the provision of attention for a significant portion of the day or frequently throughout the day. Therefore, the attention required as a result of the enuresis appears not to have been sufficient to satisfy the conditions of section 72(1) even if the enuresis was due to mental disablement.

18. Accordingly, I give the decision set out in paragraph 1 above.

(Signed) **MARK ROWLAND**
Commissioner
26 August 2004