

Bulletin 1st
C. J. H. S.

CDLA 4228 2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

I allow the appeal

The claimant is appealing with my permission against the decision of the Middlesbrough appeal tribunal on 4 September 2003 under reference U 44 236 2003 02013

For the reasons below, the decision of the tribunal is set aside.

DIRECTIONS FOR REHEARING

- A The appeal will be given an oral hearing.
- B The tribunal is to be comprised of members who were not members of the previous tribunal.
- C If the claimant wishes to appoint someone to represent him at the hearing, he is to inform the appeal tribunal of the representative as soon as possible. If the claimant and any representative wish to put any further medical evidence before the tribunal they should do so within one month of the issue of this decision.

REASONS

1 The claimant, whom I call JH, was born on 5 September 1987. Unfortunately he was diagnosed with diabetes when he was 15, and needs regular insulin. There is conflicting evidence about whether he is prone to hypoglycaemia. His mother applied for disability living allowance for the help he needed with the insulin and also with his diet. I assume for the purposes of this appeal that JH's mother was his appointee, although that is not confirmed in the papers.

2 A medical report from JH's consultant paediatrician confirmed the diagnosis. The report indicated that JH could manage his own therapy and the practical aspects of his diabetes care, but added that he would "continue to need encouragement support and supervision from his parents on a daily basis". (He has only one parent.) That report was made about two months after diagnosis. The only other medical evidence is a report from the diabetes nurse indicating that JH needed a minimum of two injections a day together with a minimum of 4 tests of blood sugar level a day. Both reports commented on diet and eating patterns. Based on this information, the Secretary of State refused JH's claim, partly on the ground that JH did not need substantially more help with his diet than other children of the same age. JH's mother appealed. She did not ask for an oral hearing so the tribunal dealt with the matter on paper. Her appeal was made in July 2003, and the tribunal decided the case on 4 September 2003, the day before JH was 16. It issued a decision that day rejecting the appeal.

3 It is clear from the tribunal's statement of reasons that it was sympathetic to JH's position. But it took account of the paediatrician's evidence and also the opinion of the medical member of the tribunal that "a 15 year old boy would learn to manage his

condition by 6 months after the diagnosis." There is no reference to the evidence of the mother or of the diabetes nurse. JH would need monitoring but not "even for a significant part of the day". In particular, the tribunal were of the view that JH would not need a significant level of care and attention for as long as the qualifying period for disability living allowance, which it rightly put at 3 months before the allowance could start, and a minimum of 6 months from the date it started.

4 JH's mother put in a lengthy statement of appeal to the Commissioner, stressing the time she had to spend helping JH with his diabetes. But it is a restatement of her views about JH, and does not raise a point of law save in so far as it implies that the tribunal did not adequately explain why it rejected her evidence. But it was not clear that she was entitled to do this. JH was 16 the day after the tribunal held its hearing. This raises two issues: did the tribunal deal with the case adequately in the absence of any evidence from JH (as there is nothing at all in the papers indicating his views), and could JH's mother appeal from the decision on his behalf.

Claiming disability living allowance for a child

5 I deal with the technical point first. Where the Secretary of State receives a disability living allowance claim in respect of a child, regulation 43 of the Social Security (Claims and Payments) Regulations 1987 provides that the Secretary of State must appoint someone to exercise the child's rights and to receive and deal with the payment of any allowance. I am told by the Secretary of State's representative that the person appointed to act is normally the child benefit recipient. That is usually the child's mother, as in this case - obviously the most appropriate appointee for most child claims for disability living allowance.

6 The problem is that the regulation does not define "child". The facts of the case suggest that JH remained a "child" for child benefit purposes after he was 16 as he remained at school (Social Security Contributions and Benefits Act 1992, section 142). But disability living allowance differentiates between awards for those who are 16 and over, and for those under 16. For example, those under 16 are not expected to cook for themselves (Social Security Contributions and Benefits Act 1992, section 72(6)(a). And in addition to the usual tests it must be shown that someone under 16 has a requirement for care or supervision substantially in excess of the normal requirements of someone of the child's age (section 72(6)(b)). In other words, the legislation assumes that parents or others will provide at least some personal care and supervision for anyone under 16. That test was applied by the Secretary of State to stop JH's claim.

7 There is no consistent approach to, or general definition in the Social Security (Claims and Payments) Regulations 1987 of, "child". For the purposes of regulation 9(2) (interchangeable claims for benefit), "child" appears to have the child benefit meaning. In regulation 29 (payments to persons under age 18) the implication is that a person under 18 is a minor in the legal sense but not a child for the purposes of receiving benefit. The Secretary of State's representative submits that for the purposes of regulation 43 "child" should be confined to those under age 16. The educational status of a claimant is irrelevant to disability living allowance, while, as noted, the fact that someone is or is not 16 or under can be very important to a claim. I agree.

8 "Child" in regulation 43 is limited to those under 16. It follows that any appointment under regulation 43 automatically lapses when the child for whom the

appointment is made becomes 16. If he or she needs an appointee after becoming 16 as a matter of fact, then a new appointment must be made under regulation 33 (persons unable to act). Otherwise the individual must make his or her own claims and appeals. In this case JH has indicated that he wants the appeal to proceed.

9 The tribunal appears to have been a little unsure about how to handle JH's claim. The statement of reasons asserts that JH is "now" 16. The statement then tests JH's entitlement to benefit without direct references to the tests applied to those under 16 but nonetheless relied on the view of the medical member was that a 15 year old would learn to manage his condition 6 months after diagnosis. It did not comment on the reason given by the Secretary of State.

10 If the tribunal was unsure, it is not surprising. It is important to remember that the tribunal is limited to looking at the circumstances as at the date of the decision on the claim (some two months before JH was 16). But it must also look forward six months, during most of which time JH was 16. There is no specific statutory guidance about how to deal with the provisions of section 72(6) when they apply to part only of the period that the Secretary of State or tribunal must review and not to the other part.

11 There is an additional aspect here. There is no examining medical practitioner report or general practitioner evidence in this case. The only medical evidence is the brief evidence of the consultant and the evidence of the diabetes nurse on the claim form. Because of this, and because JH's mother claimed for JH and asked for a paper hearing on the basis of evidence of what she did and had to do for him, there was no specific evidence before the tribunal of what JH himself thought his needs were, and very limited indirect evidence. Had there been an examining medical practitioner report, or had JH's mother asked for an oral hearing and JH had attended, then the tribunal would have had such evidence.

12 This is a marginal case. But I consider the decision inadequate for three interlinked reasons. First, the tribunal had no specific evidence of JH's views of his needs. Given that the tribunal heard the case so near to JH being 16 it might have looked for evidence from him. This is not least because if the tribunal did award any allowance, then it would be JH not his mother who would receive it. As there is no such evidence, it could have considered whether it should either adjourn for an oral hearing or to seek an examining medical practitioner report. Instead it rested on an assumption by the medical member (rather than evidence) about how well "a 15 year old boy" would cope after the initial period, supported by the brief report from the consultant. That leads to the second interlinked reason. The tribunal has not indicated any view about the evidence of the diabetes nurse, nor has it explained why it does not accept the mother's evidence of continuing personal care needs for JH. The third is that the original rejection of the claim was by reference to the absence of need by JH for substantially more help than that given to other 15 year olds. It is not clear if the tribunal was taking that into account in its views about 15 year olds as against 16 year olds.

13 I therefore refer the matter for rehearing. That places the new tribunal in the same position as the last tribunal in dealing with a claim that straddles the day on which JH became 16. It is required to look forward six months from the date of claim or later award. The fact that JH becomes 16 shortly after the decision was made by the Secretary of State is a circumstance that exists at the date of that decision, but

nonetheless the effective tests change from that date. So it must take a long view while keeping in mind the assumption that JH's mother is expected to care for, and cook for, him at least to some degree until he is 16 but not thereafter.

14 It may be for this reason that the tribunal considers that JH is entitled when 16 but not 15. If so, the tribunal may find that this should be treated as an advance claim by JH under regulation 13 of the Social Security (Claims and Payments) Regulations 1987, with reference to the change in conditions of entitlement when he became 16, as the decision under appeal was made less than three months before the date on which JH became 16.

15 At present, JH has taken over the appeal from his mother, and she has no legal status in the appeal. He may wish to consider appointing her as his representative. Or he may wish - separately or with his mother - to seek the help of a citizens advice bureau, welfare rights office, solicitor or other expert adviser in connection with the new hearing. He should also consider with any representative whether he should produce his own evidence of his needs and/or seek further medical evidence, for example from his general practitioner of his needs for help with his diabetes. If so, he must remember that the tribunal is required to look at the circumstances, including his age, at the date of the decision refusing the allowance: June 2003.

David Williams
Commissioner

24 February 2004

[Signed on the original on the date shown]