THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/4416/1998

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM THE DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Appellant: [redacted]

Respondent: Adjudication Officer

Tribunal: Exeter

Tribunal Case No: D/42/194/1997/00076

AMBdla441698

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the disability appeal tribunal given at Exeter on 1 May 1998 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. The claimant made a claim for disability living allowance on 29 May 1997. An adverse decision was made in respect of that claim. Thereafter another adjudication officer reviewed that decision and revised it to the extent that the claimant was found entitled to the care component of disability living allowance at the lowest rate from and including 29 May 1997. The claimant appealed to a disability appeal tribunal. Her appeal was heard on 1 May 1998. Her appeal was not successful in respect that the tribunal found that the claimant was not entitled to the allowance except insofar as it had been awarded by the adjudication officer in the review decision under section 30(1) of the Social Security Administration Act 1992.

3. The claimant has appealed to the Commissioner. Her grounds of appeal relate both to the tribunal's decision in respect of the care component and the mobility component.

4. In respect of the care component it is asserted that the tribunal conducted the wrong test and was looking at attention which was needed rather than attention which was reasonably required. There was also an assertion that the tribunal mis-noted the position when they said:-

> ""Although profoundly deaf, [the claimant] throughout the Tribunal hearing was able to communicate by lip reading with good ease and fluency - understanding instantly all that was said to her and replying to questions readily and easily without the need for assistance from her mother-in-law who was present to act as an interpreter.""

The grounds of appeal go on to say:-

> "This is not the case. The appellant had to turn to her mother-in-law on at least two occasions for assistance."

5. An adjudication officer in a submission to the Commissioner said in response to the grounds of appeal in relation to the care component:-

> "4.1 It is contended that the tribunal failed to apply the correct test of reasonable requirement when considering the claimant's attention needs and failed to note the two occasions (at least) when she required assistance from her mother in law as an interpreter (page 80, paragraph 5). The claimant relies upon the findings of Lord Slynn in the Secretary of State for Social Security v Fairey case. In the tribunal's statement of facts (page 76A) it is stated that the claimant throughout the hearing was able to communicate by lip reading with great ease and fluency, understanding and responding to questions readily and easily without the need for assistance from her mother in law. In the record of proceedings (page 77B) the claimant confirms that she can communicate one to one, that at work they tell her what's going on, that she helps with the Brownies and that she would like to go to college (page 77C). At page 71 her employer has stated that after meetings, she needs to explain the contents on a one to one basis and at page 73 the claimant is described

as being very helpful at Brownie meetings discussing the structure and inputs a lot of good ideas. The tribunal at page 76A have indicated in their reasons that they considered that the claimants wishes to go to college are well within her capabilities and not requiring extra attention. I would therefore submit that the tribunal have acted reasonably in reaching the conclusion that the current award was appropriate as the attention reasonably required would not satisfy the frequently throughout the day criteria and did apply the correct test as regards the reasonableness of the attention the claimant does require."

6. I find myself in agreement with the adjudication officer's submission. The tribunal in the reasons for their decision said:-

> "Nevertheless being profoundly deaf is inevitably going to give rise to occasions when she will require assistance. Lacks communication - this on the evidence before the Tribunal will certainly not be necessary frequently throughout the day but can fairly be described as necessary for a significant part of the day."

While it is true to say that the word "necessary" was used by the tribunal rather than "reasonably required" their decision requires to be read as a whole. It is quite clear to me, having read the statement of facts and reasons that the tribunal were aware of the exercise which they required to carry out and applied the statutory test properly. Thus I am not prepared to hold that the tribunal applied the wrong test. Further even if the claimant on two occasions had to turn to her mother-in-law for assistance and in respect of that there was mis-note by the tribunal chairman or the tribunal did not see that I do not consider that it undermines the tribunal's decision. I further cannot entertain what is in effect evidence set out in paragraph 5 of the grounds of appeal at page 80.

7. In relation to the lower rate of the mobility component the grounds of appeal are in the following terms:-

> "8. We submit that walking out of doors is the incorrect test to be applied to the lower rate of the mobility component. The test is detailed in section 73(1)(d) of the Social Security Contributions & Benefits Act 1992 where it states the correct test to be applied is whether the claimant can: "take advantage of the faculty out of doors without guidance most of the time".
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> 9. "Faculty" could be otherwise described in this context as "ability" (Penguin English Dictionary). "Take advantage" means "profit by" or "make use of". This implies there is a base starting point whereby the ability to be out of doors is useless or unprofitable. Again by implication, it is accepted that the claimant may or may not be able to walk out of doors and that this is not the issue. The issue is whether they can make any use of that ability without guidance or supervision on unfamiliar routes.
>
> 10. By limiting itself to whether the claimant could or could not walk out of doors without guidance or supervision, the tribunal, we submit, was in error of law. The notion of profiting by being out of doors cannot be confined to, say, a walk own the road in an unfamiliar city. It must take into account a host of

other situations such as being in a car, on a train, in a field with a picnic to name but a few. In respect of this the tribunal then has to consider whether the claimant can profit by any of these activities if they are alone and the physical and geographical locations are not familiar. This may include whether feelings of anxiety or panic are prevalent in these situations, whether a claimant can relax in these situations, if they are reasonably free from danger; in other words, if they can or cannot enjoy the ability to be out of doors as much as the non-disabled person unless another person is present. This is not a situation wholly covered by a test of walking out of doors and therefore cannot be a satisfactory test to use to the exclusion of all others.

11. We submit then the tribunal has applied the wrong test to its determination of entitlement to the lower rate mobility component of Disability Living Allowance and is thus in error of law.

12. If the tribunal feels it has conducted the test properly then we submit it is still in error of law as this is not recorded correctly. If it were then there would be no basis for this submission.

13. Furthermore, the case papers contained evidence of our client's problems whilst using public transport. These problems include not knowing where to get off or of any changes that service providers had made to travelling arrangement. Our client has no such problems locally (apart from the change in travel arrangements) but she does on unfamiliar routes, which is, of course, what the legislation concerns itself with. It is unclear of the tribunal took account of this. The full written decision claims to have considered all the evidence in the case papers yet this situation, by no means uncommon for a claimant who is profoundly deaf, does not appear to have been taken into account. This can only be because it was not after all considered, it was considered but not recorded, or because the tribunal applied the test only to walking out of doors. Either of these scenarios creates, we submit, an error of law."

8. The response of the adjudication officer to that submission is as follows:-

"4.2 It is further contended that the tribunal have erred when considering the lower rate of the mobility component, in that the test to be applied is whether the claimant can take advantage of the faculty out of doors without guidance or supervision most of the time, as detailed in Section 73(1)(d) Social Security Act 1992, and that the ability to walk out of doors is an incorrect test when applied to this criteria. It is contended that the lower rate mobility component should therefore be applied in a host of situations, such a [sic] being in a car, using public transport, et seq. and that the claimant may feel anxious or panic in these situations without the company of another person (page 81, paragraph 10). I would submit that the tribunal have applied the correct test to the above in that the first consideration must relate to the ability of the claimant to walk outdoors and can not be extended to include the situations described above. In the unreported decision CDLA/206/94 the Commissioner held

> *"Mr H sought to introduce the need for guidance or supervision if the claimant had to catch a bus, go shopping or if someone spoke to him. These, to my mind, have nothing to do with the claimant's ability to take advantage of his* **faculty of walking.** *Accordingly, I direct the new tribunal on this matter to concentrate only upon the extent to which the claimant may require guidance or supervision through becoming lost, confused or disorientated and whether that would be required "most of the time" that he was* **walking** *on an unfamiliar route.""*

9. I accept the adjudication officer's submission. What the tribunal said was:-

> "In respect of the claim to the mobility component - she can walk and so the lower rate mobility component is only in issue. To receive this she would have to establish a need for guidance and/or supervision.
>
> She can read and will have no difficulty with direction signs. She can communicate very competently on a one-to-one basis and thus would be able to seek directions.
>
> She does not panic - in fact when driving in car recently and when she had an accident she drove on to where her husband was to ask him to "sort it out".
>
> It is accepted that if she broke down she would be unable to use a road side telephone - whilst this would present a difficulty it is not considered a substantial danger would arise."

I consider in the light of what the tribunal said there that they could have reached no other conclusion than the one which they reached. This is particularly so having regard to what was said by Mr Commissioner Walker QC in the case quoted in the adjudication officer's submission. I am not satisfied that asking for directions of a stranger is guidance. In CSDLA/223/98 I said:-

> "It seems to me that the guidance being referred to in the statute is not the guidance of a passing stranger of whom directions are asked but rather that of a guide who accompanies the claimant and without whose guidance the claimant cannot exercise the faculty of walking, in the context of the statutory perimeters. The suggestion which appears to being made by the Commissioner [in paragraph 12 of CDLA/14307/96] is that the section may be satisfied that the claimant is unable or finds it difficult by reason of her deafness to communicate with strangers so as to ask for directions when walking out of doors in unfamiliar routes. It appears to be being postulated that in these circumstances that if she had a guide to ask for guidance from a stranger that would remedy the incapacity in respect of her ability to walk and thus enable her to take advantage of that faculty. For myself I do not see how a person accompanying the claimant asking a stranger for directions on an unfamiliar route could be said to giving guidance to the claimant. It is rather more in the way of a person with the claimant providing her with a substitute method of communication with a third party. On any proper view it is not guidance."

10. It is also my view that anxiety or panic are not factors to be taken into account when determining whether or not the statutory parameters are satisfied. Nor is the question as to whether a person with a disability such as the claimant can enjoy the faculty of walking out of doors as much as a person who has no difficulty with hearing. These are not relevant considerations as they are not linked directly to the severe physical or mental disablement which is required before the statutory condition can be satisfied. I do not accept that the tribunal applied the wrong test.

11. The appeal fails.

(signed)
D J MAY QC
Commissioner
Date: 8 June 1999