

Severely mentally impaired by DVA:
- SMI = IQ of 55 or below
- Antisocial personality results in poor memory
- APPENDED TO COA (Megarry) DEC 97.

(7)
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DGR/SH/CW/18

Commissioner's File: CDLA/6219/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons set out below, the decision of the disability appeal tribunal given on 21 May 1997 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the DAT of 21 May 1997.

3. The claimant's representative asked for an oral hearing. I refuse this application, as I am satisfied that the appeal can properly be determined without such a hearing.

4. The question for determination by the tribunal was whether the claimant was entitled to either or both of the components of disability living allowance. In the event, the tribunal allowed the care component at the highest rate, and the mobility component at the lower rate, but was unwilling to award the latter component at the higher rate. The claimant's representative contends that, in failing to award the mobility component at the higher rate, the tribunal erred in point of law.

5. The tribunal considered the matter under section 73(1)(a) of the Social Security Contributions and Benefits Act 1992, and concluded that the claimant was not virtually unable to walk. They then went on to consider whether the claimant might still succeed by reliance on section 73(3). For a person who falls within that provision is entitled to the mobility component at the higher rate. In the event, they were not satisfied that the claimant's case had been made out.

6. Section 73(3) provides as follows:-

"A person falls within this subsection if -

- (a) he is severely mentally impaired; and
- (b) he displays severe behavioural problems; and
- (c) he satisfies both the conditions mentioned in section 72(1)(b) and (c) above.

It is to be noted that in order to get within the subsection the claimant has to satisfy all of the above provisions. In the present case, it is not in dispute that the claimant satisfies (c), so that, if the claimant is to succeed, he has to satisfy only (a) and (b). However if he fails to satisfy either, his claim will not succeed. In the event, for the reasons given below, I have in this case only to consider (a).

7. What constitutes "severely mentally impaired" is defined in regulation 12(5) of the Social Security (Disability Living Allowance) Regulations 1991. It reads as follows:-

"A person falls within subsection 3(a) of section 73 of the Act (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."

Accordingly, in order to satisfy this particular provision, the claimant must suffer from a state of arrested development or incomplete physical development of the brain, and this condition must result in (i) severe impairment of intelligence and (ii) severe impairment of social functioning. If the claimant does not suffer from severe impairment of intelligence, it is unnecessary to go on to consider whether or not he suffers from severe impairment of social functioning. Social functioning becomes wholly irrelevant, an aspect of the case which I think the claimant's representative has not properly appreciated.

8. The adjudication officer now concerned supports the appeal on the basis that the tribunal decided that the claimant did not suffer from a state of arrested development or incomplete physical development of the brain, but failed to explain why they reached that conclusion. This submission is wholly misconceived. The tribunal did not make any finding that the claimant did not suffer from a state of arrested development or incomplete physical development of the brain. They in fact said as follows:-

"The tribunal however could not be satisfied that autism is a severe mental impairment result[ing] from arrested development or incomplete physical development of the brain from birth."

The tribunal were not suggesting that there was no arrested or incomplete physical development of the brain; what they were saying was that there was no severe mental impairment resulting from the claimant's condition. And if there was no severe mental impairment i.e., "severe impairment of intelligence", the claim must inevitably fail. Manifestly, the tribunal were not satisfied that the case had been made out on behalf of the claimant, on whom the burden of proof rested, that he suffered severe impairment of intelligence.

9. What constitutes "severe impairment of intelligence" was considered at length with the benefit of expert evidence in CDLA/1678/1997, which involved an autistic child. In the course of that decision I said as follows:-

"8. I now have to consider whether this condition results in severe impairment of intelligence and social functioning. I will deal first with the question of severe impairment of intelligence. In CDLA/8353/1995 I considered what constituted severe mental impairment based on the medical evidence given to me in that case by a Dr. Measey. I concluded as follows:-

'15. Dr. Measey said that, from a medical standpoint, a person could not be said to be suffering from severe impairment of intelligence, unless he was intellectually 'three standard deviations' below the norm. A deviation was 15%. Dr. Measey explained how the system worked. The average IQ is 100. 72% of the population fall within the range 85-115. Those who have an IQ of 85 are one standard deviation below the 'norm, those with an IQ of 70 are two standards below; and those with an IQ of 55 are three standards below.'

I asked Dr. McKinley whether he agreed with that analysis. He said that he did, and that this was the accepted way of judging mental capacity.

9. What is the IQ of the claimant? Unfortunately there is no direct evidence on this issue. The evidence closest is that of the hospital consultant Dr. B W Knight, who in answer to the question 'if this patient's IQ was assessed formally, is it likely to be around 50 or less?' answer 'No', adding the qualification 'IQ not known'. Dr. McKinley explained to me that the intelligence of sufferers from autism might vary considerably from one case to another. Out of 10,000 children 94 might be suffering from autism to some degree. Four of them would experience the condition in its severe form, with consequential severe learning difficulties, whilst the other 90 might suffer only moderately or mildly. Those that fell within the latter category would normally have an IQ of between 80 and 90.

It follows from these statistics that more than 90% of sufferers from autism have an IQ above 55, and as a result do not have a severe impairment of intelligence. The view of Dr. Knight would appear to suggest that the claimant fell within the majority group of sufferers from autism, and this was the opinion of Dr. McKinley himself after he had studied the file."

10. In the present case, if the claimant's case was to be made out it had to be shown that he fell within the very rare category of a sufferer from autism who had an IQ of 55 or below, and there was absolutely no evidence in this case to that effect. Indeed, in a report by Dr. M Cameron in answer to the question "If this person's IQ was assessed formally would it be likely to be around 50* or less?" answered "No". Dr. Cameron did also state that, in her opinion, the claimant was severely mentally impaired, and to justify this conclusion, in the light of her further assertion as to the claimant's IQ, she said as follows:-

"George has classical autism which severely limits his social capacity and he has very limited language and play skill and has no sense of danger and [illegible line] He...and care and will need special schooling throughout his school years."

As I explained earlier, any limitation on the claimant's social functioning is wholly irrelevant, and the doctor's view that the claimant was severely mentally impaired cannot be justified in the face of her categorical assertion that the claimant's IQ would not be 50 or less. In short, there was absolutely no evidence before the tribunal that the claimant was the rare type of autistic child whose mental capacity was such that he fell within regulation 12(5).

11. Accordingly, I see nothing wrong in law with the tribunal's decision. They stated in effect that the claimant's case had not been made out, and I do not see that they were required to elaborate further. Moreover on the evidence before them, they could have reached no other conclusion.

12. For completeness, I should mention that the claimant's representative has cited further medical evidence, which was not before the tribunal. That evidence has, as a result, no relevance to this appeal.

* Seemingly, 50 was being used as the base figure rather than 55 for ascertainment of severe impairment of intelligence, but nothing turns on it. Certainly, there was no suggestion anywhere that the claimant's IQ was between 50 and 55.

13. Accordingly I have no hesitation in dismissing this appeal.

(Signed) D G Rice
Commissioner

(Date) 1 May 1998