

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/6701/1999

Starred Decision No: 53/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

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so as to arrive by 17th July 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

1. This is an appeal by the Claimant, brought with the leave of a Commissioner, against a decision of the Eastbourne Disability Appeal Tribunal made on 24 March 1999. My decision is set out in paragraph 20 below. The result is that the appeal in substance fails.
2. The Claimant is a boy who was born on 26 January 1991 and is therefore now aged 10. He has been diagnosed as suffering from Asperger's Syndrome and autism. He lives with his parents and attends a specialist autistic unit attached to a mainstream school.
3. On 5 December 1995 he was awarded the lowest rate of the care component and the lower rate of the mobility component of disability living allowance, in each case from 26 January 1996 to 25 January 1999.
4. On 22 January 1998 an adjudication officer reviewed that award on the ground of an increase in the Claimant's needs, but did not revise it. On 28 April 1998 a different adjudication officer conducted an "any grounds" review of that decision, and made a revised decision purporting (a) to award the highest rate of the care component from 13 April 1997 to 12 April 2001 and (b) to leave the previous award of the lower rate of the mobility component undisturbed.
5. The Claimant appealed on 30 July 1998, the contention on his behalf being that he was entitled to the higher rate of the mobility component, but by the decision which is now under appeal to me the Tribunal dismissed that appeal.
6. The contention on behalf of the Claimant before the Tribunal was not that he was unable or virtually unable to walk, but that he was nevertheless entitled to the higher rate of the mobility component because he fell within s.73(3) of the Social Security Contributions and Benefits Act 1992:

"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."

7. S.73(6) authorised the making of regulations specifying the cases falling within s.73(3)(a) and (b). They are to be found in Reg. 12(5) and (6) of the Social Security (Disability Living Allowance) Regulations 1991:

"(5) 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.

(6) A person falls within subsection (3)(b) of section 73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which –

- (a) is extreme,
- (b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and
- (c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.”

8. The Tribunal held that the Claimant did not satisfy either s.73(3)(a) or (b) of the 1992 Act (as amplified by Reg. 12(5) and (6) of the 1991 Regulations). It took the view that this was a very clear case. Its statement of material facts and reasons (omitting parts not material to an understanding of this decision) were as follows:

“Facts

..... he is able to walk; [he] is hypersensitive to noise; he is not disruptive at school where it is structured and safe; he keeps calling for his mother whenever she leaves the room he tries to hit his mother but not himself; he is demanding and gets physical if he does not get his way or is tired; if obsessed by something he may wish to run off and needs to be persuaded by “bribes”; if he is doing what he wants to do [he] does not need close attention he tends to lash out if there are too many people around as there is too much noise; he does not want his mother’s attention to be taken away; he can’t understand situations such as traffic on the roads.

Reasons

The Tribunal considered all the evidence; particularly the medical evidence in this appeal The Tribunal were not satisfied that it could be said that the Claimant was severely mentally impaired. It accepts an incomplete physical development of the brain but the evidence does not support severe impairment of intelligence AND social functioning. In any event the Tribunal could not find that the evidence established that [he] displayed severe behavioural problems as defined. All three paragraphs of Regulation 12(6) have to be satisfied and the evidence is just not there to justify a finding that they all apply to [him] and in particular the requirement for another person to be present and watching over him whenever he is awake.”

9. In my judgment the Tribunal’s decision was erroneous in law in a number of respects. First, in simply upholding the adjudication officer’s decision of 28 April 1998 it omitted to notice that that decision, by awarding the highest rate of the care component for a fixed period different from that for which the lower rate of the mobility component had previously been awarded, was in breach of s.71(3) of the 1992 Act. The Tribunal should have revised the award of the lower rate of the mobility component so as to make it terminate on 12 April 2001, the date on which the award of the care component was to terminate.
10. Secondly, I accept the submission of the Secretary of State’s representative that the Tribunal’s findings and reasons in relation to Reg. 12(5) were inadequate. The Tribunal did not say whether the condition which it found not to be established was impairment of

intelligence or impairment of social functioning (or both). Nor did it make it clear whether it was saying that it was positively satisfied that there was not a severe impairment (and if so on what evidence it relied) or whether it was merely saying that there was insufficient evidence to satisfy the onus which lay on the Claimant to establish severe impairment.

11. Thirdly, as regards Reg. 12(6), in view of the fact that there was evidence before it from the Claimant's mother that (i) the Claimant was on occasions physically violent and (ii) he needed to be supervised throughout the day, the Tribunal ought in my judgment to have explained in more detail why it found that he did not satisfy the requirement for "another person to be present and watching over him whenever he is awake."
12. The Secretary of State submits that, although the Tribunal's decision was erroneous in law in relation to Reg. 12(5), it was not so in relation to Reg. 12(6). He therefore submits that, as it was necessary for the Claimant to satisfy both Reg. 12(5) and 12(6) in order to qualify for the higher rate of the mobility component, I should set aside the Tribunal's decision but substitute a decision to the same effect. However, as I said in the previous paragraph, I think that the Tribunal's decision was also erroneous in law in relation to Reg. 12(6). I think that the Tribunal's reasons were too shortly expressed to be understandable.
13. However, I am nevertheless satisfied that it does follow from the findings of fact made by the Tribunal that the Claimant did not fall within Reg. 12(6)(c). My reasons are as follows.
14. The first finding of importance for this purpose was that "he is not disruptive at school, where it is structured and safe." That finding clearly came from the evidence given by the Claimant's mother to that effect before the Tribunal (p.166 of the case papers). The Claimant's mother has since confirmed its correctness (see p.195: "He is well behaved at school due to the extreme structure and teacher/children ratio").
15. Now it is no doubt the case that while the Claimant is at school there is always an adult "watching over" him. It may be (although this is unclear) that it is the presence and active interest of a teacher which results in the Claimant not being disruptive at school – i.e. that he would become disruptive if left alone there or if left unsupervised with other children. But that is in my judgment not sufficient to satisfy Reg. 12(6)(c). Limb (c) of Reg. 12(6) is in my judgment only satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant if and when he starts actually to become disruptive. Giving a fair reading to Reg. 12(6)(c) in the context of Reg. 12(6) as a whole, I think the clear meaning is that the "watching over" must be necessary in order that the person watching (or, I suppose, someone who can be summoned immediately by the person watching) can intervene when the claimant actually does become disruptive. If the structured regime of the school is of itself sufficient to prevent the claimant becoming disruptive, Reg. 12(6)(b) is in my judgment not satisfied. I reach that conclusion for three main reasons. First, that is simply how the provision strikes me. Secondly, the presence of limb (b), referring to physical restraint, before limb (c), leads naturally to the meaning that the presence must be necessary in order actually to deal with unpredictable disruptive behaviour, and not merely (by presence short of physical restraint) to avoid it. Thirdly, Reg. 12(6) can only apply if the Claimant does in fact regularly require physical restraint. That means that if a particular claimant were, by

supervision short of physical restraint, prevented from ever being disruptive, or from being disruptive on a regular basis, Reg. 12(6) would plainly not be satisfied.

16. The same consequence in my judgment flows from the Tribunal's findings that at home he only becomes disruptive if his mother leaves the room, or her attention is diverted away from him, or he does not get his own way. (The correctness of that finding has in my view again since been confirmed by the long letter from the Claimant's mother at pages 195 to 197 of the case papers). Reg. 12(6)(c), again read in the context of Reg. 12(6) as a whole, requires that the claimant's disruptive behaviour is so unpredictable that another person is required to be present at all times in order to deal with the Claimant should he become disruptive. It is not sufficient that the presence and active interest of the Claimant's mother at home is sufficient to prevent disruptive behaviour occurring at all.

17. In her grounds of appeal and correspondence (particularly at pages 74-5) the Claimant's mother has criticised the Tribunal for looking at all at the Claimant's behaviour when at school or at home:

"I feel that most of the questions directed at me during the hearing such as restraining in the home, violent behaviour at home etc. were rather irrelevant, all based round the personal care issue which I receive at the higher rate anyway.

Nearly all the other questions were about his behaviour at home and at school where everything is very structured whereas his outside behaviour is a completely different matter due to unfamiliar factors."

18. In CDLA/2054/1998 the (as he then was) Deputy Commissioner gave the following guidance about Reg. 12(6)(a) for the assistance of the new tribunal:

"The word "extreme" is an ordinary English word, connoting behaviour which is wholly out of the ordinary. However, the claim is for the mobility component of disability living allowance and it is the claimant's behaviour when taking advantage of the faculty of mobility, generally outside the home environment, which needs to be considered."

19. However, it seems to me that the requirement in Regs. 12(6)(b) and (c) that the Claimant must need watching over, for the purpose of restraining potentially disruptive behaviour, "whenever he is awake" indicates that the watching over must be required at home just as much as outside it, and must be required whether or not the Claimant is "seeking to take advantage of the faculty of mobility." It is plainly not sufficient if the claimant only requires watching over when outside the home. I accept that it may be difficult to see that reg. 12(6) really falls within the scope of the rationale behind the other heads of entitlement to the mobility component (whether at the higher or lower rate). But that cannot justify giving Reg. 12(6) a meaning other than that which it plainly has.

20. For the above reasons my decision on this appeal is as follows:

(1) I set aside the Tribunal's decision as erroneous in law;

- (2) In exercise of the power in s.14(8)(a)(i) of the Social Security Act 1998 I make the decision which in my judgment the Tribunal ought to have made. That is to replace the adjudication officer's decision of 28 April 1998 with the following decision: the adjudication officer's decision of 22 January 1998 is revised, the revised decision being that the Claimant is entitled to the highest rate of the care component of disability living allowance from 13 April 1997 to 12 April 2001 and to the lower rate of the mobility component of that allowance until 12 April 2001.

(Signed)

Charles Turnbull
(Commissioner)

(Date)

6 April 2001