

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/6784/99

Starred Decision No: 132/01

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*Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

so as to arrive by 6th March 2002

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SOCIAL SECURITY ACTS 1992 TO 1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Tribunal:

Case No:

1. This appeal is allowed. The decision of the tribunal is set aside, and I substitute my own decision that the claimant is entitled to the middle rate of the care component of disability living allowance for the periods from 9 February to 25 July 1996, 4 December 1996 to 25 July 1997, 4 December 1997 to 25 July 1998 and 4 December 1998 to 25 July 1999, but is not otherwise entitled to any award of disability living allowance for any part of the period covered by this decision, namely 9 February 1996 to 20 September 1999, both dates inclusive. I remit the case to the secretary of state to determine the amount of disability living allowance to which the claimant is entitled as a result of this decision.

2. This is an appeal with the leave of a commissioner from a decision of the Warrington Disability Appeal Tribunal on 15 July 1999 that the claimant was not entitled to an award of either component of disability living allowance. Although it appeared at one point that the claimant might wish to have an oral hearing of the appeal, his representative made it clear by a form dated 14 November 2000 that no oral hearing was sought, and I am satisfied that I can determine the points of law which arise on this appeal without an oral hearing. The Office of the Social Security Commissioners have been informed by the secretary of state, although this has not been confirmed with the claimant, that a fresh application for disability living allowance was made by the claimant with effect from 21 September 1999, so that the period with which I am concerned for the purposes of this appeal ends on 20 September 1999. If the accuracy of this information is challenged by the claimant, he may apply to me under regulation 31 of the Social Security Commissioners (Procedure) Regulations 1999 to have the decision set aside.

3. The claimant was born in February 1984. He has severe/profound sensory-neural hearing loss. He was awarded attendance allowance at the lowest rate from 11 September 1991 to 8 February 1996, the day before his 12th birthday. An adjudication officer refused to make an award of disability living allowance from 9 February 1996, and another adjudication officer refused to revise this decision on a review. On appeal from those decisions, on 6 November 1996 a disability appeal tribunal held that the claimant was entitled to the middle rate of the care component from 9 February 1996 to 9 February 2000. The adjudication officer appealed that decision on the grounds that the tribunal failed to make adequate findings of fact or to give adequate reasons, and on those grounds the appeal was allowed in by a deputy commissioner in February 1999 and the case was remitted to a new tribunal for reconsideration (CDLA/5833/1997). The deputy commissioner gave guidance to the new tribunal as to the matters which required consideration at the rehearing.
4. The claimant's case before the 1996 tribunal is substantially set out in a letter of appeal dated 19 March 1996 from his mother at pp.65-67 of the file, which formed part of the evidence before the next tribunal to hear the appeal. The following points are made:
 - (a) The claimant had to be physically shaken awake each morning because he could not hear calls and did not respond to a special vibrating alarm clock.
 - (b) His ears had to be checked for infection and cleanliness each morning, and his hearing aids had to be checked for cleanliness and battery function.
 - (c) Usually his school uniform was laid out for him to decrease the frustration of having to communicate with him about it.
 - (d) While he was upstairs, a member of the family would either have to remain with him rather than going downstairs or would have to go up and downstairs to communicate with him.
 - (e) When it was necessary to communicate with the claimant, the tasks he was undertaking had to be interrupted and he spent so much time concentrating on listening that he was often forgetful of other matters. He had to be told everything face to face.
 - (f) He could not hear traffic and had to be taken to and from school every day. He had to remain with an adult when walking to enable any communication to take place.
 - (g) There were additional potential problems for a young child if a stranger in a car tried to communicate with him because he would have to get very close to find out what the communication was about.
 - (h) He was in a mainstream school and had to sit at the front of the class to lipread effectively, and the effort made him very tired.
 - (i) His hearing aids had to be checked regularly, and he himself needed regular checks from an audiologist.
 - (j) He could not go out with friends as he could not hear danger and the friends could not be relied on to protect him. He needed a special loop to hear television and would often ask one of his parents to phone his friends for him as he could not hear on the television.
 - (k) Even taking a walk he needed somebody with him in case his hearing aid batteries ran out.
 - (l) Far greater effort was required in giving help with homework than would normally be the case because of the difficulties in communication.

- (m) The claimant needed extra help when bathing and going to bed because of his hearing problems
 - (n) He needed far more sleep than other children of his age because of the additional concentration required of him each day.
 - (o) He could not hear the smoke alarm and needed checking if he called out during the night. His isolation caused by his deafness impaired his sleep patterns and he often dreamed and sleep walked. In such cases, because of his deafness, and the absence of his hearing aids it could take up to an hour to calm and settle him.
 - (p) He could not go out alone.
5. An advisory teacher for the hearing impaired reported in February 1996 (p.68) that the claimant had perfected good skills in lip reading.
 6. The new tribunal had to determine the claimant's entitlement down to the date of its decision and on 15 March 1999 a new report on the claimant's hearing ability was produced (file, pp.146-147). This indicated that in speech tests in December 1998, free field with hearing aids, the claimant had scored 30% without lip reading and 50% with lip reading, a result which was stated to be in keeping with his articulation index. The report went on to state that approximately 50% was sufficient to fully understand conversation, and that in good conditions with good lip reading opportunities the amplified information with good quality hearing aids would permit near complete understanding, but that under anything less than good conditions (and there would be countless such situations) the claimant would be seriously struggling for understanding.
 7. The claimant attended the new tribunal hearing with his father and was also represented. At that stage his representative is recorded in the record of proceedings as claiming the lower rate mobility and middle rate care components (p.152). I note that in the original claim form in 1995 no case for lower rate mobility was put forward, but in the circumstances the tribunal was plainly required to consider the case down to the date of its decision, and there were equally far more circumstances when a 15 year old might be expected to walk on unfamiliar routes than would be the case with a 12 year old. However, his father gave evidence, recorded at pp.153-155, which sets out his daily problems and states that there were no changes in his circumstances since he was 12.
 8. The tribunal stated in its summary of grounds that it accepted that the claimant had some difficulties but agreed that he did not require frequent attention with bodily functions nor did he require guidance out of doors on unfamiliar routes most of the time. It also found that he did not require continual supervision to avoid substantial danger. In the statement of material facts and reasons, the tribunal made findings of fact as to what happened at school and as to a number of other matters including the facts that he went on a school skiing trip in February 1999 without his mother and went to Euro Disney for three days in 1995.
 9. Unfortunately, in dealing with lower rate mobility the tribunal made no reference to unfamiliar routes in the statement of material facts and reasons. It is well known that profoundly deaf people are frequently unwilling to walk alone on unfamiliar routes, although they can walk alone on familiar routes, and that in some circumstances their problems in

doing so can lead to the conclusion that they satisfy the condition for lower rate mobility (see the decision of the tribunal of commissioners in CDLA/714/1998). The tribunal has stated that there was no evidence that supervision was required to enable the claimant to walk outdoors. That was also wrong. The mother's evidence, summarised above was plainly evidence that the claimant required supervision to walk out of doors in 1996, and could not go out alone (p.67). The tribunal expressly accepted that evidence and all the other written evidence from the claimant and his parents. It related to walking on familiar routes, but the problems identified would have applied with at least equal force to unfamiliar routes.

10. In relation to the care component, I can find no explanation why the care identified by the claimant and his parents as being required (the evidence being accepted by the tribunal) did not amount to attention in connection with bodily functions required for a significant portion of the day or frequently throughout the day. On this account also the tribunal failed to give adequate reasons for its decision and so erred in law.
11. The next question is whether it is expedient for me to substitute my own decision. I have come to the conclusion that there are sufficient findings of fact to enable me to do so. It is clear that the evidence given on behalf of the claimant was accepted and that the real issue is as to the proper inferences to be drawn from them. Although there are some minor facts which might have been further explored, in particular as to the dates of school terms, I have come to the conclusion that it would be wrong to send the case back for a third tribunal hearing because of this.
12. In relation to lower rate mobility, I have to consider whether the claimant satisfied the test to which I have referred, but with the added qualification that for so long as the claimant was under the age of 16 section 73(4) of the Social Security Contributions and Benefits Act 1992 provides that to qualify for the lower rate of the mobility component, the claimant must require substantially more guidance or supervision from another person than persons of his age in normal physical and mental health would require or that persons of his age in normal physical and mental health would not require such guidance or supervision.
13. The evidence as to walking relates essentially to problems hearing traffic, and problems with speaking to strangers because of the dangers inherent nowadays in such conduct. There is no evidence that the claimant had any particular problem walking on unfamiliar routes. The dangers from strangers, it appears to me, is not significantly different for the claimant compared with other children of his age. With regard to the dangers of traffic, I consider that a child of 12 or 13 would not normally walk on unfamiliar routes without guidance or supervision most of the time, and that the guidance or supervision which the claimant would have needed, while clearly more than other children of his age would have needed, was not significantly more. This is so particularly taking into account the finding by the tribunal that the claimant himself would be aware of the traffic and of his difficulties and would be likely to take extra care of himself. Insofar as a child of 12 or 13 would walk unsupervised on unfamiliar routes, I find that there is nothing in the evidence that the claimant would be unable to do so as well. Although there is evidence that deaf children take much longer to understand concepts such as road safety, there is no evidence that the claimant, during the period in issue here, did not understand the concept, but only that his hearing made it more

difficult for him to be safe. There is also evidence that the claimant needed somebody with him in case his hearing aid batteries ran out, but I cannot accept that that supervision was reasonably needed most of the time given the care which was plainly taken to check his batteries each morning.

14. So too, I bear in mind that the claimant was not pre-lingually deaf, and that he was able to communicate with others, so that on unfamiliar routes, by the time he was old enough, apart from his deafness, to be allowed to go out alone and unsupervised, he would be able to read street signs, ask directions if necessary and understand the replies. While he may well be cautious on unfamiliar routes, I cannot find any evidence to suggest that he would be unable to walk on such routes to a similar extent that other youngsters of 14 or 15 would normally be permitted to walk on them without guidance or supervision.
15. It follows that in my judgment, the evidence did not entitle the claimant to an award of the lower rate of the mobility component.
16. With regard to the care component, the evidence, which was accepted, was that the claimant received the following attention by day:
 - (a) Being shaken awake each morning
 - (b) Having his ears and hearing aids checked each morning
 - (c) Having to have special steps taken to attract his attention insofar as this was providing him with a personal service rather than to enable another person to communicate with him for that other person's benefit. Examples of attracting attention that would be a personal service would include warning him of a traffic problem when out, or of a need to do something at school.
 - (d) Having to have his parents phone friends because he could not hear properly even on a specially adapted phone.
 - (e) Having to have his friends explain to him what teachers had said when he could not hear them, which was often the case. As the tribunal found, he was able to hear teachers with loud voices but had difficulties with teachers who had quiet voices, and "his friends remind him with regard to what is happening as he does miss instructions generally."
 - (f) Having to have explained to him what visitors were saying, who did not speak clearly.
 - (g) Having to have concepts explained to him at length which his deafness made it more difficult for him to understand.
 - (h) Having to have extra help when bathing and going to bed when he was without his hearing aid – the precise nature of this help is not explained.
17. I bear in mind that the claimant could hear most of what was said if he went to the pictures, and that he could follow television programmes with a loop. I also bear in mind that his care needs must either be substantially in excess of the normal requirements of children of his age, or be of a 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 (Social Security Contributions and Benefits Act 1992, s.72(6)(b)).

18. It is necessary that the care needs should be real needs, that is that they must be reasonably required by him. There is no doubt that most of the care needs listed above were reasonably required, but I am not satisfied that he reasonably required to have his ears and hearing aids examined throughout the period under review. I would not expect it to be reasonably necessary for one of his parents to examine his ears most day, or to check the battery levels in his hearing aids. Insofar as there was a need to check the level of his batteries, I would also expect that the claimant would be able to do that for himself and to report when they were running low.
19. Nevertheless the claimant does have a need for help with his hearing at school which is frequent at least throughout the school day and which is substantially in excess of the normal requirements of children of his age. In addition to help which he receives from other children, I would expect that in a normal school aware of his problem the teachers would also be trying to ensure that he understood what was going on and what was required of him. That care would also be taken into account. There are also other times during the rest of the day when the evidence I have recited shows that he has some need for help with his hearing. In CA/140/1985, the Chief Commissioner explained that the fact that the need for attention was in the main during one or two specific parts of the day did not mean that attention was not required frequently throughout the day.
20. However, the claimant is not at school for the whole of the year. There are weekends, half term holidays, and holidays between terms. While I consider that I can infer that the claimant will require additional attention from his parents during these times, the evidence of that attention is not such as to enable me to conclude that on those days the attention will either be for a significant part of the day or frequently throughout the day. I bear in mind in considering the expression "frequent... throughout the day" that the attention in question need not be for a significant part of the day, yet will qualify the claimant for a higher rate of benefit than if it was for a significant part of the day. It appears to me that the evidence before me does not indicate that the claimant would reasonably require a great deal of extra attention on those days.
21. The question then arises as to the effect of s.72(2) of the 1992 Act, which requires that the condition for an award of the care component must be satisfied throughout the period of three months immediately preceding the date on which the award of that component would begin and be likely to continue throughout the period of six months following that date. In my judgment, the expression "throughout the period" does not mean that the condition must be satisfied every day throughout that period. An overall view must be taken of the claimant's needs, in the same way as an overall picture has to be formed of a claimant's abilities, where a claimant has a variable condition in relation to incapacity benefit. It seems to me that a claimant who needs frequent attention throughout the day five days a week and some attention on the other two days, most weeks during the school year, satisfies the requirement during the school year.
22. The summer holiday, however, is about six weeks long. It does not appear to me, taking an overall view, that, in considering care needs based largely on what the claimant needs at school, it is right to include the period of the summer holidays. I am concerned with a period

beginning on 9 February 1996, in relation to a claimant who already has an award which has been converted into an award of the care component of disability living allowance until 8 February 1996. It appears to me that the claimant satisfied the requirements for the award of the care component throughout the three months period ending on 8 February 1996 and, looking at the matter overall also satisfied the condition for the following six months ending on 8 August 1996. However, given that school term ended in late July 1996, I would only make the award of the care component until about the end of the term, which, in the absence of precise evidence, I would fix as 25 July 1996.

23. It then appears to me that the claimant must undergo the three months qualifying period in respect of the following school years of 1996/7, 1997/8 and 1998/9, which I fix, in the absence of precise evidence as starting on 4 September each year and ending on 25 July in the following year. That means that the claimant will be entitled to the middle rate of the care component from 4 December in each of those school years to the following 25 July and I so decide. I am not concerned with any subsequent school year, as the period with which I am concerned ends in September 1999.
24. The appeal is allowed and I substitute my own decision, as set out in paragraph 1 of this above, for the decision of the tribunal. Bearing in mind that the objective of the legislation was to enable a disable person to pay something to those who cared for him, and much of the relevant care in this case, as I have held, is that provided by the claimant's classmates, it might be thought strange that the claimant should be entitled to assistance from a limited public purse. However, I must construe the legislation as I find it. The claimant was plainly working very hard at school to overcome his disabilities, and did need a good deal of help in that respect, and on the wording of the legislation he qualifies for what is in effect a partial award of the middle rate of the care component.

(signed) Michael Mark
Deputy Commissioner

26 March 2001