Detailed discussion of 'frequent attention in connection with a bodily function' — summarises a no. of Commissioner decisions. Will repay detailed study.

DJM/AMB/T/CH Commissioner's File: CSA/8/96

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A DISABILITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

22/4/97

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Disability Appeal Tribunal: Glasgow

Case No: D/51/131/95/0585

[ORAL HEARING]

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1. My decision is that the decision of the disability appeal tribunal given at Glasgow on 2 August 1995 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted disability appeal tribunal for a rehearing.

2. The claimant made a claim for attendance allowance on 1 August 1994. It will be noted that she was born on 30 April 1924. An adverse decision was made in respect of her claim on 24 August 1994. Thereafter another adjudication officer reviewed that decision but decided that he could not revise it so as to award benefit.

3. The claimant appealed to a disability appeal tribunal. This tribunal heard the claimant's appeal on 2 August 1995. They upheld the adjudication officer's decision that the claimant was not entitled to attendance allowance.

4. The claimant appealed to the Commissioner. Her appeal was heard before me at an oral hearing on 11 February 1997. The claimant was represented by Mr Orr of the City of Glasgow Council Welfare Rights Department. The adjudication officer was represented by Mr Neilson of the Office of the Solicitor to the Secretary of State for Scotland.

5. In a written submission to the Commissioner the adjudication officer did not support the claimant's appeal. However at the oral hearing before me Mr Neilson indicated that he was resiling from the adjudication officer's submission. He indicated his support for the claimant's appeal.

6. In this case both the day-time supervision and day-time attention conditions of the allowance were in issue.

7. It was accepted by both parties to the appeal that the findings in fact in relation to the supervision condition were inadequate. They are restricted to the finding in paragraph 6:-

"She had a bad fall at a friend's house about 2 years ago, and since then has lost some of her confidence, she only goes out now when accompanied."

Further evidence of falls were noted by the chairman in her note of evidence. There was also evidence to the effect that in her house she was inclined to bump into doors or wall-mounted cupboards etc. That evidence was not the subject of findings in fact though reference to the claimant having falls in what are described as unfamiliar surroundings and in the shower are referred to. However there were insufficient and precise findings in fact to provide the factual foundation for the conclusion which has been reached. I am further of the view that it is not clear why standing the evidence to which I have made reference it is asserted in the reasons that there is no evidence to suggest that the claimant is at risk of substantial danger. Thus I am satisfied that an error in law has been demonstrated and that the decision of the tribunal must be set aside.

8. The principal submissions in the case were addressed to the day-time attention condition. It is self-evident that the disability suffered by the claimant was blindness. It is a finding in fact to the effect that the claimant was registered blind in August 1994. The bodily function which is impaired by that disability is inevitably sight. It is also apparent from the findings in fact that the claimant has diabetes and arthritis which affects her legs, feet and hands and which it would appear, in consequence, requires her to take pain-killers. It is also found that she has asthma which she copes with by using inhalers. It is further clear that the tribunal accepted that she reasonably required attention in respect of her bodily function seeing. The matters which are identified as being ones in respect of which attention is required included bathing, sorting out her clothing - see finding in fact 4. and guiding to a club for the blind once a week, a church club once a week in the winter months, when going into the city centre about once a fortnight and going to the common room in the sheltered accommodation in which she lives. See finding in fact 6. It was also accepted by the tribunal that she required attention in identifying medicines and dealing with correspondence. It is also apparently envisaged by the tribunal that she might have to ask someone to check what food was in her refrigerator if she was unsure.

9. The critical question in the case was whether, in respect of such attention as was identified as being reasonably required by her, this could be described as being frequent, throughout the day. That qualification is of course an essential ingredient of the statutory test which required to be applied.

10. The way in which the tribunal dealt with this in their reasons was as follows:-

"The majority of the tribunal took the view that (apart obviously form the need to be accompanied to the clubs etc, at specific times most of the items of care mentioned would not necessarily be required at any particular time of day and not all are required every day. Arrangements could and presumably are made to suit the convenience of the carer to some extent - for example, if [the claimant's] sister-in-law calls to help her with the shower. It would be reasonable to suppose that she could also check the medication, the clothing and the fridge if necessary all in a relatively short space of time. Another period of care in the same day might involve accompanying [the claimant] when walking outside or helping her to and from the common room. It appears to the majority, however, that for a large part of the day [the claimant] can

manage independently and has no requirement or the intervention of another person, and they cannot accept that the evidence shows that she requires "frequent attention throughout the day in connection with bodily functions. [Social Security Contributions and Benefits Act 1992, Section 64(2)(a)].

11. Mr Orr on behalf of the claimant submitted that by dealing with that question in the manner in which they did the tribunal erred in law.

12. In support of his submission Mr Orr referred me to CA/140/1985 where the then Chief Commissioner said in paragraphs 10 and 11:-

> "10. The delegated medical practitioner thus proceeded by three stages to his conclusion. He firstly found that the needs were confined "in the main" to the beginning and the end of each day; he then found that there were lengthy periods in the day where no help was necessary; he then concluded that the requirement of frequent attention throughout the day in connection with bodily functions was not satisfied.
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> 11. In my judgment the principal error of law committed by the delegated medical practitioner was to fail to look as a whole at the evidence of the requirement of need throughout the day including both what occurred in the morning on getting up and what occurred in the evening on going to bed. It cannot I think be justified to split up the attention and then say that because of the resultant gaps the requirement of "throughout the day" was not justified. The evidence relating to the day must be looked at as a whole where naturally connected, as it is indeed in this case. In my judgment this approach discloses an error of law."

13. It was Mr Orr's submission that the tribunal in this case made the same error in law as was identified by the Chief Commissioner in that case.

14. He further went on to submit that the tribunal also erred in law by looking at when attention in connection with the claimant's bodily functions was reasonably required from the point of view of the carer rather than the claimant. He made reference to the passage in the tribunal's reasons where the tribunal indicated that arrangements could and presumably are made to suit the convenience of the carer.

15. Mr Orr also submitted that there were insufficient findings in fact in relation to material matters. He referred me to finding in fact 3. where the tribunal found:-

> "[The claimant] is also diabetic and attends her clinic regularly. She has arthritis affecting her legs, feet and hands, and takes painkillers as required."

He submitted that no findings had been made in respect as to when these painkillers are required to be taken and that finding 3 seemed to be inconsistent with the concept that some particular time in the day could be identified for the purposes of the claimant's medication. He also submitted that the tribunal should have made findings as to whether it was reasonable or not to lump different attention needs together for the purpose of concluding that they could all be attended to at the same time. He pointed out to me that in the reasons the tribunal said:-

"Another period of care in the same day might involve accompanying [the claimant] from walking outside or helping her to and from the common room."

He submitted that the tribunal should have made clear findings as to what was meant by a period of care.

16. Further Mr Orr submitted that if such considerations were to be the foundation of the tribunal's decision these considerations should have been put to the claimant for her evidence and submissions upon them. It was submitted that if it is suggested that a number of the attention needs could be carried at the same time then it would be necessary to enquire as to whether such matters could have reasonably been carried out at the same time. Mr Orr in that connection referred to paragraph 12 of CSA/5/90 as an analogy. In that case the Commissioner said:-

"12. Accordingly I am driven back to a conclusion which I have reached in other cases, that unless the suggestion is of the simplest - such as laying out pills in advance or providing a drink for overnight use - a question will arise, and it is for the DMP in the first place to consider and decide as a judicial authority, whether any particular precaution or device can be assumed to be so certain to be available that it can properly be taken into account. And if so he should explain why so, briefly."

Mr Orr also made reference to CA/080/1986 in which the question of "throughout" was discussed by the Commissioner. There in paragraph 5 the Commissioner said:-

"There is no definition of "throughout" in the Act but the Oxford Dictionary gives it meaning as "right through, in every part in all aspects". It will of course not be necessary and there is no such suggestion for a claimant to require attention every minute of the day in order to satisfy the statutory conditions. However "throughout" in the context of the 1975 Act connotes attention which is given very often during the period accepted as the day."

17. It is I think important to recognise that when the question as to whether or not identified acts of attention in connection with a claimant's bodily functions constitute frequent attention throughout the day arises it is one which is a question of fact. In that connection see Mallinson v The Secretary of State for Social Security [1994] 2 All ER 295, in the speech of Lord Woolf at page 304. It is also apparent from the same speech that in answering that question it is necessary to aggregate all the attention requirements to determine whether the aggregation as a matter of fact fulfils the condition that there should be a requirement for frequent attention throughout the day. See Lord Woolf page 305. As Lord Woolf points out:-

"The requirement of frequency of attention throughout the day is a significant control on the circumstances in which the allowance is payable."

With that guidance a tribunal ought, having made the necessary findings in fact, to be able to reach a conclusion as to whether the condition was satisfied. It need be no more difficult than that. While cases such as CA/080/1986 and CSA/5/90 can provide a tribunal with assistance

in their task the question is essentially a jury one relating to facts. It is to be approached broadly. If properly approached and recorded it will not be disturbed on appeal. That is not the way the tribunal in the present case approached the appeal before them.

18. It is apparent from CA/140/1985 paragraph 11 that to look at the question from the point of view of the gaps in time when attention is not required is not the correct way of addressing the test. It is apparent, having regard to the terms of the tribunal's reasons for their decision, that they examined the matter from the point of view of the gaps. Accordingly having approached the case from the wrong angle the tribunal erred in law and their decision must be set aside for these reasons. I am also satisfied that it is an error to look at the matter from the point of view of the convenience of the carer rather than the claimant who is cared for. There is an ambiguity as to whether the tribunal fell into that error. Standing that ambiguity I consider that they erred in law as their position is not clear.

19. The case now case goes before a freshly constituted tribunal. In approaching the attention condition they should pose the questions put by Lord Woolf in Mallinson at page 307 and make findings in respect of the answers. They should also note that the question as to whether the attention reasonably required is frequent throughout the day is one which is a question of fact. They should approach this question of fact in the manner outlined in paragraph 17. In relation to the supervision condition it should be appreciated by the tribunal that the test is a very high one. The tribunal should have regard to what was said by the Commissioner in CDLA/899/1994 paragraphs 10 and 11 and to the cases referred to in paragraphs 12 and 13 of that decision.

20. The appeal succeeds.

(signed)
D J MAY QC
Commissioner
Date: 20 February 1997