

AA - Extra Laundry - might be  
OK to claimant unable to do  
1 to home

DJM/HJD

Commissioner's File: CSA/35/93

**SOCIAL SECURITY ADMINISTRATION ACT 1992**

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

**DECISION OF SOCIAL SECURITY COMMISSIONER**

Name:

Disability Appeal Tribunal: Edinburgh

Case No: D/51/091/93/0078

**[ORAL HEARING]**

1. My decision is that the decision of the disability appeal tribunal given at Edinburgh on 4 June 1993 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. This case came before me on an appeal by an adjudication officer against the decision of a disability appeal tribunal held in Edinburgh on 4 June 1993. An oral hearing was held on 12 May 1994. The adjudication officer was represented by Mr Neilson, Advocate from the Scottish Office Solicitors' Office. The claimant was represented by Miss Duncan of the Social Work Department of Central Regional Council. The claimant was not present.

3. The claimant was born on 21 October 1921. He made a claim for attendance allowance on 10 June 1992. His claim was only concerned with the conditions of entitlement for the day time allowance. His claim was not accepted and according to the terms of the documents submitted to the disability appeal tribunal the date upon which the decision notifying him that his claim was not accepted was 16 September 1992. The claimant then sought review of that decision. The review decision was that the adjudication officer decided that he could not revise the original decision so as to award benefit. He decided that the attention and supervision required by the claimant was not sufficient to meet the conditions of attendance allowance. The full text of the decision can be found at page 54 of the bundle. It was notified to him on 4 February 1992.

4. The claimant appealed to a disability appeal tribunal. The decision of the tribunal was as follows -

"Appeal allowed.

[The claimant] is entitled to the Attendance Allowance at the lower rate from 01 06 92 for three years."

The findings in fact made by the tribunal as being material to their decision were as follows -

"[The claimant] has wide spread psoriasis. He has daily tar ointment treatment (Dr Dick 20 May 93) usually applied to his back by his wife.

His underwear and pyjamas require daily washing. His sheets also require more frequent washing than normal. This also is done by [the claimant's wife]. It is reasonably required from another person. Together these amount to attention for a significant portion of the day. This condition obtained from longer than 6 months before date of claim.

He is over 65 at date of claim."

The reasons given for the decision were as follows -

"Pages 45 and Mr Dick's letter of 20 May 93 confirm Psoriasis and its tar treatment. R(A) 1/91 assisted us in reaching our decision. We found this additional laundry and application of tar satisfied the qualifying criteria for frequent attention throughout the day in connection with his bodily functions.

We thought [the claimant's] evidence on his other problems exaggerated and insufficiently borne out by the medical evidence to establish a need for supervision during day and night. It seems he is an unreliable witness about his medication (Dr Acheson 01 June 93). The Statutes, Regulations and Commissioner's Decision quoted in the submission are correct ones and we have applied them to the facts found by us."

5. The adjudication officer appealed against the decision of the disability appeal tribunal. The grounds of appeal submitted were as follows -

"I wish to appeal on the following point of law that the DAT have erred in following R(A)1/91, which conflicts with R(A)2/80 Appendix. As this decision was made by the Court of Appeal a higher authority, it should be followed in preference to R(A)1/91."

In paragraphs 11 and 12 of a written submission by the adjudication officer to the Commissioner it was said -

"11. In my submission, therefore, the Commissioner in R(A) 1/91 was obliged to follow the Court of Appeal's judgement as it was that of a higher authority. To the extent that he did not do so, R(A) 1/91 should not be followed as it is not good law.

12. In the present case, the tribunal should have followed R(A) 2/80 rather than R(A) 1/91. I therefore submit that it is erroneous in law."

A supplementary written submission was presented to the Commissioner. That submission made reference to the case of Mallinson v The Secretary of State for Social Services [1994] 2 All ER at page 295. It was said by the adjudication officer in his submission -

"6. It is my submission that this Judgement of the House of Lords approves the authorities preferred in the adjudication officer's submission dated 23 August 1993 and confirms, without any provisos, that domestic chores cannot qualify as "attention in connection with the bodily functions". I therefore again submit that R(A)1/91 should not be followed as it is not good law."

6. At the oral hearing before me it was accepted by both sides that the tribunal had not stated facts and reasons for their decision adequately. In these circumstances it will be necessary to set the decision of the tribunal aside and remit the case to a freshly constituted disability appeal tribunal for a rehearing. It is quite clear to me that the tribunal failed to make sufficient findings in fact to apply the statutory formula set out in section 35 of the Social Security Act 1975. The terms of section 35(1)(a) are as follows -

"A person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain and either -(a) he is so severely disabled physically or mentally that, by day, he requires from another person either - (i) frequent attention throughout the day in connection with his bodily functions, or (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or ....."

7. It was necessary for the tribunal in this case to apply that statutory formula to the facts that were found. It was said in relation to this task in relation to a delegated medical practitioner (whose duties were performed under the scheme for adjudication no longer applicable) by Lord Woolf in his speech in Mallinson v The Secretary of State for Social Services at page 307 -

"But this usually involves doing no more than looking, as in this case, at the claimant's account of what he can and cannot do together with the relevant medical report and asking four simple questions. (1) Has the claimant a serious disability? (2) If so, what bodily functions does it impair? (3) Does he reasonably require attention in connection with those functions? (4) Is that attention frequent?"

These questions are ones, which in my view, the disability appeal tribunal required to ask and answer to enable them to find the facts which would enable them to apply the statutory formula.

8. In this case in relation to question 1 the tribunal made the finding in fact that the claimant had widespread psoriasis. It appears however that there was evidence before them that he has other disabilities. In particular there was evidence in relation to blackouts. The tribunal have made no findings in fact in relation to this evidence. In their reasons they say that they thought the claimant's evidence on his other problems was exaggerated and insufficiently borne out by the medical evidence to establish a need for supervision during day and night. However they do not indicate whether they accept his evidence that he suffers from blackouts to any extent nor do they set out the extent of any disability caused by that. In addition the claimant gave evidence to the effect that he needed help with the application of tar on his back. They made no findings in fact however in relation to that matter. They did not investigate the reasons why he needed such help and whether it was as a result of any disability. Thus the findings in fact in relation to the first question posed by Lord Woolf had not been completely and sufficiently dealt with by the tribunal.

9. In relation to the second question it was submitted by Mr Neilson that the tribunal had not identified the bodily function which was impaired by such disability as the tribunal have found to exist. I accept that submission and I understood Miss Duncan to accept it as well. What is meant by the phrase bodily function is dealt with by Lord Woolf in Mallinson at pages 301 and 302 and 303. At page 303 Lord Woolf in his speech quotes with approval what was said by Mr Commissioner Monroe in 1984 in decision CA/60/74 where he said -

"I consider that the words in this section refer to a person who meets the relevant degree of attention in connection with the performance of his bodily functions and that they are directed primarily to those functions which the fit man normally performs for himself."

Lord Woolf went on to say in a speech which had the approval of the majority of the House -

"These words of Mr Commissioner Monroe which received such strong endorsement of this House in 1984 are not wide enough to cover "domestic chores". Nonetheless, they mean that attention qualifies if it is "in connection with the performance" of the many "functions which the fit man normally performs for himself"."

The tribunal in this case have clearly failed to address the question as to relevant bodily functions in this case and they have also failed in these circumstances to define which bodily functions were impaired.

10. In relation to questions 3 and 4 posed by Lord Woolf in his speech at page 307 it is clear that in the absence of proper findings in fact in respect of finding 2 that there could be adequate findings in respect of questions 3 and 4. The tribunal have made findings in relation to the attention which was received by the claimant in respect of his disability. However they are not sufficient as they are not tied to any finding in relation to impairment of any bodily function.

11. It follows that having failed to state facts adequately their reasoning is also flawed. Without adequate facts to apply the statutory formula they were not entitled to reach the conclusion that they did. R(A) 1/91 could not as they assert have assisted them in reaching their decision because of the lack of a proper factual foundation to enable them to apply the statutory formula.

12. The proper relationship between disability and bodily function is I think set out in the passage in Lord Woolf's speech at page 306 where he says -

"Then it might be suggested that the section requires a 'disability' which differs from the loss of 'function' and that that is why in the present case you have to treat the inability to walk as the loss of function and the loss of sight as the disability. Again I do not agree. If a man loses his leg and cannot walk, the loss of the leg is the disability and the inability to walk is the bodily function which is impaired. If a man's eyes are injured (he could lose one or both eyes), the disability is partial or total blindness and the bodily function which is impaired is the ability to see.

I note that s 35 refers to bodily functions, in the plural, and I recognise that the same result can be achieved by treating the assistance with walking required due to blindness as being in connection with both the bodily function of seeing and that of walking. This is a possible approach. But take the cutting of Mr Mallinson's food or the assistance with bathing which, correctly, in accordance with earlier decisions, are treated as attention. There is nothing wrong with Mr Mallinson's hands. They function satisfactorily and still perform many functions without assistance but he still cannot use them for these functions because they require sight. In time he may well be able to do but for the time being he needs help. Therefore where, as is the case with blindness and other disabilities, such as deafness or paralysis, the function which is primarily impaired as a result of the disability can be readily identified, I suggest that it is preferable to focus on that function. So here, the assistance with cutting of food, with bathing and guiding would all be

attention, which should be aggregated as being required in connection with Mr Mallinson's totally impaired sight. This is a more straightforward approach than seeking to link the attention with those different functions which he could perform perfectly but for his loss of sight."

13. Thus in this case it would be difficult to see how additional washing, which it was found by the tribunal was a task performed by the claimant's wife, could amount to attention within the statutory formula unless the impairment of the claimant's bodily function prevented him from carrying out this task for himself. It was conceded by Mr Neilson that if the claimant had not been capable of doing washing of the nature found by the tribunal due to a physical impairment then the washing involved could constitute attention within the ambit of the statutory formula. However I am reluctant to come to any conclusion on that matter in the abstract. It is only when adequate facts have been found that the statutory formula falls to be construed and applied. The reasons why the adjudication officer's appeal succeeds in this case are related to the failures of the tribunal to state facts and reasons adequately rather than the grounds set out by the adjudication officer in the grounds of appeal. The factual situation in R(A) 1/91 was rather different to the present case in respect that that case was related to a 9 year old child. I am not inclined standing the approach I have taken in this appeal to make any obiter observations on R(A) 1/91.

14. I should also briefly add that I consider that the question of day supervision was before the tribunal. The tribunal made no proper findings in fact in relation to the evidence in respect of the disability caused by blackouts and in my view it did not give adequate reasons for rejecting the claimant's evidence in that regard.

15. When the case comes before the freshly constituted tribunal in relation to the attention condition a tribunal should ask and answer and make findings in fact in respect of the questions posed by Lord Woolf at page 307 of the report of his speech. When they have done that they should apply the statutory formula in accordance with the facts found following what was said by Lord Woolf in Mallinson in relation to what constitutes bodily functions and what attention in connection therewith satisfies the statutory condition. They will have to make findings in fact in relation to all the disabilities in respect of which the claimant gives evidence and ask the questions in respect of each of the disabilities. They will also have to deal with the issue of supervision which was before them. They will require to make findings in fact in that regard. If there was evidence of falling the tribunal ought to have regard to what was said by the Commissioner in R(A) 3/89 and R(A) 5/90. I would direct the adjudication officer to make a fresh submission to the tribunal in relation to the case. As I have indicated on many occasions before what was presented to the original tribunal is not a proper submission. A proper submission involves setting out the facts relied upon by the adjudication officer in a narrative form in conjunction with the statutory provisions and authorities relied upon together with the adjudication officer's views as to how they ought to be applied by the tribunal. In addition it would I think be helpful to the tribunal for them to have a submission in relation to the adjudication officer's view in relation to the effect of Mallinson upon the appeal.

16. The appeal succeeds.

(signed)

D J May  
Commissioner  
Date: 19 May 1994