WMW/HJD Commissioner's File: CSA/83/90

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM DETERMINATION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: [redacted]

[ORAL HEARING]

1. I hold the determination given for and on behalf of the Attendance Allowance Board on 22 May 1990 to be erroneous in point of law. In exercise of the power conferred by regulation 23(2)(a)(ii) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 I set that determination aside and I make the findings and give the decision I consider appropriate.

2. That decision is that with effect from the expiry of the certificate issued for consideration of payment of the allowance on 9 September 1985 a further certificate should be taken to have been issued, in response to the application for a renewal dated 24 July 1989, to have effect until the child's 16th birthday. That, however, is to be read subject to what is said in paragraph 9 below.

3. Before proceeding further I should explain that attendance allowance, and indeed the Board, have effectively been abolished to allow for the introduction of the new disability living allowance. It is because of the consequential changes in the law of social security that I have been enabled to give the decision just recorded. However it is also appropriate to remit the case for consequential procedure to the adjudication officer.

The case came before me by way of an oral hearing, convened also to consider a very similar case on file CSA/113/91. In respect of both claimant's Mrs Gill Jones, a Health and Community Care Officer with the National Deaf Childrens' Society appeared. In respect of the other case she was also assisted by Mr Alan McQueen, a local representative of the Society. She was further assisted by Mr Alex Preston who acted as her interpreter since she is herself deaf. The Secretary of State was represented by Mr William Ferrie, Solicitor, of the Office of the Solicitor in Scotland to the Department of Social Security. I am indebted to all those, and perhaps especially Mr Preston, for the assistance which they afforded to me in these cases.

5. In this case the former certificate had been issued upon the grounds of satisfaction of the day supervision condition - section 35(1)(a)(i) of the Social Security act 1975. The renewal request was refused and the review subsequently requested produced a determination not to revise that renewal determination being *ultra vires*. It is that latter determination that is now before me. I at once say that I perceive no error of law in that determination so far as the day supervision condition, or either of the night conditions is concerned - nor, indeed, in regard to the adequacy of the DMP's explanation as to why he held the day supervision condition no longer to be

satisfied. Indeed it is right to record that no challenge was directed to those possible grounds of satisfaction of the attendance allowance conditions. That leaves the day attention condition and it was upon that that the case centred.

6. The claimant, by whom of course I mean the child, is profoundly deaf. She has consequential communication problems. There was no dispute but that her difficulties in receiving and emitting communication were bodily functions. What the statute requires in that regard, in order to warrant the allowance, is that the individual requires frequent attention from another person throughout the day in connection with that function - and in this case of a child, that attention being attention substantially in excess of that normally required by a child of the same age and sex. The DMP accepted that the child is profoundly deaf and noted evidence that her attempts at speech are quite distorted. He referred to reports indicating that the child was able to understand lip-reading to a certain extent and could understand sign language. He went on to refer to evidence indicating that an interpreter is required at all times since she cannot communicate with strangers, for example in shops or social situations. From that evidence he accepted -

> ".. that [redacted] requires some attention in connection with her bodily function of communication, particularly outside her home and school environment."

He then went on -

> "Bearing in mind that she can lip-read and use sign language, albeit to a limited extent, I do not accept that such attention is required with sufficient frequency to satisfy the requirements of the 1975 Social Security Act. Communication is one of many bodily functions, and the evidence clearly shows that [redacted] is independent in the management of the other bodily functions listed in the medical report."

He then referred to evidence suggesting that the child needed extra help to cope with education and responded that he considered -

> ".. that attention required to improve her educational attainment does not constitute attention in connection with her bodily functions."

He then noted that the child needed the help he had set out but, viewing the overall picture, he did not accept the relevant statutory condition to be satisfied.

7. Mrs Jones and Mr Ferrie were really at one in submitting that the DMP had not addressed the central issue here properly. Because the child could to some extent at least lip-read and use sign language no doubt some rather less amount of attention than formerly was required in order to achieve actual communication with her. That is the only matter the DMP determined and, for all that I can say, determined it correctly. But as they pointed out the question is not determined by the degree of communication that can be achieved but by the amount of attention required in order to achieve it. And the evidence before the DMP clearly indicated that attention was required on virtually every occasion when communication was to be had with the child. That is because, on account of her deafness, it was necessary to make some form of physical contact with her in order to commence communication at all. Thus, as the mother recorded in one of her letters, she could not even call

the child for meals: she had to go and make physical contact in order to gain the child's attention - and that even if they were in the same room. That is understandable. Normally one might speak to a child, or call its name and, hopefully, gain a response. But here, as was explained, perhaps more fully to me, unless the child happened to be looking at the individual wishing to effect communication, and from their relative positions and other factors such as lighting could appreciate that she was being addressed it would still be necessary first to make a physical contact. It is not set out in the papers and I have to say that it was not raised in the hearing before me, whether when the child wished to communicate she had to do something similar or whether her distorted speech might be sufficient. It must therefore be understood that I am dealing only with situations where it is desired that the child received communication. The DMP has not considered that aspect of attention and, given the evidence before him it is clear that he should have considered it. That is an error of law and indeed is the sole error of law upon which I have set aside his determination.

8. From the material before him, but even more from the material before me, whilst as the child has got older it may be that once communication has commenced she can make more of it of herself it is in the very nature of things that communication will tend to become more frequent - no doubt in part because of any improvement in the child's ability to conduct the communication for herself. But given that the attention is required to initiate any communication, even if no longer so much required for the conducting of it, it appears to me to be inevitable that whilst the amount of attention may in one sense have decreased in the other it will have become required more frequently. And I suspect that that will be so whether at home or at school or elsewhere. In that respect at least I would have held, had it been necessary, that the DMP was ill-founded as matter of law when apparently rejecting attention required to improve educational attainment. In so far as that was related to the initiation or the conduct of communication it was, in my judgment, still attention in connection with a bodily function however much it may also have been in connection with an intellectual function as well. To that extent I have included attention in the sense in which I have been sing it hereinbefore as being required because of the child's physical isability as counting towards the total attention required from another person.

9. So approaching the matter it appears to me that the attention this child requires has grown in a form of inverse proportion to the amount of attention required by a hearing child of the same age and sex going through the same years of growing up. Accordingly I hold the day attention condition to have been satisfied as at the date of application for the renewal certificate and, of course, the preceding six months has been in any event covered by the then existing certificate. I consider that, upon the same evidence, the Board would, or at least ought, have granted the certificate until the age of 16 when the statutory conditions would change. Having said that I must at once repeat that attendance allowance having now been replaced by disability living allowance the consequence will be a conversion to disability living allowance after 6 April 1992. These consequences in this particular case must be reserved to the adjudication officer.

10. Finally, I should note that one point was raised about the day supervision condition. That was not so much on a point of law as on a question arising from my decision although I think it was initially advanced by Mrs Jones on the former basis. However I am satisfied that it is not

really a point of law. What was being urged was that because of the difficulty explaining dangers in the abstract to this child it was necessary that an eye be kept on her so that if she appeared to be getting into a dangerous situation communication could be initiated upon the particular danger. Otherwise, it appeared, it would be difficult if not impossible to teach her about danger. There were examples in the papers of, on one occasion, the child inserting a knife into a live electric toaster. Other examples included turning on taps and leaving them. Where a hearing child could listen to the extent on which the container was filling, and even be reminded that it was filling by the sound it was necessary to initiate communication with this child when she appeared to be forgetting; similarly with pans put on a stove and the like. And of course there can be no suggestion that this child should be disadvantaged by not being able, for example, to run a bath or to try to cook. This all rather demonstrated, to my mind, how much attention and supervision may overlap. But I have come to the view that the primary consequence of this child's disability being the need for attention to get communication going it is probably that aspect rather than supervision which is involved and therefore I have so regarded the sort of incidents mentioned above.

11. The appeal succeeds.

(signed) W M Walker
Commissioner
Date: 30 November 1992