

→ Dear Carol - Needs Attention in
Commissioner when the Basic Function

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WMW/HJD

Commissioner's File: CSA/113/91

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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: MRS IRENE MASON ON BEHALF OF COLIN GEORGE MASON

[ORAL HEARING]

1. This claimant's appeal succeeds. I hold the determination given for and on behalf of the Attendance Allowance Board on 9 June 1991 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 to the case.
2. That decision is that with effect from the expiry of the certificate issued for consideration of payment of the allowance on 7 October 1986 a further certificate should be taken to have been issued, in response to the application for a renewal dated 10 August 1990, to have effect until the child's 16th birthday.
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 on that account to remit the case for consequential procedure to the adjudication officer.
4. The case came before me by way of an oral hearing, convened also to consider a very similar case on file CSA/83/90. In respect of both claimants Mrs Gill Jones, a Health and Community Care Officer with the National Deaf Children's Society appeared. In respect of this 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 required produced a determination not to revise that renewal determination. 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 I really mean the child, is severely deaf. He has consequential communication problems. There was no dispute but that his 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 noted professional evidence which stated that the claimant was "profoundly deaf" and "severely deaf" without determining whether there was any difference between these terms or, if so, which in his view was applicable to the case. He went on to note that the claimant had been deafened before acquisition of language and had severe problems with communication. He had and used a hearing aid and had been integrated into a hearing class at school but for 80% of the time required the support of an extra teacher from the partial hearing unit. Lesson texts sometimes had to be changed for him. He could lip read. His communication difficulties meant that anyone wanting to speak to him -

"... had to stop what they were doing and go to wherever he was and attract his visual attention."

When his hearing aid was out of use his hearing was dramatically reduced. From the evidence he accepted -

"... in situations where he needed to communicate with strangers he would need help in order to understand what was going on but it was nevertheless my medical opinion that in normal day to day communication with familiar people he did not need help which could be regarded as being frequent throughout the day."

That seems to me unexceptional, although I doubt if the last part justified the protection of being a "medical" opinion; it was properly a judicial conclusion drawn from the evidence. He had earlier referred to evidence suggesting that the child needed extra help to cope with his education and concluded that -

"... [the boy] still needed more help in developing his independent living skills and in improving his educational attainment especially when he moved on to secondary school but I do not accept that this help constituted attention in connection with his bodily functions."

Although not expressed, it is implicit in his determination that the DMP accepted that communication was a bodily function. Finally he 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 lip-read, had a hearing aid and could to some extent speak, no doubt some rather less amount of attention than formerly was required in order to achieve 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 to be 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 his deafness, it was necessary to go and make some form of visual contact in order to commence communication at all. Normally, no doubt, 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 he was being addressed it would be necessary first to make contact, usually physically. I should add that as the aspect was not dealt with in evidence, even before me, I am unaware of any problem in starting communication in the reverse direction, from child to another person. Accordingly I have concentrated solely upon the attention required in gaining the child's co-operation in the two-way process of communication. The DMP has not considered that aspect of the day attention condition 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, it is clear that as the child has got older it may be that once communication has commenced the child can make more of it for himself but in the very nature of things communication will naturally tend to become more frequent - no doubt in part because of the child's increasing ability to conduct the communication for himself. But given that attention is required to initiate any communication with him, 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 in law when apparently rejecting attention required to facilitate communication at school. In so far as that was related to the initiation or the conduct of communication it was, in my judgment, 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 using it hereinbefore as being required because of the child's physical disability 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 an 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 is in any event covered by the then existing certificate. I consider that, upon the same evidence, the Board would, or at least ought, to have granted the certificate until the age of 16 when the statutory conditions would have changed anyway. 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 from and after 6 April 1992. The consequences of that change in this particular case, however, are 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, and other rather abstract concepts, it was necessary for some extra-normal supervision to be provided lest the child got into a dangerous situation. Examples included dealing with electric appliances, or 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 if he appeared forgetful. And of course there can be no suggestion that he should be disadvantaged by not being able, so far as appropriate to his age, to run a bath or use electric appliances. 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 attention to get communication going it is probably that aspect rather than supervision which is involved.

11. The appeal succeeds.

(signed) W M Walker
Commissioner
Date: 7 December 1992