RH -v- Department for Communities (DLA) [2025] NICom17

Decision No: C3/25-26(DLA)

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**DISABILITY LIVING ALLOWANCE**

Application by the claimant for leave to appeal

and appeal to a Social Security Commissioner

on a question of law from a Tribunal’s decision

dated 27 August 2024

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I give leave to appeal and allow the appeal. The decision of the appeal tribunal (“the tribunal”) dated 27 August 2024 is set aside and the case remitted to a panel of the Appeal Tribunal which must be wholly differently constituted, to hear the appeal entirely afresh.

2. The Appellant, a boy aged 7 at the date of the Department’s decision (24 October 2022), acting by his mother as Appointee, had appealed to the tribunal, which allowed the appeal only to the extent of extending the period of the Department’s award so that it expired on 10 November 2027 rather than on 10 November 2024 but otherwise refused it. In particular, it refused an award of the higher rate of care component (HRCC) which meant that there was no question of the Appellant being awarded the higher rate of mobility component (HRMC) via the “severe mental impairment” route either.

3. By a submission dated 24 February 2025, Laura Patterson on behalf of the Department supported the appeal on the basis that the tribunal had not given adequate reasons for explaining that the Appellant does not meet the night-time condition for HRCC because it had not shown that it considered the test described by Judge Hemingway in *LB v SSWP (DLA)* [2018] UKUT 445 (AAC).

4. In an email of 23 May 2025, the Appointee submitted that the case is suitable for a decision to be substituted, awarding both HRMC and HRCC, given (on her case) that the facts have already been established. She indicates she is experiencing mental health difficulties and financial strain and has sought an expedited decision.

5. Under section 73(3) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, to qualify under the severe mental impairment route a person has to be “severely mentally impaired”, to exhibit “severe behavioural problems” and to qualify for HRCC. The meaning to be given to the first two terms quoted is then developed in regulation 12(5) and (6) of the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992/32:

“(5)  A person falls within section 73(3)(a) (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning.

(6)  A person falls within section 73(3)(b) (severe behavioural problems) if he exhibits disruptive behaviour which –

(a) is extreme;

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property; and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.”

6. The Appointee’s case in summary was that she would have gone to bed at (it is variously stated) 9.30 or 10 pm but that the Appellant needed attention before he would settle at 11.30 pm -12 midnight.

7. I return below to whether the tribunal’s findings of fact were adequate, but it dismissed the appellant’s entitlement to HRCC and thereby to HRMC on the basis that if the Appointee was staying up to provide the attention the Appellant needed, the time when that attention was provided necessarily remained part of the day, so such assistance could not meet the night condition.

8. That, in my judgment, was an error of law.

9. In *LB*, Judge Hemingway observed:

“5. In *R v The National Insurance Commissioner ex parte Secretary of State for Social Services* [1974] 1 WLR 1290, the word “night” as used as part of the statutory test for DLA was defined as being: “That period of inactivity or that principal period of inactivity through which each household goes in the dark hours and to measure the beginning of the night from the time at which the household as it were, closed down for the night.”

6. In volume 1 of “Social Security Legislation 2018/19 Non-Means Tested Benefits and Employment and Support Allowance” published by Sweet and Maxwell, there is this, to my mind, insightful observation:

“While this definition seems to address itself to the habits of the particular household there should be room to take account of the more objective, typical household. Thus, if one (possibly the only other) member of the household remains up late to undertake what is a regular attention need that should be regarded as a night-time need because otherwise the household would, as a whole, have been retired to bed. Conversely, when children have gone to bed, but their parents have not, any attention prior to the parents normal bedtime will be attention by day, and any attention to the child before the parents usual time of rising will be attention at night. The first part of this approach was confirmed in R(A) 1/78 (rejecting another part of Lord Widgery’s judgment in the case above).”

7. For the avoidance of doubt, “the case above” is *R v National Insurance Commissioner ex parte Secretary of State for Social Services*.

8. …[I]n CDLA/997/2003…, the mother of a child claimant had to rise regularly, at 5.00 am each morning, because that was when the child claimant would wake up and his supervision needs would commence. But the evidence was that, otherwise, she would not have risen until 7.00 am. So, it was accepted that the supervision between those hours would count as being given at night. That decision is perhaps somewhat dated now but the passage of time has left the force of its logic undiminished.

9. Translating all of that to this case, it does seem to me that when it rehears the appeal the tribunal will have to consider whether there are at least some nights when the appointee has to remain awake later than she would otherwise do as a result of the child claimant’s needs which arise when he is being helped to get to sleep. I have in mind the lying down with the child and any other activity which may accompany that. If it is concluded that the appointee does stay awake later than she would normally do, that on those nights the household would otherwise have closed down earlier, and that during the time between the normal closing down of the household and the actual closing down there is a need for watching over or prolonged or repeated attention then it will be open to the tribunal to conclude that any such activity is to be taken into account when evaluating the extent of the child claimant’s night-time needs. I do not think I am saying anything at all which is new here but rather, I am simply restating what was said in CDLA/997/2003 and agreeing with the words I have quoted from the above well known publication.”

10. However, Judge Hemingway expressly indicated that the above observations were not an operative part of his decision (in legal jargon, they were *obiter dicta*).

11. Nor do I consider that those observations, while helpful, paint a sufficiently rounded picture as to the state of the law that this case could properly be decided by reference to that case alone. In R(A)1/04, a reported decision which on the principles applied at that time commanded the broad assent of the majority of judges of the Administrative Appeals Chamber of the Upper Tribunal in Great Britain, the judge summarised existing authority in the following terms:

“13. In CDLA/3242/2003 Mr Commissioner Jacobs, considering *R v. NI* *Commissioner* and R(A) 1/78, said:

‘My understanding of the law is this.

13.1Day and night are words that have a significance in indicating a division of a period of 24 hours.

13.2 Day and night are determined for the household as whole, not individually for each member.

13.3 In determining the precise point when night begins and ends, the routine of the household will be relevant for marginal purposes.

13.4 But unusual or extreme household arrangements cannot override the core element contained in the words ‘day’ and ‘night’.’

14. There are two other recent decisions, CDLA/997/2003 and CDLA/2852/2002, which have considered “day” and “night”. In CDLA/997/2003 the Commissioner had to consider a child who woke at 5.00 a.m. everyday and remained awake. His mother got up at 5.00 a.m. as well, but the other members of the household remained in bed until about 7.00 am. The Commissioner held that the mother would not have got up at that time, but for the child waking. Accordingly that time was the “dehors” of the rising time of the household generally and was accordingly night. In both these cases the Commissioners considered that there was an objective element to the word “night” whatever was the routine of the household.”

12. The judge observed in para 15 that “I consider that it is within my judicial knowledge that a reasonably average household might consider night to be from about 11.00 p.m. to about 7.00 a.m”.

13. What constitutes “night” for this purpose is ultimately a question of fact: see *R v National Insurance Commissioner ex p. Secretary of State for Social Services* [1974] 1 WLR 1290. The patterns of the individual household are relevant but, as noted by Judge Jacobs above unusual or extreme household arrangements cannot override the core element contained in the words ‘day’ and ‘night’. It therefore does not automatically follow that if a person says that their household does, or would, go to bed at an unusually early hour, it thereafter becomes “night”.

14. I do not consider that the present situation is on all fours with CDLA/997/2003. In that case, the household’s hours were within typical objective parameters, but the carer had to get up early. Here, the carer’s case is that the sleeping arrangements she would have adopted but for her caring obligations displace the parameters identified in R(A)1/04.

15. In the present case, the tribunal has recited much evidence and law, but has not made sufficient findings of fact. Although it recites in para 39 the Appointee’s evidence that she would go to bed at 9.30 pm, there is no finding of fact that that is the case. The decision is equivocal as to whether it accepted that the Appellant needed assistance for 50-70 minutes every night: note the words “if at all” in para 33 of its Reasons. On the other hand, in para 36, the suggestion that he “reportedly required routines at night” was “not disputed by the tribunal”, while para 39 recites the Appointee’s evidence on the topic without making a finding. Effectively the tribunal was able to hedge its bets in this way by the erroneous position it adopted that if the Appellant did have such needs, it necessarily meant they were day needs.

16. The tribunal’s errors with regard to eligibility for HRCC were to fail to make the necessary findings of fact as to the attention provided to the Appellant. It also needed to consider in the round whether such attention was provided by day or at night, rather than by ruling in effect that if the Appointee stayed up to provide attention, that meant it was necessarily by “day”.

17. I also consider the tribunal made insufficient findings as to the remaining conditions for the “severe mental impairment” route.

18. I do not consider that the tribunal ever reached a conclusion as to whether the Appellant does have “severe impairment of intelligence and social functioning” for the purposes of the legislation. Although it addresses the question between paras 23 and 25, it does not answer it, at any rate not in terms. Then, when it goes on to consider the issue of “severe behavioural problems” for the purposes of the legislation in paras 26 and 27, it recites the evidence in para 27 without appearing to reach a conclusion; or, if (contrary to my view) para 27 is to be read as reaching a conclusion, it is only that “many” of the behavioural criteria were satisfied, when in order to qualify, they all need to be. These gaps appear to have been conditioned by the tribunal’s view that it was impossible for the Appellant to meet the condition of receipt of HRCC and thus that the remaining conditions did not need to be definitively determined.

19. This is not a case in which I consider it expedient to remake the decision myself. As further findings of fact are required, they will best be made by a panel of the Appeal Tribunal, which will contain a Medically Qualified Panel Member and a Disability Qualified Panel Member.



(Signed): C G WARD

DEPUTY COMMISSIONER (NI)

30 July 2025