

## Taking Mallinson Cases to Tribunal - a guide for visually impaired people

This briefing paper is intended for people who are appealing for the middle rate care component of Disability Living Allowance (DLA) and its equivalent, the lower rate of Attendance Allowance.

In particular we focus on the daytime attention condition as it is affected by the House of Lords judgements in *Mallinson v. Secretary of State for Social Security* [21.4.94] (published as an appendix to the reported Commissioner's decision, R(A)3/94) and *Secretary of State for Social Security v. Fairey (aka Halliday)* [21.5.97]. This paper assumes some familiarity with the *Mallinson* judgment. You should, therefore, have read either our 'Disability Living Allowance' or 'Attendance Allowance' fact sheets and our 'help with seeing' checklist.

### Appeal Tribunals

If you have been refused Attendance Allowance or DLA middle rate care component following a claim, revision or supersession you can appeal to a tribunal. We strongly recommend that you seek representation when you appeal. This is the way appeals work:

- Appeals are decided either by an oral hearing or through correspondence. The Appeals Service will offer you the option of an oral hearing or paper appeal. You should get at least 14 days notice of your tribunal date. If you cannot attend, or need time to obtain further evidence you should ask the Appeals Service for a postponement.
- Your case will be decided by an Appeal Tribunal made up of three people. The chair is a lawyer and the two other 'wing' members consist of a medical practitioner and someone with experience of working with disabled people or is disabled themselves. The DWP is sometimes represented by a 'presenting officer' who takes no part in the decision making. The Appeal Tribunal is not allowed to conduct medical examinations. If there is any dispute or doubt about a medical question (e.g. the nature and extent of a visual impairment) you can request an adjournment to obtain further medical evidence.

### How to argue your case

The reasons for the Benefits Agency decision will be contained in the appeal papers. The crucial 'disability question' is whether you need 'frequent attention throughout the day...in connection with [your] bodily functions' [sections 64 and 72 Social Security Contributions & Benefits Act 1992]. The Benefits Agency may decide that you don't satisfy this condition because:

- the help you need is not reasonably required
- the help you need is related to a domestic duty
- the help you need is not frequent enough
- the need can be met by an aid or adaptation.

Let's look at each of these issues in turn:

## **Reasonably required attention**

In order for attention to count it must be “*reasonably required*” as opposed to medically required [R(A)3/86]. The House of Lords judgment in *Fairey/Halliday* [21.5.97] has confirmed that help to perform social activities can be reasonably required. On 14.10.94 Commissioner Sanders in Rebecca Halliday's case ruled that:

**“it is right to include in the aggregate of attention that is reasonably required such attention as may enable the claimant to carry out a reasonable level of social activity” [CA/780/91]**

The Secretary of State for Social Security appealed against this ruling, unsuccessfully to the Court of Appeal, and then to the House of Lords. The Secretary of State argued that help with communication could only count if it served an ‘*essential*’ purpose. Social activities, it was argued, were merely ‘*desirable*’ but not essential. The Law Lords, by a four to one majority, took a different view. Lord Slynn said:

**“I reject the contention that the relevant attention must be essential or necessary for life and that attention must not be taken into account if it is merely desirable. The test, in my view, is whether the attention is reasonably required to enable the severely disabled person as far as reasonably possible to live a normal life. He is not to be confined to doing only the things which totally deaf (or blind) people can do and provided with only such attention as keeps him alive in such a community”**

Lord Slynn also went on to say:

**“In my opinion the yardstick of a ‘normal life’ is important; it is a better approach than adopting the test as to whether something is ‘essential’ or ‘desirable’. Social life in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life. It is not in any way unreasonable that the severely disabled person should wish to be involved in them despite his disability”**

The House of Lords judgment means that the Benefits Agency cannot argue that help with social activities is not reasonably required. You may nonetheless wish to consider the following issues when preparing your appeal:

- **What is a ‘reasonable level of social activity’?** *Halliday* has established in law that social activities *can* be reasonably required. This does not mean that all help in social situations will automatically count. Guidance to Benefits Agency decision makers advises them to:

**“take into account the age, sex, interests and other circumstances of the disabled person in deciding whether help with a particular activity is reasonably required. A disabled person is not expected to live a restricted life because of a disability, but this does not mean that everything a claimant wishes to do is reasonably required” [AM(AOG)29, 9 June 1997]**

You need to show that the activities you need help with are part of a ‘*normal life*’ for people of your age. If you have an unusual hobby or pastime you should explain the personal importance to you of such a pursuit.

- **What if I don't have much of a social life?** If you don't go out much you may nonetheless feel that you are missing out. You should argue that you need daily help to enable you to enjoy a normal social life and to take exercise. What activities have you been forced to give up because of your disability, or because you can no longer get anyone to assist you? What social and recreational activities would you pursue if you had someone to help?

## **Domestic duties**

The issue of domestic activities is still very problematic. Where help with seeing is related to cooking, housework, shopping or any other domestic duty the DWP is likely to say that these tasks are not ‘*closely connected*’ to your bodily functions. Therefore, if a carer performs a domestic duty on your behalf this is generally not treated as attention. The House of Lords judgment in *Cockburn* [21.5.97], which was given at the same time as the *Fairey / Halliday* decision, has allowed for some exceptions to the blanket exclusion of domestic duties. The current guidance to decision makers advises that:

**“The performance of ordinary domestic tasks such as cooking, shopping and keeping the house clean, which are commonly done by one person for the benefit of another, is not attention in connection with a bodily function because the tasks do not normally need to be done in the presence of that person” [AM(AOG)29, 9 June 1997]**

The DWP approach to domestic duties derives from the cases of *Packer* [*R v National Insurance Commissioner ex parte Secretary of State for Social Services*, 1981] and *Woodling v Secretary of State for Social Services* [1984]. In the *Packer* case Lord Denning excluded domestic duties from being treated as bodily functions. Denning also held that domestic duties, such as food preparation or making hot drinks, were too remote from the bodily function of eating. Also in *Packer*, Lord Justice Dunn defined attention as a “*service of a close and intimate nature*” that involved “*personal contact carried out in the*

*presence of the disabled person*". In *Woodling* Lord Bridge held that attention involves "a high degree of physical intimacy between the person giving and the person receiving the attention". The DWP has used these two cases to argue that all domestic tasks can be performed outside the presence of the disabled person, and therefore cannot count as attention. The *Cockburn* judgment has, however, qualified the requirement of 'presence'. Lord Goff said that:

**"the requirement of presence has not to be applied too strictly, because attention...may inevitably involve brief absences from the dependent person; but it marks a characteristic of the attention which is required"**

Where then does attention end and domestic duties begin? In the case of Mrs Cockburn, Lord Goff said that:

**"the services of changing her clothes or her bed linen and remaking the bed, even (as part of the same operation) rinsing out the soiled clothing removed from her, are sufficiently personal to fall within the section. But taking laundry away to be washed transcends personal attention of that kind"**

The majority approach in *Cockburn* suggests that specific domestic activities carried out on behalf of the disabled person can count as attention if they are part of a general sequence of tasks that are closely connected to someone's bodily functions. The guidance to DWP decision makers on *Cockburn* advises that:

**"where a domestic task is closely associated with the bodily function and performed as part of a continuous episode of attention in connection with that bodily function, even if the carer and disabled person are briefly separated, the domestic task may form part of that attention" [AM(AOG)29, 9 June 1997]**

If domestic help only counts where it is part of a wider "*episode of attention*" this will probably not add to the frequency of your needs. Moreover *Cockburn* does not clarify the issue of how to treat attention that enables a disabled person to carry out their own domestic tasks. If you want to take up the issue of domestic duties we suggest you do so along the following lines:

- **You need help to perform your own domestic duties.** The *Cockburn* case and the earlier cases of *Packer* and *Woodling* assume that domestic tasks are carried out by a carer on behalf of the disabled person. However, what if you do your own shopping or cooking, but need a sighted person to assist you. For example you may need someone to guide you to the shops, read labels or price tags, or read cooking instructions to you? Help of this type is closely connected with the bodily function of *seeing*. Moreover, there is personal contact in the form of physical guidance or verbal description. Recent

Commissioners' decisions support the view that this type of assistance can count as attention. In CDLA/267/94 Commissioner Rowland held that:

**“if a claimant reasonably requires to be able himself to cook and can do so if he has assistance with, for example, seeing or lifting, that seems to show a requirement for attention in connection with his bodily functions”**

In CDLA/12381/96 Commissioner Sanders, in the case of a visually impaired woman who had problems with shopping, held that:

**“if someone else goes shopping for her that would not count as qualifying attention. But if it is reasonably necessary for someone to go with the claimant and assist her with her shopping there is, in my view, no reason in principle why such assistance should not qualify”**

Commissioner Sanders makes a similar point in relation to both cooking and shopping in CDLA/3711/95.

- **Cockburn does not apply to Mallinson cases.** The DWP guidance on *Cockburn* suggests that decision makers will continue to reject help with tasks such as cooking or shopping because these are not part of a “*continuous single episode of attention*”. You should argue that the *Cockburn* judgment does not apply to *Mallinson* activities like guiding or reading. In CDLA/11652/95 Commissioner Howell held that an adjudication officer was wrong to cite *Cockburn* in the case of a blind person who needed help to perform their own domestic tasks:

**“The needs for attention which this claimant identified...were not for someone else to take his laundry away, perform domestic chores or go out to the shops instead of him. His whole case was based on his need as a blind person to have the minimum assistance necessary from someone at his side to supplement his missing sight while he was struggling to do these tasks, and so lead as normal life as possible”**

Commissioner Howell went on to say that:

**“On the authority of the House of Lords decisions in *Mallinson* and *Fairey*...such assistance to a blind person is now eligible to be taken into account, not in connection with the functions of eating, keeping clean, etc... but in connection with his non-existent function of seeing”**

If the DWP says that shopping or cooking can't count because these tasks can be carried out without you being present, the decision maker is arguably applying the wrong test. In CDLA/267/94 Commissioner Rowland says that “*it*

seems to me that cases of this sort turn on what the claimant reasonably requires". It would be more appropriate, therefore, to ask whether help to perform domestic tasks is 'reasonably required'.

- **Is it reasonable to do my own domestic tasks?** Commissioner Rowland asks the question: "*Does he [the claimant] reasonably require attention so that he can himself cook or can that requirement reasonably be obviated by having someone else do the cooking for him*"? One line of argument would be to insist that it is important for blind people to attempt to be as independent as possible. This is why learning to perform household tasks is an integral part of rehabilitation training. Argue that it is essential to your dignity and self-esteem that you exercise as much control over your food preparation, domestic hygiene and household budget as you can. Explain why it is unreasonable for you to sit in an armchair all day and vegetate.

## **Caring for your child**

Looking after a young child is another area of dispute. We believe that if a parent needs sighted help to wash, dress, feed and play with his/her child that is attention with the bodily function of seeing which is reasonably required. In CDLA/16996/1996 Commissioner Saunders said:

**"In my view, attention in connection with the bodily function of seeing to enable a sight impaired person to deal with (to use a neutral expression) her very young children is properly capable of counting as qualifying attention."**

However, Commissioner May in CSDLA/314/97 disagrees saying such help is "*too remote*" to be attention.

The issue came up again in CDLA/16129/1996. Commissioner Goodman agreed with Commissioner Saunders saying:

**"In summary I conclude that such assistance as the present claimant receives from other persons to enable her to look after her young baby's personal requirements is assistance with claimant's bodily function of seeing."**

Given this difference of opinion you should not rely on it if possible.

## **Aids and adaptations**

If the DWP thinks that you can use a particular daily living aid to meet a need then they will say you don't need attention from another person. They may, for example, argue that a guide dog is an '*aid*' that overcomes a need for guidance. It has, however, been established in law that it must be '*reasonable*' and '*practical*' to use a particular aid. It is therefore important to anticipate

problems relating to the use of aids and be able to argue why a particular aid may not be a reasonable or practical solution.

- **Mobility aids:** A guide dog will not be able to follow directions, read street signs and bus timetables, or anticipate outdoor hazards such as overhanging branches. A long cane will be less reliable in anticipating these obstacles and others such as loose paving stones. You should think about all the problems you commonly encounter outdoors which your mobility aid cannot anticipate or deal with.
- **Magnifying glasses:** People with some sight may be able to make use of magnification to read some print. You will need to think about what types of print you cannot read with magnification. There will be situations, outside your home where the light is too poor to read anything. Equally, reading a long text may put too much strain on your eyes.
- **Other equipment:** Some tribunal doctors or presenting officers may be inclined to propose aids that you haven't tried to use, e.g. closed circuit TV, talking newspapers, Braille markings, liquid level indicators, etc. Just because you have not tried something doesn't mean it will work. Again, try to anticipate these suggestions and imagine what practical problems you might have in using them. For instance neither the radio nor talking newspapers can adequately provide the depth of analysis and the features which daily papers offer.

## **Passing the frequency test**

A crucial issue to bear in mind is that of frequency. The help you need must be both '*frequent*' and '*throughout the day*'. It has been established in law that '*frequent*' means "*several times-not once or twice*" [R(A)2/80] and that '*throughout the day*' means "*at intervals spread over the day*" [CA/281/89], not just at the beginning or end of the day. The DWP may argue that there are lengthy periods during the day when no help is needed. Although the help you need must be '*spread over the day*' it does not have to be evenly spread. In CA/140/85 the Chief Commissioner considered the case of a blind man whose "*needs were confined "in the main" to the beginning and the end of each day*", and where "*there were lengthy periods in the day where no help was necessary*". The Commissioner ruled that it was wrong "*to split up the attention and then say that because of the resultant gaps the requirement of "throughout the day" was not justified*". He added that it was incorrect to conclude that:

**"once dressed in the morning there was no significant need for dressing subsequently; he went out every day and could hardly be expected to get up in the morning in his mackintosh. What happened if he got up in slippers, who was to choose the shoes of a pair so that he avoided wearing either two left shoes or one brown and one black one? As for eating and drinking he had the ordinary three meals a**

## **day with tea in the morning and apparently on occasions some late evening drink before going to bed”**

You can use this decision to argue that the help you need with activities like eating can include snacks and breaks taken in between main meals. When presenting a picture of the frequency of your needs there is little point in concentrating on relatively rare activities (e.g. you may visit a relative once a month). Instead it is far more fruitful to stress the help you need with routine, everyday activities such as reading newspapers, following TV programmes, or daily recreational outings. It is worth concentrating on the following points:

- **Attending to your appearance:** Having someone check that your clothes, hands or face are clean is not only required first thing in the morning. It is an ongoing process. You should argue that you require this help after eating, drinking, going to the toilet, and after performing tasks where you are likely to get your hands dirty or clothes stained (e.g. gardening or working). The Chief Commissioner’s decision in CA/140/85 can be used to support this approach.
- **Locating household items:** If you have difficulty finding everyday items you may require a fully sighted person to describe where something is. This is a greater problem if you live with other people, because they will tend to move or misplace objects. For example, if someone makes you a cup of tea but has to describe where it is, or guide your hand to it, this should count as attention. Again, this type of help is ongoing. In CDLA/267/94 Commissioner Rowland held that, if a blind person loses things, then *“attention to help him find things that he has lost”* can count. However, he qualified this by saying that *“the tribunal...must consider whether...when the claimant has lost something, he could reasonably be expected to wait until infrequent attention was to hand”*. It is probably a good idea to cite as examples those items that are essential, e.g. keys, money, spectacles, etc.
- **Outdoor help in familiar areas:** The DWP may assume that you only need help outdoors in unfamiliar routes. Whilst you may not need continuous guiding in familiar routes, you may nonetheless require regular assistance from sighted people. You may require help crossing roads, avoiding everyday hazards, finding your way in the dark, reading bus numbers, and so on. You should explain what problems you have inside buildings where you have no control over the placement of furniture (e.g. at work or college). If you live with other people then furniture and household items may get moved or misplaced and you will require more help.

## **Tactical issues**

When you take your case to appeal the first decision you need to make is whether you opt for an oral hearing or a paper appeal. Statistically, oral appeals are far more successful than paper appeals. So, it is better to argue

your case face-to-face before a tribunal than to rely on a written appeal submission at a '*paper appeal*'. If you really can't face an oral hearing yourself, you should still arrange for somebody to attend on your behalf. If you opt for a paper hearing then you should still seek representation. An advice agency could prepare a written submission on your behalf.

The second tactical decision you need to make is whether to argue over domestic duties and childcare at all. Even if you were to persuade a tribunal that such help can count the DWP may well appeal to the Commissioner. If this happens your payment could be suspended for a lengthy period until a Commissioner's appeal is decided. If your case is strong enough we would advise you to leave out the domestic duties and childcare arguments altogether. If you can win without them it is not worth risking a possible Commissioner's Appeal. Moreover, a lengthy debate over domestic duties and childcare may only serve to distract or confuse the tribunal. If you do not feel your case will succeed without them you should ask the tribunal to consider your case both with and without such help. The tribunal can decide whether domestic duties and childcare are conclusive. Ask the tribunal chair to state explicitly in the decision whether you qualify with or without domestic duties and childcare.

Thirdly, you should consider whether you need further supporting evidence. For example, if there is an unfavourable medical report in the appeal papers, you should obtain medical evidence that supports your case. If the disputed issue is purely medical (e.g. the extent of your sight loss) you should try to obtain evidence from a consultant ophthalmologist. If there is a dispute over the extent of your care needs then it may be more appropriate to ask a social worker or rehabilitation officer for a supporting letter. Health professionals do not necessarily understand the benefit rules and may not know what to include in a supporting letter. You should therefore fully explain what they need to include in their letter.

If your doctor or consultant refuses to write a supporting letter you may be able to obtain an independent medical report through the legal aid scheme. You must be on a low income to be eligible for legal aid. You will also need to find a solicitor who does legal aid work. If you are not eligible for legal aid you may have to consider paying for a medical report yourself. You will need to weigh up how strong your case is, whether the medical evidence is essential, and whether you will be better off in the long run.

### **What if I lose the tribunal?**

If you do lose the tribunal you may be able to get the decision '*set aside*', or you can appeal to a Social Security Commissioner. If you or your representative were unable to attend an oral hearing you can ask for the decision set aside because '*a party to the proceedings*' was absent. To appeal to the Commissioner you must show that the decision was erroneous in law. If

you have been unsuccessful at an Appeal Tribunal we can advise you about taking your case to the Commissioner.

## **Background reading**

*Mallinson v Secretary of State for Social Security* [1994] is reported as an appendix to R(A)3/94. The *Packer* and *Woodling* decisions are reported as an appendix to R(A)2/80. Reported commissioners' decisions can be obtained from HMSO (020 7873 9090). The House of Lords judgment in *Secretary of State for Social Security v. Fairey (aka Halliday)* and *Cockburn v. Chief Adjudication Officer* [21.5.97] is available from the House of Lords judicial office for £5 (020 7219 3111). The unreported commissioners' decisions quoted in this fact sheet are available from the Commissioners' Office (020 7352 5145). You may also find the following journal articles useful:

*Attention needs for blind people*, Welfare Rights Bulletin 120, June 1994, published by Child Poverty Action Group (020 7253 3406).

*Mallinson: the struggle continues*, Duleep Allirajah, Welfare Rights Bulletin 121, August 1994, CPAG.

*The impact of Mallinson*, Duleep Allirajah, Adviser No. 45, Sept/Oct 1994, published by Shelter and NACAB (01858 435371 for back copies).

*The Mallinson Ruling*, Duleep Allirajah, Disability Rights Bulletin, Summer 1994, published by Disability Alliance ERA (020 7247 8776)

*Disability Living Allowance and domestic duties*, Duleep Allirajah, Disability Rights Bulletin, Winter 1996, Disability Alliance ERA.

*The House of Lords gives landmark disability ruling* [analysis of Halliday judgment], Welfare Rights Bulletin 138, June 1997, CPAG.

If need further advice you should contact your local Citizens Advice Bureau, law centre, welfare rights unit, or:

**Welfare Rights Service  
Action for Blind People  
14-16 Verney Road  
London SE16 3DZ**

**National Helpline: 0800 915 4666**

**Website: [www.actionforblindpeople.org.uk](http://www.actionforblindpeople.org.uk)**

**Email: [benefit.check@actionforblindpeople.org.uk](mailto:benefit.check@actionforblindpeople.org.uk)**

Registered Charity No. 205913



INVESTOR IN PEOPLE



**Action for blind people**