CDLA/2907/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I find the decision of the appeal tribunal ("the tribunal") given on 11 May 2004 under reference U/42/137/2004/00053 erred in point of law. I allow the claimant's appeal. Under section 14(8)(b) of the Social Security Act 1998, I set aside the decision of the tribunal and remit the case for re-hearing by a differently constituted tribunal.

2. Both parties have expressed the view that the decision appealed against was erroneous in point of law.

3. The claimant is a woman born 16 September 1959. She claimed both components of disability living allowance on 28 August 2003. In her claim form she stated that her problems were "severe lower back pain and sciatica, numbness in legs and feet and depression". Her stated medication was for pain relief, anxiety and depression. After an examination by the examining medical practitioner, the decision-maker decided that the claimant was not entitled to either component of disability living allowance. Her late appeal was accepted, the decision was reconsidered but not revised, and the appeal proceeded.

4. The tribunal was held on 11 May 2004, the claimant being present and represented by the Citizens Advice Bureau. The tribunal unanimously concluded that the claimant was not entitled to either component of the disability living allowance. The claimant appealed, with my leave, largely on the grounds that the tribunal had not adequately explained the reasons for its decision regarding motivation to perform tasks, but also suggesting the principles set out in the case of *Mallinson v Secretary of State for Social Security* ([1994] 1 WLR 630 and annexed to R(A) 3/94 from which the page references below in paragraphs 7 and 8 are taken) should apply also to a case such as this. In refusing leave to appeal, the chairman stated that she did not find Mallinson is authority for the proposition of law that attention to another person can be done by word of mouth, but that even if it were so, the tribunal had made findings on the care needs throughout the day and given full reasons for this decision explaining whose evidence had been preferred.

5. When granting leave, I queried whether the tribunal had considered supervision and whether it had dealt appropriately with the general practitioner's letter of 4 May 2004, to which I refer further in paragraph 11.

6. The Secretary of State's representative does not accept the principles of the *Mallinson* case would apply in this case, as the case "ultimately concerned the issue of guiding a blind man and whether such guidance was attention in connection with seeing." However, she does support the claimant's submission that the tribunal erred in law by failing to make findings of fact as to whether the claimant required motivating to get out of bed, wash and get dressed. Further, in connection with the cooking of a main meal, the tribunal had concluded:

> "The Tribunal were satisfied on the available evidence that the Appellant was physically able to cook herself a meal".

There was no reference by the tribunal to the claimant's mental ability to prepare a meal. The Secretary of State's representative points out that there was evidence before the tribunal that the claimant was not mentally able to plan and prepare a main meal. In a letter of 4 May 2004, the claimant's general practitioner confirmed that the claimant was on a "hefty dose of anti-depressants". A letter from the claimant's friend also gave evidence as to the claimant's lack of motivation and in the Secretary of State's representative's submission the tribunal had misdirected itself by not having considered the claimant's mental as well as physical ability to prepare a cooked main meal for herself.

7. Whilst the *Mallinson* case is authority for the proposition that the attention given to a blind person could amount to attention in connection with the bodily function of "seeing", as the head note to that decision records it was also held that attention is "in connection with a bodily function" if it provides a substitute method of providing what the bodily function would provide if it were not totally or partially impaired. Delivering the main judgement in *Mallinson*, Lord Woolf considered *R v the National Insurance Commissioner, Ex parte Secretary of State for Social Services (Packer's case)* [1981] 1 WLR 1017) and at page 29 he approved Lord Denning's focus on "the close connection required between the activity and the bodily function if it is to qualify as attention".

8. He quoted from Dunn LJ's judgement:

> ".....The word 'attention' .....suggests a service of a close and intimate nature. And the phrase' attention .....in connection with...bodily functions' involves some service involving personal contact carried out in the presence of the disabled person."

and added:

> "In that passage Dunn LJ adopts an approach which I would commend subject to one minor caveat and that is that "contact" need not be physical contact: it can be the contact established by the spoken word in the type of situations to which I will refer later."

At page 33, he stated:

> "In the case of mental, as opposed to physical disabilities, the position would usually be different. If a mental disability is not serious, it will be a case for supervision, which if it is to qualify must meet the requirements in [what is now section 72(1)(b)(ii) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act")]. However, a severe case of mental disability may well require attention with a wide range of bodily functions as opposed to primarily one function".

9. It therefore follows that attention can be given by word of mouth. It is for a tribunal to establish the claimant's needs as a matter of fact and whether they satisfy the criteria for an award under Section 72 of the 1992 Act, either in respect of frequent attention or continual supervision. It is fair to say the *Mallinson* argument was not raised in front of the tribunal.

10. Turning to the tribunal's statement of reasons, paragraph 20 records:

> "The Tribunal was satisfied on the available evidence that the Appellant was physically able to cook herself a meal."

In paragraph 23, the tribunal also records:

> "The Tribunal accepted that whilst there may be a lack of motivation and the Appellant may be depressed it is clear that she could carry out physical functions and this did not create any pattern of care needs that were frequent throughout the day. The condition was noted as variable."

There can be no doubt that the tribunal concentrated only on the physical capabilities of the claimant. Even on the basis that such conclusions were fully justified, that still left for consideration whether the claimant was "so disabled... mentally that" she satisfied the criteria for an award of the care component under section 72 of the 1992 Act. As mentioned by the Secretary of State's representative and noted above, there was ample evidence in the case papers that the claimant's mental condition was an issue for consideration. Motivation can be an issue either in a claimant's overall care needs or in connection with the cooking test. A tribunal must be prepared to analyse in some depth the extent to which a claimant needs attention or supervision. A claimant may satisfy the cooking test because of either or both physical and mental needs.

11. Here, the examining medical practitioner, having concluded that the claimant was not clinically depressed (page 67) perhaps understandably thereafter concentrated on the claimant's physical needs, largely in connection with her back pain, sciatica and numbness in her legs and feet, which were for consideration in connection with the claims for both the care component and the higher rate of the mobility component. The tribunal had before it other evidence which recorded the claimant's mental problems and it was required to weigh the evidence as a whole. The tribunal erred by emphasising only the physical needs of the claimant in respect of the care component; the new tribunal must make appropriate enquiry.

12. As mentioned above, when granting leave I queried whether the tribunal had considered supervision and whether the general practitioner's letter of 4 May 2004 should have been rejected solely on the grounds that it "came into being by reference to comments that the appellant had clearly made to her GP and some of the replies mirrored the claimants (sic) own comments in her claim pack". The tribunal was, of course, entitled to make findings regarding what it considered were marked inconsistencies and obvious exaggeration in the claimant's evidence as it gave reasons for so doing. However, at paragraph 16 of the statement, the general practitioner's evidence appears to be rejected solely on the two grounds that it reflected what the general practitioner had been told by the claimant, and that the evidence "contrasted directly" with that of the examining medical practitioner. Neither of those reasons, without more, justifies rejection of the general practitioner's evidence. I am concerned by the tribunal's apparent tendency to accept the evidence of the examining medical practitioner overall. In CIB/2308/2001, Mr Commissioner William stated:

> "20. The tribunal should then have done what Commissioners have repeatedly told tribunals to do: weigh the evidence on the issues in the case. In this case, as in too many others, the tribunal took the shortcut of preferring the evidence of the examining medical practitioner as a whole to that of the claimant as a whole..... The tribunal did

not assess the evidence from all sources together in one "weighing" exercise on the issues in dispute".

This should be borne in mind by the new tribunal. It should also bear in mind that the general practitioner's letter of 4 May 2004 appears to relate to the circumstances current at that date, and also stated that the claimant "could not cope" without a hefty dose of anti-depressants. I note that the medication described by the general practitioner on 4 May 2004 at what is now supplied at page 126 is different from that described by the claimant on her claim form. The new tribunal should seek clarification on the medication the claimant was taking at the date of the decision appealed against, and the extent to which she was "coping" at that date.

13. The new tribunal must conduct a completely hearing of the issues that arise for decision on both components of disability living allowance. As the claimant has been awarded the higher rate of the mobility component and the middle rate of the care component on a subsequent claim, the period to be considered by the new tribunal is 26 August 2003 to 10 May 2004.

14. It must weigh the overall evidence. It must make, and record, full findings of fact on all necessary points, with reasons for its acceptance of the evidence which is preferred. It must not take account of circumstances which did not obtain at the date of the decision appealed against, 11 October 2003, but must take account of any evidence which came into existence after that date, but which relates to circumstances as at that date. If the claimant is minded to submit further medical evidence, she will bear in mind this must relate to her condition at 11 October 2003, and not at the date of any report given.

15. The claimant will appreciate that my decision is limited to matters of law; the new tribunal will make its decision on the evidence before it, and the outcome may not be different or more helpful to her.

16. For the reasons stated, the claimant's appeal succeeds. My decision is set out in paragraph 1, and my guidance in paragraphs 11 to 15 above.

(Signed) **E A Jupp**
Commissioner

(Date) **18 January 2005**