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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File Nos.: CDLA/714/1998, CDLA/2560/1998, CDLA/414/1999 & CDLA/823/1999

DSS n.c. speedy K c.f.A

Starred Decision No: 29/00

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 14th September 2000

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DECISION OF A TRIBUNAL OF COMMISSIONERS

1. The decision of the Tribunal of Commissioners in the four appeals is as follows:-

(a) In appeal CDLA/714/1998 ("Case A"), the claimant's appeal against the decision of the Central London disability appeal tribunal dated 19 September 1996 is allowed. The tribunal's decision is set aside as erroneous in point of law, for the reasons given in paragraphs 21 to 23 below. The claimant's appeal against the adjudication officer's decision dated 7 July 1995 is referred to an appeal tribunal constituted under the Social Security Act 1998 and regulation 36(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 for determination in accordance with the directions given below (Social Security Act 1998, section 14(8)(b)).

(b) In appeal CDLA/2560/1998 ("Case B"), the claimant's appeal against the decision of the Swansea disability appeal tribunal dated 17 December 1997 is allowed. The tribunal's decision is set aside as erroneous in point of law, for the reasons given in paragraphs 24 and 25 below. It is expedient to substitute a decision on the claimant's appeal against the adjudication officer's decision issued on 21 March 1993, on the findings of fact made by the tribunal (Social Security Act 1998, section 14(8)(a)(i)). That decision is that the claimant is entitled to the middle rate of the care component of disability living allowance for the period from 25 June 1993 to 24 June 1998 and to the lower rate of the mobility component for the same period.

(c) In appeal CDLA/414/1999 ("Case C"), the claimant's appeal against the decision of the Oxford disability appeal tribunal dated 12 August 1998 is allowed. The tribunal's decision is set aside as erroneous in point of law, for the reasons given in paragraphs 26 to 28 below. The claimant's appeal against the adjudication officer's decision dated 4 February 1998 is referred to an appeal tribunal constituted under the Social Security Act 1998 and regulation 36(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 for determination in accordance with the directions given in paragraph 28 below (Social Security Act 1998, section 14(8)(b)).

(d) In appeal CDLA/823/1999 ("Case D"), the adjudication officer's appeal against the decision of the Oxford

disability appeal tribunal dated 12 August 1998 is allowed. The tribunal's decision is set aside as erroneous in point of law, for the reasons given in paragraphs 29 to 34 below. The claimant's appeal against the adjudication officer's decision dated 23 July 1997 is referred to an appeal tribunal constituted under the Social Security Act 1998 and regulation 36(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 for determination in accordance with the directions given in paragraph 34 below (Social Security Act 1998, section 14(8)(b)).

2. Each of these appeals arises out of a claim for disability living allowance. In each case the claimant was awarded some rate of the care component. However, in each case the principal question that arises is whether the disability appeal tribunal correctly approached the question of the claimant's entitlement or otherwise to the lower rate of the mobility component of disability living allowance and, in particular, how, if at all, considerations relevant to an award of the care component may affect entitlement to the lower rate of the mobility component. The Chief Commissioner directed that the appeals be determined by a Tribunal of Commissioners. Since the four appeals raised related issues they were heard by the Tribunal at one oral hearing. In each case the claimant was represented by Mr. Richard Drabble QC and the Secretary of State (who has by virtue of the provisions of the Social Security Act 1998 succeeded to the functions of adjudication officers) by Mr. David Forsdick of counsel. At the end of the oral hearing we gave Mr. Drabble the opportunity of making a further written submission in reply because the way in which the case for the Secretary of State was put altered during the course of the hearing. Mr. Drabble took advantage of that opportunity. We are indebted to counsel for the submissions made, both written and oral.

Background

3. In order that the legal issues that arise may be better understood we give a brief background to each of the four cases.

(1) In Case A the claimant, who comes from Somalia, suffered terrible injuries during the civil war in that country. However his principal disability is post-traumatic stress disorder arising from what happened to him and what he saw during that civil war. The tribunal awarded the claimant the highest rate of the care component for the period from 21 September 1994 to 20 September 1997 on the grounds that during the day he required continual supervision and at night he required someone to watch over him for a prolonged period or at repeated

intervals, in each case to avoid substantial danger to himself: the tribunal disallowed the claimant's claim to the lower rate of the mobility component.

(2) In Case B the claimant suffers from epilepsy. The tribunal found that the claimant had tonic/clonic attacks, once or twice a fortnight, often without warning, as a result of which she fell. The tribunal further found that the claimant was at serious risk if she did not have someone with her to save her from the worst effects of her falls. The tribunal awarded the claimant the middle rate of the care component for the period from 25 June 1993 to 24 June 1998 on the grounds of her supervision needs, but disallowed her claim to the lower rate of the mobility component.

(3) In Case C the claimant has been profoundly deaf since birth. Her first language is British Sign Language: the tribunal found that she had a limited ability to read and write (although her own evidence suggested that her reading ability was not as limited as the tribunal found). The tribunal awarded her the lowest rate of care component from 2 October 1997 for life on the grounds that she required attention for a significant portion of the day, but by a majority disallowed her claim to the lower rate of the mobility component.

(4) In Case D the claimant has also been profoundly deaf since birth. The tribunal found that he had difficulty with written communication. The tribunal awarded the claimant the middle rate of the care component from 26 September 1996 for life on the grounds that he required frequent attention during the day and the lower rate of the mobility component for the same period on the grounds of his needs for guidance and supervision on unfamiliar routes.

4. In each of the four cases it is accepted that the claimant is, by any criteria, severely disabled. It is therefore not necessary for us to decide - and we do not - whether severity of disablement is to be treated as a separate and additional test of entitlement or is to be adjudged by reference to the statutory criteria relating to care or mobility needs and as part of the determination of those criteria.

Lower rate mobility component

5. The conditions for entitlement to the lower rate of the mobility component, so far as relevant to this appeal, are set

out in section 73 of the Social Security Contributions and Benefits Act 1992. Subsection (1) of that section provides:-

> "Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the age of 5 and throughout which -
>
> ...
>
> (d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time."

By virtue of section 73(11)(b) a person who falls within section 73(1)(d) is entitled to the lower rate of the mobility component of disability living allowance. The predecessor of section 73(1)(d) (to be found in section 37ZC of the Social Security Act 1975, as inserted by the Disability Living Allowance and Disability Working Allowance Act 1991, the provisions of which came into force on 6 April 1992) was enacted, at least in part, in order to provide some relief from the effect of the decision of the House of Lords in Lees v. Secretary of State for Social Services [1985] 1 A.C. 930. It was there held that a woman who was blind, who suffered from a marked incapacity for spatial orientation and who could only walk outside with someone else to guide her was not virtually unable to walk and hence did not qualify for mobility allowance (the predecessor of the higher rate of the mobility component of disability living allowance). Such a claimant would now qualify for the lower rate of the mobility component. Section 73(1)(d), however, goes further than to provide relief for the physically disabled such as the claimant in Lees. It specifically provides that mental disability can also qualify a claimant for the lower rate of the mobility component. In the case of the higher rate of the mobility component only physical disabilities can be taken into account, unless the claimant falls within the narrowly defined category of persons described in section 73(3) (relating to those who are severely mentally impaired, display severe behavioural problems and are in receipt of the higher rate of the care component of disability living allowance). The lower rate of the mobility component is payable at a rate of roughly two-fifths of the higher rate.

The main issue

6. The main issue in these appeals - and one which has caused a divergence of views amongst Commissioners - is whether supervision or attention requirements which qualify or

which might go towards qualifying a claimant for an award of the care component under section 72 of the 1992 Act should, or should not, be taken into account when assessing the need for supervision or guidance under section 73(1)(d). Relevantly section 72 of the 1992 Act provides:-

> "(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which -
>
> (a) he is so severely disabled physically or mentally that -
>
> (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or
>
> (ii) ...; or
>
> (b) he is so severely disabled physically or mentally that, by day, he requires from another person -
>
> (i) frequent attention throughout the day in connection with his bodily functions; or
>
> (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others ..."

(Section 72(1)(a)(ii), relating to the cooked main meal test, and section 72(1)(c), relating to night-time needs, are not relevant for the purposes of these appeals). The division of opinion amongst Commissioners is illustrated by decisions (such as CDLA/757/94) which hold that supervision taken into account for the purposes of entitlement to care component cannot, without more, qualify a claimant for entitlement to the lower rate of mobility component and decisions (such as CDLA/52/94 and CDLA/3360/95) which hold that such supervision can be so taken into account.

7. Mr. Drabble's submissions on this main issue may be summarised as follows:-

(a) Parliament clearly had in mind the decision of the Court of Appeal in Moran v. Secretary of State for Social Services (Appendix to R(A)1/88) when it used the word "supervision" in the predecessor to section 73(1)(d). In that case the Court of Appeal had held that supervision to avoid substantial danger to the

claimant or others did not simply comprehend the moments when intervention was required but encompassed the notion of being on hand and ready to intervene when necessary.

(b) Supervision of the Moran type was clearly comprehended within section 73(1)(d), but the omission of the words "to avoid a substantial danger to [the claimant] or others" indicated that the objective of the supervision, other than the basic requirement that without it the claimant could not take advantage of the faculty of walking, was at large.

(c) It was clearly contemplated that the claimant might qualify for both the care component and the mobility component on the basis of the same underlying disability and notwithstanding that the need for supervision could be met by a single supervisor.

(d) There was nothing surprising in this conclusion since supervision outdoors requires the supervisor to accompany the claimant and hence to devote all, or substantially all, his time to the act of accompaniment, whilst in many cases in the home the supervisor, although supervising, could get on with other tasks.

(e) In the paradigm case of the serious epileptic, unless supervision is provided out of doors, the claimant will be exposed to substantial danger and accordingly "cannot" take advantage of the faculty of walking.

8. The high-water mark of Mr. Forsdick's submissions on behalf of the Secretary of State was that the approach adopted by the Commissioner in CDLA/757/1994, in particular in paragraphs 11 and 12, was correct. That decision concerned a claimant who allegedly had a propensity to fall. The questions of entitlement to both care component and mobility component were in issue. The appeal was supported by the adjudication officer, who accepted a submission by the claimant's representative to the effect that supervision which counted for the purposes of entitlement for the care component could also count for the purpose of entitlement to the lower rate of the mobility component. The adjudication officer, however, did not accept a submission by the claimant's representative that entitlement to the care component by virtue of section 72(1)(b)(ii), on the grounds of continual supervision requirements, "passported" the claimant to entitlement to the lower rate of the mobility component. The Commissioner rejected the submissions of both parties. He held that in the case of a person who had a propensity to fall (whether from epileptic fits or otherwise) there was nothing

initially to stop him walking out of doors, and nothing to prevent him exercising the faculty of walking, save for the temporary intervention of a fall brought on by the claimant's condition. Supervision could do nothing to rectify the position. The Commissioner held that in the case before him there was nothing to prevent the claimant from walking out of doors. The fact that she might not want to do so because of her alleged propensity to fall was a matter of choice on her part. The nub of the Commissioner's decision is to be found at the end of paragraph 12 where he stated:-

> "Supervision was not a pre-requisite for [the claimant] exercising her power of walking; it was an additional advantage rendering her walking less open to risk. But section 73(1)(d) is not concerned with supervision to avoid danger to the claimant; that type of supervision is provided for under section 72(1)(b)(ii)".

9. Mr. Forsdick's second main submission, relying in part on the decisions of Commissioners in CDLA/835/97 and CSDLA/591/97, was that one had to have regard to the kind of supervision one was looking at to see whether the requirements of the lowest rate mobility component were met, bearing in mind that the care and mobility components were directed towards different impacts of disability giving rise to different needs. He submitted that it would be highly surprising if Parliament had intended the same need be met under two benefits and that therefore one had to look at the nature of the supervision which was being provided and why continual supervision under section 72(1)(b)(ii) was given in order that danger, whether to the claimant or others, might be avoided. Such supervision covered the generalised risk of falling or a generalised lack of cognisance of danger, whether indoors or out, and these were taken into account when entitlement to the care component was under consideration. He submitted that the lower rate of the mobility component was directed to requirements which were specifically walking related and which would not be required in any event. The lower rate of the mobility component was accordingly specifically concerned with overcoming the impediment to getting around: it was not concerned with either avoiding dangers which would arise in any event (for example, falls from fits) whether indoors or out; nor was it concerned with attention (including communication), which was the function of the care component. In his submissions on cases C and D (involving claimants who were pre-lingually deaf) Mr Forsdick expressly submitted that since, following the decision of the House of Lords in Secretary of State v. Fairey [1997] 1 W.L.R. 799, attention with the function of hearing could constitute attention with a bodily function for the purposes of entitlement to the care component, such attention should be discounted when entitlement to the lower rate of the mobility component was under consideration. In answer to a request from the Tribunal he put forward as a possible re-formulation

of paragraph (d) of section 73(1) "cannot exercise his ability to walk out of doors unless he has guidance or supervision relating to the specific task of walking from another person most of the time". If Parliament had meant "supervision outdoors whilst walking to avoid substantial danger to himself or others" it was necessary the legislation should so state.

10. Mr Forsdick rejected any approach which involved, or was tantamount to, automatic passporting from care component to the lower rate of the mobility component. In summary, Mr. Forsdick submitted that it had to be shown that the need for supervision arose specifically because of walking out of doors. The lower rate of mobility component was intended to take into account the specific impacts of a disability which arose when walking, which did not arise in any event and by reason of which the faculty of walking could not be enjoyed.

11. In our judgment Mr. Forsdick's main submissions are not well founded, for the following reasons:-

(a) The words "guidance or supervision" without qualification would, as a matter of the ordinary use of language, comprehend supervision to avoid substantial danger to the claimant: there is no justification for excluding the type of supervision which is most likely to be required when a disabled individual is walking alone outside.

(b) There is nothing in the language of either section 72 or section 73 which dictates that attention or supervision requirements which are taken into account for the purposes of entitlement to the care component should not also be taken into account for the purposes of the lower rate of the mobility component.

(c) If correct, Mr. Forsdick's main submissions would mean that decision-makers acting on behalf of the Secretary of State and tribunals would, in many cases, have to embark upon the difficult task of analysing what attention or supervision requirements were, or might be, covered by an award of the care component and of deducting those requirements from the aggregate of the requirements for supervision or guidance needed by the claimant when walking out of doors on unfamiliar routes. We do not consider, in the absence of clear statutory language, that it was intended that decision-makers or tribunals should have to embark upon such a fine analysis, involving an artificial dissection of the practical realities of the lives of claimants.

(d) Mr. Forsdick's main submissions could give rise to anomalies. For example, a claimant whose

requirement for supervision to avoid substantial danger to himself or others was the same both indoors and out, was not continual but yet was required most of the time would, as we understand it, not only not qualify for the care component, but would also not qualify for the lower rate of the mobility component.

(e) Taken to its natural conclusion, Mr. Forsdick's argument on behalf of the Secretary of State would mean that a blind person (such as the claimant in Mallinson v. Secretary of State for Social Security [1994] 1 W.L.R. 630) who required frequent attention with the bodily function of seeing while walking out of doors could not rely on those attention requirements for the purposes of entitlement of the lower rate of the mobility component. This could render section 73(1)(d) of nugatory effect for the blind, the one class of person for whom it is absolutely clear it was intended should be provided some relief, following the decision of the House of Lords in Lees.

(f) Section 73(1)(d) does not contain the words "cannot exercise the faculty of walking" but uses the words "cannot take advantage of the faculty of walking". We observed that the Commissioner in CDLA/757/94 and Mr. Forsdick, in the re-formulation which we invited him to make, substituted the words " cannot exercise" for "take advantage of". We accept Mr. Drabble's submission that these last words are of wider import than "cannot exercise" and carry with them the connotation that the claimant is not able most of the time to walk over unfamiliar routes so as to be able to get to a desired destination whenever he wants to without the prescribed supervision or guidance.

(g) We note (from the printed cases) that a submission was made to the House of Lords both in Mallinson and in Fairey to the effect that attention which might be connected with entitlement to mobility component should be ignored when entitlement to the care component was under consideration. Such a submission was not accepted - see per Lord Woolf in Mallinson at 633 F and 635 A and per Lord Slynn in Fairey at 813 G-H. Although the converse proposition is in issue in the present appeals, "overlap" as a concept did not influence the majority reasoning in either decision of the House of Lords.

12. The alternative way in which Mr Forsdick put the case for the Secretary of State, if his earlier submissions were not accepted, was to the effect that one should consider whether the claimant "reasonably" required guidance or supervision most of the time when walking on unfamiliar routes. In assessing the reasonableness of the requirement one should take into account the supervision or attention needs which were already provided for by virtue of the claimant's entitlement to the care component.

13. In our judgment the reasoning set out in paragraph 11, with the exception of sub-paragraph (d), applies with equal force to the alternative way in which Mr. Forsdick put his case, summarised in the preceding paragraph. There is an additional difficulty with that alternative submission. It necessitates that supervision or attendance requirements for the purposes of care component are to be disregarded for the purposes of entitlement to the lower rate of the mobility component if, but only if, such supervision or attention requirements result in an award of the care component: an implication of such a complicated nature cannot, in our judgment, be justified on the language of the statute.

14. We therefore hold that decision-makers and tribunals when considering entitlement to lower rate mobility component. and whether the claimant cannot take advantage of the faculty of walking out of doors without guidance or supervision most of the time should ignore the fact that the guidance or supervision necessary, or elements of that guidance or supervision, may also constitute attention or supervision which qualifies, or could go towards qualifying, the claimant to entitlement to the care component. Decisions of Commissioners to contrary effect (including CDLA/757/94) should no longer be followed. Although there may, in some cases, consequently be an overlap of qualifying attention or supervision between the two components, we do not consider, for the reasons given in paragraphs 11 and 13 above, that any such overlap requires us to come to any other conclusion. We do not find this a surprising or anomalous result, since, in many cases, the guidance or supervision necessary when the claimant is walking out of doors on unfamiliar routes, particularly in a street with other pedestrians or traffic, will be of a higher degree of oversight or concentration than the supervision or attention required when the claimant is in familiar surroundings, whether indoors or out. Our conclusion does not, however, mean that a claimant who, for example, receives the middle rate of the care component on the grounds of his continual supervision requirements is automatically passported to entitlement to the lower rate of the mobility component: in many cases such a claimant will be entitled to the lower rate of the mobility component, but decision-makers and tribunals should determine such entitlement by reference to the criteria set out in section 73(1)(d) and not by reference to any other criteria.

Implied qualification of "cannot take advantage of"

15. There was discussion before us whether the words "cannot take advantage of" should be subject to some implied qualification. Mr. Drabble submitted, by analogy with the authorities on the meaning of the word "requires" in relation to the care component, that the word "cannot" should be qualified by the word "reasonably". For the purposes of the alternative way in which he put his case Mr. Forsdick accepted this (see paragraph 12 above). Both counsel agreed that the word "cannot" could in any event be qualified by the words "without unacceptable adverse consequences". In our judgment it is not necessary to introduce any words of qualification. The word "cannot" does not mean physical inability. Section 73(1)(d) pre-supposes that the claimant is physically able to walk. It further pre-supposes that the claimant may be able, without guidance or supervision, to take advantage of the faculty of walking all of the time over routes which are familiar to him and some of the time over routes which are unfamiliar to him. Given the qualifications contained in the statutory wording we consider that it can be left to the good sense of the decision-maker or the tribunal to determine whether or not a claimant can or cannot take advantage of the faculty of walking out of doors without guidance or supervision most of the time. It is not necessary for the sensible interpretation of the wording for additional qualifications to be introduced.

Other issues - the deaf

16. Mr. Forsdick, on behalf of the Secretary of State, argued that, if we adopted his main submissions, very few deaf claimants would qualify for the lower rate of the mobility component. Cases C and D before us concerned special cases of deafness, namely those who were pre-lingually deaf. We did not have before us a case involving deafness of later onset where the claimant's difficulties with communication may be less, his alertness to danger more, and his ability to find his way around little impeded, at least after he has a period of adjustment to his deafness. The cases with which we were concerned were not such. An individual who is pre-lingually deaf often has British Sign Language as his first language and may have a limited ability to lip read or to read and write English. It was with such claimants that we were concerned and our decision should so be read.

17. Three issues arose. The first was Mr. Forsdick's submission that any attention with the bodily function of hearing which counted towards potential qualification, e.g. on Fairey grounds, for entitlement to the care component should be disregarded. For the reasons given in paragraphs 11, 13 and 14 above we cannot accept this submission.

18. The second issue was whether in the case of a pre-lingually deaf person with consequent severely impaired comprehension of English, who was too frightened or nervous to walk on unfamiliar routes and who never did so unless accompanied, there could ever be entitlement to lower rate mobility component. Mr. Forsdick submitted on behalf of the Secretary of State that since such a claimant would go on unfamiliar routes if accompanied he or she only did so because he or she had derived reassurance from being accompanied. He submitted that mere reassurance could not constitute supervision. We agree that mere reassurance cannot constitute supervision; there has to be that element of monitoring or readiness to intervene described by the Commissioner in paragraph 22(k) of CDLA/42/94; accordingly we do not accept Mr. Drabble's submission that reassurance is enough. However, Mr. Forsdick's submission in our view gives too simple an analysis of what takes place. The pre-lingually deaf person derives the reassurance and is able to walk in unfamiliar places because he has the knowledge that the person accompanying him will be ready to intervene or guide if and when occasion arises. The person accompanying is, in effect, supervising the claimant against external risks or eventualities. It was further submitted on this issue that mere "fear" or "anxiety", not amounting to a mental disability but which causes the claimant not to go on unfamiliar routes unaccompanied, could never qualify the claimant for lower rate mobility component. In our judgment if it is established, first, that fear or anxiety results from the underlying disability (in the instant case pre-lingual deafness) and secondly, that such fear or anxiety is a cause of the inability to take advantage of the faculty of walking on unfamiliar routes, the necessary causal nexus is established between the disability and the inability to take advantage of the faculty and entitlement to lower rate mobility component is made out. Decisions (for example CSDLA/867/97) to the effect that fear or anxiety not amounting to mental disability must in all cases be disregarded are not, in our judgment, correct.

19. The third issue was whether guidance included assistance with communication in order to ask for directions. Mr. Forsdick placed reliance on a decision of a Commissioner in CSDLA/223/98 at paragraph 22 where the Commissioner stated:-

> "It seems to me that the guidance being referred to in the Statute is not the guidance of a passing stranger from whom directions are asked but rather that of a guide who accompanies the claimant and without whose guidance the claimant cannot exercise the faculty of walking. .. For my part I do not see how a person accompanying the claimant asking a stranger for directions on an unfamiliar route could be said to be giving guidance to the claimant. It is rather more in the way of a person with the claimant providing her with a substitute method

of communication with a third party. On any proper view it is not guidance".

Mr. Forsdick further submitted that any guidance required by a deaf person could only arise when the person was lost or unsure as to which route to take and that that could never arise "most of the time" as required by the statute. We accept that in the case of many deaf people the requirement for guidance when on unfamiliar routes will be limited since they will be capable of studying maps, reading street signs or communicating with passers by, either in writing or by speaking and lip reading. However, in the case of those who are not only profoundly deaf, but also as a consequence of that or some other disability have no, or a very limited, ability to communicate (whether by speaking or writing) or to receive information (whether by reading or lip-reading) a requirement for guidance most of the time might be made out. Such claimants may need someone with them on unfamiliar routes to ensure that they do not get lost: although the guide may only intervene occasionally - for example to indicate whether or when the claimant should take a turning - he will nonetheless be guiding (or possibly supervising) all of the time since otherwise the claimant will not know whether or when to change direction.

20. We now turn to the four cases before us.

Case A

21. The tribunal held on 19 September 1996 awarded the claimant (who, as mentioned above, suffers from post-traumatic stress disorder) the highest rate of the care component for the period from 21 September 1994 to 20 September 1997, but disallowed the claimant's claim to the lower rate of the mobility component. We were informed at the hearing that, on a renewal claim, an award of the highest rate of care component was made for the period 21 September 1997 to 20 September 2001 and that an award of the lower rate of the mobility component was made for the same period.

22. We are therefore concerned with the closed period from 21 September 1994 to 20 September 1997. No complaint is made in respect of the tribunal's award of the highest rate of care component for this period: it is, however, submitted on behalf of the claimant that the decision relating to the disallowance of the lower rate of the mobility component was erroneous in law. We accept that submission for the following reasons:-

(a) In its findings of fact on the lower rate mobility component the tribunal found, at paragraph 3, "[The claimant] can walk out of doors while unaccompanied. He would not require guidance or supervision when out of doors in unfamiliar places". The tribunal further found, at paragraph 10, that "[the

claimant], because of his mental problems, requires continual supervision throughout the day and also because of his dizziness he can fall. The tribunal considered that without continual supervision he would neglect himself, he would not get up and he would not eat."

(b) These findings indicate that the tribunal failed to consider in relation to the lower rate of the mobility component whether the claimant needed supervision when in unfamiliar places out of doors because of the danger of dizziness and falls.

(c) The tribunal's reasons confirm the tribunal's erroneous approach. In paragraph 2 of those reasons the tribunal stated "[the claimant] suffers from post traumatic stress disorder but he can go out himself. He does get anxious while out of doors. He would not require guidance or supervision while out of doors. He gets anxious and distressed whether he is [in] a quiet environment or a town environment. He will go out himself to restaurants for his meals. The tribunal do not consider that he would require guidance or supervision while out of doors most of the time in unfamiliar places."

(d) However, the tribunal's reasons continued, in paragraph 3, "...[the tribunal] considered that the supervision which [the claimant] required both indoors and outdoors was to prevent him doing something foolish and also because of the dizzy spells which amount to continual supervision throughout the day. There appears to be evidence that [the claimant] had dizzy spells and would fall, that he is also forgetful, that he suffers from paranoid delusions regarding people's possible intentions towards him. For these reasons the tribunal considered that he required continual supervision throughout the day."

(e) Again, the tribunal's finding that the claimant would not require guidance or supervision for the purposes of the mobility component is inconsistent with its findings relating to supervision requirements for the care component.

23. Accordingly the tribunal erred in law and we set the decision aside. Mr Drabble urged us to substitute our own decision for that of the tribunal, submitting that it was clear that the tribunal had in mind the decision of the Commissioner in CDLA/757/94 and that the tribunal only found that the claimant did not need guidance or supervision when walking out of doors most of the time because of that decision. However that decision formed no part of the

submissions made to the tribunal: indeed the only relevant decision forming part of those submissions was CDLA/42/94, where the Commissioner in effect accepted that supervision taken into account for the purposes of the care component did not have to be disregarded for the purposes of entitlement to the lower rate of the mobility component. We therefore cannot accept Mr Drabble's submission, but have come to the conclusion that the tribunal made inconsistent findings, which inconsistency, on the evidence before us, we are unable to resolve. We therefore, with some reluctance, remit the case to a differently constituted tribunal. It may be that the Secretary of State, in the light of the evidence leading to the subsequent award of lower rate mobility component may feel able, by exercise of his powers of supersession or otherwise, to make an award of lower rate mobility component without the necessity for a rehearing by a tribunal.

Case B.

24. The tribunal held on 17 December 1997 (which was in fact the third tribunal to adjudicate on the claimant's claim, the decision of the previous two tribunals having been previously set aside by Commissioners) was that the claimant (who, as mentioned above, suffers from epilepsy) was entitled to the middle rate of the care component from 25 June 1993 to 24 June 1998 and that she had no entitlement to the lower rate of the mobility component. We were informed at the hearing that on a renewal claim the claimant was awarded the middle rate of the care component for the period 25 June 1998 to 24 June 2002, but that mobility component was again disallowed.

25. The tribunal found that the claimant needed continual supervision by day, both indoors and out, to save her from the effects of falls following epileptic seizures and further found that her husband was constantly with her. It is clear from paragraph 7 of its statement of material facts and reasons that it concluded that entitlement to mobility component depended on whether it followed CDLA/757/94 or CDLA/52/94 (where the Commissioner took the view that supervision out of doors to avoid the consequences of epileptic fits could be taken into account for the purposes of entitlement to lower rate mobility component). The tribunal chose to follow CDLA/757/94. That, in the light of the conclusions we have reached, was an error of law. Accordingly we must set the decision of the tribunal aside. However, on the tribunal's clear findings of fact we are satisfied that we can substitute our own decision namely that the claimant is entitled not only to the middle rate of the care component for the period from 25 June 1993 until 24 June 1998, but is also entitled, for the same period, to the lower rate of the mobility component. No doubt the disallowance of the lower rate of the component for the period from 25 June 1998 to 24 June 2002 will be reconsidered in the light of our substituted decision.

Case C.

26. The tribunal held on 12 August 1998 unanimously decided that the claimant (who as mentioned above is pre-lingually deaf) was entitled to the lowest rate of the care component from 2 October 1997 for life but, by a majority, decided that she was not entitled to any rate of the mobility component. The claimant appealed saying she should have been awarded the middle rate of the care component and the lower rate of the mobility component. The adjudication officer originally concerned with the appeal supported it on the grounds that the tribunal failed to make specific findings in respect of how much attention she reasonably required and how frequently it was required. Counsel for the Secretary of State and the claimant both agreed that the claimant's appeal would have to be allowed on this ground. We accept those submissions. The tribunal, having in its findings of fact enumerated a number of occasions on which the claimant needed attention with the bodily function of hearing, in its reasons stated:-

> "Taking into account Halliday and the other decisions the care needs amounted to significant needs rather than frequent. The Tribunal was satisfied that most of the time [the claimant] coped at home using BSL or the written word. However the tribunal was satisfied that there were sufficient significant occasions where she required help and therefore that the lowest rate of care component was appropriate".

The tribunal merely stated a conclusion and failed to explain why the claimant's attention needs did not satisfy the criteria for entitlement to the middle rate of the care component.

27. On the mobility component the tribunal found:-

> "4. Apart from deafness she has no other disabilities and is able to walk without problems.
>
> 5. She is nervous in unfamiliar places and also in familiar places in the dark.
>
> 6. She can ask directions in writing and able to use buses around Oxford."

In its reasons on this issue the majority of the tribunal stated that it

> "considered [the claimant] did not require guidance or supervision in walking unfamiliar places for most of the time. It considered she was able to cope reasonably well only showing nervousness rather than panic."

Apart from the fact that the tribunal did not deal with the evidence from the claimant to the effect that she never went to a place she was not familiar with on her own and that busy places where there were lots of people, and particularly traffic, made her nervous, we consider that it fell into error in holding that nervousness engendered by her physical disability could not be taken into account. As we have indicated above we consider that if nervousness or anxiety in unfamiliar places causes the claimant not to walk unaccompanied in such places most of the time and such nervousness or anxiety is a result of the claimant's disability, then the tribunal is entitled to take such nervousness or anxiety into account when considering whether the claimant can or cannot take advantage of the faculty of walking out of doors on unfamiliar routes without supervision or guidance most of the time.

28. For the above reasons we allow the claimant's appeal and remit the case for a complete rehearing before a newly constituted tribunal and direct that tribunal to apply the principles of law set out above in relation to the lower rate of mobility component, and the well-established principles of law on the conditions of entitlement to the various rates of the care component. Since the claimant's appeal was made before 21 May 1998, section 12(8)(b) of the Social Security Act 1998 will not apply and the new tribunal must take into account all matters obtaining from the date of claim - 2 October 1997 - down to the date of the rehearing.

Case D.

29. The claimant (who as mentioned above is also pre-lingually deaf) was awarded the middle rate of the care component of disability living allowance from 26 September 1996 for life on the grounds of his day attention requirements; however the adjudication officer disallowed his claim for the mobility component. The claimant appealed. Before the tribunal entitlement to the middle rate care component was not in issue. The tribunal held on 12 August 1998 awarded the claimant the lower rate of the mobility component from 26 September 1996 for life on the grounds that the claimant needed guidance and supervision in walking most of the time. The adjudication officer appealed.

30. The tribunal's findings of fact relevant to this appeal were as follows:-

> "5. Can use a map.
>
> 6. Has difficulty with written communication.
>
> 7. Relies on his son (hearing) if out walking in unfamiliar or unfamiliar places.

8. Has a history of near misses [on] crossings and at work in unfamiliar areas.

9. Has problems in London and other unfamiliar areas when walking scared by people brushing him and cars etc., coming from behind.

10. Very anxious when by himself."

The tribunal's reasons, so far as material, were as follows:-

"Although [the claimant] holds down his job as a carpenter and uses a car to work, his requirements for guidance or supervision are very great when he is working on an unfamiliar site and in unfamiliar towns. We were impressed by the assistance and comfort which he derives from the help given by his son.

We therefore found that from 26 [September] 1996 he needs guidance/supervision in walking for most of the time."

31. The grounds for the adjudication officer's appeal were threefold. First, that the tribunal gave inadequate reasons for finding that the claimant's need for guidance or supervision was very great. We agree. In our judgment the tribunal did not sufficiently identify what guidance or supervision the claimant required when walking on unfamiliar routes most of the time. It concentrated on the difficulty the claimant faced when working on an unfamiliar site or in an unfamiliar area but did not indicate how the son "assisted and comforted" the claimant, nor why such comfort and assistance amounted to guidance or supervision nor whether it was required (rather than merely preferred) most of the time. For this reason we allow the appeal and set the tribunal's decision aside. We remit the case for rehearing by a differently constituted tribunal.

32. The second ground of appeal was to the effect that the tribunal's finding related more to a requirement for supervision to prevent danger or risk to health and thus to care component. There was no error of law on this ground, for the reasons explained in paragraphs 11, 13 and 14 above.

33. The third ground of appeal was that the findings in relation to walking in unfamiliar places failed to take account of case law to the effect that inability to ask for directions did not amount to a need for guidance or supervision from another person - reference was made to the decision of the Commissioner in CDLA/240/94 where he held that an inability to ask for directions did not amount to a requirement for supervision. As indicated above we consider that an inability to ask for directions can, in certain cases, give rise to a requirement for guidance: however, in the case of a claimant who admittedly can use a map, it must be to some

extent doubtful whether he cannot take advantage of the faculty of walking without guidance from another person.

34. Finally, we note that the tribunal, in its final finding of fact, held that the claimant was very anxious when by himself. The new tribunal to which this matter is remitted will have to consider whether such anxiety was a result of the claimant's disability and whether because of this anxiety the claimant could or could not take advantage of the faculty of walking outdoors most of the time without supervision. In conducting the rehearing the new tribunal must apply the principles of law set out above in relation to the lower rate of the mobility component. Since the claimant's appeal against the adjudication officer's decision on second-tier review was made before 21 May 1998, section 12(8)(b) of the Social Security Act 1998 will not apply and the new tribunal must take into account all matters obtaining from the date of claim - 26 September 1996 - down to the date of the rehearing.

(Signed) Kenneth Machin
Chief Commissioner

(Signed) John Mesher
Commissioner

(Signed) Andrew Lloyd-Davies
Commissioner

15 June 2000