IN THE UPPER TRIBUNAL **Case No** CDLA/2669/2009
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Middlesbrough on 25 June 2009 under reference 227/09/01040 involved the making of an error on a point of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 10 of the Reasons.

REASONS FOR DECISION

1. This appeal concerns the claimant's claim for Disability Living Allowance ("DLA") made on 23 July 2008. He subsequently made a further claim with effect from 30 June 2009, which was successful. The impact of the present decision is therefore limited to the period 23 July 2008 to 29 June 2009 (both dates included).

2. Both the claimant and the Secretary of State have expressed the view that the decision of the tribunal involved the making of an error on a point of law and have agreed to a rehearing. That makes it unnecessary to set out the history of the case or to analyse the whole of the evidence or arguments in detail. I need only deal with the reasons why I am setting aside the tribunal's decision.

3. I have set the tribunal's decision aside, because:

> (a) the tribunal failed to deal sufficiently with the evidence concerning the claimant's breathlessness prior to January 2009
>
> (b) the tribunal either erred by considering that breathlessness could not amount to severe discomfort or, if that was not the view it actually took, failed in its statement of reasons to explain its reasoning to the standard required by law
>
> (c) the tribunal in its statement of reasons erred in that, to the extent that it considered that the claimant's walking ability would have been enhanced if he had taken his inhaler before he set off walking, it failed to explain this to the standard required by law.

4. As to the last of these, in CDLA/3925/1997 Mr Commissioner Levenson (as he then was) said (at paragraph 6):

> "In my view, although the question of medication can be relevant to the credibility of the claimant and the severity of the effect of any disability, it is an error of law to find that a claimant is not in severe discomfort because he could take more or stronger medication that would remove

> the severe discomfort, unless the tribunal explains precisely why this would be a reasonable, safe and appropriate thing to do."

5. In the present case, it is asserted on behalf of the claimant that "he informed the Tribunal that his inhaler is for the purposes of relieving the symptoms of breathlessness and not prevent breathlessness occurring." However, the record of proceedings, which does record that the claimant had never tried to take his inhaler before setting off, does not record him as giving an answer to the effect of the words quoted above. The tribunal judge asserts that the claimant did not give evidence to that effect. The judge's view is corroborated by the omission of any reference to the disputed words from a record of proceedings which does cover other aspects of the same topic.

6. However, even if (as I find) the claimant did not give evidence to that effect, it does not exonerate the tribunal from the duty to give sufficient reasons. A claimant may well have been given instructions by his or her medical practitioner as to the circumstances in which a particular medication is to be used. There may well be (as is alleged in this case) restrictions on dosage which limit how often a claimant could take medication, whether for the purposes put forward by the tribunal or otherwise. As part of understanding why he has lost, a claimant needs to understand what it is he is being expected to do. He will need sufficient detail of what the tribunal has in mind to be able to satisfy himself (very possibly by taking medical advice) that he would not thereby be putting his health at risk, for instance by breaching existing dosage instructions or by acting otherwise than in accordance with medical advice previously received.

7. The tendency in more recent cases such as *H v East Sussex CC* [2009] EWCA Civ 2049 is to guard against elevating particular aspects of the duty to give sufficient reasons, which may be fact-specific, into propositions of law. Deciding an appeal in 2010 rather than the late 1990s, I might therefore express myself in terms other than that "it is an error of law…unless" the relevant explanation is given. However, if in accordance with the *East Sussex* decision one applies cases such as *Meek v Birmingham CC* [1987] IRLR 250, I am clear that in the circumstances of cases such as this, the sort of standard expected by Mr Commissioner Levenson is overwhelmingly likely to be expected as part of explaining to a claimant why he has lost, for the reasons given in the previous paragraph, and indeed also as part of enabling the Upper Tribunal to see whether any question of law arises

8. In the present case the tribunal failed to explain its position to such a standard. Had the tribunal been mindful of the need to do so, questions of the compatibility of what it was proposing with instructions and medical advice would have been explored.

9. I do not need to deal with any other error on a point of law that the tribunal may have made. Any that were made will be subsumed by the rehearing.

10. I direct that the tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. While the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to these but must consider all aspects of the case, both fact and law, entirely afresh. The tribunal must not take into account any circumstances that were not obtaining at the date of the decision appealed against (8 January 2009) – see section 12(8)(b) of the Social Security Act 1998- but may take into account evidence that came into existence after the decision was made and evidence of events after the decision was made, insofar as it is relevant to the circumstances obtaining at the date of decision: R(DLA)2/01 and 3/01.

11. The fact that this appeal has succeeded on a point of law carries no implication as to the likely outcome of the rehearing, which is entirely a matter for the tribunal to which this case is remitted.

(signed)

C.G.Ward
Judge of the Upper Tribunal
17 August 2010