Commissioner's Case No: CSDLA/68/98

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the disability appeal tribunal given at Edinburgh on 8 October 1997 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted disability appeal tribunal for a rehearing.

2. This case came before me for an oral hearing on 25 June 1998. The claimant was represented by Mr Cunningham of the West Lothian Council Advice Service. The adjudication officer was represented by Miss Aitken of the Office of the Solicitor to the Secretary of State for Scotland.

3. The claimant made a claim for disability living allowance on 30 July 1996. An adjudication officer made an adverse decision in respect of that claim. Thereafter the claimant requested a review of that decision and a second adjudication officer reviewed it but did not revise it so as to award benefit.

4. The claimant appealed against this decision to a disability appeal tribunal. That appeal was heard on 8 October 1997. It was unsuccessful.

5. The claimant has appealed to the Commissioner. The appeal was supported by an adjudication officer. However I directed an oral hearing of the appeal.

6. It was submitted by both parties to the appeal at the oral hearing that the tribunal decision erred in law and required to be set aside. I am in agreement with that.

7. The first point raised by Mr Cunningham on behalf of the claimant was that there is no note of the chairman's note of evidence contained within the appeal papers. It was Mr Cunningham's submission that this rendered the tribunal decision erroneous in law. He referred me in that connection to what was said by Mr Commissioner Howell QC in CDLA/16902/96 which is starred decision 60/97. What Mr Commissioner Howell QC said was:-

> "9. A proper record of the tribunal's proceedings, from which it can be seen that the claimant's case has been given its due consideration and from which the result can be understood, is a requirement of the general law that does not depend on the terms of subordinate legislation: cf. R(A)1/72. Save perhaps where the whole case depends on a simple point of law and no facts are in issue, this requirement is not met without a proper record of the evidence taken, from which it can be seen how the tribunal's findings and conclusions are related to what was placed before them: R(SB) 8/84 para 25, CSSB 212/87 (*6/88) para 3. A tribunal record in the truncated form supplied here without a clear, complete and immediately legible record of the material points put in evidence is almost bound to fall short of this standard and therefore to have to be set aside as erroneous in law."

In this case it was important to know what evidence was led before the tribunal and in the absence of the chairman's note of evidence it cannot be seen how the tribunal's findings and conclusions, as Mr Commissioner Howell QC put it, are related to what was placed before them. Thus on these grounds alone the tribunal decision errs in law.

8. It was also accepted by both parties that the tribunal's findings and reasons were insufficient to meet the standard required by regulation 29(5) of the Social Security (Adjudication) Regulations 1995. Perusal of these findings and reasons persuades me of this. In relation to the cooked main meal test Mr Cunningham said that there was evidence before the tribunal on page 29 that the claimant lacked concentration to follow a recipe. He said that the tribunal gave in effect which was "a pull yourself together judgment" without setting out the reasons why the evidence by the claimant was rejected. I think that there is merit in that submission and I accept it.

9. The tribunal in respect of the lower rate of the mobility component found in fact that the claimant had depression in May 1996. They also made findings that she had been seen by a community psychiatric nurse but that she no longer saw him nor did she have any other form of treatment for depression. In respect of the lower rate of the mobility component they said:-

> "As to her panic attacks - [the claimant] told the tribunal she had these once a month or once a week at least. This frequency did not, in the tribunal's view, satisfy the conditions for guidance and supervision within the requirements of the lower rate of the mobility component."

10. The statutory condition for the lower rate of the mobility component set out in section 73(1)(d) is dependent upon the claimant being able to walk but being 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 of walking out of doors without the guidance or supervision from another person for most of the time. Thus it is necessary for a person to be severely disabled physically or mentally.

11. The only finding made by the tribunal in respect of any mental disablement was that the claimant had had depression in May 1996. It is not at all clear from the tribunal's findings whether they accepted that she had depression at the time of the hearing or not.

12. It was accepted by both parties in the appeal that "a panic attack" is not a mental disablement in itself. It may be that it is a manifestation of a mental disablement but that does not of necessity follow. In R(A)2/92 Mr Commissioner Skinner accepted in paragraph 10, in the context of section 35 of the Social Security Act 1975 where the phrase "so severely disabled physically or mentally" is used, that where a person indulges in aggressive or seriously irresponsible conduct the attendance allowance board had to consider whether it arose from some recognised disordered mental condition or whether it merely arose from a defective character. He also in paragraph 8 accepted the Secretary of State's submission that the phrase related to a condition of body or mind which could be defined medically. Further it was also accepted by the Commissioner in CA/123/91 that the phrase "severely disabled physically or mentally" relates to a condition of body or mind that can be defined medically and is not meant to encompass unsociable behaviour which is not related to serious mental illness. I too accept and follow what was said by the Commissioner in these cases. In this case the tribunal appear to have made their decision on the implicit basis that panic attacks are the mental disablement and accordingly there are no findings which link the panic attacks to a mental disablement. Indeed so far as the only mental disablement found in

fact is concerned there is a question as to whether the claimant still suffered from it at the time of the tribunal hearing. Accordingly on that basis the tribunal errs in law also.

13. The case goes before a freshly constituted disability appeal tribunal. In respect of the cooked main meal condition the tribunal should follow the guidance given by the Commissioner in CDLA/085/94.

14. In respect of the lower rate mobility component the tribunal will require to determine over the relevant period from the date of the claim to the date of the hearing as to whether the claimant has suffered from or is suffering from a serious mental disablement. It may well be that the person who is nominated as chairman of the tribunal which is to hear the claimant's appeal may wish to obtain a medical report for the purposes of assisting them to determine the appeal. If the tribunal determine that the claimant does suffer from a serious mental disablement it will then be necessary for them to determine whether the claimant does in fact suffer from the panic attacks which she asserts. If they come to the conclusion that she does it will then be necessary to determine whether these panic attacks are related to the severe mental disablement found by them or not. These are issues which I consider any medical report which is obtained should address for they will be material issues in the case. Mr Cunningham also submitted that account had to be taken not only of any panic attacks, established by evidence, if these were related to a severe mental disability, but also the fear of having panic attacks out of doors if that too was related to the severe mental disability. I am not inclined to accept that upon the basis that the statutory provision in my view is related to what actually happens out of doors and not to any persuasion required to get someone to go out of doors. In that regard it follows that upon reflection I do not accept the obiter remarks of Mr Commissioner Rice in paragraph 11 of CDLA/757/94 in respect of "a supervisor" "encouraging or cajoling" an agoraphobic to go out of doors. The agoraphobic's difficulty is related to going out of doors at all. Persuasion, encouragement or cajoling to go out are activities which are in my view beyond what can properly be said to be encompassed by guidance or supervision. The exclusion or disregard of any ability the claimant may have to use routes which are familiar to him on his own from the qualification for the component leads me to the conclusion that the statutory provision is related in respect of guidance to orientation and the ability to cope in the sense of finding one's way about in unfamiliar surroundings. If it is that which is impaired by physical or mental disablement then the section can apply if the other qualifications are met. The supervision requirement is I consider primarily related to claimants who have no awareness of traffic dangers such as for example by reason of a mental disablement being unable to take the elementary precautions of looking before crossing a road. I refer in that connection to paragraph 15 of what I said in CSDLA/76/98. It is also important to note that the statutory condition of being unable to take advantage of the faculty of walking out of doors without guidance and supervision, having taken into account the statutory disregard, is qualified by the words "for most of the time. That context requires to be taken into account when weighing the evidence on page 19 in respect of poor road sense in an attack.

15. If all the conditions referred to above were satisfied it is necessary to establish whether guidance or supervision would remedy the claimant's incapacity and enable her to take the advantage of the faculty of walking out of doors. Unless it does she would fall outwith the scope of the sub-section. It is in that context that the tribunal should approach that task.

16. There was evidence in this case, and the tribunal made reference to it when they issued their decision on the day of the hearing, that the claimant does not travel or go about in unfamiliar surroundings and that this appeared to be her usual habit. It was said by Mr Cunningham that the words "for most of the time" related to the occasions when a claimant wanted to go on unfamiliar routes or did so. It was freely accepted by him that in the main the claimant in this case goes about Armadale which she knows and is familiar to her. But if, for example he said, she required to go to Edinburgh for an incapacity benefit medical examination then if she satisfied the other elements of the condition she would fall within the sub-section. It was said by him that if she never left familiar surroundings then she would not qualify for the benefit.

17. I am satisfied that on a proper reading of the statutory provision the phrase "for most of the time" is related to those times when a claimant, who satisfies the other elements of the conditions for the lower rate mobility component, does in fact subject to guidance or supervision and the statutory disregard, take advantage of the faculty of walking.

18. It however is clear to me that the statutory provision is related to someone who can and will take advantage of walking in the context of the conditions and taking account of the statutory disregard. Accordingly I held in CSDLA/591/97 that if the extent of a physical capacity to walk was extremely limited and could not be extended even with guidance or supervision then the purpose of the statutory provision was defeated by means of a physical limitation which could not be remedied by guidance or supervision. Thus in that case I hold that the claimant did not satisfy the conditions. By the same token if a claimant as a matter of fact did not and would not take advantage of the faculty of walking in the statutory context or only very rarely did or would do so then guidance or supervision, if it were available, would not assist her, by reason of the fact that going out in unfamiliar routes was not something that she did or was extremely rare. Thus she would not satisfy the conditions for the allowance. In my view the conditions of the allowance are related to the realities of the claimant's life. The allowance is not designed as a form of compensation for having a disability but rather to remedy an incapacity. Accordingly the freshly constituted tribunal is directed to approach the case in this way. It is also important having regard to what I said in CSDLA/591/97 to ensure that if the other qualifications for the allowance are satisfied that any guidance or supervision required is simply that and not something of a different quality such as rendering aid.

19. The appeal succeeds.

(signed)
D J MAY QC
Commissioner
Date: 3 August 1998