Bullch 194 [illegible]
CDLA/0145/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14 of the Social Security Act 1998. It is:

The decision of the Fox Court appeal tribunal under reference U/42/160/2005/01016, held on 23 June 2005, is not erroneous in point of law.

History and background

2. The claimant submitted a disability living allowance claim pack on 2 July 2004. The Secretary of State treated the claim as made on 1 June 2004. The claimant stated that he had problems with mobility, cooking and care, which he attributed mainly to pain and exhaustion. The Secretary of State obtained reports from the claimant's GP and from an examining medical practitioner. The latter found that all upper and lower limbs were slightly impaired by generalised fatigue, but that the claimant had normal muscle tone and power, no muscle wasting and normal callous distribution on the soles of both feet. The doctor found no disablement relevant to disability living allowance. On the basis of the evidence then available, the decision-maker refused the claim.

3. The papers also contain two letters from the Infection and Immunity Special Group of the claimant's local NHS Trust, which describe the claimant's condition as being similar to chronic fatigue syndrome. I am not sure who produced those letters or when. A third letter, dated 12 May 2005, was produced at the hearing. This confirms a diagnosis of chronic fatigue syndrome.

4. The claimant exercised his right of appeal against the Secretary of State's decision. The hearing began at 11.20 a.m. and ended at 12.30 p.m.. The claimant was accompanied by his father and a representative from a local Disablement Association. The chairman's record of proceedings covers 23 pages of admittedly rather large handwriting. The chairman noted that the manner in which the claimant entered and left the room. At 12.10 p.m., the chairman put this to the claimant: 'Today you walked in normally, sat unaided, you appear unfatigued, despite long day, travel, unusual routine.' The claimant answered: 'Arms are burning, legs are burning. Get out car, hobble up here, was a process.'

5. The tribunal dismissed the appeal. The chairman provided a detailed full statement of the tribunal's decision, six closely typed pages long. He set out the tribunal's findings and gave a list of 12 reasons for those findings. One of them read:

> 'Our observation that, having made the long journey by car from Dagenham to central London, and walked 250 yards from the car to the venue, arriving in time for a 11.20 start, he entered the room walking at a normal pace, unaided, and without any apparent sign of pain or exhaustion, participated fully in a hearing lasting over an hour, without any sign of fatigue, and rose at the end and walked out, again without any difficulty.'

6. The claimant's representative sought leave to appeal on the ground that this passage showed that the tribunal had gone wrong in law. Specifically, the representative argued that the tribunal had failed to explain the significance of the observations to the claimant and to

seek further clarification. If it had done so, the representative said that it would have discovered that the claimant had rested for 30 minutes before entering the hearing room, had taken 15 minutes to walk the 250 yards. Further the representative has seen the claimant yawning several times during the hearing, which was a clear sign of tiredness or fatigue.

7. A district chairman gave leave to appeal, saying:

> 'The views of the Commissioner are sought as to the matter raised by the appeal, in these circumstances where observations of a general type, rather than a specific nature, are relied upon and not put. The issue is as to the general demeanour, whether and how one gives the appellant an opportunity to comment, the extent of the duty and whether the absence of such opportunity automatically renders the decision erroneous in law.'

I think, with respect to the chairman, that she may not have read the chairman's record of proceedings. If she had, she would have seen the record of the question put to the claimant by the chairman and, at the least, would not have worded her comments in the way that she did.

8. The Secretary of State has not supported the appeal and the claimants representative has made observations in response to those of the Secretary of State. The case is now ready for decision.

Observations

9. Observations made by a tribunal are regularly the subject of applications for leave to appeal. I will, therefore, try to give some general guidance on how tribunals should deal with them. I do not consider that there is any difference in principle between general and specific observations.

10. It is pertinent to begin with the eloquently expressed passage from the judgment of Mr Justice Megarry in *John v Rees* [1970] Ch 345 at 402:

> 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence events.'

11. And as I said, less eloquently, in *CDLA/4585/1997* at paragraph 17:

> 'However, law is one thing; practice is another. It is always good practice at the end of a hearing to put to a claimant for comment any impression that may have been formed as a result of observations made during the hearing, so that the claimant may have a chance to comment.'

12. Tribunals are not bound by the rules on admissibility of evidence. They may take observations made at the hearing into account. Doing so does not involve carrying out a

physical examination of a claimant or making a claimant undergo a physical test for the purposes of section 20(3) of the Social Security Act 1998. See *R(DLA) 1/95* at paragraph 5.

13. Tribunals have an inquisitorial function and may fail to comply with that function if they neglect to make appropriate inquiries in the light of an observation made during the hearing. Tribunals must also ensure that the parties have a fair hearing and the failure to allow a claimant to comment on observations *may* be a violation of that duty, as in *CDLA/0440/1995* (cited by the Secretary of State).

14. Like all evidence, a tribunal must not take observations into account unless they are relevant and reliable. And, if they do take them into account, they must assess their proper significance. Depending on the circumstances, this may require further investigation, analysis and, if the chairman provides a full statement of the tribunal's decision, explanation. These stages are not entirely distinct, as the following discussion shows.

15. An observation must be *relevant* to an issue of fact that is before the tribunal and to the time of the decision under appeal under section 12(8)(b) of the Social Security Act 1998. The latter is the most obvious problem that arises with the relevance of observations, because they were made later than the time of the decision. The tribunal cannot rely on them, unless it is possible to relate them back to that time: *R(DLA) 2 and 3/01*. The tribunal will have to set the observations in the context of the evidence as a whole. If that evidence does not disclose whether there has been a change in the claimant's disablement, the tribunal cannot rely on the observations without further inquiry.

16. An observation can only be taken into account if it is *reliable*. The problem with an observation is that it is a limited snapshot on a particular day. It may not give a reliable picture of the claimant's disablement. Take as an example a claimant who has asthma. The claimant may walk into the tribunal room and talk without any sign of breathlessness. The claimant may have used an inhaler before coming into the room. And the waiting and hearing rooms are likely to be warm and dry. But that same claimant may be breathless without medication or in cold or damp conditions. In other words, the tribunal's observation is reliable only in the conditions and circumstances under which it was made. Another factor is that asthma is known to be variable in its effects. The observation may be an accurate picture of the claimant's disablement on a day when the effects of the asthma are not severe. But that same claimant might be severely breathless on a different day. In other words, the tribunal's observation does not give a picture of the claimant's overall disablement. The tribunal could not rely on the observation in this example without further inquiry.

17. The *significance* of an observation can only be assessed in the context of the evidence as a whole and that evidence may have to include the result of further inquiries into the issues of relevance and reliability. And the significance of the observation, once assessed, may vary. At one extreme, it may be of no significance at all. At the other extreme, it may alone be decisive on an issue. In between, it may tip the balance of other factors, be just one of a number of factors taken into account in an overall impression, or just confirm a conclusion that is based on all evidence. The extent to which further inquiries are appropriate may depend upon the significance that the observation is likely to have in the final deliberations.

18. The significance of an observation cannot in practice be separated from the chairman's explanation of how the tribunal reached its decision, because only by that explanation is it

disclosed to anyone other than the panel members. It is unfortunate that chairmen are often not as precise as they could be in stating the significance attached to an observation. It is seldom that the observation will have been decisive. It is more likely to be just one of a number of factors that were taken into account or merely confirmatory of a decision reached on other grounds.

19. If an observation is used purely as confirmation of a conclusion that the tribunal would have reached anyway, there is no need for a tribunal to investigate it further or for the claimant to have a chance to comment on it. However, if an observation is one of the factors taken into account in reaching a conclusion, any failure in the tribunal's inquisitorial duty or violation of the right to a fair hearing will mean that the decision is wrong in law. In *De Silva v Security Commissioner* [2001] EWCA Civ 539, the chairman recorded that the decision of the majority of the tribunal had been based on the evidence as a whole and referred to three pieces of evidence by way of example. The claimant challenged the provenance of one of those pieces of evidence. The chairman had attributed this evidence to the claimant, but he denied saying it, alleging that it was said by someone else at the hearing. I dismissed the claimant's appeal, saying that even if the tribunal did make the mistake alleged, it had not affected the outcome because it was only one of three factors listed and even together they were not comprehensive of the reasons for the tribunal's decision. The Court of Appeal decided that that was wrong. As Lord Justice Latham explained at paragraph 11:

> 'Even though the Tribunal was careful to state that the decision was based upon all the evidence, the emphasis that it placed on this particular piece of evidence cannot be ignored. If it was a mistake, which was the assumption that the Commissioner was prepared to make for the purposes of his decision, it must have had an effect on the decision of the majority. That being so, I consider that the Commissioner's decision was wrong in law.'

The Court of Appeal went on to decide whether the claimant had made the disputed statement and, having decided that he had, dismissed his appeal.

Applying those principles in this case

20. I now come at last to the circumstances of this case.

21. The tribunal observed the claimant as he arrived in the hearing room, during the hearing and at the end as he left. The tribunal took account of those observations in reaching its decision. They formed but one of a long list of factors identified by the chairman, but if the tribunal went wrong in law in dealing with the observations, its decision was, on the basis of *De Silva*, wrong in law.

22. The chairman put to the claimant the observations that the tribunal had made when he arrived and during the first 40 minutes of the hearing. He did not ask the claimant to comment on its observations of him as he left. However, those observations were to the same effect as those put to the claimant. If the tribunal dealt correctly with the other observations, it did not go wrong in law.

23. The claimant's representative is correct that the chairman did not ask specific questions on the matters identified in the grounds of appeal. He did not ask how long the claimant had

taken to walk to the venue from the car. Nor did he ask how long he had sat before the start of the hearing. However, the chairman did not have to ask precise questions in order to fulfil the tribunal's inquisitorial function and afford the claimant a fair hearing. He did not have to anticipate the answers that the claimant might give or ask a series of questions covering every possibility. What he did was to ask an open question, leaving the claimant to make an appropriate response. That response could then have been followed up with appropriate, and perhaps more specific, questions. But the claimant did not give the explanations now provided by his representative.

24. The claimant's representative is also correct that the chairman did not point out to the claimant the significance of the observations that the tribunal had made. But the claimant must have realised this. He had presented his claim on the basis of pain and exhaustion and the observations were clearly directly relevant to that.

25. I consider that the chairman's questioning was sufficient even if the claimant had attended alone and unrepresented. But in this case the claimant was represented. His representative was present at the hearing and must, or should, have understood the significance of the chairman's questions. He could have asked the claimant further and more specific questions if he considered it appropriate or invited the tribunal to pursue specific inquiries. The record of proceedings shows that everyone had a chance to contribute and the representative has not alleged that the chairman prevented appropriate contributions from anyone present.

26. The representative has also challenged the accuracy of the observations, saying that the claimant did show signs of tiredness and fatigue. He does not say whether that was before or after the chairman put the observations to the claimant. If it was before, the claimant and his representative had a chance to point out that the observation was inaccurate, but neither did. If it was after, they both knew of the observations the tribunal had made and could have mentioned it to the tribunal, but again neither did. I notice that, towards the end of the hearing, the representative made a submission on the examining medical practitioner's comment that the claimant was not obviously in distress: 'Don't fall into trap – just because you can't see it, doesn't mean it's not there.' That was an ideal point at which he could have emphasised that the tribunal might fall into this trap from the observations that it had made, but he did not.

27. The chairman's explanation does not disclose the precise significance of the observations on the tribunal's decision. It is clear that they were not alone decisive. They may have done no more than confirm the effect of the other reasons set out by the chairman, but the chairman did not put it in that way. As presented, the observations were part of a parcel of factors that together led the tribunal to make its findings of fact. It was probably impossible to unravel with greater precision the effect that each of those factors had in the tribunal's reasoning. All that the chairman could say was that these in total were the factors that had led the tribunal to its conclusion. They were relevant to the findings, so the tribunal was not wrong to take them into account. There is nothing to suggest that the tribunal attributed to them an inappropriate significance.

28. Even if the tribunal had gone wrong in law in the way that it dealt with the observations, I would not have directed a rehearing. The record of proceedings shows that the claimant, his father and his representative had every chance to present their evidence and arguments in support of the claim for a disability living allowance. That same record shows the

thoroughness of the tribunal's inquiries into the facts. And the chairman's full statement of the tribunal's decision contains a clear and detailed account of how the tribunal came to its decisions. The other reasons given by the chairman are cumulatively persuasive, indeed compelling. In those circumstances, I would have substituted a decision to the same effect as the tribunal's rather than direct a rehearing.

The claimant's diagnosis

29. In response to the Secretary of State's observations, the claimant's representative has argued that the tribunal attached too much weight to the initial uncertainty over the claimant's precise diagnosis. I cannot see that the tribunal attached any significance to this at all. The chairman mentioned it, but it was historically correct and apparent from the medical evidence. The chairman went on to record specific findings on the features of chronic fatigue syndrome as it affected the claimant. That was the proper focus for the tribunal's reasoning.

Disposal

30. I dismiss the appeal.

Signed on original
on 25 April 2006

Edward Jacobs
Commissioner