Bellehs 165
[Others]

CDLA/5465/2002 and CDLA/492/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

In Case No CDLA/5465/2002, the claimant's appeal is formally allowed, and the decision of the East Ham Appeal Tribunal dated 15 August 2002 set aside. However, the following decision, to the same effect, is substituted, namely that the Secretary of State's decision of 21 March 2002 be confirmed. The claimant is therefore entitled to the lower rate mobility component and lowest rate (but not the middle rate) care component of her Disability Living Allowance for the period 30 April 2002 to 29 April 2005.

In Case No CDLA/492/2004, the claimant's appeal is formally allowed, and the decision of the Harrow Appeal Tribunal dated 14 October 2003 set aside. However, the following decision, to the same effect, is substituted, namely that the Secretary of State's decision of 25 February 2003 be confirmed. The claimant is therefore entitled to the lower rate mobility component and middle rate (but not the highest rate) care component of his Disability Living Allowance for the period 7 June 2003 to 6 June 2005.

REASONS

Introduction

1. These appeals raise a similar issue as to the proper approach of decision-makers and appeal tribunals to the various requirements for the care component of Disability Living Allowance ("DLA") set out in Section 72 of the Social Security Contributions and Benefits Act 1992. In this decision, all statutory references are to that Act, unless otherwise indicated.

Statutory Criteria for DLA

2. For some years, non-contributory benefits for the disabled have been focussed upon assistance with the functions of living and mobility. Originally the subject of separate benefits (attendance allowance and mobility allowance), the Disability Living Allowance and Disability Working Allowance Act 1991 introduced DLA as a single benefit with two components (care and mobility). Additionally, in respect of each component, that Act introduced different levels of financial benefit for different levels of functional disability.

3. So far as the care component is concerned, the relevant requirements are now set out in Section 72(1) of the 1992 Act:

> "... a person shall be entitled to the care component of a disability living allowance for any period throughout which
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> (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) he cannot prepare a cooked main meal for himself if he has the ingredients; 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; or

(c) he is so severely disabled physically or mentally, that, at night,
(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or
(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him."

4. The benefit is awarded on a weekly basis, and three weekly rates of the care component are prescribed (Section 72(3) and (4)). If the claimant only satisfies the condition in Section 72(1) sub-section (a), he is awarded the lowest rate. If he satisfies the condition in either sub-section (b) or (c), he is entitled to the middle rate. If he satisfies the conditions in both sub-sections (b) and (c), then he is entitled to the highest rate. In each case, there is no entitlement unless the relevant condition has been satisfied for three months preceding the date on which the award would begin, and is likely to continue throughout the period of six months from that date (Section 72(2)). The current weekly rate for each level is £15.55, £39.35 and £58.80 respectively.

The Proper Approach to the Section 72(1) Requirements

5. Case No CDLA/5465/2002 concerns the "day-time requirements" criteria of Section 72(1)(b), and Case No CDLA/492/2004 concerns the "night-time requirements" criteria of Section 72(1)(c). However, in considering the proper approach to any Section 72(1) requirements, the starting point must now be Moyna v Secretary of State for Work and Pensions [2003] UKHL 44, [2003] 1 WLR 1929, R(DLA) 7/03. That case concerned the so-called "cooking test" criteria of Section 72(1)(a)(ii). Having described the test as "a notional test, a thought-experiment, to calibrate the severity of the disability", Lord Hoffmann (with whom the rest of the House agreed) went on:

> "18. That leads on to the second point, which is that the test says nothing about how often the person should be able to cook. It would have been easy for Parliament to say that a person should be able to cook daily or six times a week or whatever. Instead, the statute approaches the question of frequency in a different way. Section 72(2) contemplates that one should be able to say of someone throughout a nine-month period [i.e. from three months before the effective date of the decision to six months after that date: see Paragraph 4 above] that he is a person whose disability is such that he cannot cook a main meal. What does this mean? One possible construction is that if there was a single occasion during the period when a remission in his disability would have allowed him to cook a meal, it cannot be said that throughout the period he was unable to do so. But the Secretary of State does not contend for this construction and I do not think that it would be right. That is not because one occasion is *de minimis* but because the

test does not in my opinion function at that day-to-day level. It involves looking at the whole period and saying whether, in a more general sense, the person can fairly be described as a person who is unable to cook a meal. It is an exercise in judgment rather than an arithmetical calculation of frequency.

19. I therefore agree with the Commissioner that the question involves taking "a broad view of the matter" and making a judgment. The standard of motor abilities required by the cooking test is not so precise as to allow calibration by arithmetical formula. In the present case, I think that the Court of Appeal attached too much weight to the fact that in her claim form Mrs Moyna had ticked the box "one to three days" for the event to which she needed help with heavy pans, cutting vegetables and so forth. In answering the generalised question of whether Mrs Moyna could fairly be described as a person unable to cook, it may be relevant to consider not only the number of occasions on which she says she would need assistance but also the reasons why it would be needed. The tribunal went into the matter in some detail. It observed that she could cook for herself using lighter pans and cutting up smaller vegetables. In addition, it had the opinion of the examining doctor and his record of Mrs Moyna's own description of herself as a person who could cook a meal - a description which is, as I have said, not inconsistent with her not being able to do so all the time. These are all items of evidence which go into the decision-making process.

20. In any case in which a tribunal has to apply a standard with a greater or lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law in deciding the case either way: see George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803, 815-816. I respectfully think that it was unrealistic of Kay LJ to think that he was able to sharpen the test to produce only one right answer. In my opinion the Commissioner was right to say that whether or not he would have arrived at the same conclusion, the decision of the tribunal disclosed no error of law."

6. These comments of Lord Hoffman echo those of Commissioners in earlier cases. In R(A) 2/74, the Chief National Insurance Commissioner Sir Robert Micklethwait QC considered the night-time attention criteria found in Section 2(1) of the National Insurance Act 1972 which was in similar terms to Section 72(1)(b)(i). He referred to the "composite question" posed by the relevant provisions, and then said (Paragraph 35):

> "I think the delegate should take a broad view of the matter, asking himself some such question as whether in the whole circumstances the words in the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts."

This has been regularly reiterated by Commissioners. For example, in CSA/8/1996 (Paragraph 17), Mr Commissioner May QC said of the question raised by Section 72(1)(b)(i):

> "... [It] is essentially a jury one relating to facts. It is to be approached broadly. If properly approached and recorded it will not be disturbed on appeal."

7. Although the criteria in the various sub-sections of Section 72(1) are discrete and very different, the comments of Lord Hoffmann inform the general approach to each. In respect of each, an exercise in judgment has to be made taking "a broad view of the matter", i.e. taking account of all relevant factors. In respect of none can a determination be made upon an arithmetical formula or by reference to an invariable benchmark.

8. It is therefore for a decision-maker (or, in a decision-maker's shoes, an appeal tribunal) to make a judgment as to whether the relevant criteria are satisfied in any specific case. In conventional legal language, one would ordinarily say that this is therefore primarily a matter of fact, unable to be attacked on an appeal to (e.g.) a Commissioner on a point of law only. Lord Hoffman dealt with the extent to which such matters are questions of law in Paragraphs 21 and following of his judgment. Whilst the ordinary meaning of a word is a matter of fact, the meaning which Parliament appears to have intended to convey by using that word in a statutory provision is a matter of law which "depends upon not only the conventional meanings of the words used but also upon syntax, context and background" (Paragraph 24). In this context, "it is seldom helpful to make additions or substitutions in the actual language he [the author] has actually used" (Paragraph 24). The law therefore draws the conceptual test line but, having done so, whether particular facts falls one side or the other of that line is a matter of fact (Paragraph 25).

9. Consequently, in the cases before me now, I cannot interfere if the relevant tribunal identified the correct legal line - but only if I consider it failed to recognise the correct line or, having recognised it, made a decision as to which side of the line the case fell that was "outside the bounds of reasonable judgment".

10. What matters of law affect where this line is drawn? Of course, these cannot be dealt with comprehensively in this decision, nor do I purport to do so - but the following matters are particularly relevant to the cases before me.

(i) As I indicate above, a determination as to whether a criterion has been satisfied cannot be made by reference to an inflexible benchmark. Therefore, for example, in relation to whether the night-time criteria of Section 72(1)(c)(ii) are satisfied, although no doubt the number of nights upon which a claimant requires "prolonged or repeated attention" is a relevant factor which a decision-maker must take into account, a claimant does not automatically fail to satisfy that condition merely because (e.g.) he does not satisfy the criteria for at least a majority of the nights of the week. Similarly, a person may satisfy the requirements of a provision "throughout" a period, even if he does not satisfy the statutory criteria for a majority of the days of the week. By way of further example, although "prolonged" may "seem to be accepted by decision-makers to mean 20 minutes or more" (Social Security Legislation 2003 Vol 1 Paragraph 1.205), "prolonged attention" cannot be expressed in a given number of minutes (e.g. 20 minutes), beyond which attention is invariably "prolonged" and within which it is invariably not "prolonged".

(ii) However, although the discretion of the decision-maker or tribunal must be actively exercised in each case, this does not mean that they cannot have cognisance of any sort

of guideline. For example, although it cannot be said that attention of less than X minutes cannot in any circumstances be "prolonged", it is difficult to conceive of circumstances in which, say, 3 minutes attention could properly be considered "prolonged" (see R(A) 2/74, Paragraph 35): and a guideline that attention of anything less than 20 minutes is unlikely to be "prolonged" may be at least a reasonable starting point (see CDLA/4024/2003, Paragraph 5)). It is not wrong for decision-makers to have starting point guidance in mind when considering such determinations, so long as they consider each case on its own facts and look for factors which may lead to the guidance being inappropriate in that case (e.g. circumstances that may render attention of less than 20 minutes "prolonged" for the purposes of Section 72(1)(b)(i)).

(iii) As identified by Lord Hoffman, the subsections of Section 72(1) require consideration of a "composite question", and it is unhelpful to regard the test as comprising a number of stages. For example, with regard to Section 72(1)(b)(i), the Secretary of State submitted in his observations to me in Case No CDLA/5465/2002 that this provided for a two-stage test or a test involving two discrete questions, i.e. (i) is the attention required frequently and, if so, (ii) is it required throughout the day. However, this approach is not helpful and may lead to error. The real question is the composite one of whether, throughout the relevant period, the claimant was so severely disabled that, by day, he or she required from another person frequent attention throughout the day in connection with his or her bodily functions.

The need to consider the requirements of Section 72(1) in a composite way is well established in long-standing Commissioners' jurisprudence. Considering provisions of the National Insurance Act 1972 substantively similar to those of Section 72(1)(c), in words resonant with those of Lord Hoffman, Mr Commissioner Shewan said in CSA/2/1973 (Paragraph 8):

> "... [T]he statutory condition could not, in my view, be held to be satisfied by evidence that on one solitary occasion the disabled person required prolonged or repeated attention during the night: not, in my view, is it necessary, for the satisfaction of the condition, to show that on every night he requires such attention. The test must be somewhere between these two extremes. I respectfully agree with the statement, in Decision CA 2/73 (Paragraph 13), that "in order to determine whether a condition is satisfied, or is likely to be satisfied, regard must be paid to evidence of the claimant's requirements over a period of time..."."

This composite approach was expressly approved by the Chief Commissioner in R(A) 2/74, to which I have already referred.

(iv) In Lord Hoffman's words, "it is seldom helpful to make additions or substitutions in the actual language he [the author] has actually used". Earlier cases - of both the Commissioners and the courts - which seek to make such additions or substitutions need to be considered with very great caution. It is likely that the propositions for which they have been cited in the past are no longer good. For example, in relation to Section 72(1)(b)(i), with respect I disagree with Mrs Commissioner Parker (in CSDLA/590/2000, Paragraph 43) that the words "frequent... throughout the day" necessarily mean (and could usefully be replaced by) "very often over the course of the

whole day". As Lord Hoffman indicated, such attempts at clarification by manipulating the actual words used are unlikely to be helpful, and may lead to error.

Again, if I might venture to say so, this is well established from earlier Commissioners' cases. In R(I) 2/74, the Chief Commissioner Sir Robert Micklethwait QC, having said that there can be no objection to discussion of the component parts of benefits conditions, went on:

> "When however the adjudicating authority comes to the point of actual decision of a statutory question, it is then essential for it to decide that question and not some other one. This makes it dangerous for either an adjudicating authority or the forms supplied for its use to use, at the decision stage, language different from that of the statute, which may lead to doubt whether the authority has decided the correct question."

(v) Nor, in relation to the definitions of "frequent", "prolonged" or "repeated" in Section 72(1), do I consider the oft quoted words of the Master of the Rolls in R v National Insurance Commissioner ex parte The Secretary of State for Social Services [1981] 1 WLR 1017 reported as Appendix to R(A) 2/80 to be of any substantial assistance. In that case, Lord Denning MR said:

> ""Frequently" connotes several times - not once or twice. "Prolonged" means some little time. "Repeated" means more than once at any rate."

In addition to Commissioners' decisions, the learned authors of standard texts refer to these as definitions with apparent support (see, for example, Social Security Legislation 2003 Vol 1 Paragraph 1.205 and The Law of Social Security, 5th Edition, Wikely Ogus & Barendt, page 698). However, although the case provides important authority upon the question of whether "cooking" comes within the words "attention in connection with her bodily needs" (which was the matter in issue), any comments on the meaning of "frequent" or these other words were *obiter*. More importantly - because *obiter dicta* of the Court of Appeal are in any event persuasive – in my view, Lord Denning was not purporting to lay down definitions but only identify some obvious characteristics of these words as conventionally used. To say that "repeated" connotes something occurring "more than once" is not only self-evident (as Lord Denning himself clearly appreciated from his addition of the words "at any rate"), but in most cases will not be particularly helpful. "Frequent" clearly does require there to be several occurrences, but the characteristic of frequency is not simply the number of times something occurs, but the rate at which it occurs. "Frequency" is a product of the number of times something occurs over a period of time. "Frequent" does not mean "several", either in conventional usage or in the specific context of Section 72(1).

In my view, with regard to Section 72(1), the words of Lord Denning MR quoted above have attracted a definitional authority neither intended nor warranted. The Master of the Rolls merely made some general and uncontentious comments in respect of the conventional usage of these words. Whilst one can only have respect for the words of Lord Denning - who always used the tools of his trade carefully and skilfully - it is important that his every comment is not clothed with something akin to statutory force.

His comments in R v National Insurance Commissioner should not be treated as comprehensively defining these terms in the context of Section 72(1).

(v) Phrases in Section 72(1) such as "frequent... throughout the day" consist of ordinary words not used in any unusual sense (see CA/147/1984). Although context is of course important - and I will return to it - the starting point in the construction of such phrases is the ordinary meaning of the words in conventional usage.

Therefore, by way of example, as I have indicated, "frequent" requires consideration of, not just the number of occasions something occurs, but the time over which they occur: the word having the characteristic of recurrence at intervals which are not long. Whether intervals between occurrences are or are not "long" - and therefore whether occurrences can properly be said to be "frequent" - therefore depends upon a number of factors, particularly the number and pattern of those occurrences over time. The nature of the occurrences themselves is also relevant. For example, "frequent" ice ages properly so-called would be very different in number and pattern from a "frequent" train service properly so-called. Indeed, because the nature of the occurrences is something relevant to the question of whether those occurrences are "frequent", I do not quite agree with Mrs Commissioner Parker (in CSDLA/590/2000) that the proper approach to frequency can take no account of duration of the relevant occurrence (except to exclude instances of attention that are *de minimis* as she accepts). Although it is often not illuminating to see how words are used in entirely different contexts, in common usage consideration of the frequency of a train service is affected by the length of the journey involved. An hourly service from London to Birmingham may be spoken of as "frequent", but an hourly short local service may not. However, although in my view duration of individual occurrences is not necessarily irrelevant, in relation to periods of attention under Section 72(1)(b)(i) the number and pattern of occurrences will usually be the most relevant - indeed, the overriding - factors in relation to the issue of "frequency".

(vii) However, as well as the conventional usage of the words used, in construing the requirements of the various subsections of Section 72 it is important also to take into account the context of the relevant provisions. The subsections set out sets of criteria for each of three levels of the care component of DLA. Because the tests for the different rates are separate and not logically progressive, there is no strict hierarchy whereby a claimant who does not satisfy the lowest rate criteria (of Section 72(1)(a)) could not logically satisfy the requirements of one of the middle rate tests (see, e.g., CDLA/12150/1996 (Paragraph 12)). It would also be simplistic to suggest that those with disabilities can easily be "graded" for DLA purposes, if only because it is difficult to compare the functional effects of dissimilar disabilities. However, even with these caveats in mind, in construing the provisions of Section 72(1)(b) or (c), it is proper to bear in mind that a person who satisfies those criteria is entitled to over twice the weekly benefit of someone who satisfies only the criteria of Section 72(1)(a). DLA is a benefit which is specifically designed to give different levels of financial assistance in response to different levels of functional disability. It cannot have been Parliament's intention that less disabled people should generally be awarded higher levels of DLA than those who are more disabled. Similarly, although the requirements are clearly different in nature, in construing the requirement of Section 72(1)(b)(i) ("frequent attention throughout the day in connection with his bodily functions"), it is proper to

take into account that the same level of benefit is attached to this requirement as the requirement for "continual supervision throughout the day in order to avoid substantial danger to himself or others" (Section 72(1)(b)(ii)).

Therefore, the construction of each set of criteria within Section 72(1) is to an extent informed by not only the DLA scheme as a whole, but also where it falls within the particular scheme of Section 72(1).

CDLA/5465/2002

11. The claimant was born on 30 April 1984, and acts in this claim through her mother as appointee.

12. The claimant has a number of medical conditions, including a congenital heart condition which, although now stable and asymptomatic, has caused restricted growth. As a result, her dietary intake is important, and she has reduced stamina, tires easily, has migraines and attacks of dizziness, and occasional blackouts. She also has very poor eyesight, despite corrective surgery. In addition (and importantly for the purposes of this appeal), she has learning difficulties. From age 5 to 17, she attended special schools, and from 2001 with support she has attended college.

13. The claimant was awarded DLA from the age of 5 years. On 30 April 1999, she was awarded middle rate care and lower rate mobility components for 3 years.

14. On 6 December 2001, she made a renewal claim and medical evidence was obtained. On 21 March 2002, the claim was refused: and the claimant lodged an appeal on 17 April. As a result, on 10 June, the decision was reconsidered but not revised, and the appeal therefore progressed to a hearing. On 15 August, the Appeal Tribunal allowed the appeal awarding the lowest rate care and lower rate mobility components from the renewal date (30 April 2002) for 3 years. On 25 September 2002, the claimant sought leave to appeal that decision to a Commissioner, on the basis that the tribunal had not properly considered whether the claimant had a need for attention "frequently throughout the day" within the meaning of Section 72(1)(b)(i) of the 1992 Act.

15. There was then unfortunately a hiatus in the appeal procedure. The District Chairman of the Appeal Tribunal refused to consider the application because it was one day late. When the application was renewed to a Commissioner, he appears to have accepted the application but proceeded to refuse it. That prompted an application for judicial review, which was compromised by the claimant and the Secretary of State on 15 December 2003, on the basis that the application for leave was remitted to a Commissioner for reconsideration. I granted leave on 7 January 2004, and it is that appeal which now falls before me.

16. There was an oral hearing held before me on 7 June 2004, at which the Secretary of State was represented by Jonathan Auburn of Counsel. The claimant appeared at the appeal in person, ably assisted by her mother and father.

17. The relevant facts are not in dispute.

18. Because of her restricted growth, the claimant's dietary intake has always been important. However, save for this, her cardiac condition has been stable since 1997 and, by 2002, caused her no problems relevant to the benefit. Furthermore, although she has poor eyesight, after corrective surgery, the claimant was able to attend college and, by 2002, her eyesight did not impair her ability to attend to her bodily functions or her ability to travel alone on familiar routes.

19. However, in 2002, the claimant continued to have real problems arising from her learning difficulties. She had difficulty in finding her way on unfamiliar routes most of the time. She was also vulnerable when out, because she could be inappropriately friendly to strangers. She was unable to cook a main meal for herself on a regular basis, because of concerns that (e.g.) she might burn herself.

20. On the other hand, she did not in fact use the cooker, nor did she answer the door when alone in the house - and she did not require continual supervision during the day to avoid danger to herself. Also, at night, she could use the toilet unaided. Once or twice a year, the claimant sleepwalked, but her parents did not stay awake at night to guard against the possibility of her sleepwalking nor should they reasonably have done so, because the risk of danger was remote and the obvious danger could have been guarded against by the use of a stair gate.

21. On the basis of these facts with regard to the claimant's condition as at 21 March 2002, the tribunal awarded the claimant the lowest rate care component (as satisfying the "cooking test" criteria) and the lower rate mobility component. The tribunal had evidence upon which the findings in relation to mobility could properly be made, and that element was not the subject of appeal. Neither was there any suggestion that the claimant did not warrant at least the lowest rate of the care component, on the basis of the facts as found by the tribunal.

22. The claimant appealed on one ground, namely that the tribunal failed properly to consider whether the claimant was "so severely disabled... that, by day, [she] requires from another person... frequent attention throughout the day in connection with her bodily functions..." (Section 72)(1)(b)(i)). If the claimant satisfied this criterion in addition to the others, she would be entitled to middle (as opposed to lowest) rate of the care component.

23. In relation to this issue, the tribunal made the following findings of fact, which were accepted as common ground before me (the paragraph numbers being those of the tribunal's Statement of Reasons):

> "7. [The claimant] lives at home with her parents. Undoubtedly they help her in many aspects of her life, however the aim is to make her as independent as she can be...
>
> 8. [The claimant] can dress herself. She needs someone to check that all her clothes are the right way around and buttoned correctly before she goes out, as she sometimes has problems with these things. This would take two or three minutes each morning.

9. [The claimant] can bath herself. She needs help washing her hair, in particular to check that she has rinsed out all the shampoo. This is unlikely to be a daily activity. It is likely to occupy no more than five minutes four or five times a week.

10. [The claimant] requires some prompting from another person in relation to her personal care and to eat properly. This is not due to reluctance or recalcitrance and the prompting is routine and quick. It does not amount to a great deal more than the normal exchanges that take place in a household, although the tribunal accept that the prompting is necessary on a daily basis. It may occupy two or three minutes in the morning and in the evening. Her parents are understandably concerned about her diet since she previously was treated for a growth disorder ..."

24. Before me, the claimant's father pointed out that, when the claimant is not at college, she eats at home, and an additional two or three minutes prompting to eat is needed on those days, at lunchtime. This has been the case since she began college in 2001. In 2002, she was at college for about 30 weeks of the year, for an average of three days per week. Otherwise, she was at home. Although she looked for work during the holidays, she has only ever found 6 weeks' holiday work at a hamburger restaurant. I accept this evidence.

25. On the evidence before it, the tribunal concluded that, "the attention that [the claimant] reasonably requires on a daily basis is minimal, and does not amount to a significant portion of the day on [her] evidence ..." (Statement of Reasons, Paragraph 16).

26. The claimant appealed on the ground that the tribunal does not appear to have considered at all whether the claimant needed attention "frequently throughout the day" (Section 72(1)(b)(i)) - but only whether she required such attention for "a significant portion of the day", an entirely different test under an entirely different provision (Section 72(1)(a)(i)). The Secretary of State does not support the appeal.

27. Whilst the tribunal made careful primary findings of fact in relation to the claimant's attention needs as at 21 March 2002, nowhere in its Statement of Reasons did it draw a conclusion with regard to whether the claimant had or had not satisfied the day-time requirements criteria of Section 72(1)(b)(i). Paragraph 16 of the Statement of Reasons clearly drew a conclusion that she did not satisfy the criteria of Section 72(1)(a)(i) - but, for the reasons set out above, a failure to satisfy the lowest rate criteria in that subsection does not logically mean that she would be bound to fail to meet the criteria for a higher rate of benefit. The tribunal failed to consider whether the claimant satisfied the criteria of Section 72(1)(b)(i), which had been expressly raised on the claimant's behalf in the appeal. By this failure, the tribunal erred in law. As a result, I have no alternative but to set aside the tribunal's decision of 21 March 2002, which I do.

28. However, Section 14(8) of the Social Security Act 1998 empowers me to give the decision which the tribunal ought to have given, if necessary and expedient making appropriate findings of fact. As I indicated at the oral hearing, bearing in mind the circumstances of this case (including its long history), it is in the interests of everyone but particularly the claimant and her parents that this case is disposed of as soon as

possible. This is a case in which I can properly exercise my powers under Section 14(8), which I therefore propose to do.

29. I find that the claimant's reasonable requirements for day-time attention as at 21 March 2002 were as follows:

(i) Although the claimant was capable of dressing herself, she required 2-3 minutes attention each morning to ensure she had dressed herself correctly.

(ii) Although the claimant could bathe herself, she required up to 5 minutes attention when she washed her hair to ensure she had rinsed out all the shampoo. She washed her hair 4-5 times per week, either in the morning or evening.

(iii) She required prompting from another person in relation to her personal care and to eat properly. This occupied 2-3 minutes every morning and evening, and a further 2-3 minutes every lunchtime she was at home (about 270 days per year - on about 90 days per year she was at college).

These findings were made by the tribunal, save for that relating to her lunchtime attention requirements, made by me following hearing evidence from the claimant's father.

30. On the basis of these findings of fact, I do not consider that the claimant's day-time attention requirements were "frequent... throughout the day". In coming to this conclusion, I have particularly taken into account the number of occasions per day attention was required (3-5 times per day), and the pattern of that attention (a regular pattern of occurrences, all either in the morning or evening, except when she was not at college when there was one period of attention lasting 2-3 minutes at lunchtime). Although not determinative in this case, I have also taken into account the length of the periods of attention required (with the exception of 5 minutes attention during hair washing, all of 2-3 minutes each). Whilst understanding the burden such care imposes upon the claimant's parents who give her the attention she needs - and their dedication to the claimant and her needs was very apparent from the oral hearing - in the proper context of Section 72(1)(b)(i), I do not consider this to be "frequent attention... throughout the day". Indeed, it would seem to me to fall somewhat short of the legal line drawn by the statutory provision.

31. For these reasons, the claimant's appeal is formally allowed, and the decision of the East Ham Appeal Tribunal dated 15 August 2002 set aside. However, that is of no practical benefit to the claimant because I substitute the following decision to the same effect as the tribunal's decision, namely that the Secretary of State's decision of 21 March 2002 be confirmed. The claimant is therefore entitled to the lower rate mobility component and lowest rate (but not the middle rate) care component of her DLA for the period 30 April 2002 to 29 April 2005.

CDLA/492/2004

32. The claimant has epilepsy, high blood pressure and dizziness.

33. He was awarded DLA (highest rate care and lower rate mobility) from 7 June 2002 to 6 June 2003. On 3 January 2003, he made a renewal claim and, following medical reports, on 25 February, a decision-maker on behalf of the Secretary of State allowed the claim, but on the basis of middle rate care and lower rate mobility. An appeal was lodged on 12 March 2003, as a result of which, on 2 April, a decision-maker reconsidered, but did not revise, the decision. The appeal therefore proceeded to an appeal tribunal, where it was heard and refused on 14 October 2003. The claimant then sought to appeal the tribunal's decision to a Commissioner. The District Chairman refused leave, but I granted leave to appeal on 30 March 2004.

34. The mobility component was not in issue before the tribunal, nor is it before me. So far as the care component is concerned, the claimant was awarded the middle rate as having satisfied the day-time supervision requirements of Section 72(1)(b). Before the tribunal, he submitted that he should be entitled to the highest rate because he additionally satisfied the night-time criteria of Section 72(1)(c).

35. His primary submission before the tribunal was that, because of his propensity to fit at night and in order to avoid substantial danger to himself, he required someone else (his wife) to be awake for a prolonged period or at frequent intervals for the purpose of watching over him. As I indicated in my reasons for giving leave to appeal, the tribunal found that the claimant did not reasonably require watching over at night, because his wife woke as soon as he started fitting and attended to him. That was a proper finding open to the tribunal to make upon the evidence. The condition for the care component in Section 72(1)(c)(ii) was therefore not satisfied. Although it formed his primary ground of appeal to a Commissioner in his application for leave, the tribunal's findings and conclusion in this regard are unimpeachable, and it was for that reason I refused leave to appeal on that ground.

36. However, I did give leave in respect of the manner in which the tribunal dealt with the alternative night-time care criteria in Section 72(1)(c)(i) which, as indicated above, provides:

> "... [A] person shall be entitled to the care component of [DLA] for any period throughout which... he is so severely disabled physically or mentally that, at night... he requires from another person prolonged or repeated attention in connection with his bodily functions..."

37. In relation to the number of fits at night, the tribunal expressly accepted the claimant's own evidence. This appears to have been wrongly recorded in Paragraph 13 of the Statement of Reasons as "between one and three times a week": his evidence as recorded in the Record of Proceedings (and Paragraph 12 of the Statement) was that he fitted at night once or twice a week. The tribunal also accepted the claimant's written submission as to the length of time a fit would last "up to 20 minutes" (Paragraph 13 of the Statement: the submission actually states 15-20 minutes): and concluded that he would reasonably require attention during the whole time the fit lasted. It was clearly

open to the tribunal to accept the claimant's evidence in relation to these matters, and make findings upon the basis of that evidence.

38. However, at this point, the tribunal did unfortunately fall into error, by proceeding to find that "[the claimant] did not need attention on the majority of nights in the period considered. *Accordingly,* [the tribunal] found that he did not satisfy the conditions for an award of DLA on the basis of night-time attention" (emphasis added). The tribunal erred in construing Section 72(1)(c)(i) as if it were determinative against the claimant that his need for night-time attention, even if prolonged, was not required on at least 4 nights per week. The fact that attention was required only once or twice a week was one factor that the tribunal ought to have taken into account when considering whether the criteria had been satisfied, but it was not the only, necessarily determinative, factor. In failing to consider all relevant factors, the tribunal erred in law.

39. The Secretary of State accepts that the tribunal erred in this respect, and accepts that, as a result, its decision must be set aside.

40. For these reasons, I do set aside the tribunal's decision.

41. Having set aside the tribunal's decision, as indicated in Paragraph 28 above, Section 14(8) of the Social Security Act 1998 empowers me to give the decision which the tribunal ought to have given. I consider that this is a case in which it is appropriate for me to exercise my powers under this provision.

42. As indicated above, the tribunal accepted the claimant's evidence with regard to the regularity of fits at night, the period of them and his need for assistance during the whole period each fit lasted. Paragraph 13 of the Statement of Reasons apparently did not accurately set out that evidence, and therefore for the avoidance of doubt I make the following findings of fact based upon the claimant's own evidence. As at the relevant date (25 February 2003), I find:

    (i) He fitted at night once or twice a week.
    (ii) This regularity of fitting did not change in the period from the start of 2003 to June 2003.
    (iii) He did not fit more than once per night.
    (iv) Each fit lasted 15-20 minutes.
    (v) Each fit reasonably required attention during the whole time the fit lasted.

43. The claimant in the case before me had no more than a single fit in any one night, and there is no suggestion that he fulfilled the "repeated attention" criteria.

44. With regard to the "prolonged attention" criteria, one relevant factor is of course the length of the period attention. However, whilst regularity has no part in the definition of "prolonged", one circumstance which has to be taken into account when considering whether a particular claimant satisfies the composite requirements of Section 72(1)(c)(i) is the regularity with which "prolonged" attention is reasonably required and the pattern of that attention (see Paragraph 10(iii) above).

45. Considering the findings of fact and the law as set out above, and taking a broad view of the matter, in my judgment the claimant did not satisfy the criteria of Section 72(1)(c)(i) as at 25 February 2003. In coming to this conclusion I have taken into account particularly the length of the fits (none was over 20 minutes), and the pattern and regularity of the fits (they occurred at night 1-2 times per week, on an unpredictable but regular basis). Bearing these factors in mind, I do not consider that the claimant was so severely disabled that he required prolonged attention throughout the relevant period, for the purposes of Section 72(1)(c)(i).

46. For these reasons, I formally allow the claimant's appeal, and set aside the decision of the Harrow Appeal Tribunal dated 14 October 2003. However, as with Case No CDLA/5465/2002, that is of no practical benefit to the claimant because I substitute a decision to the same effect as the tribunal's decision, namely that the Secretary of State's decision of 25 February 2003 be confirmed. The claimant is therefore entitled to the lower rate mobility component and middle rate (but not the highest rate) care component of his DLA for the period 7 June 2003 to 6 June 2005.

His Honour Judge Gary Hickinbottom
Chief Commissioner
30 June 2004
(Signed on original)