DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Appeal Tribunal is erroneous in law. I set it aside and remit the case to an Appeal Tribunal. I direct pursuant to section 14(9) of the Social Security Act 1998 that the Tribunal need not (but may) be differently constituted.

REASONS

2. The claimant is a woman born in 1970. In 1995 she contracted cancer of the cervix. The cancer was treated successfully by radiotherapy but the treatment left the claimant with some late bowel damage. In addition, the claimant's GP has reported (page 43) that the claimant suffers from anxiety and depression, accompanied by significant psychosexual difficulties, for which she was receiving medication.

3. In June 2002 the claimant claimed a Disability Living Allowance. In the claim form the claimant complained of lack of energy, saying that she could not walk more than 100 yards, taking 10 minutes, because her legs were weak like jelly; her partner sometimes had to carry her to bed; she could be full of energy one day and then in bed or on a couch for two days. She also referred to stomach cramps and said that when she needed the toilet the need was urgent. Her bladder was also weak since the radiotherapy. In addition, the claimant referred to a seizure that she had suffered while at a car boot sale; she had to be taken to the local General Hospital. On the pages of the form dealing with the help that the claimant needed (pages 34 and 35), she wrote that she needed help carrying her shopping and driving her to the doctor's.

4. The claimant's oncologist completed a hospital report form (pages 39-40) saying there was a 95% chance the at the claimant's cancer was cured but confirming the existence of bowel damage; he reported that the claimant was able to perform the activities specified on the report form, including walking out of doors without help, saying 'I have no knowledge that her walking is limited'. The claimant's GP (pages 43-44) reported a diagnosis of anxiety/depression, gave details of her medication and said that the prognosis was for a recovery; he described the claimant as coherent and rational but with a tendency to impulsive/feckless action; she had impulsively harmed herself in the past. He reported, however, that the claimant could be safely left alone indoors or out of doors and did not need supervision to get around in familiar or unfamiliar places.

5. In August 2002 a decision-maker decided that the claimant was not eligible for any component of DLA; the reasons are on page 51. The claimant appealed (pages 1G-1H) on the grounds of the help she needed from her partner within the home, also referring to a recent panic attack while in bed and a further medical problem for which

she was having an x-ray examination. In October 2002 the claim was reconsidered by the Department, but the decision was not changed.

6. The appeal first came before the Appeal Tribunal in January 2003; the claimant produced evidence of her award of incapacity benefit and a recent prescription for Loperamide for her bowel condition (it appears that the claimant had had a hospital appointment a few days before). She gave evidence about the other medication she was on and about her bowel problems. The Tribunal adjourned the case for further medical evidence.

7. In February 2003 the claimant's consultant oncologist gave a report following his review of the claimant's case in January; he referred to significant late side effects of the claimant's radiotherapy involving the bladder, bowel and vagina, with frequent loose bowel movements after eating and at any other time; he said 'this causes severe urgency with a significant risk of incontinence if she is not able to reach a toilet rapidly'. He added 'it is not likely that this condition can be other than reasonably well controlled with medication and she will endure bowel problems for the rest of her life'. He mentioned the referral of the claimant to a clinical psychologist and concluded 'Her condition does not specifically affect her ability to walk or care for herself, however her mobility is significantly limited by her concern that she may be incontinent at any time'.

8. The cancer nurse also reported in February that she had seen the claimant in July 2002 and in July 2003 (this must be a mistake and I assume January 2003 was meant); she said that the claimant had reported significant diarrhoea, which restricted her ability to leave the house, and other anxieties. The nurse said that the claimant's condition 'does not specifically affect her ability to walk or care for herself but emotionally she finds things very difficult to cope with at this time'. There was a further report from the GP including answers to questions which are not on the file (but there is a draft of them in the backing file). He reported that he had himself recorded loose stools and urinary frequency in June and August 2002.

9. The claimant's representative submitted some material on the 'cooked meal' test regarding the care component of DLA and on decision CDLA 494/94 concerning the effect of incontinence upon mobility.

10. The appeal came back before an Appeal Tribunal in May 2003. The Tribunal held the claimant to be entitled to the lowest rate of the care component of DLA but not to the mobility component. The appeal to the Commissioner relates to the mobility component only. The claimant's representative argued that the she was entitled to the lower rate of the mobility component on the grounds of a need for supervision in unfamiliar surroundings, because of a tendency to panic about her incontinence giving rise to a need for help to find a toilet – someone to act when it was necessary to deal with the claimant's incontinence. He relied on CDLA/494/94.

11. The Tribunal accepted that the claimant had suffered bowel damage which was not likely to be controlled by medication. She was able to walk and therefore not entitled to the higher rate of the mobility component (this was not contested). As regards entitlement to the lower rate, the Tribunal found that the claimant did not require supervision or guidance out of doors on a regular basis; she would go into a shop on

her own and to her father's house on her own. So far as her real fear in connection with guidance and supervision in unfamiliar places was concerned, this was nothing more than a fear of potential incontinence which would arise as a result of not being aware of the location of toilet facilities; however, the Tribunal did not find that the medical evidence substantiated an assertion of incontinence but only of urgency; the Tribunal found that her bowel problems ought to be capable of control by medication, enabling her fears to be addressed practically on arrival at premises.

12. The claimant appeals, with the leave of a Commissioner, on grounds of inadequate reasons, misinterpretation of the Regulations and failure to take into account material evidence; it is said that the Tribunal erred: in having regard to the claimant's ability to use familiar routes, contrary to section 73(1)(d) of the Social Security Contributions and Benefits Act 1992; in regarding one occasion when the claimant was alone at a car boot sale as showing that she was able to be alone in an unfamiliar place; and in giving inadequate reasons for finding the claimant's bowel condition to be controllable, in the face of evidence from her consultant that her mobility was limited by her concern about incontinence and her own evidence that her incontinence was not effectively controlled by medication.

13. In giving leave, the Commissioner referred to regulations 12(7) and (8) of the Disability Living Allowance Regulations, which were not cited to the Tribunal.

14. The Secretary of State resists the appeal, saying that the Tribunal reached a reasonable conclusion about the controllability of the claimant's bowel condition and that the claimant's fear or anxiety does not arise from a mental disability so as to be relevant under regulation 12(7) and (8). He also refers to evidence given at the first Tribunal hearing that the claimant had stopped taking the incontinence medication.

15. The claimant's representative points out that the claimant told the second Tribunal that she was taking the medication, refers to the consultant's report and asserts that the claimant's fear and anxiety are a symptom of the mental health problems for which the claimant continues to receive treatment.

16. In my judgment the fundamental reason why the Tribunal erred in law in this case is that they did not consider regulations 12(7) and (8).

17. In summary the legislation operates as follows: a person is entitled to the mobility component if he cannot walk at all (in which case he receives the higher rate); a person who can walk is entitled to the lower rate of the mobility component if he is 'so severely disabled physically or mentally that, disregarding any ability to use routes which are familiar to him on his own, he cannot take advantage of his ability to walk out of doors without guidance or supervision from another person most of the time'.

18. It is important to note that a person is not entitled to any rate of the mobility component simply because his or her disability makes it impossible in practice to go out; thus the claimant could not be entitled to the component simply because the risk of a loss of bowel control prevented her going out. If a person is able to walk, the mobility component only compensates her if she has a need for guidance or supervision.

19. That need may arise from a physical disability (e.g. blindness) or a mental disability, which can include fear and/or anxiety. Regulations 12(7) and (8) of the DLA Regulations provide that a need for guidance or supervision is not to be taken into account if it arises out of fear or anxiety unless the fear or anxiety is a symptom of a mental disability and is so severe as to prevent the person going out alone.

20. Regulations 12(7) and (8) thus have the effect that an 'ordinary' fear of having to deal on one's own with the consequences of one's physical disabilities (such as, for example, an attack of angina or of incontinence) is not sufficient.

21. CDLA/494/94 was decided before regulation 12(7) and (8) were added to the DLA Regulations. There the Commissioner held that a person with a condition similar to this claimant's would be entitle to the mobility component if, on the facts, supervision would enable the person to walk in an unfamiliar areas where she might feel terrified to walk alone. It seem to me that, under regulation 12(7) and (8) the Commissioner's approach in CDLA/494/94 has to be modified: an 'ordinary' or rational fear of having to cope with incontinence while alone is not sufficient; the fear has to be a symptom of a mental disability.

22. The Tribunal's approach to the matter was as follows: they did not take a view upon whether the claimant needed a person to be present if she had an attack of incontinence in an unfamiliar place, but decided instead that the claimant need not have an attack of incontinence in an unfamiliar place because her bowel condition could be controlled.

23. That was the wrong question. The question they should have asked themselves is whether the claimant was genuinely prevented from going to unfamiliar places alone by a genuine fear or anxiety which might be related to incontinence or urgency of defecation but must itself have been a symptom of her mental disability.

24. The claimant's representative suggests that the answer is obvious and in effect invites me to make a finding that the claimant has a fear of going unaccompanied in unfamiliar places because of her depression and anxiety state. I do not consider that it is expedient (section 14(8) of the Social Security Act 1998) for me to try to make those findings. Having looked at the written evidence as a whole I do not find the answer obvious and consider that the question needs to be addressed by a fact-finding Tribunal with a hearing. I therefore remit the case. Like the Commissioner who gave leave, I am impressed by the care and thoroughness evident from the record of the proceedings. I have directed that the Tribunal need not be differently constituted since I can see no objection to members of the previous Tribunal sitting again, the last hearing was fairly recent and their recollection of the case may well enable it to be dealt with more efficiently; my direction gives the Tribunal service the flexibility to balance those considerations against the practicalities of listing.

25. My decision does not turn on the points in the claimant's grounds of appeal. I agree with the claimant that her ability to use familiar routes is legally irrelevant, but I do not consider that the previous decision was based on an erroneous view that it was relevant; in the middle of their fourth paragraph the Tribunal explicitly turned their attention to the position in unfamiliar places. I agree that the Tribunal did not give a reason for finding that the incontinence was controllable (which amounted to an error

of law through insufficient reasons as well as answering the wrong question), but I do not find any error of law in what they said about the car boot sale. It seems to me that they were referring to that in support of a conclusion that the claimant did not have a general fear of being alone in unfamiliar places but (as they went on to say) a fear linked to the consequences of incontinence.

(Signed) **Nicholas Paines QC**

Deputy Commissioner

(Date) **9 December 2003**