DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

1.1. The decision of the Plymouth appeal tribunal under reference U/03/200/2002/00889, held on 21 January 2003, is erroneous in point of law.

1.2. I set it aside and remit the case to a differently constituted appeal tribunal.

1.3. I direct that appeal tribunal to 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. In particular:

The appeal tribunal must investigate and determine the claimant's entitlement to a disability living allowance on and from 15 January 2002, the date when her claim for a disability living allowance was treated as made.

The appeal tribunal must not take account of circumstances that were not obtaining during the period from the date of claim to the date of the decision under appeal (8 April 2002): see section 12(8)(b) of the Social Security Act 1998, as interpreted in *R(DLA) 2 and 3/01*. This applies to all aspects of the case, including both of the qualifying periods under sections 72(2) and 73(9) of the Social Security Contributions and Benefits Act 1992.

The appeal to the Commissioner

2. This case comes before me for decision on an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave. The Secretary of State supports the appeal.

The history of the case

3. In view of the issues raised by this appeal, it is sufficient to set out only briefly the adjudication history of the case. The claimant made a claim for a disability living allowance. It was treated as made on 15 January 2002. The Secretary of State refused the claim on 8 April 2002. The claimant exercised her right of appeal to an appeal tribunal. The tribunal allowed the appeal in part, making an award consisting of the care component at the lowest rate for the inclusive period from the date of claim to 14 January 2004.

How the tribunal went wrong in law

4. The tribunal went wrong in law in respect of the mobility component at the lower rate. It relied on evidence of journeys by the claimant to show that she did not satisfy the conditions of entitlement for this rate. However, as her representative points out in the application, the tribunal did not make any findings on whether or not the routes involved were familiar to the claimant. If they were familiar to her, the fact that she was able to travel over them was no indication of her ability to manage an unfamiliar route. This is sufficient to make

the tribunal's decision wrong in law. I do not, therefore, need to consider the other grounds of appeal. However, the factual points made in respect of them will be before the tribunal at the rehearing.

Other issues

5. On granting leave, I indicated that I would comment on two other matters in my decision. Both relate to evidence.

Evidence given by a representative

6. The first matter relates to evidence given by a representative. The claimant was represented at the hearing before the tribunal (but not before me) by her social worker. He sought to give evidence of her condition and disablement from his own knowledge. The chairman's statement of the reasons for the tribunal's decision records that

> 'The role of a representative is to represent and not to give evidence. The social worker representative at the hearing ... was in the difficult position that, part way through the hearing he wished to give evidence as opposed to make representations. Whilst the tribunal allowed him to do so it is important for a representative to ensure that if evidence is to be given it is not done whilst in the role of a representative. ... Having allowed the evidence to be given, the Tribunal regret that it cannot give any significant weight to it.'

7. I consider these remarks first on general principle and then on the terms of the relevant legislation.

8. Tribunals operate less formally than courts. They do not operate rights of audience. They allow, of course, professional legal representation. But they also allow lay representation and assistance from anyone whom the claimant wishes to assist in presenting a case to a tribunal. Given that breadth of representation, it is inevitable that the roles of representative and witness cannot be separated in the way that they would be in a court. The same person may wish to put the claimant's case and give evidence in support of that case. The tribunal must take care to distinguish evidence from representation so that the former's provenance is known and can be the subject of questioning by the tribunal and other parties. But, subject to the practicalities of the way in which the taking of evidence is handled, there is no objection in principle to the same person acting in different capacities as a witness and as a representative. Nor is there any reason in principle why the probative value of evidence should depend upon whether or not it came from a representative.

9. These principles are reflected in the relevant legislation, which is contained in the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

9.1. The claimant was a party to the proceedings. See the definition in regulation 1(2), which refers to sections 13 and 14 of the Social Security Act 1998. Section 14(3)(b) is the key provision, as it covers claimants.

9.2. As a party to the proceedings, she was 'entitled to be present and be heard at an oral hearing.' See regulation 49(7).

9.3. As someone who had the right to be heard, she was entitled to 'be represented by another person whether having professional qualifications or not.' See regulation 49(8).

9.4. And 'for the purposes of the proceedings at the hearing' that representative has 'all the rights and powers to which the person whom he represents is entitled.' See regulation 49(8) again.

9.5. Finally, a person who has the right to be heard 'may address the tribunal' and 'may give evidence'. See regulation 49(11).

10. So, the claimant was entitled to give evidence. She was also entitled to be represented. Her representative had the same rights and powers as she had. That included the right to be heard. And that triggered the right to give evidence.

11. The comments that I have quoted in paragraph 6 seem to me to convey a rather ambivalent attitude towards the representative who wanted to give evidence of his own knowledge. He was doing no more than exercise the rights he had both on general principle and under the express provisions of regulation 49. It is correct that the role of a representative is to represent and not to give evidence. But that distinction properly refers to the capacity in which a person acts and the function that the person performs. It does not refer to the person involved, who may act in different capacities and perform different functions. It is also correct that the giving of evidence and making of representations should be kept as distinct as is realistic. But there is no reason for a tribunal to consider that the representative who wants to give evidence is, practicalities apart, in a 'difficult position'. Nor is it for the tribunal to 'allow' a representative to give evidence. It has no power to prevent it, although the chairman has control of procedure and, through that, the power to control the way in which the evidence is given.

12. There is nothing in the statement of reasons to suggest that the tribunal assessed the representative's evidence inappropriately or irrationally. But comments like those that I have quoted are capable of being read as creating the impression that the tribunal heard the representative's evidence reluctantly and may not have assessed it dispassionately.

13. I emphasise that I am concerned here with a representative who wanted to give evidence from his own knowledge. I am not concerned with the different circumstance of a representative who wants to make a statement of the claimant's evidence to the appeal tribunal. Some tribunals refuse a representative the chance to do this. They insist on hearing the evidence from the claimant, allowing the representative to supplement the tribunal's questions to ensure that all the evidence is elicited from the claimant. That is a matter that is within the chairman's control of the procedure under regulation 49(1). Nothing I have written affects the use of that power by chairman to control the way that the claimant's own evidence is presented.

Evidence, the qualifying periods and section 12(8)(b) of the Social Security Act 1998

14. The second matter on which I said I would comment relates to the tribunal's use of evidence obtained at the hearing.

15. In *R(DLA) 2 and 3/01*, I decided in the context of section 12(8)(b) of the Social Security Act 1998 that the date on which evidence was provided was not relevant. What mattered was

whether it could be related, by its terms or by other evidence, to the date to which it related. Under that provision, a tribunal is not entitled to take account of circumstances that were not obtaining at that time. In this case, the date of the decision under appeal was 8 April 2002.

16. The date of claim was also relevant. As the tribunal wanted to make an award of the care component, it had to be satisfied that the conditions of entitlement had been satisfied for 3 months before the effective date of the award and for the following 6 months. See section 72(2) of the Social Security Contributions and Benefits Act 1992.

17. The tribunal used evidence given at the hearing. The claimant's representative argues that only evidence available at the date of claim should have been used in respect of the qualifying periods. I reject that argument. My reasoning in *R(DLA) 2 and 3/01* applies to the qualifying period as it applies to section 12(8)(b). The tribunal had to decide whether the qualifying periods for the care component were satisfied. It was entitled to consider any evidence, whenever it was produced, provided only that it could be related to the date of claim, at which date those periods had to be satisfied.

Conclusion

18. I allow the appeal, set the tribunal's decision aside and direct a rehearing.

19. I make two final comments for the benefit of the claimant.

19.1. Although I have set aside the tribunal's decision on one ground only, all issues of fact and, subject to my directions, law within its jurisdiction are open before the tribunal at the rehearing.

19.2. The award made by the appeal tribunal on 21 January 2003 has ceased to exist as a result of the tribunal's decision being set aside. The tribunal at the tribunal will not be bound to accept that award. The matter will be considered afresh. I am not saying, or even hinting, that the award was inappropriate on the evidence. All I am doing is making clear to the claimant the consequence of my decision.

Signed on original

Edward Jacobs
Commissioner
18 September 2003