DECISION OF THE SOCIAL SECURITY COMMISSIONER

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

I SET ASIDE the decision of the Durham appeal tribunal, held on 13 April 2006 under reference U/44/225/2006/00073, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT that 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 1998 Act, 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 14 July 2005, the date when his claim was treated as made. In doing so:

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 (24 October 2005): see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

History and background

2. The claimant submitted a claim for a disability living allowance on 10 August 2005. It was treated as made on 14 July 2005. The decision-maker refused the claim and the claimant's appeal to an appeal tribunal was dismissed. I have before me the appeal against the tribunal's decision, brought with the leave of Mrs Commissioner Jupp.

3. In his claim pack, the claimant set out difficulties with both mobility and care. In view of the number of errors that the tribunal made in respect of the mobility component, it is unnecessary for me to consider whether it also went wrong in law in respect of the care component. I will, therefore, refer only to the evidence relevant to the mobility component at the higher rate.

4. The claimant wrote that he could walk without severe discomfort for a distance of only 20 yards in about 5 minutes. He said that he used a walking stick, his mobility was limited by pain in his back and right leg, and he could not balance on his left foot.

5. The claimant was visited by an examining medical practitioner on 24 October 2005. He told the doctor:

> 'At present I can only walk about 20 yards on the flat, using 2 sticks before I have to stop because of pain affecting my back, R leg and L foot. It takes about 10 minutes.'

The doctor gave a symptomatic diagnosis of 'pain in back, R leg, L foot'. I shall quote some of the clinical findings on examination later. For the moment, I will just pick out that the doctor found no muscle wasting and nothing abnormal on examination of the ankles. The

doctor's opinion was that the whole of the right lower limb was slightly impaired by discomfort radiating down the leg and that the left lower leg, ankle and foot were slightly impaired by discomfort in the first metatarsal-phalangeal joint. In this doctor's opinion, the claimant could walk without severe discomfort for 200 metres on flat terrain on his worst day at a slow pace, taking three to four minutes, and with a slight limp, but with good balance, no halts and no physical support from another person.

6. The decision-maker also had available a report from the claimant's GP. It can best be described as brief. The doctor wrote that the claimant had last been seen on 3 October 2005 (a month before the report) and had had back pain and right leg pain for two years. The back pain was moderate and the claimant had been referred for physiotherapy. He currently had sciatica. On function, the doctor wrote only that insight and awareness of danger was 'OK'.

7. On the appeal, the claimant's representative produced a copy of a medical adviser's report on the claimant's capacity for work. It was completed on 13 October 2005, less than two weeks before the examining medical practitioner visited the claimant. The report led to a score of 51 points on the personal capability assessment. On mobility, the adviser found that the claimant could not walk more than 50 metres without stopping or experiencing severe discomfort. I shall quote some of the clinical findings on examination later. For the moment, I will just pick out that the doctor found muscle wasting in both thighs and described the claimant as having a severely disabling injury to his left ankle.

8. Even from the couple of quotations I have so far made from the reports of the examining medical practitioner and the medical adviser, it is clear that the two reports are completely incompatible. Unless they are both wrong, only one of them can be right. The tribunal relied on the report of the examining medical practitioner. I have set aside its decision because of the way it dealt with the conflicting medical evidence.

Inadequate reasons

9. The reasons recorded by the tribunal's chairman are inadequate to explain why the tribunal preferred the evidence of the examining medical practitioner to that of the claimant and the medical adviser. I will analyse the key paragraph in the reasons sentence by sentence:

'There was a conflict of evidence as between the Appellant and [the examining medical practitioner] and in the medical evidence of the two doctors with regard to walking ability.'

10. This is correct.

'After considering all of the evidence the Tribunal preferred the evidence of [the examining medical practitioner] whose opinion was based on his full clinical examination of the Appellant in his home and observation of the Appellant.'

11. What the tribunal says of the examining medical practitioner is correct. However, apart from the venue for the examination, the same is true of the medical adviser. Both doctors carried out a clinical examination. Both observed the claimant and recorded those observations. The main difference between the two reports is that the medical adviser recorded more details than did the examining medical practitioner on (i) the claimant's history and (ii) his daily activities as well as (iii) clinical findings on examination.

'[The medical adviser] reported that the factor limiting the Appellant's walking ability is a problem with his hips which was not referred either by the Appellant or his GP.'

12. It is not correct that the medical adviser found that *the* factor limiting the claimant's walking was the problem with his hips. The doctor found that this was a factor, but also identified a severely disabling injury to the left ankle. And the claimant must have mentioned the hip problem, at least to the medical adviser, because the doctor would not otherwise have been aware that it caused him pain. Moreover, if the tribunal wanted to rely on the GP's evidence, it had to explain why it did so, given that both the examining medical practitioner and the medical adviser found disabilities and conditions that the GP did not mention.

'[The medical adviser] also described the restriction of walking as being "moderate" which is consistent with [the examining medical practitioner's] assessment of "slight impairment" but inconsistent with a restriction of walking to only 50 metres.'

13. This is error by misquotation and selective comparison. The medical adviser did not describe the restriction on the claimant's walking as moderate. What the doctor recorded was that 'hip problem causes constant moderate hip pain, and this lead to moderate restriction of ... walking ...' The reference to moderate refers to the severity and effect of *hip pain.* The tribunal has overlooked or ignored the medical adviser's finding that 'Examination of the left ankle shows a severely disabling injury.' The doctor's opinion that the claimant could not walk for more than 50 metres without stopping or severe discomfort took account of both the hip pain and the disabling ankle injury.

'The Tribunal also found it inconsistent that a restriction to that degree had not been investigated by referral to a Consultant or by X-ray.'

14. The tribunal has overlooked or ignored the evidence at page 7 that the claimant had had an x-ray of his foot and was awaiting a further x-ray.

'The Tribunal also noted that the GP referred to the back pain as being "moderate".'

15. That is true, but incomplete. The GP also mentioned that the claimant had sciatica. And the tribunal fails to mention that the medical adviser attributed the claimant's walking difficulties to his ankle and his hip. In that context, it is not clear what significance the GP's comment on back pain has.

Finding not supported by the evidence

16. The tribunal also went wrong in law by making a finding that is not supported by the evidence.

17. The tribunal found that 'when being examined by the [examining medical practitioner] the Appellant had responded to certain tests in an inappropriate manner suggesting some exaggeration of symptoms on his part.'

18. This refers to the examining medical practitioner's record that 'Axial loading, pelvic rotation and touching the clothing over the lower spine cause pain.'

19. Tests such as those recorded by the examining medical practitioner are sometimes known as Waddell signs. They are named after Professor Gordon Waddell. Their significance is often misunderstood by tribunals. The tribunal's finding that these signs show evidence of exaggeration is an example. In 1998, Professor Waddell revisited his work on non-organic signs along with Dr Chris Main. Their conclusions were published in 1998 in volume 23 of *Spine* starting at page 2367. I have downloaded, and slightly modified, the following summary from the internet:

- It cannot be assumed without further evidence that the behavioural signs are de facto to be viewed with suspicion.

- Over-interpretation of individual signs is common.

- Assessment of behavioural signs is not a complete psychological assessment.

- Clear evidence of behavioural responses indicates that the patient does not have a straightforward physical problem; an orthopaedic intervention may be required. In such cases, pain management as well as surgery may be necessary.

- An important significant minority of patients become chronically incapacitated after injury, regardless of whether litigation is involved.

- The most serious misuse and misinterpretation of behavioural signs has occurred in medicolegal context; they do not represent a comprehensive psychological evaluation and formulations such as "functional overlay" should not be taken as definitive.

- The signs should only be described as "behavioural responses to examination" and should be understood as such.

- The signs are a form of communication between the patient and doctor and are therefore influenced by expectations (both by the patient and the doctor).

- The signs are not a reason to deny appropriate physical treatment. Some patients may require both physical management and physical pathology and more careful management of psycho social behavioural aspects of their illness.

- The behavioural signs are not on their own a test of credibility.

20. I am not saying that a claimant who exhibits Waddell signs is not exaggerating. What I am saying is that the mere presence of those signs is not conclusive of the matter. They may be consistent with the claimant's disablement being a mixture of physical and mental components. As Professor Waddell himself says, they have to be viewed in the context of the evidence as a whole. The tribunal failed to do that.

Disposal

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

Signed on original
on 30 November 2006

Edward Jacobs
Commissioner