Bulletin 193

CDLA/2974/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Leeds appeal tribunal dated 5 May 2004 and I substitute my own decision. The claimant is entitled to disability living allowance, consisting of the lower rate of the mobility component and the middle rate of the care component, from 8 April 2002 to 23 June 2004.

REASONS

2. I held an oral hearing of this appeal. The claimant neither attended nor was represented. The Secretary of State was represented by Mr Jeremy Heath of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions.

3. The claimant, who acts through his mother, is now aged 11 but was aged 8 when he first claimed disability living allowance in 2002. The claim was disallowed by the Secretary of State but, on appeal, a tribunal awarded the mobility component at the lower rate with effect from 8 April 2002 to 7 April 2005. On 16 March 2004, on the claimant's appeal, I set aside that decision and referred the case to a differently constituted appeal tribunal (CDLA/1979/2003). The new tribunal, sitting on 5 May 2004, agreed with the Secretary of State's original decision that the claimant was not entitled to either component. The result of the claimant's appeal against the decision of the first tribunal was therefore to leave him worse off than he would have been had his mother accepted that tribunal's decision. The claimant now appeals against the decision of the second tribunal with my leave. I am told that, on a new claim, the claimant has been awarded the lower rate of the mobility component and the highest rate of the care component from 24 June 2004 to 23 June 2007.

4. An appeal to a Commissioner lies only on a point of law. The claimant's mother has raised a number of points, both in her original application to the chairman and in a further letter dated 19 August 2004, that she submits are errors of law in the tribunal's decision but the Secretary of State submits that there is no error of law in the tribunal's decision.

5. The claimant's mother's first submission is that the tribunal failed to deal with the question whether the claimant needed help with communication, which, she rightly submits, would be relevant to the question whether the claimant required frequent attention throughout the day. There is some force in this contention. The tribunal noted her evidence that he had "difficulty interacting with others" but, in paragraph 13 of the decision, in which the tribunal dealt with the question of attention in connection with bodily functions in fewer than four lines of typescript, the point is not mentioned. However, when one looks at the evidence, it does not seem to me that the claimant really had an arguable case on this point. The tribunal had before them a report from a consultant clinical psychologist making it clear that the claimant's behaviour was difficult and that he had an official diagnosis of Autistic Spectrum Disorder but that that disorder might not be the only reason for his behaviour which might be due to early "negative experiences in his life". He did not have any difficulties with speech as such or with hearing. His difficulties, as described to the tribunal, were with a tendency to be obsessive or excessively polite and to lose his thread when talking and, more importantly, with aggression. Apart from the significance of his behaviour, to which I shall return, it does not seem to me that the claimant's difficulties as regards communication could conceivably be

regarded as requiring frequent attention from another person in connection with any bodily function and, although the tribunal ought ideally to have said so specifically, I am not satisfied that its failure to do so amounts to an error of law.

6. The mother's second contention is related to the tribunal's consideration of the conditions of entitlement to the lower rate of the mobility component under section 73(1)(d) of the Social Security Contributions and Benefits Act 1992, which, of course, was the element awarded by the previous tribunal. The tribunal whose decision I set aside found that "if [the claimant] were outside he would be liable to run off and he would not have the traffic sense of an 8 year old. It was significant that he could not be trusted to go outside on the street, with a teenager as opposed to an adult." I set the decision aside on the ground that the tribunal had not adequately explained why the same irresponsibility did not lead to a finding that the claimant was entitled to the middle rate of the care component on the ground that he required continual supervision, in excess of that required by most children of his age, throughout the day in order to avoid substantial danger to himself or others. This time, the tribunal said that –

> "... although the Appellant may reasonably require guidance and supervision to unfamiliar places, such guidance and supervision was not substantially in excess of what most children of his age would require. He did not run off without warning, was happy to hold hands when crossing the road and had taken part in outings without any problems and without needing special arrangements to be made for him."

7. The claimant's mother disputes having given evidence to the effect that the claimant did not run off and was happy to hold her hand. The chairman's record of proceedings is particularly clear and legible. She recorded –

> "Let him out time to time – likes to play with younger children. [He is] not into football. They call him Geek. 2 younger girls hang on every work [sic, presumably it should read "word"]. Has taken them to his room + removed clothes. I go out + sit on wall. He would go off if suggested to by another child. Other children – some go to school alone – some not. Wouldn't allow him alone. He'd see a pigeon – would follow it. Will hold hands to cross.
>
> "Drum into him – not allowed past 4-5 semis from house. We live at 18 – not allowed past #6. with other child + with permission. Has escaped – gone to shop with 12 yr olds. he was O.K."

Therefore, it appears that the claimant's mother did say that the claimant would hold her hand and it was not an unreasonable inference that he would not run off when she was there.

8. However, the implication of her evidence was that the claimant did require supervision when walking outdoors. The tribunal accepted that to some extent. Its reasoning, quoted above, was that the claimant did require guidance and supervision in unfamiliar places but not substantially more than most children of his age would require. The question whether the supervision required was substantially more than that required by children of the claimant's age (8 at the relevant time) in normal physical or mental health was not a question that had been expressly addressed by the first tribunal and so it is not clear whether the first tribunal overlooked section 73(4) of the 1992 Act or whether it simply reached a different conclusion

in relation to it. In any event, the second tribunal was entitled to reach a different conclusion from the first tribunal and I do not think it arguable that it was not entitled to find that, when in unfamiliar places, the claimant's need for guidance or supervision was not substantially greater than the needs of most 8 year olds.

9. That, however, was not the question the tribunal had to answer. As I have had cause to point out before (see R(DLA) 6/03), a tribunal must, when considering entitlement to the mobility component under section 73(1)(d) of the 1992 Act, ignore any ability to use familiar routes but it is not entitled to ignore any *in*ability to use familiar routes. If a disabled child requires substantially more supervision from another person than children of his age in normal physical or mental health would require in order to be able to walk safely over familiar routes, he may satisfy the test in section 73(4) notwithstanding that he needs no more supervision than all children of his age when in unfamiliar places.

10. When giving leave to appeal, I suggested that it was arguable that an 8 year-old with only normal requirements would be allowed to go round the corner by himself, whereas the mother's case was that this particular claimant could not be allowed even that far unsupervised. The Secretary of State, referring to CDLA/1457/2003 correctly submits that a tribunal would not be bound to take that view and that the tribunal in this case could properly have rejected the mother's case. However, as it did not ask itself the correct question, the tribunal's decision in the present case must be set aside and CDLA/1457/2003 does not require me to substitute a decision to the same effect as the tribunal's. Apart from the fact that it does not follow from the Commissioners' decision that the tribunal in CDLA/1457/2003 would necessarily have erred if the tribunal had awarded the lower rate of the mobility component (see *Secretary of State for Work and Pensions v. Moyna* [2003] UKHL 44; [2003] 1 W.L.R. 1929 (also reported as R(DLA) 7/03) at paragraph [20]), the child in that case was a year younger than the claimant in the present case.

11. In the circumstances, I will nonetheless substitute my own decision because I do not consider that this case should go before a third tribunal, particularly as now only arrears are being considered. I do not consider that there is really any doubt about the claimant's need for supervision whenever walking outdoors. The fact that, as the Secretary of State submits, the claimant came to no harm the one time he "escaped" and went to a local shop with an older child does not mean that supervision is not reasonably required even when walking over such short distances. I note the recent report of the consultant clinical psychologist, dated 3 May 2005, helpfully supplied by the Secretary of State. He says –

> "The manner in which [the claimant] is affected by his ASD means that he finds it particularly difficult understanding both the needs and feelings of others, as well as the consequences of his actions. These difficulties do result in him displaying behaviour which, at times, can be dangerous to himself and others, as well as both verbally and physically."

That seems to me to be entirely consistent with what the claimant's mother has been saying ever since benefit was first claimed in 2002. I do not doubt that, most of the time, it is relatively easy to control the claimant's behaviour or mitigate its effect when he is being supervised and that therefore the degree of supervision required when most children would be supervised is not substantially greater than that provided for other children without disabilities, although it will be a bit greater. However, my view is that an 8 year-old without

disabilities would usually be given more freedom than the claimant could safely be given at the time of the Secretary of State's decision. Dr Helen Watts, the medical policy adviser to the Department's Corporate Medical Group, appears to support the suggestion I made when granting leave to appeal. She says that "one would expect a child of 8 or 9 to be able to find their way about in familiar places to a limited degree (i.e., go round the corner or 1 or 2 streets away) but not to go further than that, unaccompanied, because of their own safety and inability to navigate". Most of the time, no doubt, the claimant or other children would not come to any harm if he was allowed to go to a local shop unsupervised, but the risks are great on those occasions when he might be tempted to run into the road or to make an inappropriate gesture or comment to someone who might be inclined to retaliate or to take younger girls to a secluded place and remove their clothes. I am satisfied that, at the time of the Secretary of State's decision, the claimant reasonably required supervision whenever he was out walking and that the supervision was both required in circumstances when other children of his age would not require it and was required more intensively when other children of his age would require it. Overall, I am satisfied that the claimant's needs for supervision when out walking were substantially greater than the needs of other children of his age.

12. This brings me to the claimant's mother's third ground of appeal, in which she submits that the tribunal took too narrow a view of the claimant's inappropriate behaviour and failed adequately to explain why continual supervision was not required as a result so as to entitle him to the middle rate of the care component. The claimant's mother's evidence to the tribunal was that the claimant had difficulty interacting with other people, displayed obsessive behaviour and was aggressive when challenged. She described a number of incidents but the tribunal clearly did not entirely accept her account.

13. For the purposes of the middle and lower rates of the care component, the tribunal had to consider the extent to which the claimant needed attention in connection with his bodily functions (see section 72(1)(a)(i) and (b)(i) of the 1992 Act) and, in relation to the middle rate only, it had to consider whether he needed continual supervision throughout the day (see section 72(1)(b)). It also had to be satisfied that the requirements for attention or supervision were substantially greater than those of most children of the claimant's age (see section 72(6)(b)).

14. The tribunal did accept that the claimant needed prompting and encouraging to wash, bath and to clean his teeth and the implication is that it accepted that that those needs arose out of his disablement and amounted to attention in connection with bodily functions, but it did not accept that such attention was reasonably required frequently throughout the day or for a significant portion of the day or that the claimant's need for attention was substantially more than most children would require. The tribunal appears not to have considered whether the claimant had additional attention needs arising out of his behaviour.

15. Turning to supervision, the tribunal said –

> "The Tribunal also found, on balance, and bearing in mind [the claimant's] condition as a whole, that he did not reasonably require continual supervision throughout the day. [The claimant's] school had not reported aggressive or dangerous behaviour and although the Tribunal accepted that [the claimant] may become frustrated with his mother and younger brother, they decided that it was inherently improbable that incidents had occurred with such frequency and to the extent stated. The reason for

this conclusion is that if the outbursts had been as frequent and as ferocious as described, then the assessment team and the psychologists would have been aware of the situation and would have included specific references to it in their reports. Furthermore if the injuries to [the claimant's brother] had been as severe as stated it is inherently improbable that such injuries would have gone unnoticed."

16. This reasoning seems to me to be flawed. Even if the claimant was seriously violent on fewer occasions than suggested by his mother, it did not follow that he did not need continual supervision. The supervision he was receiving might have been achieving its purpose and reducing the number of outbursts. Moreover, I find it odd that the tribunal should have found that the claimant did not need continual supervision throughout the day, given his age and the fact that the tribunal did not give any reason for disagreeing with the Secretary of State's decision. It seems likely that the tribunal meant to find either that the claimant did not need supervision in order to avoid substantial danger due particularly to his disablement or that, as the Secretary of State had decided, the supervision that the claimant did need in order to avoid substantial danger as a result of his disablement was not substantially more than that required by children of the claimant's age in normal physical or mental health. However, the fact is that the reasoning is, at best, inadequate.

17. Again, I can substitute my own decision for that of the tribunal. I have no doubt that the claimant needed, at the material time, continual supervision throughout the day. He was only 8 years old. I also accept that the claimant required continual supervision throughout the day specifically as a result of physical or mental disablement. Although autistic spectrum disorder was not diagnosed until after the Secretary of State's decision, I accept that the claimant was suffering from it before then and, in the light of the light of the report of the consultant clinical psychologist dated 3 May 2005 to which I have already referred, I accept that that condition was the principal cause of the claimant's problems. It seems plain to me that the claimant needed more intervention from those caring for him than most children of his age and, as the need for intervention was unpredictable, I accept that the claimant required continual supervision. Dr Holmes, the consultant clinical psychologist upon whose report the Secretary of State relied, said that the claimant "needs supervision like a younger child because his behaviour can be inappropriate". It seems to me that the problem was greater than the need to give him extra support in maintaining personal hygiene, which the tribunal accepted. The claimant's inappropriate behaviour towards other children and adults needed restraining and the claimant and others needed to be protected from the results. I consider that I should accept the tribunal's finding that the occasions upon which the claimant's aggression resulted in harm were few and far between. However, I see no reason to doubt that he frequently displayed behaviour which, if it had gone unchecked, would have resulted in harm. Dr Holmes accepted as much. I also accept that the claimant did not have as much awareness of danger as most 8 year-olds and needed more supervision on that account.

18. The difficult issue is whether the claimant had "requirements [for supervision] substantially in excess of the normal requirements of persons of his age" or "substantial requirements [for supervision] which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have" (see section 72(6)(b) of the 1992 Act). On balance, I am not persuaded that the claimant did. For much of the time, the level of supervision he required was not markedly greater than that required by most 8 year-olds although there were some contexts in which a much closer eye had to be kept on him, such as when he was in the company of others,

including members of his own family, and when he was in the vicinity of dangerous objects. The school was managing him without the formal provision of special resources. It does not follow that he was not being more closely supervised than others – it seems probable that staff had to intervene more often with him than his classmates – but I am not persuaded that the difference was substantial. Whether closer supervision amounts to substantially greater supervision depends on whether it is more disruptive of the supervisor's routine. It is all a matter of degree. In my judgment, for large parts of the day, the claimant did not require substantially closer supervision than other children of his age.

19. As I have said, I do accept that the claimant requires active intervention as a result of mental disablement. However, the distinction between "attention" and "supervision" in this context is well established. The former involves active intervention, whereas the latter is largely passive and amounts to being ready to provide active intervention if required (see *Mallinson v. Secretary of State for Social Security* [1994] 1 W.L.R. 630 (also reported as R(A) 3/94)). I do not consider that this clear and helpful distinction can or should be blurred by taking "supervision" to include the active intervention that is made possible by the passive "keeping an eye on" the claimant. For that reason, I reject Mr Heath's submission that this case "more naturally falls within the 'supervision' than the 'attention' ambit of the care component". This "either/or" approach is inappropriate. A case where a claimant requires supervision is likely also to be one where the claimant requires attention. The two conditions exist independently in the legislation because a claimant may require continual supervision to avoid a very serious danger but may in fact require attention only rarely or a claimant may require frequent attention but not require supervision when the attention is not actually being provided because the needs for attention are predictable or because the claimant can call for attention when it is required. In every case where it is decided that either the "attention" condition or the "supervision" condition is not satisfied, a decision-maker or tribunal should consider the other condition. A rejection of one by no means implies a rejection of the other.

20. My finding that the claimant did not, at the material time, qualify for the middle rate of the care component on the "supervision" ground therefore makes it necessary to consider whether, as a result of mental disablement, he required attention in connection with his bodily functions either frequently throughout the day or for a significant portion of the day and whether such attention was substantially more than other children of his age required. This was an issue that the tribunal did not address at all but, for the reasons I have given, I am satisfied that the claimant's behaviour did, as a result of mental disablement, require intervention by another person frequently throughout the day. The crucial question is: was such intervention "attention ... in connection with his bodily functions"?

21. That it was "attention" is really beyond doubt. In *Secretary of State for Social Security v. Fairey* [1997] 1 W.L.R. 799 (also reported as R(A) 2/98), the House of Lords considered the "attention" required by a profoundly deaf claimant. Lord Slynn of Hadley having referred to *Mallinson*, where the House of Lords had held that providing guidance to a blind person could amount to "attention", said:

> "Providing someone who can explain or translate normal conversation, or radio or film speech, is different from providing physical guidance by an arm. It seems to me, however, that it is also capable of constituting 'attention'. It is the one, or the principal, way in which messages to the brain normally conveyed through hearing can be conveyed by alternative means. This obviously does not improve natural hearing.

> nor does it produce a replacement method of hearing but it provides an alternative way of fulfilling the hearing function."

If acting as interpreter for a profoundly deaf claimant can amount to attention, so can helping a child interact with other children or with adults. It is attention naturally given to very young children developing social skills. If an older child, through mental disablement, lacks normal social skills, it seems to me that help given to that child equally amounts to attention. I understood Mr Heath not to dispute that proposition if this case had properly to be considered under the heading of "attention" as well as "supervision".

22. What he did submit was that such help could not amount to attention "in connection with his bodily functions". It was this issue that led me to direct an oral hearing and seek the assistance of the Secretary of State.

23. At first sight, the phrase "bodily functions" might be thought to be confined to physical functions. However, in *Regina v. Ireland* [1998] A.C. 147, the House of Lords has interpreted the phrase "actual bodily harm" so that it includes a neurotic disorder or other recognisable psychiatric illness. Mr Heath rightly pointed out that that was in the context of criminal law and that the phrase was a different one, but those distinctions do not appear to me to be material. Indeed, the fact that the statute under consideration was a criminal one and was construed in a way that was unfavourable to the defendant suggests that the reading of the word "bodily" so as to include "psychiatric" is quite natural, because penal statutes generally fall to be strictly construed.

24. Is there nonetheless a line to be drawn? The House of Lords recognised that "there is no rigid distinction between body and mind" but that does not mean that there is no distinction at all. Moreover, it was emphasised that the appeals under consideration did not involve either psychotic illness or personality disorders and that "it is essential to bear in mind that neurotic illnesses affect the central nervous system of the body, because emotions such as fear and anxiety are brain functions".

25. Mr Heath emphasised that the 1992 Act draws a distinction between physical disablement and mental disablement. That is true, but the Tribunal of Commissioners deciding R(DLA) 3/06 has pointed out that in section 72 the words "physically or mentally" are words of inclusion designed to draw a contrast with mere physical disablement in section 73(1)(a). As was observed by Lord Slynn in *Fairey*, the concept of "bodily functions" is obviously related to that of disability. He said:

> "If the bodily function is not working properly that produces the disability which makes it necessary to provide attention. The attention is provided by removing or reducing the disability to enable the bodily function to operate or in some case to provide a substitute for it.

I have some difficulty in seeing why Parliament should have brought mental disablement within the scope of section 72 but then intended the words "bodily functions" to be read in a way that prevents a claimant from being entitled to disability living allowance when he requires attention due to the effects of the disablement. The argument that such a restricted interpretation should be put upon the words is further weakened by the fact that there is no equivalent restriction of the "supervision" condition.

26. I can see why the House of Lords wished to emphasise that it was concerned in *Ireland* only with neurotic illnesses, because in criminal law causation is often an issue and it is often unwise for a court to deal with points that are not really in issue before it. However, it did not say that the distinction between such illnesses and psychotic illness would necessarily be material even in criminal law and, in respect of disability living allowance, I can see no reason for drawing any such distinction.

27. Mr Heath referred me to a series of unreported decisions of Mr Commissioner May QC. In CSA/389/97, Mr Commissioner May referred to CA/22/1993, where the Commissioner had held that "'[b]odily functions ... refers primarily to physical functions, although the need for attention with them may of course arise out of mental rather than a physical disability" and said:

> "I am inclined to the view that the Commissioner in CA/22/93 was correct when he considered that the statutory definition did not include attention in connection with the cognitive and other functions of the brain unrelated to physical functions even although the brain is an organ and is part of the body. I propose to follow him for it seems to me that what is essentially a state of mind cannot fit comfortably into the statutory definition."

That approach does not take account of the reasoning in *Ireland.* Moreover, the Commissioner's view in CSA/389/97 was not expressed with certainty and he held that, even if he was wrong about CA/22/1993, the claimant still failed because the help she required did not amount to attention. I do not place much weight on either of those cases.

28. In CSDLA/867/97, Mr Commissioner May accepted a submission that reading was not a bodily function. He said:

> "I am persuaded that whilst the ability to acquire literacy skills may be severely impaired by prelingual deafness it does not follow that assistance with the interpretation of the written word amounts to attention in connection with the bodily function of hearing. That is because in my view the adjudication officer and Mr Bevan are correct when they submit that the interpretation by the claimant of what is on the written page is related to the cognitive function being able to interpret writing rather than the bodily function of hearing. Cognitive functions for the reasons set out in the authorities quoted by the adjudication officer in his supplementary submission do not count. While the attractive argument of Miss Willens in relation to speech demonstrates that a bodily function may operate in conjunction with a cognitive function in relation to a particular activity, such as the cognitive function of determining what to say and the bodily function of actually saying it, that does not mean that what is properly identified as cognitive rather than a bodily function should be included for consideration in the application of the statutory conditions for the care component of disability living allowance."

Insofar as the specific issue of help required due to illiteracy is concerned, Mrs Commissioner Parker disagreed with that approach in R(A) 1/03, another case concerned with the effects of prelingual deafness, but Mr Commissioner May stood his ground in CSDLA/860/00, where the claimant was suffering from Asperger's Syndrome. As illiteracy is not an issue in the

present case, I need not express a view on that particular matter. Insofar as Mr Commissioner May drew a broader distinction in CSDLA/867/97 and CSDLA/860/00 between on one hand what he called "cognitive functions" and on the other hand what the statute calls "bodily functions", he again did so without the advantage of *Ireland* having been cited to him.

29. I am not persuaded that any of those decisions of Mr Commissioner May, or CDLA/1148/97 to which Mr Heath also referred me, really throws much light on the question at issue in the present case. There is clear authority from the House of Lords that "bodily" is not synonymous with "physical". In my judgment, in the context of social security benefits, the phrase "bodily functions" includes those functions of the mind responsible for a person's social functioning and, in the light of *Mallinson* and *Fairey*, if such functions of the mind are impaired by mental disablement, any consequential requirement for attention is "in connection with his bodily functions" and is to be taken into account in assessing entitlement to disability living allowance.

30. However, the House of Lords said in *Ireland* that expert medical evidence would be needed in the criminal courts if it was to be shown that an assault had occasioned psychiatric injury. In tribunals, it is apparent from R(DLA) 3/06 that a formal diagnosis is not required as a strict matter of law before it can be accepted that a claimant suffers from mental disablement but, in the absence of such a diagnosis, a claimant may have grave difficulties in showing that he is disabled. The Tribunal of Commissioners also said:

> "... behaviour cannot itself be a disability – but it may be a manifestation of a disability, namely an inability to control oneself within the accepted norms of behaviour. Therefore, in our view, in R(A) 2/92 the correct approach was not to have sought a specific diagnosis of a serious mental illness, but to have asked whether it was in the claimant's power to avoid behaving as he did. If it was not in his power to avoid that behaviour, he would be 'disabled' within the terms of sections 72 and 73(1)(d), although it would be a separate question as to whether that disability was severe enough to entitle him to benefit."

The existence of a diagnosis will be extremely important where such a judgment is being made. It is far more likely that a tribunal will accept that behaviour is not controllable if there is a diagnosis that explains why it might not be.

31. That has been particularly important in the present case, where there is evidence that the claimant has behavioural problems that have a cause distinct from his autistic spectrum disorder. Had it not been for the consultant clinical psychologist's opinion sufficiently linking particularly difficult aspects of the claimant's behaviour to the autistic spectrum disorder and for the Secretary of State's acceptance of that evidence on the claim made in 2004, I might not have been satisfied that the claimant's needs for supervision and attention arose out of disablement.

32. Mr Heath referred me to R(DLA) 3/03, where a claimant suffering from Asperger's Syndrome was found not to require attention in connection with his bodily functions and Mr Commissioner Howell QC said:

> "As the tribunal correctly recorded, the reason why a deaf or blind person may be able to have the help he needs in communicating with other people taken into account is

that he needs help because of some bodily function that is not working properly or is absent. The tribunal found that not to be the case with the claimant, and that finding appears to me incontrovertible: it was not in fact challenged by Mr Powell. If a person is in fact able to communicate with other people for themselves without assistance, it is in my judgment too far removed from the bodily functions involved in communicating to say that they satisfy the statutory conditions because they are or may be different from other people in the messages or ideas they do or do not wish to communicate in terms of establishing relationships, empathy or modulation of behaviour or interaction with other people."

33. That case was rather different from the present case because the tribunal's findings of fact, a challenge to which was rejected by the Commissioner, showed that the claimant coped reasonably satisfactorily without the attention that it was claimed he needed. The claimant was an adult in employment who sought only "assistance with training in communication, social interaction and imagination". The Commissioner's reasoning is not dissimilar to my reasoning in paragraph 5 above, rejecting the claimant's mother's submission based on the claimant's alleged inability to communicate. He, like me in that part of my reasoning, concentrated on the physical functions involved in communication. It was not argued before him that attention might be required in connection with the loss of a mental function and there was no suggestion that the claimant's interaction with others was so poor that he needed the level of protection and guidance that the child claimant in the present case needed from his mother. Essentially, that case falls to be distinguished from the present case on its facts and is reinforces my point that questions of fact are of far more practical importance in this sort of case than questions of law.

34. In the present case, I am satisfied that the claimant was so severely disabled that he did need frequent attention throughout the day in connection with his bodily functions and that his requirements were substantially in excess of those of other children of his age. This is sufficient to entitle the claimant to the middle rate of the care component.

35. However, in respect of the night-time conditions for entitlement to the care component, I am not persuaded that the claimant usually required prolonged or repeated attention in connection with his bodily functions or required to be watched over for a prolonged period or at frequent intervals in order to avoid substantial danger. There is no specific challenge to the tribunal's finding on this issue. I accept that the claimant did sometimes wake up and that he required to be settled down again, but the evidence is that he was reasonably amenable to that, particularly when his half-brother helped him and I am not persuaded that he usually required attention or being watched over for a prolonged period, although sometimes his mother or brother did spend a prolonged period assisting him. I also agree with the tribunal that, insofar as the claimant was watched over, that was not necessary for the purpose of avoiding any substantial risk of danger. Accordingly, I am not satisfied that the highest rate of the care component should be awarded from 8 April 2002, although this should not be seen as any criticism of the award of the highest rate of the care component from 24 June 2004.

(signed on the original) **MARK ROWLAND**
Commissioner
24 April 2006