DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Reading appeal tribunal dated 17 April 2002 and I refer the case to a differently constituted tribunal for determination.

REASONS

2. The claimant suffers from a chronic eye condition that sadly has necessitated a large number of operations and is causing her eyesight to deteriorate. She had appealed to the tribunal against a decision of the Secretary of State awarding her only the lower rate of the mobility component of disability living allowance from 7 August 2001, her 16th birthday. The Secretary of State's decision had been made on a renewal claim. The tribunal were told by the Secretary of State that the claimant had been entitled to the lowest rate of the mobility component and the middle rate of the care component from 5 July 1995 to 6 August 2001. In fact, for each of the first two years, the care component had been awarded at the highest rate. The inaccuracy is regrettable, although it may be that little turns on the distinction. The tribunal were also told that, "in accordance with the Data Protection Act, the previous decision is no longer held but the evidence used to determine entitlement has been sent for the tribunal's perusal". I am told that that form of words is no longer used because the Secretary of State accepts that the terms of the Data Protection Act 1998 do not require or justify the destruction of decisions awarding benefit. The evidence from earlier awards amounted only to a consultant's report dated 2 April 1997, which, I am told, is the only medical evidence in the claimant's file. The tribunal allowed the claimant's appeal to the extent of awarding the lowest rate of the care component for three years from 7 August 2001 in addition to the indefinite award of the lower rate of the mobility component. The claimant now appeals, with my leave and the support of the Secretary of State, on the ground that the tribunal did not give adequate reasons for their decision.

3. The first ground of appeal is the one upon which I gave leave to appeal and the Secretary of State supports the appeal. It is argued that the tribunal did not give an adequate explanation for not renewing the award of the middle rate of the care component. I granted leave partly because I was not satisfied that the Secretary of State had provided the tribunal with all the available material to enable the tribunal to do that. However, it appears that the Secretary of State had failed to keep any material that might have explained why the previous award had been made and in those circumstances could not have assisted the tribunal any further. The sole surviving document, a consultant's report, does not suggest any reason at all for the award of the care component. In those circumstances, it is difficult to say what the tribunal could have given as an explanation for their decision to award only the lowest rate of the care component other than an adequate explanation for their view that only the conditions for entitlement to the lowest rate were currently satisfied. Any suggestion that the earlier award was based on a mistake or was due to the fact that the claimant was then younger and needed more additional care for that reason would have been mere speculation. The mere fact that the claimant's eyesight had deteriorated did not necessarily mean that a further award of the middle rate of the care component was inevitable.

4. It is also argued that the tribunal did not give adequate reasons for finding the claimant's needs for attention to be for a significant portion of the day but not to be frequent,

that they did not adequately consider the claimant's own evidence and that of her family and that they did not record adequate findings as to the claimant's need for attention for the purpose of social and leisure activities. I run these three points together because they seem to me to be different facets of the same issue.

5. The tribunal obviously considered this case with great care. However, the claimant was represented by members of her family and therefore the tribunal did not have the advantage of the kind of focused submissions that I have received from her current representative. The tribunal placed a great deal of weight on a report of the claimant's consultant opthalmologist, obtained by the Secretary of State, in which reference was made to the claimant being "able to undertake normal school [sic]". The chairman's statement of reasons includes the following passage.

> "On the basis that she can see well enough to type and read and take part in normal school activity in the classroom [and] that she does not need special attention at school, it seemed unlikely that she has frequent attention during the day let alone a higher standard of care. .... She sought to establish an entitlement to the middle rate care based upon the contention that she needed frequent attention (rather than continual supervision during day (or night)). Based upon the opinion of the consultant, which the tribunal found was not effectively challenged by her evidence, her level of vision was not such as to require frequent attention but the Tribunal found that she did require attention for a significant portion of the day based upon her needs when getting up, and guidance during the day over and above that normally required for a child of her age. This took into account the large family with several young children in the house and the need to maintain a degree of observation for the appellant and to assist her for a significant portion of the day."

6. In arguing that the tribunal failed to have regard to the claimant's evidence, reference is made by the claimant's representative to her claim form, but it seems to me that much of what is said in that form was in such general terms that it was of no assistance to the tribunal and it was unnecessary for them to allude to it. The claimant's representative also tells me that the claimant's family gave verbal evidence to the effect that, although she was in a mainstream school, she attended a special needs unit and had a support assistant to support her in all her lessons. I am unable to see anything in the record of proceedings to that effect and, although that is not conclusive, it seems unlikely that the tribunal would have overlooked such significant evidence. The truth may be that, in the absence of skilled representation, the claimant's needs were not fully articulated, despite the tribunal giving her and her family opportunities.

7. Nonetheless, there does seem to me to be a degree of inconsistency, or at least an incompleteness of reasoning, running through the tribunal's reasoning. If, as the tribunal accepted, the claimant needed some guidance when at home, why did she not need any when at school ? Why was that need for guidance not frequent ? The amount of attention provided to a person may, in terms of time taken up, be very small in aggregate but may nonetheless be frequent, to the extent that it is possible to satisfy the condition for the middle rate of the care component while not satisfying the condition for the lowest rate. Moreover, the form entitled "More about how your illness or disability affects you", introduced after *Secretary of State for Social Security v. Fairey* (reported as R(A) 1/98) was decided and completed by the claimant

in this case, did include examples of help required by the claimant on a day-to-day basis and the statement of reasons does not commented on that evidence.

8. The claimant's representative, like at least one other whose submission I have seen recently, submitted that the tribunal had breached "Regulation 29(5)(b)" because the statement of reasons was inadequate. I think that was intended to be a reference to regulation 29(5)(b) of the Social Security (Adjudication) Regulations 1995, which required reasons to be given for a decision by a disability appeal tribunal. That particular provision was replaced as long ago as 1996. The current duty to provide a statement of reasons for a decision of an appeal tribunal is to be found in regulation 53(4) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. I accept that that duty was breached in this case.

9. But there is a clearer error of law, which I confess I overlooked when I granted leave to appeal and which both parties also appear to have overlooked. The references in the chairman's statement of reasons to "a higher standard of care" and "guidance during the day over and above that normally required for a child of her age" appear to be references to section 72(6) of the Social Security Contributions and Benefits Act 1992, which makes provision for the "application [of section 72] to a person for any period in which he is under the age of 16". It is apparent from the way the tribunal dealt with the "cooking test" that they took the view that section 72(6) applied because the claimant was under 16 at the date of the Secretary of State's decision. However, the Secretary of State's decision related wholly to a period when the claimant was not under the age of 16. It is plain from, among other provisions, regulations 13 to 15 of the Social Security (Claims and Payments) Regulations 1987 and regulation 6(2)(a)(ii) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 that the Secretary of State is entitled to anticipate changes of circumstances when making a decision and it seems to me that sections 8(2)(b) and 12(8)(b) of the Social Security Act 1998, which prohibit the Secretary of State and tribunals from taking account of "circumstances not obtaining" at the time of the Secretary of State's decision must be read so as not to prevent account being taken of circumstances that the Secretary of State is entitled to anticipate because they are almost certain to occur. This approach is different from that taken in CDLA/3848/01, with the reasoning of which I regret I do not entirely agree, but the result is the same in this particular case. Reaching the age of 16 was something that was certain to occur to the claimant in the absence of an untimely death. Accordingly, the tribunal erred in having regard to section 72(6).

10. It may be that none of these matters would, by itself, have made any difference to the tribunal's decision but, having regard to their cumulative effect, I am satisfied that the tribunal's decision should be set aside and the case referred to a differently constituted appeal tribunal.

(Signed) **MARK ROWLAND**
Commissioner
30 May 2003