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Dittn:-D

DECISION OF DEPUTY SOCIAL SECURITY COMMISSIONER

1. This appeal by the claimant succeeds. The decision of the Cambridge appeal tribunal which sat on 26th June 2003 was, in my judgment, erroneous in point of law. I set it aside and refer the case to a differently constituted tribunal (the new tribunal) for re-determination in accordance with the directions set out below. I do this under and in terms of section 14(8)(b) of the Social Security Act 1998.

History

2. A claim for disability living allowance (DLA) was made on behalf of the claimant. There appears (**doc.111**) to have been an award on 22nd November 1999 of the highest rate of the care component of that benefit from 5th November 1999, though no copy of the claim or of the award is in the papers. On 12th June 2001 there was a decision on supersession of that earlier decision and the claimant was found not entitled to the mobility component from 12th June 2001, but entitled to the highest rate of the care component from 12th June 2001 to 4th January 2002 (**docs 41-43**). On 17th August 2001 a decision was taken, which is stated to be a revision of the 12th June 2001 decision, and the claimant was found entitled to the lower rate of the mobility component from 5th January 2002 to 4th January 2005, and the highest rate of the care component (day and night) for the same period (**docs 60-75**). That decision was reconsidered but not revised on 12th October 2001 (**docs 108-123**). The claimant appealed against the decision of 17th August 2001, and a tribunal sat on 29th May 2002, dismissed the appeal and confirmed the decision. On an appeal by the claimant to a Commissioner, both parties agreed that the tribunal had erred in law in its consideration of the "virtually unable to walk" provisions relating to the higher rate of mobility component and the case was remitted by the Commissioner for hearing *de novo* by a fresh tribunal with the directions that the tribunal have regard to the parties' submissions (**docs 177, 171 and 172-173**).

The tribunal

3. The fresh tribunal sat in Cambridge on 26th June 2003. The claimant, who was then six years old, did not attend but was represented by Mr C Darlington of the Citizens Advice Bureau. It appears from the tribunal's "Statement of Reasons for Decision" that the claimant's mother attended and gave evidence (**doc 212**). The Respondent was also represented. The tribunal again dismissed the appeal and upheld the decision of 17th August 2001 (**doc 182**). The claimant sought leave to appeal which was granted by a Commissioner (**doc 215**) and so the matter comes before me.

The relevant statutory provision

4. This appeal again concerns the tribunal's consideration of the "virtually unable to walk" provisions relating to the higher rate of the mobility component of disability living allowance which are contained in section 73(1)(a) of the Social Security Contributions and Benefits Act ("said Act").

5. In order to be entitled to the higher rate of the mobility component the claimant required to be "suffering from physical disablement such that he is unable to walk or virtually

unable to do so". Regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991 ("said Regulations") states:-

> "**12.-** **(1)** A person is to be taken to satisfy the conditions mentioned in section 73(1)(a) of the Act (unable or virtually unable to walk) only in the following circumstances –
> (a) his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to the place of residence or as to the place of, or nature of, employment-
> (i) he is unable to walk; or
> (ii) his ability to walk out of doors is so limited , as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk;
> or
> (iii) [not relevant]; or
> (b) [not relevant]"

The grounds of appeal

6. The claimant's grounds of appeal can be summarised as follows:-

(a) With regard to the claimant's ability to walk, the tribunal should have made and failed to make adequate findings regarding the distance over which she could walk, the time she took to walk that distance, and the speed and manner of her walking or alternatively, they should have given reasons for not doing so.

(b) With regard to the her walking, the tribunal should have made and failed to make adequate findings regarding the claimant's refusal to walk, including how often she refused to walk and whether she could be coaxed to walk, and regarding when she became tired. It further failed to consider and state its decision in relation to the two cases of R(M) 3/86 to which it was referred on behalf of the claimant and CM/186/85.

(c) The tribunal noted the claimant's mother's evidence that the claimant would not walk, but do not appear to have considered it because there is no indication of what role that evidence played in its decision.

(d) The tribunal concluded that the claimant's problem was behavioural and not caused by a physical condition, but have failed to explain why they so concluded.

(e) The tribunal failed to have regard to the submissions of the parties at **documents 171, and 172-173**, as directed by the Commissioner when remitting the case for rehearing.

7. The Secretary of State does not support the appeal. His position is that the tribunal "reached reasonable conclusions" and "provided adequate reasons to support them" (**doc 219**). He sets out some of the evidence in paragraphs 4.2 to 4.4 of his Submission, some of which is conflicting, but does not indicate how it is that the evidence relates to the conclusion reached by the tribunal, or put another way, why the tribunal preferred some evidence and not other evidence or where in its Statement of Reasons this may be discerned. It is clear to me

from the tribunal's Statement of Reasons that the Respondent would have been unable to do so.

8. I consider the tribunal did err in law and that its decision must be set aside, for the following reasons.

The claimant's condition

9. The claimant was born on 5th January 1997. It is not disputed that she suffers from William's syndrome. This was diagnosed in 1999 when the claimant was aged about two and a half years (**docs 38 and 82**). The claimant's mother provided information from the William's Syndrome Foundation and from the CaF Directory of Specific Conditions and Rare Syndromes and this indicates that William's Syndrome is a syndrome which occurs in about 1 in 25,000 of the population. It is described as a "rare" syndrome encountered by about 1 in 30 of all general practitioners (**docs 48-51, 53-56, and 85**).

The tribunal's assessment of the evidence

10. There was a large amount of evidence in the appeal, from relatives, such as the claimant's mother and uncle who live with her, and her teacher, and from a variety of different doctors and health care professionals. Only a fraction of the evidence was mentioned in the tribunal's "Statement of Reasons for Decisions" and there was nothing to indicate that the other evidence had been considered at all, or if considered had been rejected in favour of the evidence which was mentioned, and why.

11. For example (and this is not intended to be an exhaustive list of the evidence in the appeal), there was both oral and written evidence from the child's mother who had day to day knowledge of the claimant and of her problems - appeal form (**doc 1d-2**), detailed DLA434s (**doc 3-13** and **15-31, 88-107**), letters such as docs **47 and 76-79** and her evidence before the tribunal. There was also written evidence from the child's uncle who lived at the same address as the claimant and her mother, and who speaks to the claimant's day to day problems as a William's Syndrome sufferer (**doc 14**) and from her Assessment Nursery Teacher during the period over which the tribunal had jurisdiction (**doc 175**). For such evidence to be discounted in whole or in part, the tribunal would require to have had cogent reasons and to have stated them.

12. On the medical side, the evidence was from varying sources and because of that was significantly varied in its content. Indeed, the evidence of some doctors conflicted with the evidence of others, or conflicted with the evidence of those who regularly saw the claimant, and on occasion, a doctor's evidence was internally inconsistent. Given the amount of medical evidence, the variety of sources from which it came and the fact that the claimant is suffering from a rare syndrome of which many doctors will not have had experience, particular care should have been taken to assess all of the medical evidence and the basis on which it was given.

13. There was a hospital report from Dr Mabin, who clearly deferred to Dr Grove's more specific knowledge of the claimant. That he did so should have affected the comparative weight given to his report at **32-34**. Further Dr Mabin's report was at odds with the documentation relating to William's Syndrome and with Dr Grove's report. Dr Mabin refers to the claimant having William's syndrome "with all attendant problems" but also states that

she has "mod/mild learning difficulties". Whereas the William's Syndrome Foundation and CaF entry make it clear that sufferers have moderate or severe learning difficulties, and Dr Grove states that the claimant has "significant learning and development difficulties" and attends an assessment nursery in a school for children with severe learning difficulties (**doc 38**). Then there was the report by Dr Abbas, on a BAMS request, which is at odds with the evidence of the claimant's mother and uncle, who live with the claimant, as well as with the William's Syndrome Foundation pamphlet, the CaF entry and Dr Grove's assessment. It is not clear on what basis Dr Abbas stated to the decision maker that the claimant had "mild learning difficulties" and "will not require physical restraint avoid danger". Other evidence pointed to significant or severe learning difficulties. With regard to restraint and dangers, Dr Mabin stated that the claimant had William's syndrome "with all attendant problems". The attendant problems of William's syndrome sufferers are detailed in the William's Syndrome Foundation's pamphlet in which it is stated that sufferers typically suffer from hypersensitivity to noise which causes them to become very distressed, if they hear a sudden, loud noise. They may exhibit extreme uninhibited behaviour, overfriendliness with strangers, have a very short concentration span and be easily distracted. From the outset, the claimant's mother has stated that the claimant would, if not constantly checked, talk to strangers, wander off into the road, touch, play with, eat, or put things up her nose which are dangerous to her and becomes very upset on hearing sudden loud noises. She has stated that the claimant has no fear of cars or strangers (**docs 18, 22-31**). All of which is consistent with the Foundation and CaF evidence. The specialist language therapists also stated that she was easily distracted (**doc 82-84**). The evidence of Dr Boothman on another BAMS request was simply "The hospital report shows that the customer does not have a severe learning disability" (**doc 59**). This is clearly at odds with Dr Grove's report (**docs 38-39**). On a further BAMS request a Dr Eggington (**doc 126**) refers to the occupational therapy/physiotherapy report of 14th September 2001 (**docs 86-87**) and concludes that "refusal to walk" "may happen on occasion but is not the norm". However, the occupational therapy/physiotherapy report deals with the claimant's physical skills or capabilities. It does not deal with the situation where the claimant refuses to use these skills or capabilities and, on the face of it, therefore that report was no basis for a conclusion that refusal to walk "is not the norm".

14. The above are clear examples where medical evidence was not considered against the background of all of the evidence nor was it considered on its own terms, that is as to whether it was internally consistent and as to the basis of the evidence proffered.

Failure or refusal to walk and the R(M)3/86 test

15. One of the claimant's grounds of appeal was that the tribunal noted the claimant's mother's evidence that the claimant would not walk, but do not appear to have considered it. The tribunal did note that the claimant's mother stated she "would often refuse to walk" but there is no indication in the "Statement of Reasons for Decision" of what role, if any, that evidence played in its decision. The gist of the tribunal's decision is contained in the last paragraph on page 1 of its Statement and the first paragraph on page 2 thereof. It has concluded that the medical evidence is to the effect that the claimant has the physical capability of walking, and therefore if she did not walk, this was not due to a "physical restriction" that prevented her from walking and must therefore be behavioural in cause. That the case required more than a simple conclusion on whether there was any physical restriction on the claimant's ability to walk, should have been clear from its own finding at the foot of page 1 of its Statement – that "At p.175 although the nursery teacher says that Emily finds it difficult to walk very far, especially when it involves negotiating slight hills,

she also refers to her having to be held onto in order to prevent her running off." (which apparent inconsistency it did not resolve or address) together with a reading of the Tribunal of Commissioner's decision in R(M)3/86. Although it is clear from the Record of Proceedings and from the Statement of Reasons, that the tribunal was addressed on the significance of the Tribunal of Commissioners' decision R(M)3/86, there is no indication from the terms of the tribunal's Statement that it did actually consider these decisions and what effect that consideration had on its determination of the appeal before it.

16. In R(M)3/86 the Tribunal of Commissioners held that the decision in R(M)2/78 was unaffected by the terms of the House of Lords' decision in *Lees v Secretary of State for Social Services* [1985] 1 AC 930 (reported as appendix to R(M)1/84). Accordingly, the decisions in R(M)3/86, R(M)2/78 were relevant as was CM/186/1985 which applied R(M)3/86.

17. The tribunal in the present case was faced with evidence of a number of factors which could be relevant in determining whether or not the claimant was virtually unable to walk in terms of the legislation. There was evidence that she had poor concentration and was easily distracted, that she had no appreciation of danger from strangers or cars, that she had a tendency to wander off, approach and behave inappropriately towards strangers and could also run out in front of a car. There was evidence that she refused to walk, and that she would sit or lie down when walking. There was evidence that she had a lack of coordination and poor balance, and found it difficult to and did not want to walk on inclines/uneven surfaces. There was evidence that she had a tendency to trip and to fall and had poor eyesight. There was evidence that when walking she became tired and breathless and that she desired to be carried. There was evidence that she suffered from muscle weakness, aortic stenosis and had hyperacusis (hypersensitivity to sound) exacerbated by anxiety. There was evidence that she could react aggressively if thwarted, disliked restraint and could pull away from an accompanying adult/s.

18. It was incumbent on the tribunal to decide, from the evidence, which of the above and any other relevant factor of which there was evidence, it accepted and to make findings in fact accordingly, giving reasons as to what evidence it accepted and what it rejected and why.

19. Some of these factors could be described as physical, for example, proneness to trip or fall, whereas others could be described as behavioural, for example, refusal to walk, pulling away, lying down.

20. It was incumbent on the tribunal to determine whether the problems from which it found in fact that the claimant suffered, be they physical or behavioural, stemmed from a physical disablement or a condition which can be classed as a physical disorder (such as the "faulty genetic inheritance" which Down's syndrome was found to be in R(M) 2/78) or not, and that is a medical assessment, which depends upon the evidence in the case.

21. R(M) 3/86 concerned a child who suffered from brain damage at birth which lead to severe mental sub-normality. The medical tribunal accepted that the disablement was physical. Whilst the child was physically able to walk, behavioural problems meant that he would walk erratically and unpredictably, sometimes needing to be physically restrained whilst at other times refusing to move. The medical tribunal disregarded his behavioural problems and refused an award of mobility allowance. The Tribunal of Commissioners held that it was wrong to do so. It opined that it was clear from R(M)2/78 that once it was

established that the claimant's behavioural problems, which included a failure on occasion to exercise his walking powers, stemmed from a physical disability they were necessarily relevant to the issue of whether or not the claimant was virtually unable to walk and should not have been disregarded.

22. I am, however, bound to direct the new tribunal to go further and in considering the behavioural problems it should determine whether they stem from such physical disablement or stem from conscious volition, which may be overcome by the promise of a bribe or threat of punishment, and in short could be changed by "coaxing". It appears that there was evidence on this issue from the claimant's mother who stated that the claimant could not be bribed, but nowhere does this evidence feature in the tribunal's reasons for its decision.

23. I state that I am bound to direct the tribunal to take this further step because that is what is advised by the Tribunal of Commissioners in R(M)3/86. However, with great respect, I consider it wrong in law for the reasons which I now set out.

24. The Tribunal of Commissioners said this:-

> "Manifestly, if a child who has been walking perfectly satisfactorily decides to stop, but his refusal to continue further can be overcome by the promise of a reward or the threat of punishment there can be no question of his stopping having arisen out of a physical condition over which he has no control. In the case postulated he was making a conscious choice, and on no footing could his refusal to walk be identified with a physical disablement. It is of course, for the tribunal as a medical matter to determine whether a child's propensity to cease walking is to be attributed to a deliberate election on his part or to a physical disablement".

25. It is true that the Chief Commissioner used the phrase "conscious volition" in his earlier decision of R(M)2/78, but he did not use the phrase in the way in which it has been used by the Tribunal of Commissioners in R(M)3/86. In my view the Commissioner's decision in RM(3)86 took the issue further than was stated in R(M)2/78 or could be justified in law, and this has resulted in Commissioners either disregarding the import of the decision (CM/05/1986) or seriously questioning it in application (CM/98/1989).

26. Such an approach to the interpretation of section 73(1)(a) of said Act introduces a choice between two causes for a child's behavioural problems - "physical disablement" or "conscious volition" ("just naughty behaviour" as it was described in CM/186/1985 applying R(M)3/86). It has been described as the "**would** not walk rather than **could** not walk" test (Adjudication Officer's Guide, Part 77 -77305) after the submissions in these words which were made to the Tribunal of Commissioners in R(M)3/86 (para 8). The Commissioners clearly state in the above quoted passage, that if "conscious volition" can be overcome, the causation of the claimant's behavioural problems cannot be "physical disablement". Such a generalised approach must be wrong. Children who suffer from conditions such as autism, Down's Syndrome, and William's Syndrome may have a raft of symptoms which are relevant to their ability to walk but which may make them not wish to walk. In the case of sufferers of William's syndrome, they may suffer from clumsiness and lack of coordination (**docs 56 and 48**), high levels of anxiety and fearfulness (**doc 56**), short sightedness and poor balance (**doc 39**), and a tendency to trip, which may make them understandably reluctant to walk in case they fall. They may suffer from muscle weakness, tiredness, lack of endurance, breathlessness (quite apart from pain or discomfort), which makes walking an ordeal and not the pleasant experience which a child who does not suffer from such symptoms would find it. They may suffer from some insight that they walk differently from other people and this may

cause embarrassment and a reluctance to walk. They may feel a real frustration at their physical shortcomings which causes them not to want to walk or to sit or lie down and have what has been described in some reported cases as a "tantrum". These are all matters of evidence in the individual case. To say that a child who can be persuaded or coaxed to walk further (after being promised a reward or threatened with punishment) is not suffering from problems which stem from a physical disablement must be wrong and be based on a generalisation without reference to the evidence of the particular case.

27. The decision in R(M)3/86 has led one Chief Commissioner to opine that the "won't walk/can't walk" scenario portrayed in that case was not meant to lead to the conclusion that in all cases where the refusal to walk could be overcome by the promise of a reward, the refusal to walk should be held to stem from conscious choice (CM/05/1986). However, regrettably that is what the decision says on any plain reading of it. The Commissioners stated that where a child could be coaxed to walk, "he was making a conscious choice, and **on no footing** could his refusal to walk be identified with a physical disablement" (para 8) (emphasis provided). The Tribunal of Commissioners stated that it was submitted to them that "the criterion was whether the claimant **could** not walk, as distinct from **would** not walk." (their emphasis). The Commissioners stated, "We agree with the importance of that distinction" (also para 8). The distinction is incorporated into the rubric of the report as part of the test to be applied "ii. Is his condition attributable to a physical impairment, such as brain damage, so that he cannot walk as distinct from will not walk?". The decision has been taken to impose an "either or" test of causation in commentaries such as the Adjudication Officers Guide (para 26 above) and has been read as meaning that by other Commissioners. In CM/98/1989, for instance, the tribunal applied the Commissioners' decision in R(M)3/86 and concluded that the claimant's walking ability was affected by refusals to walk which they decided were as the result of choice or conscious volition. The Commissioner, in remitting the case for rehearing on account of failure by the tribunal to sufficiently explain why it concluded that the claimant chose not to walk, said this:-

> "It is not for me to express opinions about medical matters but at least I think it can be said that, in the case of a person who was so brain damaged at birth that he could not begin to lead a normal life and has a history since birth of behavioural problems of various sorts, the adjudicating authority should provide very clear reasons for attributing the behavioural problems in question to something other than the brain damage. If, in such a case as the present, the relevant behavioural problems have nothing to do with the physical damage what do they derive from? In the case of this 18 year old are the tribunal suggesting that his behaviour was that of a naughty child who just would not walk when required? And, if they were, is not the fact that a brain damaged 18 year old behaves as a child something to do with the brain damage?"

28. What this decision does, is to correctly draw attention to the medical evidence in the case and to require the tribunal to which the case was remitted, in the face of the medical evidence which is not disputed, (as set out by him in the above paragraph) to justify its contention that a person so afflicted could be found to be deliberately choosing, in a way which was unconnected with his disability and wholly a consequence of naughtiness or wilfulness, not to walk

29. Unless and until the Tribunal of Commissioners' decision in R(M)3/86 is overturned, this is the only way, in the interests of common sense, justice and humanity, in which such cases in my opinion, can be viewed.

30. There is no precedent for the adoption of this "either or" approach to the interpretation of "suffering from physical disablement such that he is unable to walk or virtually unable to do so". No such approach is adopted in relation to other physical disablements, where there is no question of brain damage or developmental delay with attendant psychological characteristics (Williams Syndrome - **doc 55**). No justification in law or in medical terms has been advanced for a test which involves the determining of volition in claimants with such conditions but which does not involve the determining of volition in claimants without such conditions. Volition is a mental state. It cannot, therefore, be appropriate to apply such a test to a condition which results *inter alia* in psychological effects (or "characteristics" as described in the Williams' syndrome literature) as if the one cannot, in any way, be affected by the other.

31. It is, in my opinion, in any event, unnecessary in law, to adopt such an approach to the interpretation of the legislation, because by merely determining whether or not the child's physical and behavioural problems stem from a physical disablement (as is required by the provision), in light of the evidence in the case, a decision can be achieved without the risk of the injustice to the claimant which the "cant walk/wont walk" approach brings because of its emphasis on an alternative of "conscious volition", which alternative is likely to be wholly inappropriate in cases of brain damage, autism, Downs syndrome and Williams syndrome.

"Severe discomfort"

32. It was incumbent on the tribunal to determine, with reference to the relevant problems and in terms of regulation 12(1)(ii), whether or not the claimant's ability to walk out of doors was "so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort", that she was virtually unable to walk.

33. In order to be able to do so, the tribunal required to make findings as to how far and for how long the claimant could walk before any of the factors which it found intervened, for example, how far she could walk before becoming tired, or refusing to walk any further or pulling away or tripping etc and how often such failure to progress occurred so that what is referred to by the Tribunal of Commissioners in R(M)3/86 as the relevant history of the walking capacity of the person concerned" can be discerned.

Failure or refusal to walk and "severe discomfort"

34. Of course the issue of severe discomfort had to be addressed. Any ability to make progress on foot, must be without severe discomfort. CM/1/1981 is a decision which is unreported and which I have been unable to obtain but the following part of it was approved by a Tribunal of Commissioners in R(M)1/83 (at para 26). In R(M)1/83 the Tribunal of Commissioners agreed with what the Commissioner in CM/1/1981 said – namely, "that the term 'severe discomfort' does not extend to the screaming attack of an autistic child or the refusal to walk of the child suffering from Down's syndrome". The Tribunal of Commissioners said "these are the consequence of resistance to the idea of walking rather than of the walking itself". It is not clear from the tribunal's decision whether its decision or that of the Commissioner in CM/1/1981 concerned a child who stopped when walking and would not walk further or who would not walk at all. But it seems likely, on common sense grounds, that it was the former rather than the latter.

35. In my view, to state that in the case of every autistic child or sufferer from Down's or indeed William's syndrome who had been walking but stopped, and refused to walk further, that the refusal to go further was not, in any circumstances, a consequence of the walking which had gone before, is to fail to consider the circumstances of the child itself or to his/her condition. To conclude in the case of every autistic child with a screaming attack, or every Downs syndrome child who refused to walk, that this had been caused by "resistance to the idea of walking" is to ignore the obvious possibility that the refusal to walk or the screaming attack was the distressed expression of a child who has found walking in the immediate past or simply in the past, to be embarrassing, painful, uncomfortable, not pleasurable or frustrating, and who did not want to experience the embarrassment, pain, discomfort, unpleasantness or frustration again. I do not think that there is any doubt that walking is the most natural thing in the world for a child without disability. Anyone who has had charge of a child (without disability) when he/she takes to his/her feet will have seen this instinctive drive to walk in operation. I do not think that there can be any doubt, either, that many of these children who do not wish to walk or refuse to walk have communication and/or comprehension difficulties. The child with Down's syndrome in R(M)2/78 was without speech. There was evidence in the present case that sufferers from William's syndrome have increased verbal ability which is not matched by their cognitive skills. In such cases, consideration must surely be given to the question of whether or not the claimant is able to say "I am tired and can't walk any more" or "I am in severe discomfort because of walking". A claimant may not know why he or she does not want to walk, let alone be able to communicate it. How, in these circumstances can a tribunal determine that the child's resistance to walking does not derive from walking? It is true that the onus of proof is on the claimant, but whether or not the burden of proof is discharged in any case must be considered in the light of all of the evidence, taking into consideration also whether or not evidence on a particular matter, including whether the child's reasons for stopping walking, are able to be communicated or discerned. Further, it is not logical to state that a refusal to walk is either the consequence of walking or has been caused by "resistance to the idea of [future] walking". The two notions are entirely compatible with one another.

36. The Commissioner's decision in CDLA/1389/1997 did not concern a claimant with a condition such as is described above, but the general principles which he sets out in relation to the consideration of "severe discomfort" should apply equally to such claimants. The statement of the Tribunal of Commissioners in R(M)1/83 "that the term 'severe discomfort' does not extend to the screaming attack of an autistic child or the refusal to walk of the child suffering from Down's syndrome" is completely at odds with these principles. As the decision in CDLA/1389/1997 shows, in the case of other claimants, an approach is taken which encompasses consideration of all of the evidence in relation to that particular claimant. The Commissioner stated:-

> "...the tribunal must be careful in interpreting the evidence of the limitations on the actual walking undertaken by a claimant. There are at least four matters that the tribunal should consider."

The third matter, he describes thus:-

> "(c) Third, some claimants continue to walk regardless of the severity of their symptoms while some stop well short of the distance that would be covered by others with the same symptoms. The claimants' tolerance of symptoms is for the tribunal to judge on the whole of the evidence before it, including (if the claimant attends) the tribunal's estimation of the claimant's character." (para 50)

37. The Commissioner states that the tribunal should take into account the whole of the evidence including *inter alia* "the claimant's pain threshold" and "ability to report symptoms accurately" (para 44). The Commissioner went on to state that although it would be an error to automatically assume that the point at which the claimant stopped walking was the point at which onset of severe discomfort occurred, it may well be that in the great majority of cases it will be found as a matter of fact that the two do coincide (para 49). In the cases of C(M)1/1981 and R(M)1/83, however, it seems to have been assumed that in all cases of autistic children and Down's syndrome sufferers the two will not coincide.

Revision

38. The decision which the tribunal was considering was a decision (17th August 2001) which purported to revise the decision of 12th June 2001. As a revision takes effect from the date on which the decision it revises took effect (section 9(3) Social Security Act 1998), for example, on the date a decision was superseded, the decision of 17th August 2001 should have dealt with the period from 12th June 2001, but it did not and there was no evidence as to why it did not. Instead, the 17th August 2001 decision made an award for a period after the period which the decision it was revising concerned.

39. Further the 17th August 2001 decision which was appealed to the tribunal, being a decision revising the 12th June 2001 decision should have dealt with the decision maker's conclusion that the claimant was not entitled to the higher rate of the mobility component under section 73(3). It should have been noticed that the BAMS request (doc 57) sought advice on "SMI" (presumably, meaning 'severe mental impairment') but elicited the response ".....does not have a severe learning disability" (doc 59) which was wholly inept to determine whether the claimant was "severely mentally impaired (section 73(3)(a) of said Act) and suffering "from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning" (regulation 12(5) of said Regulations).

Decision

40. In all of these respects the tribunal erred in law such that its decision requires to be set aside.

41. I am unable, without making fresh or further findings in fact to give the decision which the tribunal should have given, nor is it expedient for me to make such findings. Accordingly, I must refer the case to a newly constituted tribunal with directions for its determination, and my directions are as follow.

Directions

42. I direct the new tribunal to conduct a complete rehearing.

43. I direct it to determine and state the date and nature of the decision which it is called upon to consider and the extent of its own jurisdiction both in terms of time and subject matter.

44. I direct the tribunal to consider all of the evidence relating to the claimant's condition and to determine and state what evidence it accepts, what evidence it rejects, and why. In so

far as questions of reliability and credibility arise, I direct the tribunal to explain and justify its assessments. I direct the tribunal to make full findings in fact and to base its decision upon those findings.

45. I direct it to decide whether or not the claimant was suffering at the relevant period from a physical or mental disablement which was severe enough to cause the claimant to meet any of the requirements set out in paragraphs (a) to (c) of said Section 72(1), and if it so finds, to state which and to justify its findings, by basing them on the evidence before it and by explaining why, in law, the evidence brings the claimant within any of said provisions.

46. I direct it to determine and state what are the physical and behavioural problems from which the claimant suffers. It should give appropriate weight to evidence from different sources and state where there is a conflict of evidence, why it accepts certain evidence as opposed to other evidence.

47. I direct it to determine and state whether or not the said physical and behavioural problems stem from a physical disablement or a condition which can be classed as a physical disorder or results from conscious volition. The tribunal should address this in the light of the medical evidence and should, in determining this issue, determine and state whether the claimant's behavioural problems are attributable to a conscious volition which is unconnected to her condition. In its assessment of whether or not the claimant is virtually unable to walk, it should disregard any behavioural problem which does not stem from the physical disablement or condition and which is attributable to a conscious volition unconnected with said disablement or condition and wholly a consequence of naughtiness or wilfulness.

48. I direct it to make findings in fact in relation to each of the four factors set out in regulation 12(1)(a)(ii) (distance, speed, time and manner of making progress on foot) in so far as each actually is or may be material in the case. In relation to the phrase "without severe discomfort", I direct the tribunal to disregard only such severe discomfort which, on the evidence, it finds proved is not a consequence of walking. In determining that, I direct the tribunal to consider all of the evidence, the nature of the condition from which the claimant suffers, and whether or not it is possible to determine with accuracy the child's reasons for stopping walking or refusing to walk further when she has been walking.

49. The appeal is allowed.

(signed)
A C McGavin
Deputy Commissioner
Date: 21 May 2004