R(DLA) 3/06

His Honour Judge Hickinbottom, Chief Commissioner **CDLA/1721/2004**
Mr H Levenson, Commissioner
Mr A Bano, Commissioner
29.4.05

Care component and lower rate mobility component - meaning of “so severely disabled physically or mentally”

Tribunal practice - evidence of children

The claimant, who was 12 years old, made a claim through her appointee for disability living allowance, identifying her disabilities as learning difficulties and behavioural problems. The claim was refused and she appealed. The appeal tribunal adjourned the hearing and gave a direction requiring the claimant to attend. Representations were made in response to the direction, supported by evidence from a clinical psychologist, stating that it would be inappropriate and potentially damaging for the claimant to attend the tribunal and that the Director of Social Services would be unlikely to give permission for her to attend. The child did not attend the adjourned hearing. The tribunal considered evidence from the claimant’s foster carer, her school and a clinical psychologist, and found that she did not need substantially more supervision than another child of her age. They dismissed the appeal. The claimant appealed to the Commissioner. The Secretary of State supported the appeal on the basis that the tribunal had failed to establish whether the claimant had a disability since there was no medical diagnosis of general or specific learning difficulties. Both section 72(1) (care component) and section 73(1)(d) (lower rate mobility component) of the Social Security Contributions and Benefits Act 1992 require the claimant to be “so severely disabled physically or mentally” that certain consequences follow. A Tribunal of Commissioners was directed to consider the meaning of that phrase, particularly as applied to children with learning difficulties, and also the proper approach to children giving evidence in proceedings before appeal tribunals.

Held, allowing the appeal, that:

1. conceptually and in ordinary language “disability” is distinct from “medical condition” and is entirely concerned with a deficiency in functional ability, ie the physical and mental power to do things (paragraph 35);

2. the provisions of sections 72 and 73(1)(d) cannot require that “so severely disabled” means “having a serious medical condition” since otherwise they could not achieve their purpose of correlating entitlement to care needs (paragraph 36);

3. if there had been an intention to require proof of a diagnosed or diagnosable medical condition, then the provisions could have made this clear, as they do in other benefit contexts (paragraph 37);

4. for the relevant provisions to apply, the claimant must lack the physical or mental power to perform or control the relevant function and where it is not in the claimant’s power to avoid certain behaviour he will be “disabled” within the terms of sections 72 and 73(1)(d) (paragraphs 38 to 39);

5. it is clearly apparent from the language of the provisions itself that the severity of the disability is to be measured solely by reference to the prescribed consequences, and that there is no room for any free-standing test of severity (paragraph 41);

6. the tribunal’s power to require the attendance of a child to give evidence should be exercised with great care and caution having regard to the welfare of the child and the possible unreliability of the child’s evidence (tribunal Benchbook commended and additional guidance given) (paragraphs 52 to 58);

7. in the present case the approach of the tribunal in summonsing the child to give evidence and then in drawing an adverse inference from the fact that she did not attend was inappropriate and unlawful as breaching the claimant’s right to a fair hearing (paragraphs 59 to 60).

The Commissioners remitted the case for rehearing by a differently constituted tribunal.

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decision

1. The decision of the appeal tribunal of 18 December 2003 is erroneous in point of law. We allow the claimant's appeal, set aside the decision and refer the case for re-hearing before a differently constituted tribunal.

Issues

2. This appeal raises two issues.

    2.1 In relation to disability living allowance (DLA), in the Social Security Contributions and Benefits Act 1992 (the 1992 Act) section 72 confers entitlement to the care component and section 73(1)(d) confers entitlement to lower rate mobility component on a person who is "so severely disabled physically or mentally" that certain consequences follow. This appeal raises the issue of the scope of those provisions, and the meaning of the phrase "so severely disabled physically or mentally", particularly as applied to children with learning difficulties.

    2.2 It also raises the issue of the proper approach to children giving evidence in proceedings before appeal tribunals.

Facts

3. The claimant, who was aged 12 at the date of the claim, was born prematurely and neglected in early childhood. She is now in the care of the local authority and is therefore "looked after" by the authority within the meaning of section 22(1) of the Children Act 1989. She lives with a foster carer, although she spends one weekend a month and occasional weeks with a respite carer.

4. On 22 April 2003 a claim for DLA was made on the claimant's behalf by her foster carer as her appointee, the form being completed by the claimant's social worker. The claimant's disabilities were identified as "learning difficulties" and "behavioural problems", although the claim form also referred to the claimant as having "attachment difficulties" and "attention deficit disorder". The form indicated that the claimant had been given a full educational statement for moderate learning difficulties and was not coping with mainstream school.

5. In the section of the claim form dealing with the claimant's mental health, it was stated that the claimant had emotional difficulties exacerbated by learning difficulties, which could make her easily upset and frustrated, leading to verbal aggression, disruptive behaviour, intolerance of change and forgetfulness. In relation to supervision needs, it was said that the claimant needed an eye kept on her because of her lack of awareness of danger, and someone with her when she was out of doors because (i) she was at risk of going off with people who were unsafe, (ii) she lacked road sense and (iii) she was vulnerable to suggestions which put her at risk of criminal behaviour. The claim form also asserted a range of attention needs, but those were not relied on in the appeal as a basis for an award of care component.

6. On 16 June 2003 a report was received from the claimant's school which stated that the claimant was aware of common dangers, did not have any dangerous tendencies or behaviour problems, could dress and undress, eat and drink, and attend

to her own toilet needs, that she had road safety awareness appropriate to her age, and that she did not have any supervision needs either in or out of doors that were not appropriate to her age. However, the school report also said that the claimant's behaviour was that of a pupil in a lower age group (the report suggested that the claimant's behaviour was appropriate for a 7–8 year old girl; at the time, the claimant was aged 12), that she could not concentrate for very long, and that there was constant attention-seeking behaviour. The report described the claimant's behaviour as disruptive, but not wilful, and suggested that her main problem was arrested emotional development.

7. On 21 June 2003 a decision was made refusing the entire claim. On 4 July the claimant appealed against the refusal of benefit. Although the decision was reconsidered on 1 August, it was not revised and the appeal therefore proceeded to an appeal tribunal.

8. The claimant had been referred to a clinical psychologist, who wrote a letter dated 27 October 2003 supporting the appeal. The psychologist said that she had conducted two consultation appointments regarding the claimant which had been attended by her social worker, representatives from her school and her foster carer, although she had not had any contact with the claimant herself. Her letter continued:

> "The first consultation was spent by briefly reviewing [the claimant's] history. As described as you are probably aware, [the claimant] was removed from her mother three and a half years ago due to neglect and was placed with [the foster carer]. Since being placed with [the foster carer], [the claimant] has continued to exhibit significant problems, at home and in school. Both [the foster carer] and her class teachers reported that in school [the claimant] appears to have considerable concentration difficulties. Her class teachers also reported that [the claimant] has great difficulties remaining on task in the classroom and rarely complies with even the simplest requests. In addition the school also reported that she often exhibits minor difficult behaviours, these are usually influenced by her peers. Information from school and [the foster carer] also indicates that [the claimant] appears to find school life very challenging and has great difficulties organising herself and maintaining appropriate behaviours for even short periods of time. From their descriptions, it appears that [the claimant] is experiencing significant attachment problems and also has some learning difficulties.
>
> Furthermore, I have concerns whether [the claimant] may be suffering with Attention Deficit and Hyper Activity disorder. To investigate this further I have referred her to [a local service specialising in such conditions].
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> In your letter you asked whether [the claimant] requires attention or supervision in excess of a child of the same age. Given that [the claimant] appears to be functioning emotionally and intellectually at a much younger level than her chronological age suggests, I feel that she most definitely requires supervision in excess of a child of her same age. In addition, I feel that without such supervision, there is a great risk that she may engage in behaviours which may be of a danger to herself or other people. This is because her limited concentration span and her tendency to flit from one task to the next reduces her ability to recognise danger. Furthermore, her tendency to engage in risky behaviour is potentially damaging to relationships and reduces her ability to maintain relationships."

9. The claimant's representative also provided a letter from the claimant's respite carer describing problems controlling the claimant's bad behaviour, her lack of awareness of danger and inappropriate behaviour towards animals and younger children.

10. The hearing of the appeal took place on 30 October 2003, but was adjourned because the tribunal took the view that it was necessary for the claimant to attend. The decision notice records the reason for the adjournment as being "tribunal not ready to proceed" and contains a direction: "[The claimant] is required to attend."

11. The adjourned hearing of the appeal took place on 18 December 2003. Prior to the hearing the claimant's representative made a further submission on her behalf in response to the direction requiring her to attend, stating that the claimant was a child "looked after" by the local authority and continuing:

> "The nature of disability tribunals is often stressful for adults even if the appeal is successful. For children due to the extra test of the need to demonstrate additional needs in comparison to a normal child means the tribunal have to look at the negative aspects involved.
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> There are distinct communication skills when interacting with children and often this requirement is intensified when communicating with children who are more susceptible to leading questions and often inaccurate with assessments of time etc.
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> It is our belief based on extensive experience that attendance by any child regardless of age is wholly inappropriate as it may contribute to further damage. Often as in [the claimant's] case there has been extensive trauma and negligence and therefore issues of trust a major factor. The [foster carer] expressed her reluctance at the former hearing giving evidence on how such attendance would seriously compromise progress already made whereby [the claimant] was beginning to trust [the foster carer].
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> [The social worker] also expressed great concern on this matter and would be prevented from allowing such action without permission from the Director of Social Services which is unlikely to be given due to these circumstances."

12. With the submission was a further letter from the clinical psychologist, dealing with the undesirability of the claimant attending the appeal hearing:

> "In my opinion it would be highly inappropriate for [the claimant] to attend such a meeting. This is because I feel she would find the whole experience incredibly stressful and it is likely that she would have great difficulties answering any questions openly and honestly. This is because it has been reported that she lacks any insight into her difficulties. Therefore, although she may present well in the tribunal, it would not be an accurate reflection of her actual abilities. Furthermore, I feel that her appearing at the tribunal could be very damaging for (the claimant) as she may have to listen to other people expressing negative comments about her. As you have stated, this is likely to be damaging to her relationship with carers and social services and would have a negative effect on her own self esteem."

13. The hearing was attended by a presenting officer and by the claimant's representative, but the claimant herself did not attend. Evidence was given by the claimant's foster carer, which was broadly in line with the information supplied in the claim

pack, but which also yielded the additional information that the claimant went to and from school in a taxi provided by social services because of the risk that she would go off with strangers if she went to school by bus.

The tribunal decision

14. The tribunal dismissed the appeal in respect of both components of DLA. In relation to mobility component, the tribunal considered that the school would know the claimant well, would be disinterested in the result of the appeal, and that their comments could therefore be regarded as wholly objective and impartial. Since the tribunal considered that the school report suggested that the claimant would not require significantly more supervision than another child of her age, the tribunal rejected what they regarded as the uncorroborated evidence of the foster carer. The tribunal stated that they gave less weight to the evidence of the clinical psychologist because she had not seen and examined the claimant and because the results of the referral for Attention Deficit and Hyperactivity Disorder were not yet known, and because the psychologist had not stated that the claimant required **substantially** more guidance or supervision from another person (than another child of her age). The tribunal considered that the behaviour described in the letter from the respite carer did not amount to behaviour which was unusual in a 12 year old child.

15. In relation to the care component, the tribunal accepted that, because of her emotional development and attention-seeking behaviour, the claimant would need some supervision over and above that required by 12 year olds generally. The tribunal again considered that the evidence of the clinical psychologist carried less weight because she had not seen the claimant, and concluded that, on the whole of the evidence, the claimant did not require supervision which was substantially in excess of that which would normally be required by a child of the same age.

16. The tribunal dealt with the claimant's failure to attend the hearing, as follows:

> "With regard to the question of the appellant's non-attendance, the tribunal did not accept the view of [the clinical psychologist] as expressed in her letter of 18 November 2003 as justifying the non-attendance of the appellant. This is because the view formed by [the clinical psychologist] that it would be highly inappropriate for [the claimant] to attend the tribunal and that she would find that experience stressful and have difficulties answering questions, had been formed only on the basis of what had been reported to her. It was not formed on the basis of her own assessment of the appellant, and in the view of the tribunal was therefore not persuasive in its reasoning of that fact.
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> The tribunal felt it was a matter for the appellant's foster carer as to whether she chose for her to attend the tribunal and having been given the opportunity to bring the appellant, [the foster carer] has evidently chosen not to do so. This is a matter for her. It was not for the tribunal to speculate whether the outcome of this tribunal would have been any different if the appellant had attended, and the tribunal felt that having given her the opportunity to do so, and she having declined that opportunity, there was sufficient evidence for the tribunal to make an informed decision."

17. The claimant appealed the tribunal decision on the grounds that the tribunal had not been entitled to reject the evidence of the clinical psychologist for the reasons which it gave; it had failed to make crucial findings of fact and give adequate

reasons for its decision; and it had drawn unjustifiable inferences from the claimant's failure to attend the hearing. On 14 June 2004 Mr Commissioner Bano gave leave to appeal.

18. In a submission dated 20 July 2004, whilst not agreeing with the grounds upon which leave to appeal had been granted, the Secretary of State nevertheless supported the appeal on the basis that the tribunal had failed to establish whether the claimant suffered from a disability, although it was accepted in the submission that the tribunal did not have to identify the disability. In a reply dated 20 August, the claimant's representative submitted that the condition "learning difficulties" was a disability for the purposes of sections 72 and 73 of the 1992 Act, and that the tribunal ought to have made an award of lower rate mobility component and middle rate care component on the basis of the evidence from the school that the claimant exhibited constant attention-seeking behaviour.

19. In view of the disagreement between the parties as to the basis on which the appeal should be allowed, on 27 August Mr Commissioner Bano directed an oral hearing of the appeal, inviting the Secretary of State to submit expert evidence on the meaning of "learning difficulties". On 1 September the Chief Commissioner directed that the appeal be heard by a Tribunal of Commissioners as he considered that the question of what proof of mental or physical disablement is required in DLA cases involving learning difficulties was a question of law of special difficulty.

20. At the oral hearing before us on 3 March 2005 the claimant was represented by Mr Daniel Kolinsky of Counsel (instructed by the Solicitor to the Child Poverty Action Group), and the Secretary of State was represented by Mr James Maurici of Counsel (instructed by the Solicitor to the Department for Work and Pensions). We are grateful to them both for their assistance.

"Learning difficulties"

21. The Secretary of State responded to the Commissioner's direction of 27 August 2004 on 18 October 2004, annexing a report prepared by Dr Pamela Ford, who is a member of the Department for Work and Pensions Corporate Medical Group. Whilst not independent, Dr Ford's evidence was cogent and not disputed.

22. Dr Ford distinguished between "learning disabilities" (also known as "general learning disability" or "GLD") which is an arrested or incomplete development of the mind reflected in a relatively low intelligence quotient (IQ) or mental age; and a "specific learning difficulty" which is a difficulty in a particular area of learning (eg recognising letters or numbers) but which is independent of IQ. She explained that, in GLD, consideration of IQ alone could not predict the extent or types of functional impairments that an individual might have. However, in the two internationally recognised diagnostic classifications (The International Classification of Diseases 10th Edition or ICD10, and The Diagnostic and Statistical Manual 4th Edition or DSMIV) GLD (or "mental retardation", the anachronistic term used by both classifications) is classified into four broad categories based upon IQ, namely mild, moderate, severe and profound. Dr Ford described the broad functional effects of learning disability in each of the categories as follows:

> **"Mild (IQ 50–69)**
>
> Appearance and behaviour are usually normal. There may be some developmental delay but language is adequate for conversation. A mild condition

may not be apparent or diagnosed until the child starts school. Children may need some special educational input but usually attend ordinary schools.

Moderate (IQ 35–49)

People in this group have difficulty with language, especially in learning to express themselves. They may learn to wash, dress, feed themselves etc, but it takes longer than for a normal child. They may exhibit challenging behaviour. Moderate learning disability is often associated with other physical disabilities such as epilepsy.

Severe (IQ 20–34) and profound (IQ <20)

Individuals in this category have very limited or no speech. They are unable to learn to care for [themselves] and may exhibit significant behavioural difficulties. Often they have associated severe physical disabilities including epilepsy and cerebral palsy."

23. Dr Ford indicated that, for DLA purposes, where a diagnosis of GLD is made by the appropriate specialist it is usual for the decision-maker on behalf of the Secretary of State to accept this as a **physical** disability. On the other hand, a specific learning difficulty is accepted as a **mental** disability. We find this distinction difficult, particularly as Dr Ford said that GLD is due to an arrested or incomplete development of the **mind**. Whereas the distinction between physical and mental disabilities is not in issue in the appeal before us, the distinction drawn by the Secretary of State in this area does highlight the difficulties in classification of disabilities into physical and mental categories (which is necessary in relation to other statutory provisions, eg section 73(1)(a) which restricts higher rate mobility component of DLA to a person suffering from "**physical** disablement such that he is either unable to walk or virtually unable to do so").

24. We shall return to Dr Ford's opinion as to whether the claimant suffers from GLD in due course.

The scope of sections 72 and 73

25. However, as Dr Ford pointed out, before the tribunal there was no evidence from a paediatrician or similar specialist or indeed any medical practitioner of a definite diagnosis of GLD. This appeal therefore raises the specific question of whether sections 72 and 73(1)(d) of the 1992 Act impose a free-standing requirement for a specific physical or mental condition to be established as a condition of entitlement to DLA; as well as the broader issue of the scope and meaning of those sections where they refer to a person being "so severely disabled physically or mentally that" certain consequences follow.

26. Section 72(1) of the 1992 Act provides:

"Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which –

(a) he is so severely disabled physically or mentally that

(i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods; or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients; or

(b) he is so severely disabled physically or mentally that, by day, he requires from another person –

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(c) he is so severely disabled physically or mentally that, at night –

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purposes of watching over him."

Section 73(1), so far as material, provides:

"Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which –

(a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so; or

(b) …

(c) …

(d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time."

27. As a benefit, DLA was preceded by attendance allowance, which was subject to a statutory scheme using similar concepts and wording in the Social Security Act 1975 (the 1975 Act). In relation to section 35(1) of the 1975 Act, when granting leave to appeal in R(A) 2/92, the then Chief Commissioner (His Honour Judge Bromley QC) posed the question: "Is it right … to reframe the statutory words 'so severely disabled physically or mentally that … he requires …' into a question treated as determinative whether a person is suffering from a severe mental or physical disability and to sever the language of the subsection?"

28. This question has to be seen against the background of the then current regime of adjudication of attendance allowance claims which was by a medically qualified Attendance Allowance Board (which in practice delegated the function to a "delegated medical practitioner"). "Disability" was therefore in one sense a "medical question" – it was a question dealt with by medical practitioners. But the Chief Commissioner's formulation appears to presuppose it to be a medical question in a different sense, equating "disability" with "medical condition". The Chief Commissioner's question could consequently be reformulated as follows: is it a discrete precondition for entitlement to the benefit that the claimant is severely

disabled physically or mentally in the form of a recognised medical condition? That is certainly how the question was construed by the Commissioner who heard that appeal following the grant of leave by the Chief Commissioner (Mr Commissioner Skinner). It is a question that has subsequently been considered in many cases, and it has given rise to considerable differences of opinion between Commissioners.

29. At one end of the spectrum are decisions such as R(A) 2/92 itself, in which Mr Commissioner Skinner answered the question in the affirmative, stating (at paragraph 10) that "where a person indulges in aggressive or seriously irresponsible conduct the Board has to consider whether that arises from some recognised disordered mental condition or whether it merely arises from a defective character." He found that the claimant in that case was not entitled to the benefit because the Attendance Allowance Board had not found the claimant to be suffering from a serious mental illness that could have accounted for his "violent and irresponsible behaviour". In CA/123/1991, Mr Commissioner Hallett held that the phrase "severely disabled physically or mentally" related to a condition of body or mind that can be defined medically. In R(DLA) 2/00 Mr Commissioner May QC held that the establishment of a "medically recognised physical or mental condition" that caused a disability was "an essential prerequisite" for award of DLA. Similarly, in CDLA/944/2001 Mr Commissioner Henty, after a full review of the authorities, held that, in order to show a mental disability under section 72, a claimant must be shown to suffer from some recognised mental disorder.

30. At the other end of the spectrum is the view of Mr Commissioner Levenson set out in the common appendix to decisions CDLA/15467/1996, CDLA/16176/1996, CDLA/1659/1997 and CDLA/2252/1997 (which we will refer to as simply "the Common Appendix"), in which the Commissioner held that the 1992 Act does not require any specific diagnosis or a finding that a person has a severe or serious disability in the sense that such a description should be applicable without consideration of the effects of the disability referred to in section 72. That decision was followed by Deputy Commissioner Mark in CDLA/948/2000.

31. A possible middle course was suggested by Mrs Commissioner Parker in R(DLA) 10/02, in which she held (paragraph 30) that the tribunal must be satisfied that the claimant has some condition "that is capable of being medically accepted as such", even if there is no exact diagnosis. As we understand it, the Commissioner considered the prerequisite for an award of benefit to be proof of at least a diagnosable – if not diagnosed – medical condition.

32. In this appeal, although there was some difference about the precise way in which the provisions should be applied, the parties were in agreement that sections 72 and 73(1)(d) impose no free-standing requirement for proof of a diagnosed or diagnosable medical condition. However, we have not regarded ourselves as constrained by that agreement and, in view of the authorities running contrary to the submissions of the parties in this case, we have taken the view that we have to come to our own judgment on the proper construction of the provisions in question. To that end, these issues were fully aired before us.

33. DLA is a non-contributory benefit for people who are so disabled that they need help to cope with their disability. In *R v National Insurance Commissioner ex parte Secretary of State for Social Services* [1981] 1 WLR 1017 also reported as Appendix to R(A) 2/80, Lord Denning MR said in relation to section 35(1) of the 1975 Act (at page 1022):

> "In order to qualify at all, the person must be "so severely disabled physically or mentally" that he requires attention. This conveys the thought that the attention must be required so as to enable him to cope with his disability, whatever it is."

This insight (approved by Lord Woolf in *Mallinson v Secretary of State for Social Security* [1994] 1 WLR 630 also reported as R(A) 3/94, at page 636) is equally applicable to sections 72(1) and 73(1)(d) of the 1992 Act, which use an identical formula. With regard to care, although it is paid whether or not a claimant in fact receives assistance, the purpose of the benefit is to assist with the reasonable care requirements that result from a disability. The whole focus of section 72(1) is therefore the disability which the benefit seeks to address. Section 73(1)(d) has a similar focus.

34. Although the word "disability" may have a wider meaning elsewhere, it was defined by Mr Commissioner Lazarus in this context in R(I) 1/81 as "an inability, total or partial, to perform a normal bodily or mental process". That definition is consistent with the purpose of the statutory provisions in which it appears, and it substantially accords with the definition in Paragraph 2.1 of the White Paper, "The Way Ahead – Benefits for Disabled People" (January 1990, Cm 917). The White Paper adopted the World Health Organisation (WHO) International Classification of Impairments, Disabilities and Handicaps definition of the term "disability", namely "any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being". As the White Paper goes on to say, "In everyday terms it means things people cannot do – such as not being able to walk, or not seeing well enough to recognise a friend across a room." For our own part, we do not find the words in parentheses in the WHO definition ("resulting from an impairment") to be helpful, because for the disabled person in one sense the "impairment" is the lack of functional capacity itself. However, otherwise, we consider the WHO definition captures the essence of "disability".

35. "Disability" is conceptually distinct from "medical condition". "Disability" is entirely concerned with a deficiency in functional ability, ie the physical and mental power to do things. Of course, a diagnosable medical condition may give rise to a disability. For example, a condition that inevitably involves the loss of a sense or a limb would give rise to an obvious diminution in functional capacity. But entitlement to DLA is dependent upon a claimant's inability to cope with care and mobility without assistance and with his consequent reasonable care and mobility needs; and not upon the diagnosis of any medical condition. Even if a person has a serious medical condition in the sense that his life is imminently threatened – perhaps some asymptomatic heart condition – that person is not entitled to either component of DLA if the condition has no adverse impact on his ability to care for himself and be mobile without assistance. Conceptually and in ordinary language usage, "disability" cannot be equated with "medical condition"; and a "severe disability" is not the same as a "serious medical condition".

36. Contrary to this usage, do the statutory provisions of sections 72 and 73(1)(d) require "disability" to mean "medical condition"? The requirement of these provisions is that the claimant is "so severely disabled … that" certain consequences follow. This clearly does not and cannot mean "having a serious medical condition". If severity of disability is measured by reference to the seriousness of the medical

condition, rather than to the effects in terms of care needs, the provisions could not achieve their purpose of correlating entitlement to care needs. Furthermore, as the Chief Commissioner recognised in the formulation of his question in R(A) 2/92, in context the equation of "disability" with "medical condition" requires a severance of the statutory language, which would deprive the provision of any criteria by which "severity" could be assessed. Indeed, the very use of the word "severe" is an indication that "disability" is a reference to some functional deficiency (see paragraph 41 below).

37. Sections 72 and 73(1)(d) require a claimant to be "disabled physically or mentally", and provide no further definitions or guidance. If there had been an intention to require proof of a diagnosed or diagnosable medical condition, then the provisions could have made this clear, as they do in other benefit contexts (eg the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967). We were also referred to section 1(1) of the Disability Discrimination Act 1995 which provides "[s]ubject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities". Schedule 1 provides a number of detailed provisions that supplement section 1, including in paragraph 1 the following: "'Mental impairment' includes an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness". As Mr Maurici submitted, had Parliament intended to adopt a similar restricted approach to the concept of "disability" in the 1992 Act, it could and no doubt would have done so.

38. Sections 72 and 73(1)(d) refer to "disabled **physically or mentally**". What do the emphasised words add? In the Common Appendix Mr Commissioner Levenson said (at paragraph 7): "The claimant must be disabled physically or mentally. No other kind of disability is relevant". However, Counsel before us were unable to suggest any kind of disability which was neither physical nor mental, ie that does not result from the body or mind. We consider that the words "physically or mentally" are intended to show that entitlement to care component and lower rate mobility component, unlike higher rate mobility component, is not limited to some types of disability alone. In our judgment, they are words of inclusion, not exclusion.

39. However, the scope of sections 72 and 73(1)(d) is not of course unlimited. For the relevant provisions to apply, the claimant must be disabled, ie have some functional incapacity or impairment. He must lack the physical or mental power to perform or control the relevant function. Therefore, excluded from the ambit of the provisions would be, for example, attention needs resulting from religious beliefs or cultural habit (eg CA/137/1984; and see the commentary on the provisions in "Medical and Disability Appeal Tribunals: The Legislation" (ed M Rowland, Sweet & Maxwell, 1995), quoted by Mr Commissioner Levenson at paragraph 7 of the Common Appendix).

40. In a number of previous cases, the alleged disability was some form of behavioural difficulty (in R(A) 2/92, "irresponsible behaviour" in the form of violent and dishonest criminal acts). It will be apparent from what we have said that, in our judgment, 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.

41. That is because, even if a claimant is disabled, that does not in itself entitle him to DLA. In sections 72 and 73(1)(d), the disability is required to be **severe**. We have already explained why this cannot be a reference to the severity of a medical condition. It is a reference to severity of disability; but, in our judgment, the only requirement of the provisions is that the disability is such that it results in the particular consequence identified (eg under section 72(1)(a), the claimant requires attention for a significant part of the day). This is clear, not only from the purpose of the provisions, but also from the statutory wording employed, "**so severely** disabled … **that**" (rather than "so severely disabled and …). We respectfully agree with Mrs Commissioner Parker in R(DLA) 10/02 that:

> "… the severity of the disablement is determined by reference to the care needs which arise and is not considered by reference to the general nature of that disablement divorced from the actual consequences with respect to the claimant's need for attendance."

It is clearly apparent from the language of the provisions itself that the severity of the disability is to be measured solely by reference to the prescribed consequences, and that there is no room for any free-standing test of severity. This view is supported by the House of Lords in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 (also reported as R(DLA) 7/03), in which Lord Hoffmann stressed that the purpose of the criteria for the "cooking test" in section 72(1)(a)(ii) was "to calibrate the severity of the disability", not suggesting that there is any test of severity outside the provisions of the prescribed consequence.

42. Therefore, in our view, section 72 raises two issues. (i) Does the claimant have a disability, ie does he have a functional deficiency, physical or mental? (ii) If so, do the care needs to which the functional deficiency gives rise satisfy any of paragraphs (i) or (ii) of section 72(1)(a) to (c), and if so, which? Section 73(1)(d) gives rise to similar questions in relation to mobility.

43. Those care needs have to be assessed on the basis of all the available evidence. As the authors of Wikeley, Ogus & Barendt's "The Law of Social Security" (5th edition (Butterworths, 2002) at page 681) observe, clinical tests cannot themselves determine functional incapacity, eg an inability to self-care. However, we agree with Mr Commissioner Levenson (at paragraph 8 of the Common Appendix) that medical evidence, although not essential, will in many cases be important in determining whether a claimant has a disability, and, if so, in determining the extent of the care needs to which the disability gives rise. For example, some medical conditions (such as the loss of a sense or a limb) give rise to obvious functional impairment. Others (particularly psychiatric conditions) are diagnosed by reference to a constellation of symptoms, and where such a diagnosis is made one might assume (or at least expect) certain symptoms or patterns of behaviour. But that does not mean that, in the absence of a diagnosis (or even in the absence of any medical evidence), the statutory criteria will necessarily fail to be satisfied. There will be cases in which there has been no medical diagnosis of a disabling condition for some particular reason, for example, because a person with a psychiatric condition is unwilling to undergo treatment, or perhaps because of a shortage of medical

resources in a particular area. The absence of a diagnosis does not necessarily negate entitlement to DLA, and the absence of such a diagnosis does not lift from the shoulders of a decision-maker or tribunal the burden of assessing the evidence of disability such as it is. For a tribunal, in the absence of a determinative diagnosis, all of the evidence of the functional abilities of the claimant will need to be considered, relevant findings of fact made in relation to those abilities, and a decision made as to whether the disability is such as to satisfy one or more of the statutory tests in section 72(1)(a) to (c) and section 73(1)(d).

44. We have referred above to some Commissioners who have in the past taken a different approach to these statutory provisions from that taken by us. There do not appear to be any helpful cases from the higher courts directly in point. We were referred to *Harrison v Secretary of State for Social Services* reported as R(M) 1/88, in which the Court of Appeal upheld the dismissal by Mr Commissioner Monroe of an appeal against a refusal of a claim for mobility allowance by a claimant whose restricted walking ability had been found by the medical appeal tribunal to be due not to a physical cause, but hysterical in origin. O'Connor LJ said:

> "The inability to walk is not itself the physical disablement. There must be some physical disablement such that he is unable to walk. In the present case on the evidence before them the Medical Board and the Medical Appeal Tribunal held that this man was not suffering from any physical disablement: he was suffering from a functional disablement. That was a matter which was entirely for them, and neither the Commissioner nor this court can possibly interfere with the finding."

We consider that different terminology would now be appropriate. However, *Harrison* was a case decided under the former regime of exclusively medical adjudication for awards of attendance allowance and mobility allowance. Mobility allowance, like the mobility component of disability living allowance, was payable only in respect of **physical** disablement, and the question in *Harrison* was whether the adjudication authorities were correct in holding that a restriction in walking which was hysterical in origin was not a physical disablement. Stocker LJ observed that physical and hysterical conditions were often used as contrasting terms. It was in that context that the Court of Appeal held that the adjudication authorities were entitled to find that the claimant was not suffering from a physical disablement, and we do not consider that the case is any authority for the proposition that section 72 requires a free-standing diagnosis of a severe medical condition. The term "hysteria" is not currently in general use, but was formerly used to describe extreme emotional instability giving rise to symptoms. Since the Court of Appeal noted, without apparent criticism, that the claimant had subsequently been awarded mobility allowance on the basis of a psychiatrist's report giving a **physical** cause for the relevant symptoms, it seems clear that their reason for upholding the medical authorities' rejection of the earlier claim was the lack of any evidence at that time of any **physical** basis for the claimant's condition. We do not consider there is anything in *Harrison* which is contrary to our construction of the relevant statutory provisions.

45. Returning to the Commissioners' jurisprudence, it seems to us that in at least some of the cases in which it has been held by single Commissioners that the provisions require a diagnosis of a medical condition, the intention has been simply to prevent entitlement to DLA arising in cases which cannot in any event have been

intended to have been covered by the legislation. However, insofar as these cases are inconsistent with this decision, they should not be followed.

Application of principles to this case

46. As Dr Ford pointed out, in the claimant's case it is not clear from the evidence whether there has been a definite diagnosis of GLD made by a consultant paediatrician or similar specialist, but Dr Ford gives her own opinion as follows (Report 6 October 2004, paragraph 14):

> "My view is that the claimant probably does have mild or mild to moderate learning disabilities, and that this should be considered to be the main disabling condition. I base this on the information provided on the claim pack where the fostering social worker notes a full educational statement for moderate learning difficulties with low general ability, delayed acquisition of speech/language skills, difficulty in reading. Information collected at the tribunal show that the claimant was a premature baby who was severely neglected. I accept that this is my opinion based on the reading of the papers provided. If my view is correct, it is likely that she had an assessment by a paediatrician or psychiatrist at some time in the past."

This opinion reflects the evidence of the claimant's psychologist, that the claimant functioned intellectually at a much younger level than her chronological age; and also by the evidence of the claim form that the claimant had had the benefit of intervention from both psychiatric and psychological services. Having accepted that the claimant has a disability, Dr Ford considered that "the appeal tribunal is probably correct in their decision that the claimed needs are not in excess of an able bodied child of the same age …"; but that it would not be unreasonable to conclude that the claimant was entitled to at least lower rate mobility component.

47. In our view, bearing in mind the IQ of the claimant (as assessed by Dr Ford) and the evidence from the school that the claimant's misbehaviour was not wilful (which would seem to support the conclusion that she is genuinely unable to control her behaviour), despite the lack of a diagnosis by a medically qualified person, the tribunal in this case properly directing itself did have evidence upon which it could have found that the claimant was disabled and satisfied the criteria of sections 72 and 73(1)(d) of the 1992 Act, and the tribunal's approach to the statutory provisions and its failure to make a finding on that issue were errors of law.

Children's evidence before appeals tribunals

48. We therefore turn to consider the tribunal's approach to the claimant's failure to attend the hearing, in response to the direction given on 30 October 2003 at the first hearing of the appeal.

49. At common law, a child of such tender years that he has neither sufficient intelligence to testify nor a proper appreciation of the duty of speaking the truth is not a competent witness *(R v Brasier* (1779) 1 Leach 199). Section 96 of the Children Act 1989 provides that a child's evidence may be heard by the court in civil proceedings if, in its opinion, the child understands that it is his duty to speak the truth and he has sufficient understanding to justify his evidence being heard. "Civil proceedings" are defined in section 96(7) as proceedings before any tribunal in which the strict rules of evidence apply and, although tribunals constituted under the Social Security Act 1998 are not bound by the strict rules of evidence (see

CDLA/2014/2004), by analogy with section 96 such tribunals undoubtedly have power to hear the evidence of children.

50. Furthermore, a tribunal has power to summons a witness. Such a power is conferred by regulation 43(1) of the Social Security (Decisions and Appeals) Regulations 1999 (SI 1999/991) (the 1999 Regulations), which provides that:

> "A chairman … may by summons … require any person in Great Britain to attend as a witness at a hearing of an appeal … at such time and place as shall be specified in the summons…and, subject to paragraph (2), at the hearing to answer any question or produce any documents in his custody or under his control which relate to any matter in question in the appeal …"

On the face of the regulation, there is no reason why such a summons may not be directed to a child.

51. Although regulation 43 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) provides for the Secretary of State to appoint a person to exercise on behalf of a child any right in connection with a claim for DLA, the making of such an appointment does not have the effect that the child ceases to be a party within the meaning of that term in regulation 4. The child remains a party to the proceedings.

52. In *Brown v Secretary of State for the Home Department* (LTA 97/6885/J) Otton LJ stressed that the Immigration Appeals Tribunal – another tribunal in which a child could have given evidence and could be required to do so – was not bound to hear the evidence of a child of tender years:

> "The Tribunal is a master of its own procedure and is required to be fair to the party and sensitive to the interests of young children. The court, in my view had a discretion whether to require the child to give evidence or to accept evidence in some other form."

An Appeals Service tribunal is equally master of its own procedure (see, eg regulation 38(1) and (2) of the 1999 Regulations). Therefore, such a tribunal has the power to hear evidence from children – indeed, has the power to require the attendance of a child to give such evidence – but it has a discretion as to whether to compel or indeed allow a child to do so. How should such a discretion be exercised? In short, with great care and caution.

53. The Council on Tribunals' Guide to Drafting Tribunals Rules (November 2003) does not contain a model rule relating to child witnesses. Neither do the procedural rules of Appeals Service tribunals (set out in the 1999 Regulations) make any specific provision with regard to children giving evidence. However, valuable guidance on the subject has been given in the Benchbook issued by the President of the Appeals Service tribunals. Paragraphs 64.7 to 64.15 deal with child witnesses, to which we were referred. Paragraphs 64.11 to 64.13 are particularly pertinent:

> "11. Dilemmas are posed for the tribunal when the claim to DLA has been made on the child's behalf and the child is present at the hearing. The child will hear information about himself, eg as to his inadequacies or behavioural dysfunction; the tribunal may probe the statements of the parent and wish to question the child directly. Information revealed and discussed in the hearing may be harmful to the child, even if true. The tribunal has the option to ask the child to leave if it considers it inappropriate for the child to hear the

> evidence, but not if the parent is the carer as the child cannot be left unattended in the waiting room.
>
> 12. When a child is present the tribunal needs to be skilled at talking to children and making them feel at ease. A disruptive child may need to be calmed by the chairman. Recognising the most appropriate behaviours and styles of questioning for the chairman and members to adopt in seeking to conduct a full and fair exploration of the issues before it when communicating with a child requires a considerable degree of experience and sensitivity.
>
> 13. A further difficulty will arise when the child does not appear. Some tribunals take the view that a better assessment of the child's needs can be made by seeing and listening to the child. However, adverse findings should not be inferred from a child's non-attendance – the parents might have reasonable grounds for deciding not to involve the child, they may for example see the appeal as a humiliating and upsetting experience for the child. The tribunal has of course no power to compel the child's attendance except through a witness summons."

The submissions by the claimant's social worker and the letter from the clinical psychologist (see paragraphs 11 and 12 above) in response to the direction to the claimant to attend the hearing closely reflect some of those concerns set out in the Benchbook.

54. The concerns about a child giving evidence before a tribunal are at least two-fold. First, there is a legitimate concern about the welfare of the child. Giving evidence is a stressful event for anyone, but particularly a child. To compound this, a DLA appeal is concerned with the extent of a claimant's care and mobility needs, so that the evidence will inevitably deal with the demands made by the child on those by whom care and supervision is provided. As the Benchbook points out, it may be necessary for the tribunal to probe deeply the evidence relating to the child's care needs and the child may consequently be exposed to information relating to such matters as his or her functional inadequacies or dysfunctional behaviour. The risks to the welfare of the child are even greater where, as here, the child has a history of emotional disturbance.

55. A second (although related) concern is that the evidence of a child taken orally in a tribunal may not be reliable, if only because of the stress of the event. In particular, the behaviour of the child in the abnormal environment of the tribunal setting is unlikely to provide a reliable indication of the child's behaviour on other occasions, and the value of the child's evidence is likely to be further diminished if the tribunal members do not have experience or training in facilitating children's evidence.

56. The need to be sensitive to the interests of children and the dangers of calling a child to give evidence have been recognised in the rules of procedure of a number of tribunals. For example, under regulation 17 of the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002 (SI 2002/816) a child may only give evidence in person where the President or nominated chairman of the tribunal has given the parties an opportunity to make representations and considers that the welfare of the child will not be prejudiced. Arrangements must be made to safeguard the welfare of the child, including the appointment of a person

with appropriate skills or experience in facilitating the giving of evidence by children. The Special Educational Needs and Disability Tribunal (General Provisions and Disability Claims Procedure) Regulations 2002 (SI 2002/1985) permit a child to give evidence and address the tribunal, but it is a power exercised with caution (see Whitbourn on "Special Educational Needs and Disability in Education – A Legal Guide" (Butterworths, 2002), paragraph 8.19.7).

57. The problems of children giving evidence are therefore not unique to this jurisdiction. As we have indicated, other tribunal jurisdictions (such as immigration, special educational needs and care standards) have considered the issue either in procedural rules or in rulings. We consider that the issues raised would better be dealt with, not in the context of a single case in a single jurisdiction such as this, but rather on a cross-tribunal basis with the benefit of the experiences of various tribunals and the court system, and any research into the issue being made available. It may be that it is an issue which can be taken up by the Council on Tribunals, or other body overarching tribunals. We should say that these comments do not reflect adversely on any of the legal representatives in this appeal, who had researched the issues with care and made helpful submissions.

58. The guidance we are able to give is as follows.

> 58.1 A tribunal should have proper regard to the wishes of a child of sufficiently mature years and understanding who wishes to give evidence in a DLA claim made on his behalf. However, a tribunal should be very cautious before requiring any child to give evidence, and should only call for a child to give evidence if it is satisfied that a just decision cannot otherwise be made. Before reaching such a conclusion, the tribunal should consider first all the other available evidence, and then ask itself whether any necessary additional evidence can be obtained from another source, for example, a health visitor, social worker, teacher, family member or friend, to avoid the need for the child to be called at all.
>
> 58.2 In any event, a tribunal should be very slow to exercise its power to require a child to give evidence if that child's parent or carer takes the view that for the child to give evidence may be detrimental to the child's welfare, particularly if there is evidence from a competent professional that to do so might be harmful. It would be wholly exceptional for it to be appropriate for a tribunal to call a child in such circumstances.
>
> 58.3 Even if it is those representing the child, rather than the tribunal, who wish the child to give evidence, as *Brown* indicates, a tribunal has power to disallow the child from giving evidence if it is against the child's interests to do so. If it is proposed that the child gives evidence, the tribunal must consider whether it is in that child's interests to do so.
>
> 58.4 The tribunal should bear in mind that the mere presence of a child at a hearing is unlikely to give a reliable indication of the effect of a child's disability in normal circumstances.
>
> 58.5 Where a decision is taken to call a child to give evidence, after submissions from interested persons (including the parents or carers of the child) a tribunal should give consideration to precisely how that evidence will be taken, so that the interests and welfare of the child are maintained, giving any directions that are appropriate. In doing so the tribunal will bear in mind

that a child may perceive what is said at a tribunal hearing very differently from an adult. It will be necessary for the tribunal to identify any matters that the child ought not to hear (eg it will not generally be appropriate for a child to hear criticism of those responsible for his or her care) and questions that the child ought not to be asked (eg it will not generally be appropriate to question a child about his or her own care needs).

58.6 In addition, where a child is to be called to give evidence, the tribunal will need to give consideration to practical matters such as the geography of the hearing room, having an appropriate adult in close attendance, whether any of the tribunal (including the chairman) should be selected because of experience in dealing with child witnesses and even (in appropriate cases) taking such steps as taking the child's evidence by video link if available, giving directions where appropriate.

59. In this case, there is no indication that the tribunal had regard to any of the above matters or indeed to the guidance in the tribunal Benchbook concerning the evidence of children, either when directing the claimant to attend or when reaching their decision dismissing the appeal. Despite the final sentence of the passage in the statement of reasons quoted above (paragraph 16), it seems to us that, taking the statement as a whole, contrary to the guidance in paragraph 64.13 of the Benchbook the tribunal did draw an adverse inference from the claimant's failure to attend the hearing of the appeal. The decision that the claimant should not attend was one made by the child's foster carer on the basis of her own knowledge of the child and the advice of a clinical psychologist, as being in the child's best interests. The local authority also took the view (at Director level) that the child's giving evidence would be adverse to her interests. On any view, this did not justify the drawing of any adverse inference.

60. In the circumstances, we consider the approach of the tribunal to the child claimant – in summonsing the child to give evidence, and then in drawing an adverse inference from the fact that she did not attend (despite the view of the local authority, her carer and a clinical psychologist that her attendance might have an adverse effect upon her) – was inappropriate and unlawful as breaching the claimant's right to a fair hearing. We therefore accept that the tribunal erred in law in its approach to the claimant giving evidence and her non-attendance at the hearing, and allow the appeal for that reason also.

Disposal

61. For the reasons set out above, we allow the appeal and set aside the decision of the appeal tribunal.

62. Mr Kolinsky asked us, if we allowed the appeal, to substitute for the tribunal's decision a decision making an award of lower rate mobility component and middle rate care component. On the basis of the evidence before us (in particular, of the claimant's propensity to go off with strangers), we would have been prepared to make a finding that the claimant is disabled to the extent that she requires supervision to take advantage of the faculty of walking out of doors and to find that she requires substantially more supervision that persons of her age of normal functional ability. However, we cannot be satisfied on the basis of the material before us that the claimant reasonably requires continual supervision throughout the day in order to avoid substantial danger to herself or others. Proper consideration of this

requires further findings of fact to be made which we simply cannot deal with on the basis of the evidence before us. We therefore remit the case to a differently constituted tribunal for complete rehearing.