CHAPTER 15

Attendance allowance, mobility allowance, invalid care allowance and disability living allowance

(Invalid Care Allowance was changed to Carer's Allowance on 01/04/03).

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CHAPTER 15

Attendance allowance, mobility allowance, invalid care allowance and disability living allowance

(Invalid Care Allowance was changed to Carer's Allowance on 01/04/03.)

Part 1: Attendance allowance: adjudication

Sections 35 and 106(2) of the Social Security Act 1975 regulation 10 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 (hereinafter in Chapter 15 referred to as 'the Act' and 'the Regulations').

1 Function of Commissioner on appeal

R(A) 1/73

i An attendance allowance being a benefit under (what is now) the Social Security Act 1975, the actual award or refusal to award the allowance is made by the statutory authorities; but the question whether either of the medical conditions is satisfied is for decision by the Attendance Allowance Board or by their delegate, whose decision is binding on the statutory authorities. An appeal against a decision of the Board or its delegate on the medical conditions lies only against the determination on the review of any question of law; there is no appeal on the fact. It would, therefore be unfortunate if the Commissioner, in the guise of deciding questions of law, were in truth substituting his own layman's opinion on the facts or the medical inferences to be drawn from the facts. It is accordingly important that both the limits beyond which the Commissioner has no power to act and the tests to be applied when it is being decided whether a decision of a question is erroneous in law should be recognised. See also 15.2.2 i and 15.2.5 i *below*.

R(A) 4/78

ii It is important that, on an application for leave to appeal from a decision given on review by the Attendance Allowance Board, or by the Board's delegate, the limitations of the Commissioner's jurisdiction should be appreciated. An appeal, with leave of the Commissioner, lies only on the ground that the decision of the Board is erroneous on a question of law. On grounds of fact and medical opinion the Board's decision is final. Medical issues are not for the Commissioner to decide and he may not, therefore, substitute his own views on medical issues for those found in a decision which comes before him. A renal dialysis patient had been in receipt of an attendance allowance at the lower rate for a little over two years until 10th September 1977, when the certificate expired. In response to an application for a further certificate to be issued it was decided that the claimant did not satisfy either of the conditions in section 35(1) of the Social Security Act 1975 for entitlement to an allowance. On review of that decision a delegated medical practitioner concluded, having regard to the guidance given by R(A) 2/74, 15.1.2 ii *below*, and on the facts found by him, that a frequency for attention and supervision on 2 occasions a week did not enable him to find that the relevant conditions of section 35 were met 'by day' or 'at night'. The delegate accordingly declined to revise the decision disallowing the claim for the claimant's allowance to be continued. On appeal to the Commissioner a plea that it was contrary to natural justice for the allowance to have been 'taken away' from the claimant was rejected: as was a submission that certain 'guide lines' set out by the Attendance Allowance Board for the benefit of delegated medical practitioners were *ultra vires* the Board's powers. The sole remaining question was whether, on the facts found by the delegated medical practitioner, it could be said that no person acting judicially and properly instructed as to the relevant law could have come to the conclusion to which the delegate came. In answer to that question the Chief Commissioner said that he did not find it possible 'to hold that the conditions in section 35 must, as a matter of law, have been found to be satisfied by a requirement for attention and/or supervision of the specified nature for 2

occasions a week, and that on such requirement being found no reasonable person, properly instructed, could hold that the conditions were not met 'by day' or 'at night'. The appeal from the review decision was accordingly dismissed. See also R(A) 1/89, 15.1.2 viii *below*.

R(A) 5/83

iii The applicant, whose child was hydrocephalic, claimed attendance allowance. The Attendance Allowance Board held that the day condition of entitlement only was satisfied. The claimant applied to the Commissioner for leave to appeal, which he refused on the grounds that the appeal raised no question of law. The Divisional Court in proceedings for judicial review of the Commissioner's refusal to grant leave to appeal held that the court had power to review such a refusal, but accepted the contention that it should not seek out grounds on which to quash a determination when, on a proper reading of the statute, Parliament had made it plain that there were, at best, in an applicant's favour only severely restricted rights of appeal on a point of law. (As to rights of appeal against a refusal to grant leave to appeal see R(SB) 12/73 Appendix - 17.5.1 vii *below*.) See R(A) 1/81, 15.1.4 i, 15.2.5 ii, R(A) 1/83, 15.1.2 iv, 15.2.1 vi, 15.2.2 iii and 15.2.5 iv *below*.

2 What constitutes an error of law

R(A) 1/72

i A medical practitioner acting on behalf of the Attendance Allowance Board decided on review that a determination be not revised on the ground that the claimant had failed to satisfy him that he was 'so severely disabled' physically or mentally that he required attention or supervision to the extent specified in (what is now) section 35(1) of the Act. The review decision on both conditions was expressed in a single sentence, which repeated the statutory language of both conditions prefaced by the words '... on the evidence I am not satisfied that ...'. There was a conflict of material evidence before the medical practitioner relevant to the question whether continual supervision was needed and, if so, whether to avoid substantial danger to others. It was held that there had been a failure adequately to observe the requirement of (what was then) regulation 14(2) of the National Insurance (Attendance Allowance) Regulations 1971 (see now regulation 9(2) of the Regulations) to set out the reasons for the review decision in writing. It was held further than a decision may be held to be erroneous in law if (1) it contains a false proposition of the law *ex facie*; or (2) it is supported by no evidence; or (3) the facts found were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question; or (4) there has been any breach of the obligation to act according to the demands of natural justice. It was pointed out further that the obligation to give reasons for the decision imports a requirement to do more than only state the conclusion, and that it was doing no more than stating a conclusion if the determining authority merely states that on the evidence the authority is not satisfied that the statutory conditions are met. It is not obligatory to deal with every piece of evidence or to over-elaborate, but the minimum requirement must at least be that the claimant, looking at the decision, should be able to discern on the face of it the reasons why the evidence had failed to satisfy the authority. The review decision in question did not satisfy the statutory requirement. See also R(A) 1/73, paragraph 14. (Approved and followed in R(SB) 6/81 para 8. Approved and followed in R(SB) 5/82 - but the legal nature of the decision in the 2 cases distinguished). See R(SB) 1/84, 17.3.5 ix, 30.3.1 xv, *below*.

ii A woman who was kept alive by means of a kidney machine made a claim for attendance allowance, which was rejected by a delegate of the Attendance Allowance Board. On review another delegate found that neither of the day conditions was satisfied and recorded in his decision: 'With regard to the night conditions, attention is necessary when Mrs. ______ is on the dialysis machine, which is 3 nights per week. On the other nights no attention is necessary and I am, therefore, unable to accept that she requires prolonged or repeated attention during the night in connection with her bodily functions. So far as supervision is concerned, I accept that supervision is necessary when she is on the dialysis machine, but this is 3 nights per week and I do not accept that she requires from another person continual supervision throughout the night in order to avoid substantial danger to herself or others'. On appeal to the Commissioner it was held that the delegate's decision was erroneous in point of law and should be set aside on the ground that it wrongly equated the normative approach to the arithmetical approach. See paragraphs 19-25. It was observed that the phrase 'normative approach' enshrined an important truth but was so likely to mislead that its use was undesirable. See 15.2.1 i, 15.1.2 ix *below* and 15.2.3 i *below*. — R(A) 2/74

iii In the case of a boy of 13 a delegated medical practitioner found, on review of a decision awarding an attendance allowance at the lower rate, that the boy had epileptic fits 2 to 4 times on 6 nights a week; that his parents attended him for up to half an hour each time he had a fit; and that he was often incontinent. Nevertheless the delegate was 'unable to accept that his health would deteriorate if he were not given attention when he had nocturnal fits'; that the boy could wear incontinence pads and suitable protective clothing; and considered that the boy would come to no harm if he were not changed repeatedly during the night. In conclusion the delegate expressed himself as being unable to accept that the boy 'requires prolonged or repeated attention during the night in connection with his bodily functions or that he has required such attention throughout the period relevant to the claim'. The application for a review of the decision that only the day conditions of section 35(1) of the Act, as modified by the Regulations were satisfied, was accordingly rejected. On appeal to the Commissioner it was held that in testing whether attention was required in connection with bodily functions by considering only whether there was a health risk arising from the two conditions of epilepsy and incontinence the delegated medical practitioner applied an erroneously limited test, which he considered decisive of what he had to decide, namely was there a requirement for attention in connection with bodily functions? 'Bodily functions are those physical activities essential to the hygiene and wellbeing of the human body, such as eating, drinking and sleeping', and it was clear that throughout any night disturbed by fits there was the question of the boy getting back to sleep. His parents attended him on the occasions of his fits and the delegate found that to withhold such attention would be unreasonable, but nevertheless made no findings on the question whether the attention thus given was or was not in connection with the bodily function of sleeping because he applied too narrow an approach and limited his consideration to the possible effects of the fits and incontinence. It was held that the delegate based his decision given on review on an approach which was erroneous in law and the decision was accordingly set aside. See also 15.2.5 ii, *below and* **15.1.2 ix** *below*. — R(A) 3/78

iv In deciding that neither the day nor night conditions for attendance allowance were satisfied in respect of an epileptic, the delegated medical practitioner (the 'DMP') gave as his reasons that, although it was possible, it was very rare in practice for an epileptic to suffer serious injury by falling or choking during an epileptic attack and that he had no evidence that the claimant had suffered such major injuries. A Tribunal of Commissioners, in setting the decision aside, held that the DMP's statement was equivocal and did not adequately explain why the claimant did not satisfy the 'supervision test' in section 35(1)(a)(ii) and (b)(ii) of the Act, since it was not clear whether the DMP was saying that the possibility of any substantial danger occurring was so remote that it could properly be disregarded or whether he was asserting that, although it sometimes happened, it did not happen very often, (in which case his view was erroneous in that isolated — R(A) 1/83 (T)

instances had to be taken into account, notwithstanding their infrequency) (paragraph 11). See 15.2.2 iii and 15.2.5 iv *below*. See also R(A) 5/83, 15.1.1 iii *above* and 17.5.1 vi *below*.

R(A) 1/84 v In May 1978 a delegated medical practitioner determined that a claimant satisfied the medical conditions for attendance allowance at the lower rate and issued a certificate to that effect for life. In December 1982 another delegated medical practitioner reviewed that decision and determined that the claimant did not satisfy either the day or night medical conditions for the allowance. He gave no reasons for his decision other than that the previous delegated medical practitioner made his decision on an earlier claim for a different period. The Commissioner held that this was not so; the earlier decision had been for life. He also held that, where the Attendance Allowance Board or a delegated medical practitioner proposed to remove an existing award, it was imperative that the claimant should be given clear and adequate reasons; this the second delegated medical practitioner had failed to do and so his decision was erroneous in point of law. See R(A) 1/89, 15.1.2 viii *below*.

R(A) 3/86 vi The claimant was incontinent by night and received attention for 15 minutes twice a night to change her nightclothes and sheets. The delegated medical practitioner concluded that there was no medical need for repeated changing of the bed and considered that attention given for 15 minutes at a time was not 'prolonged' as required by section 35(1)(b)(i) of the SS Act 1975. The Commissioner held that the delegated medical practitioner had erred in law by restricting himself, in relation to the need for attention, to medical considerations, the appropriate question being whether the attention was 'reasonably' required (see 15.2.1 vii *below*). Furthermore, all questions of fact were for the delegated medical practitioner, not just medical questions. Having reached a conclusion on the degree of attention required at night the delegated medical practitioner had to go on to consider the essentially non-medical questionswhether that requirement was of repeated or prolonged attention; in the present case the delegated medical practitioner had not considered whether the attention was repeated.

R(A) 1/87 vii The claimant claimed attendance allowance for her son who suffered from phenylketonuria which was a condition requiring strict dietary control. If the diet was not maintained the child was at risk of becoming mentally retarded. There were 2 other children in the home on a normal diet. A delegated medical practitioner decided the child needed the same level of supervision as any 2 year old boy except that extra vigilance was required to prevent him from obtaining and eating foodstuffs other than those stipulated by his diet. The practitioner was satisfied that precautions could be taken to ensure that all foodstuffs were locked away and that the other children in the home would be warned not to give him food and drink. The Commissioner held that the delegated medical practitioner was entitled to suggest and take account of practical measures to overcome a problem thought to involve a requirement of attention of supervision, but the practitioner did not explain how his suggestion was practical and compatible with the evidence of the child's agility and with normal domestic arrangements. He had therefore not given reasons which adequately justified his conclusions and his decision was erroneous in law.

R(A) 1/89 viii The claimant suffered from cystic fibrosis, and certificates in respect of attendance allowance at the lower rate were issued up to the claimant's 16th birthday (28 August 1986). The claimant made a renewal claim which was rejected by the delegated medical practitioner on the grounds that on the basis of the examining medical practitioner's report the claimant did not satisfy any of the conditions of entitlement. The claimant requested a review, and another delegated medical practitioner reviewed the determination but did not revise it. The Commissioner held that the delegated medical practitioner's determination was erroneous in law, and held that whenever there is a renewal claim, the delegated medical practitioner should see the medical evidence which was considered in the last favourable decision. If this evidence is not in the documents before the delegated medical practitioner, he should defer his decision until he has seen it. See also R(A) 2/83 15 Annex; R(A) 1/84, 15.1.2 v *above* and compare R(A) 4/78 15.1.1 ii *above*.

ix The claimant, a tetraplegic, made a renewal claim for attendance allowance which had previously been awarded at the higher rate. The delegated medical practitioner determined that the claimant satisfied one of the day conditions but neither of the night conditions for an award of attendance allowance. The claimant applied for a review but another delegated medical practitioner declined to revise the determination. The Commissioner held that where one delegated medical practitioner disagrees with the conclusion of a previous delegated medical practioner he should give reasons for it, to avoid uncertainty. Paragraph 5 of R(A) 2/83 followed. See also R(A) 1/89, 15.1.2 viii *above* and compare R(A) 4/78, 15.1.1 ii *above*. A further summary of this decision is at 15.2.2 v *below*. R(A) 2/89

x The claimant was awarded attendance allowance at the lower rate for a limited period. On a renewal claim a delegated medical practitioner decided that none of the day or night conditions were satisfied. The Commissioner held that the delegated medical practitioner should have indicated in what respect the claimant's condition had improved and, without over-elaboration, in what respect his attention needs had decreased. There was evidence that the claimant had fallen in the past. It was held that where there is evidence that a claimant may fall, a delegated medical practitioner must enquire into and answer the following questions: R(A) 3/89

a. Are the situations in which the claimant may fall predictable or unpredictable?

b. If the falling is predictable, can the claimant reasonably be expected to avoid the risk of falling, or to place himself at risk only when adgquately supervised?

c. If the falling is unpredictable, will the falling give rise to substantial danger to himself?

d. Is the substantial danger so remote a possibility that it ought reasonably to be disregarded?

3 Power to review

i On a claim for attendance allowance the claimant was found to have satisfied one of the day conditions for the allowance and a lower rate certificate was issued accordingly. On review it was decided that the day condition had not been satisfied until a fortnight before the claimant's death, but that one of the night conditions had been satisfied during the whole period covered by the claim and the lower rate certificate was allowed to stand. There was then an appeal to the Commissioner on the grounds that the review decision contradicted the earlier decision in holding that, apart from the last fortnight, neither of the day conditions had been satisfied and that there was no power to decide on such a contradiction. The Commissioner rejected the appeal on the grounds that, on the evidence available to him, there was no discrepancy between the 2 decisions and that the review decision was not erroneous in point of law. Subsequently a document was produced which had not previously been made available in the proceedings before the Commissioner and which established that the original decision had been based on acceptance of one of the day conditions. The Commissioner was invited to set his decision aside on the appeal and to give a fresh decision. It was held that the Commissioner's previous decision would be set aside; that on review the determining authority had a duty to reconsider the case as a whole and give the determination considered to be correct; and that the review determination was erroneous in point of law as infringing the rules of natural justice in that no reasonable opportunity had been given for the presentation of evidence concerning the day-time requirements of the claimant. R(A) 2/76

ii In February 1987 a claimant suffering from bullous emphysema and asthma claimed and was awarded attendance allowance at the lower rate. In December 1987 the claimant completed a further claim form which was treated as an application for review. On 7 October 1987 the delegated medical practitioner reviewed but declined to revise the decision. The claimant appealed to the Commissioner. On 4 August 1987 pending the appeal hearing a further review, under section 106(1)(b) of the Social Security Act 1975, was carried out, by the Attendance Allowance Board as a result of a letter received by them, written by the claimant's general practitioner without the R(A) 6/90

knowledge, approval or authorization of the claimant. The Commissioner held that the board had erred in law by treating the claimant's general practitioner's letter as an application for review. They had misconstrued section 106(1)(b) of the Social Security Act 1987 and regulation 38(2) of the Social Security (Adjudication) Regulations 1986. The regulations provide for either "a claimant" or the Secretary of State to apply within the prescribed period for a review on any ground. "A claimant" will include the claimant's solicitor or a duly authorized representative. The claimant's general practitioner was not an authorized representative and therefore there was no application for review in compliance with section 106(1)(b) and consequently the purported review was a nullity and had no effect. Therefore, the claimant's appeal against the delegated medical practitioner's decision had not lapsed. The Commissioner also held that on a review on any ground the Attendance Allowance Board will not be limited or constrained by the terms of application for a review and are at liberty to consider the matter *de novo*. The principles laid down in *Moran v. Secretary of State for Social Services* are not limited to epilepsy. R(A) 1/73, R(A) 1/89, R(A) 5/89 and *Moran v. Secretary of State for Social Services* (printed as an appendix to R(1/88) considered).

4 Attendance Allowance Board (including Delegated Medical Practitioner)

R(A) 1/81

i The Attendance Allowance Board may revoke the authority delegated by it to a delegated medical practitioner at any time before he makes a final determination on a claim to an attendance allowance (paragraph 8). The Board acts in a judicial capacity and must conform to the rule of natural justice, known as *audi alteram partem*, and ensure that before making its final decision, every party affected by the decision is aware of all the relevant issues (paragraph 10). If this rule were broken it would not cure the breach for the Board to say that there would be an opportunity of an appeal to the Commissioner (paragraph 17). It is not right to say that legal argument about any erroneous approach by the Board can usefully be mounted only before the Commissioner and that therefore there is no breach of the rules of natural justice if the Board refuses to engage in legal argument with the claimant's solicitors. The Board is bound by legal rules, including decisions of the Commissioners on points of law, and there is no reason why a claimant or his representative should not in fact make submissions on points of law to the Board (paragraph 21). See also 15.2.2 i and 15.2.5ii *below*. See R(A) 5/83, 15.1.1 iii *above* and 17.5.1 vi *below*.

R(A) 5/81

ii Where a disabled person suffered unpredictable attacks of grand mal which were always followed by attacks of petit mal, the delegated medical practitioner's finding that the attacks of petit mal were predictable for the purposes of determining whether the disabled person required continual supervision was not at law supportable (paragraphs 6 to 9). See 15.2.5 iii *below*.

R(A) 1/94

iii A claimant, who was brain damaged at birth in 1990, was awarded attendance allowance from the first pay day 6 months after his birth. His mother later applied for a review, under the special rules relating to terminally ill claimants, and asked for her son to be deemed to have satisfied the qualifying conditions since the date of his birth. After some delay, the delegated medical practitioner decided that he did not satisfy the special conditions relating to the terminally ill. The Commissioner held that:

a. in considering the question of whether the claimant was terminally ill, the delegated medical practitioner should have directed his mind to the position as it was at the date of application for review and not to the irrelevant consideration that, by the date of his determination, the claimant had lived for more than 6 months;

b. in order to satisfy the past presence conditions, the person in question must have an independent existence and cannot be an unborn child;

c. the claimant was not entitled to attendance allowance until he had been present in Great Britain for 26 weeks, that is 26 weeks after his birth.

See R(A) 4/75, 15.3.1 ii and R(A) 2/78, 15.3.1 iii.

iv A renewal claim for attendance allowance was rejected and the claimant applied for review. A delegated medical practitioner provisionally considered that she did not satisfy any of the conditions of entitlement. The claimant submitted further medical evidence and letters from friends relating to her epileptic attacks. The delegated medical practitioner determined on review that none of the day or night conditions for an attendance allowance were satisfied. It was held that the delegated medical practitioner failed to consider this additional evidence and thereby breached the rules of natural justice. Further synopses of this decision can be found at 15.2.2 vii and 15.2.5 x *below*.

R(A) 3/90

5 Review on any ground

i Where a determination of a delegated medical practitioner is reviewed on any ground, the determination of the reviewing delegated medical practitioner becomes the effective determination and the reviewed determination ceases to have effect. This is so even if, after review, the earlier determination is not revised. An appeal, or application for leave to appeal, lapses if the determination of the delegated medical practitioner which is the subject of the appeal is reviewed and revised. If the claimant does in fact wish to appeal it may be necessary for the claimant to apply for stay of the review.

R(A) 5/89 T

Part 2: Attendance Allowance: words and phrases

1 'Attention'

i It was held in the case of a woman who was kept alive by means of what is commonly known as a kidney machine, 15.1.2 ii *above*, that there was evidence on which it was legitimate to hold that attention was required and given in connection with the claimant's bodily functions consisting of (1) her husband's activities relating to her during each of the dialysis periods; and (2) his activities at other times in the preparation of the machine and various things that he had to do in connection with it. See also 15.1.2 ii *above* and 15.2.3 i *below*.

R(A) 2/74

ii The AA Board decided, in the case of a claimant who was seriously disabled through poliomyelitis, that neither of the conditions for entitlement to an allowance was satisfied by him. On review it was found that the claimant satisfied the day condition, and decided further that the original decision should be not be revised. On appeal to the Commissioner it was held that the review decision of the AA Board was not erroneous in law and that, in particular, it was open to law to the Board to decide on the evidence before them that the claimant did not require prolonged or repeated attention during the night. It was said that the word 'attention' denotes a concept of some personal service of an active nature and references was made to an unreported decision in which that was said and examples were suggested, such as helping the disabled person to bath or to eat his food, cooking for him, or dressing a wound. Reference was also made to another unreported decision in which it was said that the presence of the words 'frequent', 'prolonged' and 'repeated' fits in much more easily with the concept of some personal service of an active nature than with an interpretation of attention as being something merely passive. So far as this decision relates to 'cooking' as attention in connection with a bodily function, this case was overruled by a CA; see R(A) 2/80. See also 15.2.3 ii *below*.

R(A) 3/74

iii [Spare paragraph]

iv A 67 year old claimant suffered from diabetes mellitus and deficient circulation which led to bilateral amputation of both legs below the knee. He was unable to do any cooking because of his disability. A DMP acting on behalf of the AA Board held that the preparation of meals for the claimant was not a factor he could take into account when assessing the claimant's need for attention in connection with his bodily functions. The Commissioner held that the delegate's decision was erroneous in law because the attention required by a disabled person in connection with the preparation of food is a relevant matter to be taken into account under s. 35(1) of the Act.

R(A) 1/80

v The Commissioner's decision that 'cooking' constituted attention in connection with a bodily function and should have been taken into account by the DMP considering whether AA should be awarded, (s. 35(1)(a)(i) SS Act 1975) was quashed by the CA on an application by the S of S for judicial review for an Order of Certiorari. While eating is a bodily function 'cooking' does not constitute 'attention' for the purposes of s. 35(1). So far as it related to 'cooking' R(A) 3/74 was wrongly decided. (The decision of the CA was upheld by The HL *sub nom. Woodling, in re, Woodling v. The Secretary of State for Social Services* [1984] 1 WLR 348; [1984] 1 All ER 593 HL, and R(A) 2/80, App. 2 *printed in the 1983-1984 Volume of the Commissioner's Decisions*).

R(A) 2/80

vi 'Attention' denotes a concept of some personal service of an active nature, as distinguished from 'supervision' which denotes a more passive concept, such as being in the same room with the disabled person so as to be prepared to intervene if necessary; but not actually intervening save in emergencies (para. 7). See also 15.2.2 iii and 15.2.5 iv *below*, and R(A) 5/83, 15.1.1 iii *above* and 17.5.1 vi *below*.

R(A) 1/83 (T)

R(A) 3/86 vii The attention that a person requires in order to satisfy s. 35(1) of the SS Act 1975 is not limited to what he 'medically' requires but is what he 'reasonably' requires, as approved by the CA in *R. v. Secretary of State for Social Services, ex parte Connolly* [1986] 1 WLR p 424-433 (see 15.2.5 v *below*). A further summary of this decision is at 15.1.2 vi *above*.

R(A) 1/91 viii The claimant, a child, suffered from a severe skin condition involving the frequent application of ointment and profuse flaking of skin. It was held that the normal washing of clothes and bedclothes would not be relevant to the attention conditions. However, the frequency and type of washing may constitute attention in connection with bodily functions if, for example, the abnormal amount of laundry charges were regarded as part of the overall treatment of the person's condition. Furthermore, it was held that where a person suffers from a disability that necessitates the involved and complex preparation of food, this may be relevant to the attention conditions. See also R(A) 1/87, 15.2.3 vii *below*.

R(A) 2/98 ix It was held, when considering a claimant's reasonably required attention needs, that it would be appropriate to include in the aggregate of such attention as may enable him/her to carry out a reasonable level of social activity. It was further held, specifically in relation to the needs of a deaf person, that some social activities, that are open to hearing people, would not become more accessible to a deaf person whatever additional assistance or attention was given. (See also R(A) 1/83, 15.2.1 vi *above*). The second case in this judgment involved a claimant, suffering from arthritis and incontinence, who because of these disabilities, required help during the night with the changing and washing of soiled clothing and bedding. It was held that, as the above tasks were closely associated with a bodily function and performed as part of a continuous single episode of attention in connection with that bodily function, the changing and washing of the soiled clothing and bedding may form part of that episode of attention. The consequences of the incontinence would have to be dealt with at the same time in order to qualify. See also R(A) 1/91, 15.2.1 viii *above*.

R(DLA) 1/02 x It was held, in the case of a claimant suffering from profound deafness, that if the attention in connection with the bodily functions of hearing and communication was provided for the claimant, it would be unlikely to meet the contact/proximity test referred to by Lord Clyde in the decision R(A) 2/98. If, however, the above attention was rendered in the claimant's presence and in such a way as to assist him to carry out the activity, it could count as attention. See also R(A) 1/83, 15.2.1 vi *above*.

R(DLA) 2/02 xi The Commissioner held in the case of a profoundly deaf claimant, that where "unusual efforts" were required to attract his attention in order to communicate with him those "unusual efforts" would count towards his attention needs. At para. 23 the Commissioner defined the above efforts as being steps that are not or would not be required in respect of attracting the attention of a person in the same environment who is not deaf. See also R(A) 3/86, 15.2.1 vii and R(A) 2/98, 15.2.1 ix *above*.

R(DLA) 3/02 xii The Commissioner held, in the case of a profoundly deaf claimant, that the correct approach to fact finding is, first, to ascertain whether communication in the claimants current daily life would be made significantly more efficient or effective by the use of an interpreter, having regard to the practicability and desirability of having one in attendance. The Commissioner further held that the same considerations should be applied to what the claimant might like to do if help was available, but additionally having regard to the feasibility of fitting such activities in with other commitments. In many cases the extra effort involved in the initiation of communication will be *de minimis,* however, fact finders must properly investigate allegations of such needs. See also 15.2.1xii *above* in respect of the definition of extra effort and R(A) 3/86, 15.2.1 vii and R(A) 2/98, 15.2.1 ix *above*.

R(DLA) 10/02 xiii It was held that care needs must be reasonably required and, that in the assessment of these needs, it would be appropriate to consider the nature and effects of any prospective medical treatment and the claimant's attitude to it. An unreasonable refusal of help from medical services, which would eliminate or reduce the care needs, could result in these needs not being reasonably required. Compare and contrast with (M)1/95, 15.4.5 ii. See also R(A) 1/87, 15.1.2vii and R(A) 3/90, 15.2.5x.

xiv The claimant was deaf and dumb from birth and the main issue was whether the use of an interpreter comprehending and responding to written documents counted as attention in connection with the bodily function of hearing. The Commissioner held that the requirement "in connection with" a bodily function is satisfied if it is a close and intimate act that is either carried out in the claimant's presence or is so very closely associated with such an act which is immediately and directly linked to a mental or physical disability. Furthermore, the requirement for "frequent attention" depended upon the pattern and frequency of the attention across the whole span of the day and not on the total duration of that attention. See also R(A) 3/74 15.2.1 ii *above*.

R(A) 1/03

xv The claimant suffered from Asperger's disorder and although he had no practical difficulties with communication, he did have difficulties with social interaction. It was argued that help with social interaction was attention in connection with a bodily function of speaking. The Commissioner rejected this and held that if a person was able to communicate with other people without assistance then it was too far removed from the bodily functions (such as hearing and seeing) involved in communicating. See also R(A) 2/98 15.2.1 ix *above*.

R(DLA) 3/03

xvi The Chief Commissioner held that "frequent" requires consideration of not just the number of occasions something occurs, but the time over which they occur; the word having the characteristic of recurrence at intervals which are not long. Whether intervals between occurrences are or are not "long" and therefore whether occurrences can properly be said to be "frequent", depends upon a number of factors, particularly the number and pattern of those occurrences over time. He considered that the duration of individual occurrences is not necessarily irrelevant, however in relation to periods of attention under S. 72(1)(b)(i) the number and pattern of occurrences will usually be the most relevant and overriding factors in relation to the issue of "frequency".

R(DLA) 5/05

xvii The claimant was seriously disabled by arthritis in her back and knees and her mobility was severely restricted. She needed drinks to be brought to her during the day, but could drink unaided. The claimant also had attention needs in the morning and evening. Her claim for AA was refused by the Secretary of State and, on appeal, by a tribunal, on the ground that her need for attention in connection with her bodily functions was insufficient to meet the condition of "frequent ... throughout the day". The Commissioner allowed her appeal, and held that the bringing of drinks to the claimant could be counted as attention in connection with drinking and was reasonably required on a number of occasions throughout each day. The CA allowed the appeal by the Secretary of State, and held that the term "frequent attention in connection with his bodily functions" is to be read as a whole, and that the words "attention" and "functions" denote a requirement of a close and intimate nature created by the disability, beyond the normal run of domestic assistance. The Court decided that assistance with carrying drinks to a person has none of the characteristics of a servcie of a close and intimate character and is not capable of constituting "attention".

R(A) 1/06

2 'Continual supervision'

i It is to be observed that the word is 'continual' and not 'continuous' supervision and that the former is wider than the latter. There may also be a close link between attention and supervision in that if a person is liable to require attention at unpredictable intervals it may be necessary for someone to be continually available to provide attention when it is needed. In such a case the requirement of continual supervision could properly be found. 'If one starts with the fact that the disabled person is living with relatives who are looking after him and then asks oneself to what extent he requires supervision, that is beginning at the wrong point.' Attention and supervision can clearly overlap and be provided simultaneously. The question is whether supervision is required, not whether it is in fact provided. See also para. 12 of R(A) 1/75 where reference is made to two unreported decisions in one of which it was said: 'If a person is liable to require attention at unpredictable intervals, it may be necessary for someone to be continually at hand, that is to say in attendance so as to provide the attention when it is needed. In such a case a requirement of continual supervision could properly be found.' In the other unreported decision it was said that it may well be that a person sleeping either in the next room or in the same room as the disabled person should be held, in some circumstances, to be exercising supervision over the disabled person. The question depends upon the facts of the particular case. See also 15.1.1 i and 15.1.4 i *above*.

R(A) 1/73

ii At para. 14 of the decision it was said that the characteristic nature of 'continual supervision' is an overseeing or watching over, considered with reference to its

R(A) 1/75

frequency or regularity of occurrence, and if the Board, having regard to the claimant's disabilities, consider that such is required for the purposes laid down by the Act, the question whether what has been or is being done fulfils that requirement is itself not relevant. The question for the Board is not whether this or that arrangement in any particular case is supervision within the meaning of the statutory language; the question is whether the claimant in the particular case **requires** continual supervision within the meaning of the statutory language. Appreciating the characteristics of the supervision, the Board were not bound to find that it was being exercised or, if exercised, was required on occasions or at times other than when the claimant was assisted to get out of bed and visit the toilet. See also R(A) 2/75.

R(A) 1/83 (T) iii For the satisfaction of the 'supervision test' the claimant must show that four elements are satisfied; (1) that his medical condition is such that it might give rise to a substantial danger either to himself or some other person; (2) that the substantial danger is not too remote a possibility (as to the nature of these two elements, see 15.2.5 iv *below*); (3) that there is need for supervision to ensure that the claimant avoids the substantial danger referred to above (as to the concept of supervision, see 15.2.1 vi *above*); and (4) that the supervision is continual. Supervision which is only occasionally or spasmodically required is insufficient. Where an epileptic only requires supervision during attacks and the attacks are not very frequent he can hardly be said to require continual supervision, but where he requires supervision between, as well as during, attacks for the purpose of avoiding the substantial danger referred to above, and there may be need for continual supervision, although the instances of such an attack may be rare. In so far as the final para. of R(A) 1/81 - see 15.2.5 ii *below* indicates the contrary, it should not be followed. (Paras. 5 - 10 and 12.) R(A) 1/75 approved and followed. See also 15.1.2 iv *above* and see R(A) 5/83, 15.1.1 iii *above* and 17.5.1 vi, *below*. The CA held, in considering R(A)1/88, that supervision should not be given the restricted meaning adopted in the last sentence of para. 9 of R(A) 1/83 (T) - see 15.2.2 iv.

R(A) 1/88 (T) iv An epileptic claimed AA on the basis that she required continual supervision throughout the night to avoid substantial danger to herself and others. The frequency of her grand mal attacks at night were about twelve times over a nine month period. The Commissioner held that in basing his decision on R(A) 1/83, para. 9, the delegated medical practitioner did not err in law. The claimant appealed to the CA who held that:

1. supervision should not be given the restricted meaning adopted in the last sentence of para. 9 of R(A) 1/83;

2. supervision might be precautionary and anticipatory, and there was no justification for drawing a hard and fast distinction between the positions between and during attacks - in each case the function of the other person was standing by to intervene in case the epileptic needed attention;

3. accordingly a person who stood by to intervene in the event of an attack might be exercising supervision between attacks - it was a question of fact and degree in each case;

4. the relative frequency or infrequency of attacks was immaterial to the question whether supervision was continual so long as the risk of substantial danger was not so remote a possibility that it ought to be disregarded.

The decision of the CA is set out in an appendix to the Commissioner's decision. For another synopsis of this decision see 18.6.2 vi *below*.

R(A) 2/89 v On a renewal claim a delegated medical practitioner determined that the claimant, a tetraplegic, did not satisfy either of the night conditions for AA. The Commissioner held that the CA judgment in *Moran v. Secretary of State for Social Services* (reported as an App. to R(A) 1/88, 15.2.2 iv *above*), which considered whether the circumstances in which a person needed to be on hand meant that there was a need for supervision, was not confined to cases where the claimant is an epileptic. In looking at the need for supervision regard should be had as to whether there was a relevant risk in the claimant being left alone at night, and whether it is a risk which he could reasonably be expected to guard against. See also R(A) 1/83, 15.2.2 iii *above* and R(A) 1/81, 15.2.5 ii *below*. A further summary of this decision is at 15.1.2 ix *above*.

R(A) 4/92 vi The claimant suffered from epilepsy and narcolepsy. He was subject to blackouts, during which he was unaware of what he was doing, although he might continue to be

active. The AA Board found that neither a day nor a night condition was satisfied, holding that any risk of danger from a blackout could not be avoided by supervision, because the absence of any warning would prevent intervention quickly enough to assist the claimant. It was held that if the presence of another person is sufficient to reduce the amount of danger involved when a sudden attack occurred, that may be sufficient to comply with the conditions of entitlement.

vii A renewal claim for AA in respect of epilepsy was rejected and the claimant applied for review. The DMP ruled that, following the CA judgment in *Moran v. Secretary of State for Social Services*, the original DMP had been in error in certifying that the claimant satisfied the day supervision condition, as supervision which related to fits on 10 affected days a month did not constitute continual supervision. It was held that the DMP had misapplied *Moran*. If the onset of a fit is unpredictable and without warning, the relative infrequency of the attacks is not, of itself, a matter to be taken into account. It is, of course, open to one DMP to differ from another on medical questions but the difference must be explained and the preferred view supported. A DMP must give clear and adequate reasons for the removal of an award to which the claimant had hitherto been entitled. See 15.1.2 v and 15.2.2 *above*. Further synopses of this decision can be found at 15.1.4 iv *above* and 15.2.5 x *below*. — R(A) 3/90

viii It was held that not everyone who falls needs continual supervision to avoid danger to himself or others. It is only if the person has a propensity to fall by reason of his or her condition, so that this situation has to be catered for, that the possible need for continual supervision has to be considered. In this case the claimant had fallen in 1986 and again in 1993 whilst hurrying to answer the phone, it was considered that anyone is likely to fall who hurries to answer the phone. See also 15.2.5 vi and 15.2.5 viii *below*. — R(A) 1/96

ix The Commissioner held that a tribunal had erred by construing the meaning of "continual supervision" as equating to "uninterrupted supervision". "Continuous" meant "uninterrupted" whereas the proper meaning of "continual" was "frequently recurring". See also R(A) 1/73, 15.2.2 i; R(A) 1/75, 15.2.2 ii; R(A) 1/83, 15.2.2 iii and R(A) 1/88, 15.2.2 iv *above*. — R(DLA) 10/02

3 'Day' and 'night'

i The words 'during the night' may well mean merely 'at night' and not during a particular night. Further, it is not correct that each night has necessarily to be considered separately, for that would mean that if on any particular night the claimant required attention which in the opinion of the Board or its delegate was not repeated on that night and did not amount to prolonged attention, that night would have to be disregarded altogether, although on other nights massive attention might be required. See also 15.1.2 ii and 15.2.1 i *above*. — R(A) 2/74

ii The words 'day' and 'night' do not have an inflexible meaning; it is for the Board to decide what constitutes 'day' or 'night' according to the circumstances of each case. See paras. 12-15 and para. 32 of R(A) 1/73, 15.1.1 i and R(A) 3/74, 15.2.1 ii, *above*. — R(A) 3/74

iii A man who suffered from paraplegia could not walk unaided , dress or undress, get in or out of bed, or in or out of his wheelchair or car, and had two full-time personal attendants, one always being constantly in attendance on him. The AA Board were satisfied that he was severely disabled and needed frequent attention throughout the day, but they found that once he was in bed any attention he might require was not 'prolonged or repeated attention during the night'. In the opinion of the Board the assistance which the claimant required when going to bed and getting up was assistance properly attributable to the day and not to the night. It was held that the decision was erroneous in law in that the claimant's night began when he was taken in his wheelchair into his bedroom, undressed and helped to get into bed, and that operation was properly relevant to the question whether he required prolonged attention during the night. At para. 22 it was said that it was necessary in that case to assign some meaning to the word 'night', but it was not intended to propound the general principle or give any general definition of the word. The Commissioner added: "I confine myself solely to the decision of what may be described as 'the night' in relation to the present claimant. I assume that his habits, so far as going to bed and getting up are concerned, follow a more or less normal and usual pattern and that there comes a time after he has had dinner when he comes to the conclusion that the day is over and decided to retire for the night". The decision was subsequently quashed by the Divisional Court on an application for — R(A) 4/74

certiorari. See 18.1.2 iii *below*. In the course of his judgement the Lord Chief Justice said that he was not going to attempt to give any single definition of 'night' for the very good reason that he did not think it could be done. He observed that the Court had been invited to regard the night as being that period of inactivity, or that principal period of inactivity, through which each household goes in the dark hours, and to measure the beginning of the night from time at which the household closed down for the night. He added that he would recommend AA Boards first to instruct themselves as a matter of law in the meaning of 'night' in the light of what he had said, namely the coming of night according to the domestic routine of the household, and that, when they had done that, there was no more law to bother about; from then on it was for the Board to decide, using their good sense and medical knowledge, what services are fairly to be described as rendered at night and what are fairly to be described as rendered by day. If they conscientiously apply themselves to the problem and reach a conclusion which a sensible Board might have reached in the circumstances, then their decision is final because it is their function and their function alone to weigh the considerations which may be urged upon them.

R(A) 1/78

iv A claim for an attendance allowance was made by the mother of a child who had spina bifida and was also a hydrocephalic. A delegated medical practitioner decided that the child satisfied one of the day conditions but neither of the night conditions of s. 35(1) of the Act as modified by reg. 6(1)-(2) of the regs., and accordingly a certificate at the lower rate was issued to the claimant. On review another delegated medical practitioner was of opinion that the attention given by the child's parents before they retire to bed at night was attention required by the child by day and declined to revise the decision. The claimant then applied for, and was given, leave to appeal to the Commissioner against the decision given on review, and on behalf of the claimant reliance was placed on something the Lord Chief Justice said in the course of the his judgement in *R. v. National Insurance Commissioner, Ex parte Secretary of State for Social Services*, see 18.1.2 iii, in relation to the meaning of 'night' in the case of a child. It was contended that, in the case of a child who is put down to sleep before the household closes down, 'night' for the purposes of the relevant statutory provisions is the child's night from the time he is put to bed until he awakes, and that the 'coming of night according to the domestic routine of the household' is an erroneous test in the case of a child. It was held that the delegate's decision given on review was not erroneous in law. A perusal of the judgement of the Lord Chief Justice shows that the meaning of the words 'night' and 'day' was required to be consistent with the background distinction between service by day and service by night, the purpose of the Act and the provision it seeks to make being related to the domestic routine, the distinction between 'day' and 'night' being made because attendance at night may be far more onerous for the attendant than it would be during the day when the house is alive and people are about. The concept of a 'child's night' starting when the child is put to bed at a time when the household is still active and people are about abandons the background related to the domestic routine of the household as such. The meaning of 'night' commended by the Lord Chief Justice, as to which see 15.2.3 iii, *above*, applies to all claimants, children and adults alike. See paragraphs 13-17.

R(A) 1/04

v The claimant suffered from dementia and lived alone. He had a pattern of having very little sleep and rising early, frequently as early as 4.30am. There was no evidence of any attention or supervision needs whilst asleep, but once awake the claimant spent a lot of time outdoors easily becoming confused, and requiring continual supervision. The tribunal decided that the word "night" should be defined by reference to the habits of the particular household, and thus finding no night time needs. Allowing the appeal, the Commissioner held that although "night" will normally be that period of inactivity during which the particular household closed down, there must be an objective content to the word. Where the disabled person has abnormal sleeping habits, "night" required to be assessed objectively by reference to a hypothetical household and whether the carer would reasonably consider that he or she was providing night care.

4 'Person'

R(A) 3/75

i A claim for an AA was made by Dr. Barnardos in respect of a mentally handicapped child who had been in the care of the home since she was a baby, and whose parents were not making any contributions towards the cost of her maintenance. It was submitted that Dr. Barnardos were entitled to an AA for the child on the ground that the word 'person' used

in reg. 7(3) of the National Insurance (Attendance Allowance) Regs. 1971 (see now reg. 6(4) of the Regs.) included a corporate body and that the child was living with such a person. It was further contended that reg. 7(3) was *ultra vires* because the effect of it was to deprive the disabled child of entitlement to an AA and to confer an entitlement on somebody else in respect of the child. It was held that, unless the contrary intention appears, when the word 'person' is used in the statute it includes a corporate body, but that both in s. 2 of the National Insurance Act 1972 (see now s. 35 of the Act) and in reg. 7 of the Regs. then in force a contrary intention did appear; that the reg. was not *ultra vires* for the reasons given in para. 13 of the decisions; and that Dr. Barnardos was not entitled to an AA in respect of the child.

5 'Substantial danger'

i The phrase should not be too narrowly construed, but see further para. 17 of the decision. See also 15.1.1 i and 15.2.2 i *above*. — R(A) 1/73

ii In determining whether a person needs continual supervision to avoid substantial danger to himself or others, the question is not, is it generally true that (in this case) epileptics are at risk of suffering serious injury in an attack? The question is whether this epileptic is exposed to such risk (para. 25). Also the question is now how often is such an incident (i.e. during a seizure, falling and dislocating a shoulder or falling on an electric fire and getting burnt), but is there a relevant (i.e. not remote) risk of such an incident occurring. If the answer is in the affirmative, then the further question arises, if such an incident does occur, is it likely to give rise to substantial damage to the epileptic or others (paras. 25 to 29). See also 15.1.4 i *above,* and R(A) 5/81, 15.2.5 iii *below*. Approved and followed in R(A) 1/83, see 15.2.2 iii *above* and see also R(A) 5/83, 15.1.1 iii *above* and 17.5.1 vi *below*. — R(A) 1/81

iii The test in s. 35(1)(a)(ii) of the Act is not confined to the risk of injury caused to the disabled person by the disabled person, but also to the risk of injury to the disabled person by others (para. 11). Also the test of risk of substantial damage is not in relation to how often the incident of the risk is likely to occur, but in relation to the question whether there is a relevant (i.e. not a remote) risk of such an incident occurring and, if so, whether it is likely to give rise to substantial danger to the disabled person or others (para. 12). See also 15.1.4 ii *above*, 15.2.5 ii *above*, and R(A) 2/83 (the 'substantial danger' test in SS Act 1975, s. 35(i) a subjective, not an objective, one). — R(A) 5/81

iv The 'substantial danger' to which a claimant's medical condition may give rise to satisfy the first element of the 'supervision test' (see 15.2.2 iii *above*) must be either to himself or to someone else. What is a substantial danger will depend upon the facts of each individual case. It must not be too remote a possibility, but the fact that it may take the form of an isolated incident does not in itself constitute remoteness. The mere infrequency of the contemplated danger is immaterial. The relevant question is whether or not the relevant danger is likely to occur. If it is, then its infrequency is immaterial (para. 5). See also 15.1.2 iv, 15.2.1 vi and 15.2.2 iii *above* and see also R(A) 5/83, 15.1.1 iii *above* and 17.5.1 vi *below*. — R(A) 1/83 (T)

v A severely mentally handicapped claimant had his AA reduced to the lower rate on the ground that only the day time conditions were satisfied. After unsuccessful applications for leave to appeal to the Commissioner and to the High Court for judicial review, an appeal was made on his behalf to the CA for an order of certiorari quashing the Commissioner's refusal to leave and the AA Board's refusal to revise the allowance. The claimant lived with his father and family and though aged 25 had the mental age of a child. One of the issues before the Court was whether the Commissioner could properly have refused leave to appeal. The Court did not accept that the claimant's intellectual incapacity of itself showed that he required continual supervision by night, though a young child might have done so. They did not accept that the Board had based its refusal of an award for night-time supervision on the ground that the claimant could call for help if he needed it. The Board had properly taken account of the likely risks to the claimant and to others if there was no one continually on hand in the house, and their findings that there were no relevant risks of substantial danger was not unreasonable. See *R.* v. *Secretary of State for Social Services, ex parte Connolly* [1986] 1 All ER 998, CA. (Synopses of the CA judgment are at 18.1.1 xiv and 17.4.2 xii). — CSA 8/81 (unreported)

R(A) 6/89 vi The claimant, who suffered from epilepsy, had been awarded AA at the lower rate on the ground that she satisfied only the daytime condition in relation to supervision. The AA Board discounted the possibility that substantial danger might arise from a nocturnal fit, relying upon "recent medical evidence and opinion". A tribunal of Commissioners held that it was not sufficient to treat a risk as too remote merely because the event in question was unlikely to occur. The possible consequences of even a very unlikely event need also to be considered.

R(A) 5/90 vii The claimant suffered from arthritis and cervical spondylosis which restricted her ability to move. It was alleged that the claimant frequently fell. An award of AA at the lower rate was made for one year on the basis that she required continual supervision throughout the day in order to avoid substantial danger. When the claimant made a renewal claim the DMP considered that the claimant, who was mentally competent, could refrain from activities beyond the limits imposed upon her by her disabilities and could take precautions to minimize the possibility of falling. It was held by a tribunal of Commissioners that the DMP must identify the precautions to be taken and the activities to be refrained from in order to avoid substantial danger. The four questions to be refrained from in order to avoid substantial danger. The four questions posed in para. 12 of R(A) 3/89 are not statutory requirements but may be helpful in evaluating the risk of falling.

R(A) 2/91 viii The claimant suffered from schizophrenia. In a report a consultant psychiatrist said of her "no danger to others but at times significantly depressed and potentially at risk to herself". The DMP in a review decision said that if her medical advisers were of the opinion that she was at serious risk of an attempt at self harm she would have been detained under in-patient hospital care. He decided that the risk of self harm was not a relevant risk within the meaning of s. 35 of the SS Act 1975. The Commissioner held that it was not reasonable to draw from the evidence the inference that the medical advisers have not recommended in-patient supervision because they do not regard the claimant's condition as serious, without putting the question to them. There may be other reasons for not putting her in hospital. For example, it may be desirable in the claimant's interest to keep her at home and in the community. The claimant's adviser had actually put forward facts which suggest the reasons why the claimant was not confined in a hospital. He said that he had managed to enable her to live at home by keeping her medication low and by her family coping with her occasional difficult behaviour in relation to her irrational fears. The clear inference from this evidence is that the claimant's condition could be dealt with at home by the use of medication and supervision. It was contrary to the rules of natural justice to decide the claimant's case on the basis of an imputed motive to the consultant which he was not asked about and which the claimant was given no opportunity of rebutting. See also R(A) 3/92, 15.2.5 ix *below*.

R(A) 3/92 ix The claimant suffered from schizophrenia and was at risk of committing suicide. The DMP did not accept that the claimant required continual supervision throughout the day in order to avoid substantial danger to himself, for two reasons. First that if the claimant's doctors thought that there was a danger of suicide the claimant would have been detained as an in-patient, and secondly, he considered that no amount of supervision would prevent a determined suicide attempt. It was held that it was not reasonable for the DMP to infer that the claimant was not a danger to himself just because he had not been made an in-patient in hospital. The Commissioner also held that the adjudicating authority has to find whether continual supervision is required in order to effect a real reduction in the risk of harm to the claimant, not in order to eliminate all substantial danger and that this is a question of fact to be decided in the light of the evidence in each case. See also R(A) 2/91, 15.2.5 viii *above*.

R(A) 3/90 x The DMP stated that in order to remove the risks to the claimant of her wandering about after an epileptic fit the house doors should be locked. Held that, if a DMP proposes a solution with a view to avoiding the need for supervision, it is clearly incumbent upon him to evaluate the risk attendant upon his proposed solution. The DMP failed to give any reasons to justify the impositions of his proposed solution to meet dangers arising from post-fit wandering and failed to deal with obvious consequential hazards. The DMP further decided that unless there were complicating medical conditions or special features relating

to the fits the risk of substantial danger is so remote a possibility that it ought reasonably to be disregarded. It was held that the proper statutory test cannot be allowed to be subverted by an expression of medical opinion which states a presumption against entitlement. Further synopses of this decision can be found at 15.1.4 iv and 15.2.2 vii *above*.

6 Bodily functions

i It was held that "bodily functions" in SS Act 1975, s. 35(1) included breathing and hearing per Woolf J in *R v. The Social Security Commissioner, ex parte Butler*, citing with approval the judgment of Lord Denning MR in *R v. National Insurance Commissioner, ex parte the Secretary of State for Social Services* [1981] 2 All ER 738 at 741 CA (*Packer's Case*).

CA/89/1982 (unreported)

ii A tribunal of Commissioners held that the functions of the brain were included within the term "bodily functions", and that prompting and motivating were capable of constituting attention in connection with an impaired bodily function. They also held that it was necessary to consider whether a particular activity was a "bodily function". The focus in the statutory provisions was on disablement (i. e. functional deficiency) and whether attention was reasonably required because of that deficiency. Where a particular activity could not be described as a bodily function, recourse must be had to the discrete bodily functions involved in the activity which will have to be identified and "unbundled", considered and assessed. In functionally complex activities, the "unbundling" exercise was the correct approach.

R(DLA) 1/07

7 So severely disabled physically or mentally

i The claimant was given to violent and irresponsible behaviour and the evidence showed that he committed criminal acts, both of violence and dishonesty. The AA Board found that he was not suffering from a severe physical or mental disability and that his anti-social behaviour arose from a personality disorder and they could find no medical evidence of severe mental disability. The members of the board directed themselves that before they could issue a certificate of attendance needs, they must be satisfied that the claimant had relevant attention or supervision needs which arose from a severe mental or physical disability. It was held that the phrase "severely disabled physically or mentally" relates to a condition of body or mind that can be defined medically and that it is not meant to encompass unsociable behaviour which is not related to serious mental illness. Further, 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.

R(A) 2/92

ii The Commissioner held that there was no freestanding need for severe disablement in s. 72 of the Contributions and Benefits Act 1992. The Commissioner further held that there has to be a physical or mental disablement, which met the above statutory criteria. The severity of the disablement was to be determined by reference to the care needs, which arose, and not by reference to the general nature of the disablement. Compare and contrast with R(A)2/92, 15.2.7(i) *above*.

R(DLA) 10/02

iii The claimant was aged 6 and suffered from constipation and encopresis (faecal soiling) during the day, and also bedwetting at night. The Commissioner held that s. 72(6) only came into play where the child suffered from physical or mental disablement with resultant attention or supervision requirements. A young child's inability to perform functions due to immaturity is not a disablement and so, where there is no identifiable physical problem in an older child, it is necessary to distinguish between unexceptional development delay and delay due to some mental disorder. Whereas the use of nappies in an older child may not be a practical or effective way to deal with nocturnal enuresis, any requirement for attention at night could normally be avoided through the use of nappies in children of this age.

R(DLA) 1/05

iv A child aged 12 with learning difficulties and behavioural problems claimed DLA through her appointee. The claim was refused. The tribunal concluded the claimant did not have substantially more supervision needs than a child of her age. The Secretary of State

R(DLA) 3/06

supported the appeal to the Commissioners, contending the tribunal had failed to establish whether the claimant had a disability since there was no medical diagnosis of a general or specific learning difficulty. A tribunal of Commissioners was directed to consider the meaning of the phrase "so severely disabled physically or mentally" particularly as applied to children with learning difficulties. The tribunal of Commissioners concluded the following; a disability is distinct from a "medical condition" as it is entirely concerned with a deficiency in functional ability i.e. the physical or mental power to do things. The provisions of Ss. 72 and 73 (1)(d) cannot require that "so severely disabled" means that a person must have a serious medical condition. There is no need for the claimant to provide proof of a diagnosed or diagnosable medical condition. The claimant must lack the physical or mental power to perform or control the relevant function and where it is not within the claimant's power to avoid certain behaviour they will be "disabled" within the terms of Ss 72 and 73(1)(d). It is clear from the language of the provisions that the severity of a claimant's disability is to be measured only by the reference to the prescribed consequences and that there was no free-standing test of severity of the claimants disabilities. See also 17.3.8 xx for a further synopsis of this decision.

8 Mental disability or conduct behavioural in origin

R(A) 1/98

i In a case which involved a young child (aged eight). It was held that whether a person is suffering from a mental or physical disablement is a matter for the medical authorities alone. They were entitled to reach the conclusion that bizarre conduct may not be caused by any "disability" but due to some other medically recognised reason. The term "behavioural in origin" was clearly one that could be properly used in medical diagnosis. The CA was satisfied that the medical authorities had found that the psychological condition from which the claimant was suffering did not amount to mental disability.

9 Meaning of "attention given after completion of the bodily function"

R(DLA) 2/00

i The claimant, a child, suffered from asthma and enuresis. The latter condition led to episodes of bedwetting after which his mother attended to his resulting needs, for example the changing of bed clothes. The CS held that the attention did not have to be "in the performance" of the bodily function i.e. urinating, but may extend to include attention **after** completion of the bodily function. The Court held further that whether such help will count as qualifying attention is a matter for consideration in the circumstances of each case under reference to the statutory requirements as a whole. See also R(A) 1/91, 15.2.1 viii *above*.

10 Meaning of "personal attention"

R(A) 4/94

i The claimant, already in receipt of the lower rate of AA in respect of her day time supervision needs, claimed the higher rate on the grounds that during the night she had to attended to her husband (who himself was in receipt of the higher rate) and that during such attendance she required watching over in case of falls. It was held that s. 35(1) of the SS Act 1975 was only concerned with the needs of the claimant and not those of her husband. Furthermore, the night attendance on the husband did not permit a further claim by the claimant or an aggregation of his needs with those of the claimant. See also R(A) 3/74, 15.2.1 ii, and R(A) 1/83, 15.2.1 vi *above*.

11 Meaning of "period throughout which"

R(DLA) 7/03

i The claimant could on most days, prepare a cooked main meal for herself. Her claim for DLA was refused and on appeal, a tribunal decided she did not satisfy the "cooking test". The claimant appealed to the Commissioner who found no error in law.

The claimant appealed to the CA, who held that the provision of a cooked main meal was required on a regular basis in order to ensure a reasonable quality of life and that if there was a clear pattern of a person not being able to provide for herself, the test would be satisfied.

However, the HL held that it was wrong to conclude that the cooked main meal test was satisfied if there was a clear pattern of a person not being able to provide a cooked main meal for herself more or less every day. They held that the cooking test does not function at a day to day level, rather it involves looking at the whole of the period and deciding whether, in a more general sense, the claimant can fairly be described as a person who is unable to cook a main meal for herself. It is an exercise in judgement rather than an arithmetical calculation of frequency.

The HL further held that the cooking test is a notional test, a thought experiment, to ascertain the severity of the claimant's disability. It does not matter whether the claimant actually needs to cook. Cultural or dietary preferences are irrelevant.

ii The Chief Commissioner took the opportunity to review the authorities and set out the correct approach to the requirement of S. 72(1) of the Social Security Contributions and Benefits Act 1992. He held that in considering the proper approach to any S. 72(1) requirements, the starting point must now be *Moyna v. Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929, R(DLA) 7/03. Although the criteria in the various sub-sections of S. 72(1) are discrete and very different, the comments of Lord Hoffman inform the general approach to each. In respect of each, an exercise in judgment has to be made taking "a broad view of the matter", i.e. taking account of all relevant factors. In respect of none can a determination be made upon an arithmetical formula or by reference to an invariable benchmark (paras. 5 and 7).

R(DLA) 5/05

12 Meaning of "enactment relating to persons under disability"

i The claimant was awarded a DLA including the care component at the middle rate. The Secretary of State decided it was not payable while the claimant was resident in a particular residential care home, funded by the LA under S. 117 of the Mental Health Act 1983. Reg. 9(1)(b) of the Social Security (DLA) Regs. provided that the care component would not be paid for any period during which a claimant was living in accommodation the cost of which was borne wholly or partly out of public funds in pursuance of an enactment relating to persons under disability. The Commissioner held that the long title of the Mental Health Act and its definition in S. 1(2) were sufficient to suggest that it was concerned with persons who have a disability.

R(DLA) 6/04

Reg. 9(1)(b) brought other legislation within its scope by description rather than legislative name. This decision makes useful reference to how much reliance should be given to the list of relevant legislation in the guidance for DMs.

Part 3: Whether an attendance allowance or disability living allowance is payable

1 In respect of an adult

i A young man who was severely disabled mentally and who satisfied the statutory medical conditions for an AA at the lower rate was admitted, following arrangements made by his parents, to a home run by a charitable Trust. On the advice of the Trust the parents applied for and were granted assistance by the Social Services department of the County Council towards the cost of the claimant's maintenance. He was not in the care of the County Council and no negotiations took place between the Trust and the council as to the latter's contribution, which was made pursuant to s. 12 of the Health Services and Public Health Act 1968. The claimant's parents paid the Trust an annual amount in addition to the County Council's contribution. It was contended on behalf of the insurance officer that an AA was not payable on the ground that the claimant was living in accommodation provided for him in pursuance of the County Council's general power under s. 12(1) of the Health Services and Public Health Act 1968 and that, in terms of reg. 5 of the NI (AA) Regs. 1971 (see now reg. 4 of the Regs.), he was a person living in accommodation provided for him in circumstances which the cost of the accommodation was borne partly out of public funds in pursuance of an enactment mentioned in the Sch. to the Regs. The contentions relied upon on behalf of the insurance officer were rejected for the reasons given in paras. 9 to 17 of the decision and it was held that an AA was payable to the claimant at the lower rate. See also R(A) 3/83 *below*.

R(A) 1/74

ii A claimant for an AA who had been ordinarily resident in the Republic of Ireland met with a road accident in Ireland and subsequently made a claim for allowance. It was held, for the reasons given in paras. 9 to 6 of the decision, that the provisions of the relevant EEC Regs. did not assist the claimant and that an AA was not payable on the ground that the claimant was not present in GB and was not relieved of the consequences of his not being present either by domestic regs. or by regs. of the EEC.

R(A) 4/75

iii A widow of Irish nationality whose husband had been insured in England as an employed person came to live in England. She arrived about the middle of October 1975 and towards the end of the following May she made a claim for an AA. A DMP certified that the claimant satisfied, or was likely to satisfy, one of the relevant conditions in s. 35 of the Act, but the local tribunal upheld the insurance officer's decision disallowing the claim on the ground that the residence condition in reg. 2 of the Regs. was not satisfied. On 22 March 1977 the claimant died and her son was appointed by the S of S to proceed with the claim. On appeal to the Commissioner it was held that by the application of the EEC Regs. an AA was payable from the date she satisfied condition (c) of reg. 2 of the Regs.; that is to say, from the day after which she had been in GB for a period of 26 weeks. See paras. 5 to 10.

R(A) 2/78

iv AA is not payable to a person who has attained the age of 16 for any period during which he is living in accommodation provided for him under s. 21(1)(a) of the National Assistance Act 1948 not withstanding that that person is paying the full cost of his accommodation.

R(A) 2/79

v Where a LA has power under s. 2(1)(b) of, and para. 2(1)(1)(a) of Sch. 8 to, the National Health Service Act 1977 to bear the whole or part of the cost of private residential accommodation provided for a claimant for AA, that allowance is not payable in respect of him, whether or not the LA in its discretion does or does not bear any part of that cost. Compare and contrast R(A) 1/74 - the wording of the relevant enabling provision and AA reg. was different. This decision was upheld by the CA, *sub nom., D. Gledwyn Jones (Receiver) on behalf of Harold Wildred Wilde) v. The Secretary of State for Social Services*, reported as an App. to R(A) 3/83. Compare and contrast R(A) 1/74, 15.3.1 i *above*, where the word of the relevant enabling provision and of the AA reg. was different.

R(A) 3/83

R(A) 4/83 vi The purpose of reg. 5 of the Regs. is to allow partial exemption from the effect of reg. 3 (no allowance when the claimant is maintained free of charge in certain hospitals etc), but on terms that, where two relevant periods (in hospital) are separated by 28 days or less, a claimant (for the allowance) is not entitled to take advantage of the 'four weeks concession' under regs. 5 twice over. Accordingly, where a claimant was so maintained in hospital for two periods, the periods being less than 28 days apart, and he was not entitled to the allowance immediately before the first period, but was so entitled immediately before the second, he was entitled to the concession in respect of the second period.

R(A) 1/86 vii The decision of the HL in McCaffrey's case (*Insurance Officer v. McCaffrey* [1984] 1 WLR 1353) applies to AA, the provisions of s. 35(4) of the SS Act 1975 precluding payment not entitlement in respect of periods before a claim. In particular a claimant for AA who at a date earlier than the date of claim satisfied all the conditions for an award of the allowance must, for the purposes of reg. 5 of the SS (AA) (No 2) Regs. 1975, be treated as entitled to the allowance at that date. *Pearson v. Secretary of State for Social Services* [1983] SLT 73 and R(S) 6/83, 2.10.2 i *above*, and R(S) 11/83, 13.1.1 xi *above*, distinguished. See 18.6.2 i for the HLs' decision in *McCaffrey's* case.

R(A) 2/96 viii It was held that a LA only had the power to pay some or all of the costs of accommodation provided by a third party, where arrangement had been made for the provision of such accommodation, or once such an arrangement had been made, for its cost. Where such a arrangement had not been made, the provisions of reg. (4)(1)(c) of the AA Regs. 1975 (now reg. 7(1)(c) of the AA Regs. 1991), would not apply. See also R(A) 1/74, 15.3.1i, and R(A) 3/83, 15.3.1v *above.*

R(A) 3/96 ix A claimant who had been provided with accommodation because of her age (not her illness), could continue to be paid AA on the basis that she was paying the full cost of accommodation and that care and attention was not otherwise unavailable to her (s. 21(1)(a) of the National Assistance Act 1948 refers). It was further held that the LA was not empowered to provide such accommodation under either the above enactment or para. 2, Sch. 8 to the National Health Service Act 1977.

R(A) 1/02 x Two cases were heard together. Both claimants had been placed in residential accommodation provided by their respective LA Social Services departments who had made use of the relevant powers under Part III of the National Assistance Act 1948. For this reason they, the claimants, had their AA withheld. However, Social Services were in effect merely providing **'bridging finance'** pending sale of the claimant's homes - which in each instance produced sufficient funds to reimburse their LAs in full. Once these sales were finalised, the claimants sought arrears of AA on the basis each had met their own residential accommodation expenses; but DMs, and subsequent ATs, determined it was not possible to go back and conduct reviews. Subsequent events (i.e. reimbursements), they held, could not retrospectively alter the material facts. Following the Northern Ireland case in *CAO v. Creighton and Others*, the Commissioner held that if the claimant ultimately stood the cost of their accommodation then they were to be considered to have 'met' their own expenses at all material times. Accordingly, and where it was apparent all along that the proceeds of the sale of the claimant's home would be sufficient to reimburse the LA, it was wrong in law to withhold their AA. Compare and contrast with R(A) 2/79, 15.3.1 iv, R(A) 3.83, 15.3.1 v, R(A) 2/96, 15.3.1 viii and R(A) 3/96, 15.3.1 ix *above.* See also R(A) 1/02, 17.6.4 xix.

R(DLA) 2/06 (T) xi Following long stays in hospital, these claimants were placed in care homes. They were treated as in certain accommodation and the care component of DLA continued to be payable, although their mobility components were not. The tribunal of Commissioners concluded that they were, in fact, in a similar institution to the hospital. They remained the responsibility of the Health Authority (HA), who had a duty to provide accommodation free of charge. The HA provided the funding for their care through a grant payable under section 28A of the 1977 National Health Service Act. This was paid to the care homes, via the Local Authority. These claimants, who all had learning difficulties, were "undergoing medical or other treatment" and were "maintained free of charge" (paragraphs 61 - 75)

2 In respect of a child

i It was provided by reg. 5(5)(b) of the NI (AA) Amendment Regs. 1972 (but see now reg. 7(1)(b) of the Regs.) that the allowance was not payable in respect of a child if the child was a person living in accommodation provided for him in pursuance of, or in circumstances in which the cost of the accommodation was, or might be, wholly or partly provided out of public funds in pursuance of, *inter alia*, s. 12 of the Health Services and Public Health Act 1968. Accordingly when a foster mother made a claim for AA for a child who had been placed in her care by a LA in the exercise of powers conferred by s. 12 of the Act of 1968 it was held that the allowance was not payable. R(A) 2/73

ii A claim for an AA was made in respect of the illegitimate child of the claimant's daughter. The child, who was very severely disabled, was living with and was wholly provided for by the claimant, who made application to the LA for financial assistance in providing for the child. The application was met by the authority taking the child into care under s. 1 of the Children Act 1948. The child, however, remained under the physical care of the claimant and her husband, to whom the LA paid a weekly sum. Pursuant to s. 13 of the Children Act 1948, as substituted by s. 49 of the Children and Young Persons Act 1969 it was held that the arrangement made by the LA to leave the child with its grandparents while paying them for its upkeep was in accordance with the authority's duty to take the child into care and provide for its accommodation and maintenance. Therefore the child was living in accommodation provided in pursuance of ss. 1 and 13 (as substituted) of the Children Act 1948 and payment of an AA was precluded by what was then reg. 8(1)(b) of the NI (AA) Regs. 1971 (see now reg. 7(1)(b) of the regs. and reg. 6 of the SS (AA) Amendment Regs. 1977). Distinguished in R(SB) 28/84, 30.7.3 i *below*. R(A) 3/73

iii A nursing sister employed by the Trustees of Leyden House Trust claimed an AA in respect of a patient/pupil at Chailey Heritage Craft School and Hospital, who spent alternate weekends and annual holidays at Leyden House. The full cost of providing for the child at Leyden House was defrayed by the Trustees, the claimant making no contribution. It was held that, after the terms of (what is now) reg. 7(1)(a) of the regs. had been considered (see paras. 10 to 12), it is a valid and effective provision. Leyden House could not be regarded as a private household in terms of that reg. and the Trustees' expenditure on behalf of the child could not be attributed to the claimant. An AA was not, therefore, payable. R(A) 1/76

3 Satisfying the presence condition

4 Meaning of "cost of accommodation"

i The claimant, resident in a care home in Scotland, was in receipt of free personal care and nursing care, paid under the provisions of Part 1 of the Community Care and Health (Scotland) Act 2002. The decision maker determined that attendance allowance was not payable. Reg. 7(1) precluded payment of AA where the cost of accommodation was borne wholly or partly out of public funds. The Commissioner held that "accommodation" and "cost of accommodation" was to be given a wide meaning and was properly to be interpreted as including personal care. AA was therefore not payable. R(A) 1/07

ii The claimant, resident in a care home in Scotland, had been in receipt of free personal care (FPC) and nursing care, paid under the provisions of the Community Care and Health (Scotland) Act 2002. The decision maker determined that AA was not payable whilst the claimant was in receipt of FPC and that an overpayment had occurred, as there was no disclosure of the payment. Reg. 7(1) precluded payment of AA where the cost of accommodation was borne wholly or partly out of public funds in pursuance of any enactment relating to disability. The Commissioner held that the "cost of accommodation" is the aggregate cost of the bricks and mortar of the building. "Accommodation" and "cost of accommodation" was to be given a wide meaning and was properly to be interpreted as including personal care. He concluded the Community Care and Health (Scotland) Act 2002 was an enactment relating to disability. R(A) 2/07

Part 4: Mobility allowance

1 Meaning of "unable to walk or virtually unable to do so"

R(M) 1/78

i Although the question whether a person is unable or virtually unable to walk is a question of fact, the meaning of "virtually unable to walk" is a question of law and connotes that a person is practically unable to walk. A medical board found that a girl of 17 who suffered with spasticity of her legs and was subject to frequent and unpredictable epileptic seizures was unable to walk and ascribed her inability to do so to the main condition of "inco-ordination and frequent epilepsy". On appeal the MAT upheld the board's decision and recorded: "In the light of the evidence given by Dr.... it is clear that the appellant's capacity to walk is seriously handicapped by spasticity and unpredictable liability to epileptic seizures". The S of S appealed to the Commissioner from the MAT's decision on the ground that the tribunal had erred in law and it was held that the tribunal's decision was erroneous in law. The doctor's evidence had been that he did not advise that the girl should walk unattended, not that she was unable or virtually unable to walk; nor was it possible to hold, on the evidence, that the girl, who was capable of walking about a mile or more, was unable by reason of physical disablement to walk or virtually unable to walk. Compare R(M) 2/81.

R(M) 2/78

ii It is for the medical authorities to decide what weight should be attached to physical and mental disablement in cases where both factors may be present; and the answer to the question whether the one or the other, or both, are responsible for the inability, or virtual inability, to walk is for their decision as a medical question. See paras. 15 to 17 and R(M) 1/83, 15.4.1 vi *below*. See R(M) 3/86, 15.4.1 viii *below*, in which it was held that this decision was unaffected by *Lees v. Secretary of State for Social Services* [1985] 1 AC 930. The CA held in *Harrison v. The Secretary of State for Social Services* (see appendix to R(M) 1/88) that R(M) 2/78 would have to be regarded with caution.

R(M) 3/78

iii A medical board decided that the conditions in s. 37A of the Act for entitlement to a mobility allowance were not satisfied by a woman who suffered from tachycardia (said to be caused by hiatus hernia) when she walked, and from Rombergism, imbalance, disabling fits and "drop attacks" similar to epileptic fits, and on appeal the MAT upheld the board's decision. The tribunal expressed themselves to be satisfied that (a) the claimant was not "unable or virtually unable to walk"; and (b) there was not sufficient evidence to show that the exertion required to walk would constitute a danger to the claimant's life or would be likely to lead to a serious deterioration in health. On appeal to the Commissioner it was held that the MAT's decision was not erroneous in law. As to (a), the Commissioner expressed the view that a person may have the physical capacity to walk but might be inhibited in some other way from being able to walk, which might constitute "virtually unable to walk"; but did not accept (as was submitted) that inability to walk or virtual inability to do so must be considered in the light of the purpose for which walking is required. The Commissioner added: "Further, I agree with the meaning given to "virtually unable to walk" in para. 11 of decision R(M) 1/78 as unable to walk to any appreciable extent or practically unable to walk". As to (b), it was pointed out that "the exertion required to walk" governs the application of reg. 3(1)(b) of the relevant regs. (i.e. the Mobility Allowance Regs. 1975) without regard to extraneous circumstances, and that it is "the exertion required to walk" which must lead to the danger to life or to a serious deterioration in health. See further paras. 12 to 15. Compare R(M) 2/81 and see R(M) 1/83, 15.4.1 vi, and R(M) 1/84, 15.4.1 vii *below*.

R(M) 1/81

iv In regulation 3(1)(b) of the Social Security (Mobility Allowance) Regulations 1975, as amended by SI 1979/172, the words ‘without severe discomfort’ do not govern those which precede them. On the correct construction of the regulation what must be looked at what are the limits, if any, of the claimant’s ability to walk outdoors *without* severe discomfort, be the limitations in point of distance, speed, length of time or manner, and there should be ignored any extended out door walking accomplishment which the claimant could or might attain only *with* severe discomfort (paragraphs 9-13). See also R(M) 1/84, 15.4.1 vii *below*.

R(M) 2/81

v A blind claimant was held to be unable to walk within the meaning of the Social Security (Mobility Allowance) Regulations 1975, because, although he was able physically to move on his feet, he suffered from a physical disablement in his balance mechanism and sense of direction which made it impossible for him to control the direction in which he wished to move without much help from another person. Compare R(M) 1/78 and R(M) 3/78 *above*. See R(M) 1/83, 15.4.1 vi, R(M) 1/84, 15.4.1 vii, and R(M) 3/86, 15.4.1 viii *below*.

R(M) 1/83 (T)

vi The claimant for mobility allowance, a child, was found by a medical appeal tribunal to be hyperactive, with no sense of direction or danger, and unable to move about freely and easily owing to mental retardation. Having observed the claimant’s walking, the tribunal concluded that he was neither unable nor virtually unable to walk and that no question arose as to the consequences of the exertion required to walk. On the meaning of the expression ‘unable to walk or virtually unable to do so’ for the purposes of section 37A of the Social Security Act 1975 and regulation 3 of the Mobility Allowance Regulations 1975, a Tribunal of Commissioners held that the need for guidance, supervision or support is a facet of the manner in which a person can make progress on foot and should be taken into account by medical authorities in determining whether, in the terms of regulation 3(1)(b) of the above Regulations, a person is virtually unable to walk (paragraph 22); it is a question of degree whether a person is to be regarded as virtually unable to walk; account may properly be taken of the facet that a major purpose of walking is to get to a designated place (paragraphs 24 and 25); and ‘severe discomfort’ in regulation 3(1)(b) means, for example, the pain of breathlessness which may be brought on by walking, but does not extend to factors which are a consequence of resistance to the idea of walking, rather than of walking itself (paragraph 26). (*For the duties of a medical appeal tribunal in recording their findings etc., see* 15.4.3 iii *below*). See R(M) 2/78, 15.4.1 ii, R(M) 3/78, 15.4.1 iii, R(M) 1/81, 15.4.1 iv, R(M) 2/81, 15.4.1 v *above* and R(M) 2/83, 15.4.4 i and R(M) 3/86, 15.4.1 viii *below*. Followed in R(I) 2/85.

R(M) 1/84

vii Factors to be taken into account when determining whether a person is unable or virtually unable to walk - regulations 3(1) of the SS (Mobility Allowance) Regulations 1975. A claimant was blind and suffered from hydrocephalus with symptoms including impairment of balance and marked impairment of spatial orientation. She was physically able to walk, but only with the help of an intelligent adult to pilot her could she walk for reasonable distances at a reasonable pace. The question in issue was whether the claimant was unable or reasonably unable to walk within the meaning of the regulation. The Commissioner held that regulation 3(1)(b) was not to be construed so as to import a further test of a claimant’s inability or virtual inability to walk, namely whether she was able to orientate herself spatially (paragraphs 9 and 10); her impaired capacity for spatial orientation was, like her blindness, a handicap totally unrelated to her capacity or otherwise to perform the physical act of walking; accordingly those factors could not be taken into account when determining whether she satisfied regulation 3(1)(a) or (b) (paragraph 11); in order to satisfy regulation 3(1)(c) the exertion which might cause danger to life or a serious deterioration in health had to be exertion involved in actually walking, not merely in the consequences of walking (paragraph 13). (*This decision was subsequently upheld in the Court of Appeal and House of Lords - see Appendices 1 and 2 to the Commissioner’s Decision*). R(M) 3/78 followed; R(M) 1/81 considered: R(M) 2/81 not followed. See also R(M) 3/86, 15.4.1 viii *below*.

R(M) 3/86 (T)

viii Mobility allowance was claimed for a child who had suffered brain damage at birth, resulting in severe mental abnormality; though capable of walking, his behaviour was erratic and unpredictable. The Commissioners held that the majority decision of the medical appeal tribunal was erroneous in point of law in disregarding the behavioural problems. The questions for consideration were whether the claimant's ability to walk was so restricted that he had to be treated as virtually unable to walk; and whether his condition was due to some physical impairment so that he could not, as distinct from would not, walk. In particular, 'hyperactivism' did not in itself qualify a person for mobility allowance. They also held that R(M) 2/78, in which a child suffering from Down's Syndrome was found to be virtually unable to walk, was unaffected by *Lees v. Secretary of State for Social Services* [1986], AC 930 (see R(M) 1/84, 15.4.1 vii *above*).

R(M) 6/86

ix A claimant with a degenerative spinal condition, who suffered pain and breathlessness on walking, was found by the medical appeal tribunal not to suffer severe discomfort while walking (regulation 3 of the Mobility Allowance Regulations 1975). The Commissioner held that there was nothing in the regulations which said that pain or breathlessness had to reach a certain level before being regarded as severe discomfort; this was a matter entirely for the medical appeal tribunal in view of their medical expertise. An appeal by the claimant from the Commissioner's decision was dismissed by the Court of Appeal (*Baron v. the Secretary of State for Social Services,* R(M) 6/86 Appendix) who, in the course of their judgment, said that it would be an almost intolerable burden if medical appeal tribunals had to make specific findings of distances which people could walk and the extent to which breathlessness and pain caused them to stop; and that there was no obligation on the medical appeal tribunal to tell the claimant during or at the end of their examination that they did not accept what he had told them. A further synopsis of this decision is at 14.3.4 viii *above*.

R(M) 2/89

x The claimant had been run over by a bus when a child which necessitated amputation of his left leg below the knee. He had an artificial leg, but was unable to wear it from time to time. When not using his leg, he used two elbow crutches. He had also been cast and measured for a new patellar tendon bearing leg. Whilst the medical appeal tribunal inspected the claimant's artificial leg, they observed him walk only with the aid of elbow crutches, concluding he could walk. The Commissioner held that, while it was for the tribunal to determine whether the progress a claimant makes amounts to walking, it was unreasonable to impose a walking test whereby a one legged man made progress by means of crutches. "Walk" was an ordinary English word and meant that at least one foot should always be on the ground. A new medical appeal tribunal would have to bear in mind that an ability to walk is to be judged having regard to a prothesis or artificial aid which the claimant habitually uses (regulation 3(2) of the Mobility Allowance Regulations 1975). They would have to consider whether the artificial leg was worn habitually, and whether when using it habitually there was an inability to walk without severe discomfort. They would also have to consider whether his existing prothesis was suitable, and take account of his new artificial limb. See R(M) 3/78, 15.4.1 iii *above*.

R(M 1/91

xi The claimant made a renewal claim for mobility allowance on the basis that he was virtually unable to walk, and a medical appeal tribunal confirmed the decision of the medical board that the claimant did not satisfy the medical conditions for an award of mobility allowance. The tribunal found that although the claimant walked with a marked limp he was able to make steady progress without apparent pain or stress. The claimant appealed to the Commissioner who upheld the decision of the tribunal and dismissed the appeal. The claimant challenged the wording of the tribunal's decision because they had used the words "pain and distress" instead of "severe discomfort" which the law provides for. The Commissioner held that there was no obligation for them to use the same wording, and held that "pain and distress" is not as bad as "severe discomfort", so if the claimant did not experience "pain and distress" he could not therefore experience "severe discomfort". The Commissioner also held that the tribunal were not required in law to carry out a medical examination. The Commissioner agreed that the meaning of "virtually unable to walk" was a question of law as held in R(M) 1/78, and that the base point from which to determine

whether a person was "virtually unable to walk" was a total inability to walk, which can be extended to take in people who can walk but only to an insignificant extent. The Commissioner went on to say that "virtually unable to walk" cannot be established by an inability to walk to the shops or to the bus stop and to carry on a normal life, and that the claimant was not to be put into the same position as a person without a walking disability. The ability to walk must be assessed out of doors, and the test should select a pavement or road normally to be found in the course of walking out of doors. The person's ability to climb hills or mountains was not relevant to the question of inability to walk. See R(M) 1/7, 15.4.1 i and R(M) 3/78, 15.4.1 iii *above*.

R(M) 2/92

xii The CA decided that "severe discomfort" is not the same as "severe pain or distress" and that the tribunal having failed to use the statutory term "severe discomfort" applied the wrong test. The MAT of 22 August 1987 decided that the claimant was not virtually unable to walk for the purposes of reg. 3(1)(a)(ii) of the Mobility Allowance Regs. 1975 after they observed the claimant whilst walking to be "slightly breathless. There was no evidence that the exertion caused severe pain or distress." The claimant's appeal to the Commissioner was dismissed because the Commissioner saw no distinction between the words "severe discomfort" and the words "severe pain or distress". The claimant appealed to the CA. It was submitted on behalf of the S of S that the whole phrase "severe pain or distress" ought to be considered, and "distress", was in this context, synonymous with discomfort. The tribunal could thus be taken to mean "severe discomfort" when they used the words "severe distress" thereby applying the right test and answering the right question by inference. The CA *(Cassinelli v. Secretary of State for Social Security)* held, allowing the appeal, that the tribunal had adopted the wrong test. If the S of S submission was correct, there was no reason why the tribunal should not have used the word "discomfort". Secondly, the tribunal's use of the words "severe pain or distress" appeared to draw a distinction between pain (of which discomfort was a lesser concomitant) and distress (which could arise from pain or discomfort as well as other reasons such as breathlessness). See also R(M) 1/91, 15.4.1 xi *above*.

R(DLA) 4/98

xiii The Commissioner held that "pain" was medically defined as encompassing a wide range of intensities caused by stimulation of functionally specific peripheral nerve endings. "Discomfort" was not medically defined. Its ordinary meaning was the condition of being uncomfortable, uneasiness and thus might have different causes from pain. It described the sensation experienced from lesser levels of pain. "Severe" was an evaluative term which might be contrasted with moderate or mild. Thus "mild pain" might not by itself cause a sufficient level of sensation to be "severe discomfort". A tribunal must decide for itself whether there is severe discomfort considering all the evidence and taking into account other factors causing discomfort in addition to the pain. See also 15.4.1 xi (R(M) 1/91) and 15.4.1 xii (R(M) 2/92).

R(M) 1/98

xiv The claimant suffered from ME and any physical exertion left him exhausted. When exhuasted, he was able to rest and recover within two or three days. The Commissioner held, dismissing the appeal, that:

1. the tribunal had given full and adequate reasons for their decision and the Commissioner could not interfere with their conclusion that the claimant's tiredness did not amount to severe discomfort;

2. deterioration in health only arose where:

(a) there was a worsening of the claimant's condition from which he never recovered; or

(b) there was a worsening from which the claimant only recovered after a significant period of time e.g. twelve months; or

(c) there was a worsening from which recovery could only be effected by some form of medical intervention;

3. a person does not suffer a deterioration in his health if, without medical intervention, his condition can be restored by a few days of rest.

See also 15.4.1 iii (R(M) 3/78) and 15.4.1 vii (R(M) 1/84).

R(DLA) 4/03

xv The claimant sought an award of the higher rate mobility component contending that she was virtually unable to walk in that she satisfied the statutory criteria set out in reg. 12(1)(a)(ii) of the Social Security (DLA) Regs. 1991. The appeal tribunal upheld the Secretary of State's decision to refuse her claim.

The claimant appealed to the Commissioner who refused the appeal and held that it is not the law that only walking to the first halt required through severe discomfort is relevant. If a stop is the absolute limit of the claimant's capacity to walk, then no issue of taking the test only to the first onset of severe discomfort arises.

However, if a claimant recovers after a period of rest and continues walking without severe discomfort, then the statutory test does not preclude such continued walking from being assessed. The tribunal must judge how far the claimant can initially walk without experiencing severe discomfort, how long any severe discomfort lasts before it subsides, or if he has paused to prevent such discomfort, then the necessary duration of that pause, how frequently these halts recur, if at all, and what is the total distance and time he can walk in this manner without severe discomfort.

The tribunal is required to balance the time, speed, manner and distance of walking achieved without severe discomfort, in order to reach an overall judgement on virtual inability to walk.

R(DLA) 4/04

xvi The claimant had suffered serious multiple injuries in an accident, and his remaining injuries included a painful claw foot. He was refused higher rate mobility. An AT accepted that the claimant had a severe disablement which affected his mobility, but dismissed the appeal on the basis that the level of pain he suffered did not increase when he walked and he therefore did not fall within the terms of reg. 12(1)(a)(ii) of the SS (DLA) Regs. 1991.

Allowing the appeal, the Commissioner held that:

Reg. 12(1)(a)(ii) requires that walking which cannot be accomplished without severe discomfort is to be disregarded; and although it is only discomfort related to the physical act of walking which is relevant to higher rate mobility component, there is no requirement that such discomfort must first arise or increase after walking has commenced. Where the claimant suffered from a physical disablement which affected the physical act of walking and which caused the claimant severe discomfort even when not walking, then any walking which the claimant was able to accomplish despite the severe discomfort was to be disregarded.

R(DLA) 4/06

xvii Two claimants sought an award of the higher rate mobility component on the basis of being virtually unable to walk. Both claims were refused: one on the grounds that there was no physical reason for the severe degree of pain experienced, and the other on the grounds that vertigo and dizziness did not have a physical cause, the implication being that the disabilities were psychological in origin. The claimants' argument was that the entitlement depended on the manifestation of their disability, rather than as the Secretary of State contended, that entitlement depended on the physical (ie organic) cause of their disability. The tribunal of Commissioners would have considered it unnecessary for the claimants to show that their impairment had an identifiable physical cause but for *Harrison v. Secretary of State for Social Services* [1987] (See also R(M) 1/88 app. 15.4.2 ii). This decision is however a binding authority that where a claimant suffers from physical symptoms or manifestations of a medical condition (whether that condition be physical or mental), it is necessary for him to show an identifiable physical cause for those symptoms or manifestations. In cases involving both physical and mental factors, the physical disorder must be a material cause although more than a minimal one. (See also R(M) 1/88 app. 15.4.2 ii).

2 Distinction between physical and mental disability

R(M) 1/80

i A claimant suffered from agoraphobia. She was perfectly able to walk inside the house but was in practice unable to walk outside the house. Her claim was disallowed by a MAT because they found that her inability to walk outside the house was not due to any physical disability. It was held that under reg. 3(1) of the Mobility Allowance Regs. 1975 the inability or virtual inability to walk or the exertion entailed in walking is tied to the physical condition of the claimant. The MAT took the view that agoraphobia is not a physical thing and that is a medical determination which the Commissioner has no power to question except on certain legal grounds which had no application in the present case. See also R(M) 1/88, 15.4.2 ii *below*.

R(M) 1/88

ii The claimant injured his back in an accident in 1979. He was awarded mobility allowance to 24 June 1983. On his renewal claim a MAT, confirming the medical board's decision, found that his inability to walk was not due to a physical cause but was hysterical in origin. The Commissioner held that the question whether the claimant's hysteria was a manifestation of his physical condition was a matter for the tribunal, and their decision that the cause of the inability to walk was not physical could not be disturbed. The claimant appealed to the CA who held that:

1. inability to walk was not itself a physical disablement. There had to be some physical disablement such that the claimant was unable to walk;

2. on the evidence before them the tribunal held that the claimant was not suffering from any physical disablement. He was suffering from a functional disablement, and that was a matter entirely for them.

The Court's decision is set out in an appendix to R(M) 1/88. For other synopses of this decision see 14.1.5. vii *above* and 18.6.2. ix *below*. See also R(M) 1/80, 15.4.2.i *above*.

3 Adjudication (see also Chapters 14 and 17)

R(M) 1/82 (T)

i On a question in reg. 13(1) of the SS (Mobility Allowance) Regs. 1975 (medical questions) only a decision limiting the period during which the (medical) conditions are satisfied to a shorter period than that stated by the medical practitioner to whom the medical question has been referred can be said to be adverse to the claimant so as to enable an appeal to be made to a medical board (paras. 1, 15 and 16). The appeals procedure does not confine enquiry by a medical board to the only issue or issues to which objection has been taken (para. 12). Both the medical issue and the period during which the claimant is likely to be unable or virtually unable to walk are medical questions within the meaning of reg. 13 (para. 10). On a medical question, appeal lies from the medical board's decision which results in a review by the insurance officer to a MAT (para. 14). There is a right of appeal to a MAT against a decision of a medical board restricting the period of an award (para. 16). The insurance officer in making an award is bound by the period stated by the MAT (para. 15). See R(M) 2/82 *below*.

R(M) 2/82 (T)

ii A decision of an insurance officer is not adverse to a claimant where the period of an award is based on and in accordance with a medical practitioner's report properly obtained and the claimant is not entitled to appeal from that decision under reg.16 of the SS (Mobility Allowance) Regs. 1975 (appeals from insurance officer's decision) (paras. 1, 7 and 9). In any event, the claimant's grounds for appealing in this case, namely, that, owing to the short period of the award, he could not take advantage of the motability scheme, were not relevant grounds for appeal (para. 7). See R(M) 1/82 *above*.

R(M) 1/83 (T)

iii The claimant for mobility allowance, a child, was found by a MAT to be hyperactive, with no sense of direction or danger, and unable to move about freely and easily owing to mental retardation. Having observed the claimant's walking, the tribunal concluded that he was neither unable or virtually unable to walk and that no question arose as to the consequences of the exertion required to walk. On the requirement for a MAT to record their reasons for their decision and as to how far it is permissible in the construction of regs. under the SS Act 1975 to have recourse to

Hansard, departmental press releases and the relevant NIAC Report, a tribunal of Commissioners held that:

1. although in many cases a MAT can state their findings of fact and reasons very briefly, they must deal with any specific contention addressed to them which they reject. In particular reasons must be given where the tribunal reach a conclusion different from that reached by the medical board. An unsuccessful claimant should be able to see on which of the various possible grounds his claim has failed (para. 9).

2. the tribunal should record findings on the primary facts in dispute and not merely the conclusions drawn from them; however where they merely confirm the medical board decision which has answered the relevant questions they can be taken as having adopted the board's answers to those questions. It is unnecessary for the tribunal to record findings of fact on matters not in issue, although they should remember that points may arise by implication (paras. 10 and 11).

3. When construing SS regs. it is permissible to look at reports of the SS Advisory Committee which led to the making of the regs., in order to resolve ambiguity, but not so as to contradict the clear words of a reg. (para. 21).

Followed in R(M) 2/83. (For the meaning of 'unable to walk or virtually unable to do so' for the purposes of s. 37A of the Act etc. see 15.4.1 vi above.) See R(M) 2/83, 15.4.4 i *below*, and R(G) 3/58. Followed also in R(I) 2/85 and R(M) 3/86, 15.4.1 viii *above*. Para. 3 *above* followed in R(SB) 6/86 which also holds that Departmental leaflets are not aids to construction.

R(M) 1/86 (T)

iv On a claim for mobility allowance a medical board determined the medical questions adversely to the claimant and the claim was disallowed by the insurance officer. Subsequently on appeal a MAT decided that the medical conditions had been satisfied by the claimant but with effect from a date later than the date of claim. The CAO referred certain questions regarding the implications for the AO of the MAT's decision to a SSAT, who decided that the decision of the insurance officer should be reviewed and revised and that the claimant was entitled to mobility allowance. A tribunal of Commissioners held that the AO was obliged to give effect to the decision of the MAT; it was not for him to enter into the merits of the medical questions which had been referred to the appropriate adjudicating medical authority, or to consider the correctness or otherwise in law of the medical authority's decision. The Commissioners supported the conclusion of the AT that the appropriate authority for the adjudication officer's review of the insurance officer's decision was section 104(1)(*b*) of the SS Act, the decision of the medical AT constituting a relevant change of circumstances. They drew analogies with a decision of a Commissioner, as settled by R(I) 25/63 (see 17.6.4 iii *below*), and the case of retrospective legislation referred to in para. 10 of R(G) 3/58.

R(M) 4/86

v A claim for mobility allowance made before the claimant attained age 65 had been disallowed on the ground that the medical conditions were not satisfied. A further claim was made when he was over the age of 66. The Commissioners held that the effect of ss. 37A(5)(aa)(ii) and (b) of the SS Act 1975 was that a claimant who showed that he satisfied the residential and medical conditions during any period immediately preceding his 65th birthday was not entitled in respect of that period unless the first week in that period was the week, or later than the week, in which the claim was received by the S of S. The claim must be one which was allowed and led to the claimant being entitled to an allowance for the period. A claim which was disallowed could no longer have any effect. The judgment in *'McCaffrey's* case' (see 18.6.2 i) distinguished for purposes of mobility allowance.

R(M) 5/86

vi The questions at issue were whether a MAT, in the light of an opinion expressed by a DHSS doctor on the claimant's ability to walk, could review the original decision awarding mobility allowance and, if so, whether that decision could be revised. It was held that a new medical opinion did not of itself constitute a material fact and did not import that a previous decision given in ignorance of that opinion was given in

ignorance of a material fact; R(I) 3/75 (17.6.3 vi *below*) followed and also *R. v. Secretary of State for Social Services, ex parte Loveday* (unreported but relevant extract appended to R(M) 5/86). Neither was a medical report of itself a relevant change of circumstances (R(S) 6/78, 17.6.4 v *below*, followed), but it might be evidence that there had been a change of circumstances. The new MAT to whom the case was directed would be entitled to consider whether such a change had occurred notwithstanding s. 37A(7) of the SS Act 1975. See *Insurance Officer v. Hemmant* [1984] 1 WLR 857, R(M) 2/84 App. They would need to look at the situation as at the date of the application for review. Other synopses of this decision are at 17.6.3 x and 17.6.4 x *below*.

R(M) 3/89

vii The claimant made a claim for mobility allowance before his 65th birthday. A medical board decided he was not unable to walk nor virtually unable to walk. A MAT heard his appeal after he had reached the age of 66, by which time he had undergone two amputations. The tribunal confirmed the decision of the medical board. They did not examine the claimant's walking ability. The Commissioner held that the tribunal should have considered any deterioration in the claimant's condition which occurred between the date of claim and the day before he reached the age of 65. The amputations occurred after the claimant's 65th birthday and occurred too late to be the basis of a mobility allowance award. R(M) 4/86 applied.

4 Benefit from enhanced facilities for locomotion

R(M) 2/83

i The claimant for mobility allowance was an epileptic child, who was grossly mentally handicapped, incapable of speech, possessed poor eyesight and completely oblivious of danger. In consequence she required the constant attendance of an adult. A MAT found her gait, though haphazard, to be satisfactory and concluded that she was neither unable nor virtually unable to walk and added that even if she had been, her mental condition was such that she would not have been able to benefit from enhanced facilities for locomotion. The Commissioner, set aside the tribunal's decision as being erroneous in point of law:

1. because they had failed to make clear why they considered that the claimant was not virtually unable to walk and, in particular had failed to deal with a specific contention which had been addressed to them, but had rejected it (para. 9); and

2. because there was no evidence before the tribunal to enable them to conclude that the claimant would have been unable to benefit from enhanced facilities for locomotion, and they failed to give their reasons for so concluding (para. 10); added that the requirement that the claimant's condition should enable her from time to time to benefit from enhanced facilities for locomotion merited a liberal interpretation involving mental stimulation from being able to get out and about without the claimant herself necessarily appreciating that she was deriving mental benefit (para. 11).

See R(M) 1/83, 15.4.1 vi, 15.4.3 iii *above*.

5 Walking with physical support

R(M) 1/90

i The claimant had suffered a right hand stroke. A MAT concluded that she did not satisfy the medical conditions. The members of the MAT observed her walking out of doors and noted that she could walk 100 yards at a slower than average pace without stopping **and** with manual support, with no evidence of distress. The claimant appealed to the Commissioner on the grounds that she needed, and was given help to walk by one of the MAT doctors. The Commissioner held that if a claimant needs help in walking, the reason for the need and the nature of the help should be made clear so that guidance or reassurance of a precautionary nature can be distinguished from **physical** support. If the claimant needs physical support, the MAT should consider whether the need arises from a physical cause. If it does but is not so severe so as to prevent the claimant from walking, the tribunal should then consider if the withdrawal of the support would make the claimant unable or virtually unable to walk within the meaning

of reg. 3(1)(a) and (b) of the Mobility Allowance Regs. 1975, or render the exertion to walk harmful for the purposes of reg. 3(1)(c). If the withdrawal of the support would mean that any of the provisions of reg. 3(1)(a), (b) or (c) were satisfied, the tribunal must then consider whether the claimant could use a suitable artificial aid as a substitute for the physical support.

ii The claimant refused to have a colostomy operation. Her appeal was dismissed on the basis that her refusal to have an operation was the same as refusing to use an aid such as a walking stick. The tribunal assessed her ability to walk on the basis as if the operation had been carried out and disallowed her claim for mobility allowance. The Commissioner held that whether or not the claimant was virtually unable to walk should be assessed in the light of the claimant's existing condition and not as her condition might be improved with medical intervention.

R(M) 1/95

Part 5: Invalid care allowance

(Invalid Care Allowance was changed to Carer's Allowance on 01/04/03.)

1 Entitlement of married woman

i A married woman living with her husband claimed ICA with effect from 5 February 1985, after having given up work to care for her mother who was receiving AA. The claim was referred by the AO to a SSAT who decided that, all the other qualifying conditions being satisfied, the claimant was not disentitled by s. 37(3)(a)(i) of the SS Act 1975 on the ground that the provision was discriminatory on grounds of sex contrary to EEC Directive 79/7/EEC (s. 37(3)(a)(i) had excluded from ICA any married woman living with her husband; the section was repealed by s. 37 of the SS Act 1986 with retrospective effect from 22 December 1984). An appeal was made by the AO to the Commissioner, who referred certain questions to the ECJ. In the light of that Court's rulings (see 19.2.12 i *below*) the Commissioner dismissed the AO's appeal, and held that the claimant was entitled to ICA as from 5 February 1985. Further synopses of this decision are at 19.1.2 ix and 19.2.12 i *below*.

R(G) 2/86

2 Overlapping benefits

i ICA must be adjusted by deducting from it any personal contributory benefit to which there is also an entitlement, if both benefits would otherwise be payable: Reg. 4 of the SS (Overlapping Benefits) Regs. 1979. *See* 4.3.5 ii *above* and 19.2.12 ii *below* for fuller synopses of the decision.

R(S) 2/89

ii On 9.2.96 the claimant was notified that he was entitled to ICA from June 1995 but that, by virtue of regulation 4 of the Social Security (Overlapping Benefits) Regulations 1979, it was not payable because he was receiving IB at a higher rate. The claimant's IB was terminated from 12.5.2000, however it was not until March 2001 when the claimant returned a routine enquiry form to them that the ICA Unit became aware of this. A decision-maker (DM) superseded the decision that ICA was not payable on the grounds that there had been a relevant change of circumstances. The DM decided that, because the result of the supersession was advantageous to the claimant and because the claimant had not notified the change within one month of its occurrence, the effective date should be set in accordance with regulation 7(2)(b)(iii) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. That is the date the enquiry form was received. The result of this was that no ICA was payable for the period 12.5.00 to 26.13.01.

R(G) 1/03

The claimant appealed to a tribunal which confirmed the DM's decision. The claimant appealed to the Commissioner and the Secretary of State appealed to the Court of Appeal.

The Court held that, while a decision was needed to restore payment of ICA it was more in conformity with the legislative scheme to regard that as a decision under section 8 of the Social Security Act 1998 rather than a supersession under section 10. The Court gave the following reasons for its decision:

1. Nothing in Social Security law entitles the Secretary of State to place on the claimant "the onus of telling him what he himself has done or to proceed as if he had not stopped a claimant's incapacity benefit when he, of all people ought to know that he has".

2. Regulation 4 of the Overlapping Benefits Regulations is an accounting provision aimed at preventing excess payment. It does not deal with entitlement and its operation involves no judgement or fact finding of any description.

3. The result of using section 10 in the circumstances of the case would be to penalise the claimant for the Department's failure to resume payment

of ICA upon cessation of IB. "To do this would tend to defeat the objectives which Parliament and the rule-maker can be seen to have in mind when assembling the present scheme".

3 Entitled immediately before pensionable age

R(G) 3/89

i A woman aged 61 claimed ICA. That claim was disallowed in accordance with s. 37(5) of the SS Act 1975 because she was over pensionable age (which is 60 for a woman) and had not been entitled to ICA immediately before reaching that age. Pensionable age is 65 for a man. The Commissioner decided that:

1. s. 37(5) of the Act discriminated against women contrary to EC Directive 79/7;

2. this discrimination was not permitted by art. 7(1)(a) of that Directive;

3. as a result women are entitled to ICA on the same terms as men. Therefore for the purposes of s. 37(5) of the Act pensionable age should be regarded s 65 for women.

The Secretary of State appealed against that decision. The CA dismissed that appeal and decided that:

1. the exceptions in art. 7(1)(a), which set out when the Directive will not apply, must be applied strictly and in accordance with the principle of proportionality;

2. Member States can only retain conditions of entitlement for benefits other than retirement or old age pensions which are linked to the different pensionable ages for RP when this is a necessary consequence of the different pensionable ages for men and women for RP purposes;

3. the discrimination in s. 37(5) of the Act is not excluded from the effects of Directive 79/7/EEC by the exclusions in art. 7(1)(a).

The Secretary of State made a further appeal to the HL. On 27 November 1991 the HL referred preliminary questions to the ECJ. The ECJ (Case 328/91) decided that:

1. the discrimination which results from linking the condition of entitlement for benefits other than RP to the different pensionable ages for men and women for RP purposes is only acceptable if it is necessarily and objectively linked to these different ages;

2. the awarding of non-contributory benefits such as SDA and ICA has no direct influence on the financial equilibrium of contributory pension schemes.

The ECJ referred the case back to the HL for a final decisionwho on rehearing the HL confirmed the decision of the CA.

4 The caring condition

R(DLA) 3/95

i The claimant was in receipt of ICA because she looked after her autistic step-son when he came home at weekends and during the school holidays. The pattern of the step-son's weekend visits home varied, but for a period his weekend visits were from Friday afternoon until Monday morning on **alternate** weekends. For those weeks, the AO disallowed ICA because the claimant failed to meet the 35 hour test in any one week. This was because although the claimant cared for her step-son for a total of more than 35 hours over these weekends, the days of caring fell into two separate weeks and she could not satisfy the test in **both** of these weeks. The SSAT confirmed the disallowance. The claimant appealed to the Commissioner on the grounds that the correct method of working out the number of hours caring in any one week was to use a kind of averaging. The Commissioner confirmed that the term "a week" in reg. 4 of the ICA Regs means

a period of seven days beginning with Sunday as defined in Sch. 20 to the SS Act 1975 [now s. 122(1) of the SS Contributions and Benefits Act 1992]. The Commissioner also held that reg. 4 of the ICA Regs does not allow for averaging out the hours of caring so as to satisfy the 35 hour test. To satisfy the test, the claimant must be engaged in caring for at least 35 hours in that week, and also be regularly engaged in caring. The Commissioner dismissed the appeal. *See* also R(F) 1/84, 6.1.2 vii.

5 Entitlement because severely disabled person admitted to hospital and AA not payable

i The claimant (the carer) was paid ICA because he was looking after his severely disabled mother and he met the conditions of entitlement in s. 70(1) of the SS Contributions and Benefits Act 1992. An AO decided that the mother had not been entitled to AA for certain periods because of her admissions to hospital. In consequence it was also decided that the carer was not entitled to ICA because he had received it during those periods when his mother was hospitalised. On appealing the AO's decision, the tribunal decided that the claimant's mother was not a "severely disabled person" within the meaning of s. 70(2) when she was not entitled to AA. The Commissioner held that s. 70(2) exclusively provides for the definition of "severely disabled person". Reg. 4(1) of the SS (ICA) Regs. 1976 deals with the meaning of s. 70(1)(a) and is not intended to involve any departure from the statutory definition at s. 70(2). Further, there is no conflict or inconsistency between reg. 4(2) and s. 70(2) with its statutory definition; and there is nothing in the regulatory powers of s. 70(8) to disapply the statutory definition. — R(G) 1/02

6 Calculation of number of hours of education: meaning of "attends a course of education at" - meaning of "supervised study".

i The claimant's entitlement to ICA was reviewed and withdrawn on the grounds that she was receiving full-time university education as laid down in s. 70(3) of the SS Contributions and Benefits Act 1992. The claimant appealed to the CA arguing that, in assessing whether education was "full-time" (twenty-one hours or more a week) under Reg. 5(1) of the SS (ICA) Regs. 1976, the phrase "attends a course of education at" should be construed as requiring the student's physical presence at the premises of an educational establishment. She further argues that the expression "supervised study" in reg. 5(2) did not include private study at home. The CA dismissed the appeal and held that. The expression "attends a course of education at a university" is to be construed in the sense of being enroled upon such a course and does not bear a locational connotation. Hours of study away from the premises of the university are therefore capable of coming within the period during which the student is attending a course of education. As regards reg. 5(2), the test of what is "supervised study" does not depend on the period of time for which the supervisor is present with the student. However, the study must be directed to the curriculum of the course of education involved and in addition there must be a degree of direction by and answerability to a supervisor. The fact that the work is "set" – in the sense that is work which the student is expected or required, by the curriculum or by a supervising member of staff, to do – will (save in exceptional cases) bring it squarely within the concept of "supervised study". It was also agreed that the ascertainment of hours of attendance is question of fact to be determined by the DM or tribunal. The approach of the Northern Ireland CA in *Bronwyn Wright-Turner v. Department for Social Development* was broadly correct and should be adopted. — R(G) 2/02

7 Earnings

i The claimant, relying on R(IS) 4/05, argued that in SS Benefit (Computation of Earnings) Regs. 1996, reg. 10(4) "amount paid by way of tax" includes tax which she is liable to pay. Rejecting this, the Upper Tribunal followed CG/1054/2005, holding that she could not reduce her earnings by the amount of any tax liability resulting from receipt of carer's allowance because no tax had in fact been paid. — R(G) 1/09

[2010] AACR 17

ii *C v SSWP (CA)* [2009] EWCA 1333; [2010] AACR 17. The claimant's final payment consisted of wages and holiday pay which was a payment in lieu of outstanding annual holiday entitlement. The question before the UT was whether the claimant's holiday pay was "earnings of the same kind" as payment of ordinary wages for the purposes of regulation 6(2)(a) of the Social Security Benefit (Computation of Earnings) Regulations 1996 in which case that reg specifies the period over which those earnings are to be treated as paid. This involved consideration and interpretation of the words used in the legislation. It was held that–

i holiday pay is payable in respect of a period so falls within reg 6(2)(a);

ii "of the same kind" in reg 6(2)(a) is intended to distinguish those earnings paid in respect of a period and covered by reg 6(2)(a) and those other kinds of earnings to which reg 6(2)(b) applies;

iii reg 6(2)(a) is a deeming provision designed to identify an end date when a periodic payment is made which does not consist of ordinary pay.

Part 6: Disability living allowance

1 Blind and deaf

i The claimant appealed against the DAT decision refusing to award his higher rate mobility component of DLA on the basis that he is both blind and dea*f* [s. 73(2) of the SS (Contributions and Benefits) Act 1992]. The question before the Commissioner was the meaning of "blind" and "deaf". The Commissioner held that there was no definition of "blind" and "deaf" in either the SS (Contributions and Benefits) Act 1992 or the SS (DLA) Regs. 1991. However, for industrial injuries benefit there is a definition of what constitutes 100% disablement resulting from blindness in Sch. 2 of the SS (General Benefit) Regs. 1982 (item 4). Similarly, for cases of occupational deafness there is machinery for assessing the percentage degree of deafness set out in para. 34 of, and Sch. 3 to the SS (Industrial Injury) (PD) Regs. 1985. Although there is no statutory link between these regs. and the SS (DLA) Regs. 1991, the Commissioner held that it was desirable to make a link between these regs. and apply them when deciding if the claimant is blind and deaf for DLA purposes.

R(DLA) 3/95

2 Child terminally ill; care and mobility needs

i A claim was made in respect of a child under the special rules relating to terminally ill claimants. The Commissioner held that the award of the care component should have been made from the date when it could first have been said with reasonable certainty that the claimant's death could be reasonably anticipated and should have been made until her death. It was also held that it was not necessary for a child claimant who was terminally ill to establish that her care requirements were substantially in excess of the normal requirements of children of the same age (s. 72(6)). However, the Commissioner confirmed that there were no special provisions for terminally ill claimants in respect of the mobility component, and it is necessary for a child claimant who is terminally ill to establish that a need for guidance or supervision whilst walking in unfamiliar areas is substantially in excess of the normal requirements of a child of the same age (s. 73(4)).

R(DLA) 1/99

3 Child undergoing renal dialysis; deeming provision

i The claimant, a child, required renal dialysis treatment for renal failure. It was held that the regs. do not distinguish between the different types of dialysis and that if some attention (or supervision) beyond the absolute minimal was required, the deeming provision can be satisfied. It would not be necessary to consider the other factors involved i.e. the repeated nature, the frequency of attention needs or in the case of a child, whether the child's attention needs were "substantially in excess". The definitions of "night" and "day" as provided in R(A) 1/78 can be modified to follow the pattern of dialysis, rather than the household pattern. *See* R(A) 1/78 15.2.3-5 iv.

R(A) 1/93

4 Child with diabetes mellitus; definition of bodily function/attention needs

i It was held that diabetes mellitus was a serious disability which impairs a claimant's bodily function of metabolism. It was held that, as this case involved a child, some of the elements in the regime designed to counteract the impairment of the bodily functions did not have to specifically involve some direct and personal service carried out in the presence of the child. These elements could be included in the calculation of the child's aggregate of attention needs. As an example the Commissioner considered that the analysis of the child's blood sample would form part of the above regime and could be included in the above aggregate of attention needs.

R(DLA) 1/98

5 Inability to prepare a cooked main meal

i It was held that the "cooking test" is a hypothetical test to be determined objectively. It relates to the preparation of a labour intensive main daily meal which it is reasonable for the claimant to prepare for one person on a daily basis, and depends

R(DLA) 2/95

upon what a claimant cannot do without help. The test includes all activities auxiliary to the cooking such as reaching for a saucepan, putting water in it and lifting it on and off the cooker.

R(DLA) 1/97

ii It was held, in the case of a claimant suffering from haemophilia, that the test of "reasonableness" was to be applied when consideration was given hypothetical test of preparing a cooked main meal. The above test related to consideration of the risks faced by the claimant whilst carrying out of the various tasks involved in the preparation of a cooked main meal. It was further held that, although the claimant **may** face additional risks and anxiety whilst undertaking certain activities, including cooking, it was unreasonable to expect the claimant to prepare a cooked main meal.

R(DLA) 7/03

iii The claimant could on most days, prepare a cooked main meal for herself. Her claim for DLA was refused and on appeal, a tribunal decided she did not satisfy the "cooking test". The claimant appealed to the Commissioner who found no error in law.

The claimant appealed to the Court of Appeal, who held that the provision of a cooked main meal was required on a regular basis in order to ensure a reasonable quality of life and that if there was a clear pattern of a person not being able to provide for herself, the test would be satisfied.

However, the House of Lords held that it was wrong to conclude that the cooked main meal test was satisfied if there was a clear pattern of a person not being able to provide a cooked main meal for herself more or less every day. They held that the cooking test does not function at a day to day level, rather it involves looking at the whole of the period and deciding whether, in a more general sense, the claimant can fairly be described as a person who is unable to cook a main meal for herself. It is an exercise in judgement rather than an arithmetical calculation of frequency.

The House of Lords further held that the cooking test is a notional test, a thought experiment, to ascertain the severity of the claimant's disability. It does not matter whether the claimant actually needs to cook. Cultural or dietary preferences are irrelevant.

R(DLA) 2/05

iv It was held that, in testing a claimant's abilities against the hypothetical main meal test, a tribunal should look at all the evidence as to the claimant's ability to perform the activities involved in cooking. As well as direct evidence of actual difficulties with cooking, the tribunal should consider indirect evidence of other activities using the same bodily functions that are normally used in cooking.

R(DLA) 1/08

v The claimant argued that she was entitled to the lowest rate of the care component of DLA under the cooked main meal test because, although physically capable of cooking, her disability (primary biliary cirrhosis) means that the smell of cooking food causes her to feel nauseous. The Commissioner held that in applying the cooking test the effect on the claimant of cooking should be taken into account where, as in this case, the nausea is a symptom of the disability from which the claimant suffers.

6 Meaning of "arrested development or incomplete physical development of the brain"

R(DLA) 2/96

i The claimant who suffered from Alzheimer's disease made a claim for the higher rate mobility component of DLA. In order for her claim to succeed the claimant had to show that she was "severely mentally impaired" as defined in reg. 12(5) of the SS (DLA) Regs. 1991. It was accepted that the claimant satisfied this provision, provided she could be said to be suffering from "a state of arrested development or incomplete physical development of the brain ...". The tribunal upheld the AO's decision that the claimant did not fulfil this condition with the result that her claim for the higher rate mobility component failed. The Commissioner held that the current state of the medical authorities indicated that the brain was fully developed before a person

reached the age of 30. Alzheimer's disease caused a gradual but inevitable loss of brains cells, eroding an already developed brain. Thus a sufferer from it did not fall within reg. 12(5). The consequence was that the claimant was not entitled to the higher rate mobility component. The Commissioner also gave a definition to the expression "arrested development" and "incomplete physical development of the brain" where they are used in reg. 12(5).

ii The Commissioner held, in this case where the claimant suffered from schizophrenia, that: R(DLA) 3/98

(a) the fact that a person has lucid intervals did not mean that he or she did not experience arrested development of the brain (para. 7);

(b) on the evidence, the claimant fell within the 30% group suffering from neuro-developmental damage and therefore had suffered from arrested development of the brain (para. 14);

(c) there was no evidence to suggest that the claimant's intelligence was anything like three standard deviations from the norm and she was therefore unable to satisfy the "severe impairment of intelligence test" (para. 16); (see also *Megarry v. CAO)*

(d) to be "severely mentally impaired" within reg. 12(5) the arrested development of the brain had to result in both severe impairment of intelligence and also severe impairment of social functioning. As the claimant could not satisfy the test of severe impairment of intelligence, there was no need to investigate in addition whether she suffered from severe impairment of social functioning (para. 17).

7 Severe discomfort to arise from physical act of walking

i The claimants were suffering from porphyria, which causes the skin to blister when exposed to daylight. The question in issue was whether the claimant was unable or virtually unable to walk within the meaning of reg. 12(1)(a)(ii) of the DLA Regs. 1991. The Commissioner held that reg. 12(1)(a)(ii) was not directed to the fact of being out doors but to the physical act of walking. The "severe discomfort" referred to in reg. 12(1)(a)(ii) must therefore arise from the physical act of walking itself. See R(M) 1/84, 15.4.1 vii, and R(M) 3/86, 15.4.1 viii. R(DLA) 6/99

8 Severe mental impairment; relevance of I.Q. test results

i The claimant who suffered from autism, in order to satisfy the provisions of reg. 12(5), must show that his condition resulted in a severe impairment of intelligence and severe impairment of social functioning. The Commissioner upheld the tribunal's decision that the claimant was not severely mentally impaired on the grounds that the evidence did not show that his IQ was 55 or less. The CA allowed the subsequent appeal and held that, whilst the claimant's IQ, as conventionally tested, was likely to be the essential starting point for considering the impairment of intelligence, the IQ test and score will not invariably prove decisive and evidence of the claimant's useful intelligence and impairment of social functioning may be required. See R(DLA) 2/96, 15.6.6 i. R(DLA) 1/00

9 Tribunal to give reasons for rejecting renewal claims

i The fact of a previous award does not raise any presumption in the claimant's favour or result in the need for consistency having to be treated as a separate issue on renewal claim. However, the requirement for a tribunal to give reasons for its decision means that it is necessary to explain why it is not renewing a previous award unless this is obvious from its findings. See R(A) 1/72, 15.1.2 i. R(M) 1/96

10 Residence and presence

11 Tribunal to determine both components, if appropriate

R(DLA) 1/95 i Where the question of entitlement to a component (care component in this case) is brought fairly and squarely before the tribunal (even though the component was not raised on the claim form) it is necessary, under s. 71 of the SS Contributions Act 1992, for the tribunal to reach a decision (i.e. in this case a decision was required on both the mobility and care component). The tribunal's ocular observations of the claimant did not amount to a walking test or medical examination. A tribunal are entitled to take account of such observations provided they are carefully considered.

12 Tribunal - whether obliged to consider both components

R(DLA) 2/97 i It was held that DLA is a single benefit with two components and both components should in general be considered. But where a claim under appeal relates only to one component and there is no award of the other component, a tribunal may safely accept, record and proceed upon a restriction of the appeal to the component claimed.

13 Mobility component - lower rate - guidance or supervision

R(DLA) 4/01 i This decision of a tribunal of Commissioners concerned four joined appeals. It was held that:

(a) the question of whether supervision or attention provided by a claimant so as to qualify for the care component, also qualify in the context of lower rate mobility component (guidance or supervision). The tribunal found nothing in the law to prevent the same type of assistance enabling the claimant to qualify for both parts of the benefit. However, it was emphasised this does not mean supervision requirements are automatically passported to entitlement to the lower rate mobility component.

(b) the application of the words "cannot take advantage of" in particular cases is left to the good sense of DMs' and tribunals.

(c) in relation of deaf claimants, and in particular the pre lingual deaf the Commissioners found it could be appropriate to find that they required guidance or supervision all of the time whilst walking over unfamiliar routes because without that supervision they would not attempt that route for fear or anxiety of becoming lost. In these cases it has to be clearly established that the fear or anxiety results from the underlying disability.

R(DLA) 6/03 ii The tribunal declined an award of the lower rate of mobility component on the basis that the claimant chose not to walk in unfamiliar surroundings because of her limited mobility. The tribunal failed to consider whether the claimant could use even familiar routes without guidance or supervision and the Commissioner held that it was irrelevant whether the claimant actually walked on unfamiliar routes and that the question was whether or not the claimant could do so without guidance or supervision. The Commissioner also held that whilst a tribunal must ignore any ability to use familiar routes, it is not entitled to ignore a claimant's inability to use familiar routes.

In allowing the appeal, the commissioner noted that the tribunal chairman said there was no point in making an award of lower rate mobility if its purpose was frustrated. However the Commissioner held that the frustration of the purpose of awards was provided for by reg. 73(8) which provides that

> "A person shall not be entitled to the mobility component for a period unless during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion."

The Commissioner held that the fact that a person chooses not to walk in unfamiliar places does not frustrate the purpose of an award of the lower rate of mobility component, if the person is able to benefit from enhanced facilities for locomotion.

iii The claimant sought lower rate mobility component on grounds that she was unable to go out alone and needed someone to accompany her, "talk all the time, and encourage and reassure her". The claim and subsequent appeal was dismissed, the tribunal finding that being accompanied for reassurance was not needing someone for guidance and supervision. In refusing leave to appeal to the Commissioner, the tribunal further commented that reg. 12(7) of the SS (DLA) Regs would apply. The Commissioner held that the fact that a claimant derives reassurance from a person is not conclusive as to whether they are also providing guidance and supervision. He further held that severe anxiety may be a symptom of mental disablement.

R(DLA) 3/04

iv The claimant who suffered from anxiety was seeking the DLA lower rate mobility component as he required supervision when walking out of doors because he had a fear of suffering a severe asthma attack when walking out on his own.

R(DLA) 6/05

Reg. 12(7) and (8) of the Social Security (Disability Living Allowance) Regs. 1991 had been added in 2002 following the decision of a Tribunal of Commissioners in R(DLA) 4/01. The effect of the amendment was to limit the circumstances in which a claim may succeed where the impediment to walking arises because of fear or anxiety; it must for the purpose be established that the claimant's problems are systems of a mental disability and are so severe that he cannot take advantage of the faculty of walking out of doors without guidance or supervision (para. 7 and 8).

However, in regard to the asthma attacks, the quite different question to be asked was whether the claimant cannot reasonably be expected to venture outside without a companion most of the time because of the level of difficulty caused by an asthma attack (the test for lower rate mobility being distinct from the supervision test for the care component) (para. 9). Guidance and supervision does not have to be related directly to the act of walking but it must be instrumental in allowing the claimant to go out of doors and exercise that faculty.

v The starting point was to consider whether the claimant could walk on familiar routes without assistance, before moving on to look at ability on unfamiliar ones (CSDLA/12/2003 applied). In consideration of the legal criteria for the lower rate mobility there must be ignored any ability to use familiar routes, albeit not an inability. When considering whether a claimant is unable to walk on unfamiliar routes without guidance or supervision, it may be evidentially relevant to make findings of fact, what, if any, difficulties there are with familiar routes; though the ability to walk on familiar routes is disregarded.

R(DLA) 2/08

14 Renewal award of care component after age 65 - entitlement to lowest rate of care component.

i The claimant, who had been entitled to the highest rate of the care component for a limited period, reached age 65 during the course of this entitlement. The tribunal found that she did not satisfy the criteria for an award of the care component at either the middle or highest rate. The tribunal further found, although the claimant satisfied the lowest rate care criteria, that she was prevented from receiving such entitlement due to the fact that this entitlement had arisen **after** her 65th birthday and no such entitlement had existed in her previous award. It was contended that, as the claimant had previously been entitled to the highest rate care component, she must have also satisfied the criteria for lowest rates on the basis of an "underlying payability".

R(DLA) 5/02

15 Severe behavioural problems - whether conditions relating to disruptive behaviour and "watching over" satisfied

i The claimant was a child aged 10 who suffered from Asperger's syndrome, an autistic spectrum disorder. It was contended on his behalf that he was entitled to the higher rate of

R(DLA) 7/02

the mobility component, partly on the grounds of severe behavioural problems under subsection (3)(b) of s. 73 of the SS Contributions and Benefits Act 1992 and reg. 12(6) of the DLA Regs. 1991. The Commissioner held that limb (c) of reg. 12(6) (severe behavioural problems) requiring "another person to be present and watching over him whenever he is awake", is satisfied only if the constant presence of an adult is necessary in order to intervene if and when the claimant actually becomes disruptive. Conversely, that limb of the reg. is not satisfied if the structured regime of a school, or the presence of the claimant's mother, is of itself sufficient to prevent the claimant becoming disruptive. The requirements of limbs (b) and (c) indicate that "watching over" must be needed both in the home and outside it and whether or not the claimant is seeking to take advantage of the faculty of mobility.

16 Signification portion of the day

R(DLA) 8/02

i The Commissioner held that the proper construction of "day" in the expression "signification portion of the day" (s. 72(1)(a)(i)) of the SS Contributions and Benefits Act 1992) meant daytime as opposed to night-time, based on the domestic routine of the house, and not a period of 24 hours. See also R(A) 4/74, 15.2.2 iii and R(A) 1/78, 15.2.2 iv.

R(DLA) 2/03

ii The claimant aged 12 at the date of his renewal claim for DLA suffered from bowel incontinence due to spina bifida. For psychological reasons he did not use incontinence pads. He required attention once or twice a day after soiling himself. On these occasions the claimant had to get into the bath, his mother would help him undress, remove his soiled clothing and shower him until he was clean. It was also necessary to wash soiled clothing, towels and bedding and clean up any soiled carpets, furniture and other surfaces. The AO refused to renew the award of DLA and the tribunal confirmed that decision, finding that the claimant did not require attention for a significant portion of the day. The tribunal took into account the undressing; showering and rinsing out of soiled clothing, but excluded the washing of clothing citing *Cockburn v. Adjudication Officer* [reported as R(DLA) 2/98]. The tribunal did not mention the cleaning up of furniture, carpets and other surfaces. The claimant appealed to the Commissioner, who upheld the tribunal's decision.

The Court remitted the appeal to a differently constituted tribunal held that:

1. whilst the decision in *Cockburn* made it clear that the laundering of soiled bedclothes and clothing out of the presence of the claimant could not qualify as attention, it equally recognised that certain immediate and essential cleaning up after an incident of incontinence might qualify as attention (para. 37);

2. steps taken in the presence or vicinity of the applicant for the immediate removal of soiling from clothes, bed linen or adjacent surfaces were apt to qualify for attention; in the case of faecal incontinence, where the interest of hygiene was required thorough washing rather than merely rinsing meant the criteria of immediacy and intimacy were satisfied (para. 37);

3. whether the portion of the day spent in attention was "significant" depends upon its size and significance assessed as a percentage of the day as a whole but also upon other factors such as the amount of time available in the day, the extent to which the relevant tasks become a matter of routine, and the concentration and the intensity of the activity. (para. 39). See also R(A) 1/91, 15.2.1 viii and R(DLA) 1/05, 15.2.7 iv.

17 Mobility component - disruptive behaviour requiring another person to be present and watching over claimant while awake

R(DLA) 9/02

i The Commissioner held that a carer cannot be said to be present and watching over a person while awake (as required by reg. 12(6)(c)) when a door is shut with the carer and patient on opposite sides of it.

18 Duration of award - whether there is a minimum period

i The claimant submitted a claim for a DLA and this claim was disallowed. The claimant exercised her right of appeal to an AT. By the time of the appeal hearing, she had made another claim on which an award had been made. The tribunal found that, except for the provisions of s. 72(2)(b) of the SS Contributions and Benefits Act 1992, the claimant would have been entitled to an award in respect of the first claim. The Commissioner held that above provision did not impose a limitation on the period for which an award can be made. The Commissioner, in this respect, found that this provision only imposes a requirement that it must be likely that one of the conditions of entitlement set out in s. 72(1) would be satisfied for a further six months – if a claimant's disablement is likely to last for longer it is irrelevant that part of that period was covered by a later award.

R(DLA) 11/02

19 Transient effects of alcohol

i The claimant has chronic alcoholism and other medical conditions. He was awarded the higher rate of the DLA mobility component and the middle rate of the DLA care component for two years. His renewal DLA claim was refused. The AT dismissed his appeal. The Tribunal of Commissioners held that physical symptoms or manifestations of alcohol abuse alone do not result in a physical impairment and would not entitle the claimant to an award of the higher rate of the DLA mobility component. However if the claimant has a separate medical condition due to abusing alcohol then any disabling symptoms can be taken into account when assessing entitlement to the care or lower rate mobility components of DLA. However, the transient effects of **choosing** to drink too much alcohol should not be taken into account. Alcohol dependency is a medical condition, not a disability. A person who cannot realistically stop drinking to excess because of a medical condition and cannot function properly as a result can reasonably be said to be suffering from a disablement, therefore there is no reason why the effects of being intoxicated should not be taken into account when considering care needs. There is also no reason why the possibility of a claimant taking advantage of professional assistance to control their alcohol consumption should not be taken into account.

R(DLA) 6/06

20 Terminally ill - higher rate mobility component - whether deemed entitlement

i The claimant was awarded the higher rate of mobility component and the highest rate of care component from October 2000 on the basis that he was terminally ill with a life expectancy of less than six months. Following an operation in November 2001, the claimant returned to work. In January 2004 the DM superseded the award and disallowed both components from November 2001 on the basis that there has been a change in circumstances in that the claimant was no longer terminally ill. The DM then gave a decision that a recoverable overpayment of DLA had occurred for the period November 2001 to February 2004. On appeal, the tribunal found there was evidence that the claimant was no longer terminally ill, and they confirmed the DM's supersession of January 2004. In considering the period November 2001 to January 2004, the tribunal found that the claimant had no mobility or care needs, but concluded that, following CDLA/1804/1999, that was irrelevant so long as the special rules as to terminal illness applied, and there was therefore no material fact for the claimant to disclose. The Secretary of State appealed to the Commissioner who allowed the appeal and held it was clear from the wording of s. 73(9) of the Contribution & Benefits Act 1992 that a terminally ill claimant will only be entitled to an award of the mobility component if, apart from the three months QP, he would be entitled to it if he were not terminally ill and CDLA/1804/1999 was wrongly decided insofar as it held that s. 73(12) of the Contribution & Benefits Act 1992, gives deemed entitlement to mobility component to a claimant who satisfies the special rules as to terminal illness. Accordingly, the claimant was therefore under a duty to disclose as a material fact the improvement in his walking ability from November 2001 and had he done so, his award of mobility component would have been superseded. However, on the balance of probabilities the award of care component would have continued under the special rules for the terminally ill. There was therefore a recoverable overpayment from November 2001, but only of the mobility component and only to the date when the DLA Unit knew that the claimant had gone back to work.

R(DLA) 7/06

The decisions listed below are not included in chapter 15

A *Decisions the principles of which are covered by other decisions in this chapter*

R(A) 2/83 The ‘substantial danger’ test (SS Act 1975, s. 35 (1))
A subjective, not an objective, one

R(M) 1/85 Mobility allowance - change of ordinary residence a ground for review (see R(M) 2/84, Appendix and 15.4.3 iv *above*)

R(A) 7/89 Decisions given under statutory provisions which are no longer in force

R(A) 1/90 Decisions given under statutory provisions which are no longer in force

R(A) 4/90 Decisions given under statutory provisions which are no longer in force

R(G) 3/93 Decisions given under statutory provisions which are no longer in force

B *The following decisions are no longer relevant*

R(G) 2/95 Invalid Care Allowance - decision given under statutory provisions which are no longer in force

R(A) 3/94 Attention - blind person requiring guidance. This decision has been superseded by the House of Lords Judgment in *Mallinson v. Secretary of State for Social Security*