## Children and Substantially in Excess Test

**children – substantially in excess**

C12/92(AA) (paragraph 5) confirmed "… if the required attention comprised or included attention of a kind normally needed by a child of the same age or sex, then even if it was frequent throughout the day, it did not satisfy the relevant conditions unless it was substantially in excess of normal requirement. The modification (now Section 72(6)) had, however, no relevance to circumstances in which attention of a kind not normally required by a child of the same age and sex was required frequently throughout the day…".

**1. Chief Commissioner R R Chambers 14.5.1992**

**children – substantially in excess**

CA/092/1992 (paragraph 9) on examining the term "substantially in excess" held "… It seems to me that the legislation contemplates a yardstick of an average child, neither particularly bright or well behaved, nor particularly dull or badly behaved and then the attention or supervision required by the child whose case is being considered must be judged to decide whether it is substantially more than would normally be required by the average child. That, I think, comes to much the same thing as saying that the attention or supervision required must be substantially more than that normally required by most children ...".

**3. Deputy Commissioner Mark Rowland 10.3.1993**

**children – substantially in excess**

CA/092/1992 (paragraph 5) held "In the case of a child, it is to be noted that the attention or supervision required must be "substantially in excess of that normally required by a child of the same age and sex" and there is a similar modification to section 35(1)(b)(ii). Attention or supervision may be required "substantially in excess of that normally required" either by virtue of the time over which it is required or by virtue of the quality or degree of attention or supervision which is required."

**3. Deputy Commissioner Mark Rowland 10.3.1993**

**children – substantially in excess**

CDLA/191/1994 held:

"11. In addition the DAT [*Disability Appeal Tribunal*] were required to consider whether Hayleigh's requirements were 'substantial in excess of the normal requirements of persons of her age'. The DAT found that Hayleigh's attention needs were different but not substantially in excess of the normal requirements of a person of that age. They rejected Dr Anderson's assessment because they found 'that considerable is not the same as substantial in excess'. I do not agree. Dr Anderson reported that the amount of attention and stimulation that Hayleigh needed was 'in considerable excess for that of a normal child of her age.' In my view 'considerable' is synonymous with 'substantial' in the present context. It would be pedantic in the extreme for me to conclude otherwise." [*My insert*].

**4. Commissioner R F M Heggs 9.3.1995**

**children – substantially in excess**

R(DLA)1/05 (CDLA/4149/2003 unreported) held:

"10. The word 'most' is no more part of the statutory terminology than the word 'many' and it is wrong to draw from my decision [*referring to CA/092/92*] the implication that the comparison to be carried out for the purposes of section 72(6)(b)(i) of the 1992 Act must be between the claimant's needs and those of a simple arithmetical majority of children. The word in the legislation is 'normal' and requirements may be normal notwithstanding that fewer than half the total number of children have them. However, there comes a point where the proportion of children who have the requirements is so small that the requirements can no longer be said to be normal, even though the total number of children affected may still be quite substantial. It is important to bear in mind that, in section 72(6)(b)(i), 'normal' describes 'requirements' and not 'child'. This is in contrast to section 72(6)(b)(ii), where the word 'normal' describes 'physical and mental health'. Section 76(2)(b)(ii) applies only where no child of the claimant's age in normal physical and mental health would have the same type of requirements as the claimant. It must also be remembered that section 72(6) comes into play only where it is accepted that the child suffers from physical or mental disablement and, as a result, has attention or supervision requirements sufficient to satisfy at least one of the conditions of section 72(1). Thus, before one gets to section 72(6), section 72(1) (excluding section 72(1)(a)(ii)) must be found to apply. Section 72(6) imposes an additional condition for children, not an alternative condition." [*My insert*].

**7. Commissioner Mark Rowland 26.8.2004**

**substantially in excess test – common condition (child nocturnal enuresis)**

CA/96/1984 concerned the case of an eight year old child who suffered from nocturnal enuresis. The findings/evidence pointed to the child's condition requiring a change of bed sheets and night-clothes twice in the night four nights per week and that the changes took between 20 to 30 minutes. The DMP in refusing the claim considered "nocturnal enuresis" as being a condition which was "relatively common" amongst children of the claimant's age.

The Commissioner confirmed that the "substantially in excess" test applied to claims on behalf of children and held:

"6. … In granting leave to appeal I indicated some concern that the DMP [*Delegated Medical Practitioner*] might be taken to have equated equated something which was relatively common with that which was not in excess of what was normal. If he had done so he would clearly have erred in law."

The Commissioner (paragraph 5) held that just because something was "relatively common" did not mean that it was "not in excess of what was normal." The Commissioner (paragraph 5) criticised the DMP for seemingly being influenced by the "irrelevant consideration" that the condition was "relatively common" pointing out that the real question that needed to be determined was whether or not "relevant attention" was required.

**9. Commissioner J G Monroe 16.12.1985**

**children – substantially in excess test**

CDLA/3525/2004 involved a 3 month old child who suffered with "maple syrup urine disease and reflux". In rejecting the appeal the appeal tribunal held that whilst it accepted that there was an arduous feeding regime it "bore in mind the guidance given in Commissioner's Decision CDLA/92/1992 (*note:* should be CA/92/1992) that the test imposed by section 72(6) is a stringent one. The learned author in *Medical and Disability Tribunals: The Legislation* comments that 'obviously the younger a child is, the more difficult it is for him or her to satisfy the additional conditions'."

The Commissioner held:

"9. Commissioner Rowland, who decided CA/92/1992, recently revisited the issue in CDLA/4149/2003. The case concerned a child aged 6 with continence problems. He reaffirmed his general views about the context in which, and the standard against which, the test of 'substantially in excess' is to be applied. I respectfully agree with that reaffirmation and adopt his reasoning as part of this decision. A copy of CDLA/4149/2003 is to be issued with this decision. The tribunal used the right approach.

10. How is it to be applied to a child born just weeks before the claim is made? The general guidance offered by the Department for Work and Pensions' medical advisers in *The Disability Handbook,* second edition 1998, (see www.dwp.gov.uk/medical/dhb) is:

> 33.3.1 *The non-disabled infant*
>
> An infant for the purposes of this text is taken to be a child aged less than one year old. Healthy infants require a great deal of attention in connection with their bodily functions. They must be fed, winded, changed and bathed frequently. In addition, if emotional development is to proceed normally, an infant must be handled, cuddled, talked to and played with regularly. Furthermore, during the time when the infant is sleeping periodic checks are made to ensure all is well.
>
> 33.3.2 *The infant with disabilities*
>
> Because of the amount of care and supervision/watching over required by a healthy infant, that required by an infant with disabilities may not usually be much greater than that needed by a healthy child. The kind of attention given may differ: for example, instead of being handled in the ordinary manner, the infant with disabilities may need more specific stimulation or formal passive movements of the limbs in the form of physiotherapy, but the amount of care or supervision/watching over may not be greater than that given to a healthy infant.

I am not sure how far the needs of an infant are a question of medical expertise as against general experience. The above appears to be something of both, but is a clear and practical statement of the approach to the needs of very young claimants. There is further guidance in chapter 43 of that guide on metabolic disorders in children, but it adds nothing of assistance in this case. The commentary to which the tribunal refers is currently in *Social Security Legislation 2004, Volume I, Non-Means Tested Benefits,* paragraph 1.212. This sets out the short passage quoted by the tribunal and also part of decision CA/92/1992, but takes things no further."

In final analysis the Commissioner held:

"12. The test of 'substantially in excess' in section 72(6) is essentially 'a matter of fact and judgement in each case' to quote the tribunal and to paraphrase R(A)1/87. It must be applied against the benchmark set in CA/92/1992 and CDLA/4149/2003, and by reference to the age of the claimant and a 'normal child' of that age. In that context what is 'substantially in excess' is partly a matter of general experience and partly a matter on which medical expertise is of particular relevance. But that makes it a question which a disability appeal tribunal is admirably equipped to decide. At the margins there will be difficult decisions, as in this case. But if the tribunal considers and evaluates all the available evidence, applies the statutory test against the proper benchmark, and properly explains how it reaches its conclusion in doing so, then its decision cannot be attacked as in error of law.

In particular, there is no basis on which the representative can challenge this tribunal for making an error of **law**, rather than **fact**, in its interpretation of 'substantially in excess'. The tribunal correctly understood that these are ordinary English words not open to further definition. As the House of Lords emphasised in *Secretary of State v Moyna* [2003] UKHL 44, R(DLA)7/03, 'there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law in deciding the case either way'."

**7. Commissioner David Williams 9.12.2004**

**enuresis and encopresis – children**

CSDLA/829/04 held:

"9. There are three separate stages, each of which must be satisfied before one moves to the next. The first two steps in the process are the same whether a claimant is an adult or a child. Firstly, the tribunal must be satisfied that the claimant has a physical or mental disablement within the scope of s.72(1). Chronic constipation, and any soiling which may result from it, may or may not amount to such. The critical point is set out by Mr Commissioner Rowland in paragraph 14 of R(DLA)1/2005, following a case of my own, CSDLA/552/2001 (the case citation is incorrect in paragraph 14 of R(DLA)1/2005). In CSDLA/552/2001, the claimant's accepted problem was eneuresis (*sic*) and in R(DLA)1/2005, as here, that of constipation and encopresis (faecal soiling).

10. Mr Commissioner Rowland agrees that eneuresis (*sic*) and encopresis can occur without any underlying physical or mental health disorder but rather as an emotional statement made by a child. In a new claim, the onus of proof on a balance of probabilities lies on the claimant: therefore, the mother must establish that the daughter's chronic constipation and any resultant problems are due to a physical or mental disablement. In R(DLA)1/2005 neither a tribunal nor the Commissioner were so satisfied, primarily because the child had no problems at school. The tribunal erred in law by failing to address this issue first, which necessarily arose in the particular circumstances.

11. Secondly, before one reaches the additional child condition, does the daughter satisfy the regular statutory criteria governing attention or supervision requirements set out in s.72(1) (albeit excluding s.72(1)(a)(ii))? Adequate findings of fact and reasons will be necessary in application of the contended statutory tests. In the present case, only attention with bodily functions for a significant portion of the day or frequent attention throughout the day appear to be in contention. Although the tribunal took obvious care with this appeal, it was insufficiently precise and appeared not to realise that attention in connection with the skin condition and with constipation and soiling had to be aggregated together when applying the statutory tests concerned with incidence of such attention.

12. If the daughter satisfies thus far, then consideration of the additional child condition set out in s.72(6) is required. At paragraph 7 of R(DLA)1/2005, Mr Commissioner Rowland quotes from paragraph 9 of his earlier unreported decision, CA/92/1992, in which he said:

> 'Attention or supervision is not to be regarded as 'substantially' in excess of that normally required unless it is outside the whole range of attention that would normally be required by the average child.'

13. The point is further well made by Mr Commissioner Rowland at paragraph 10 of R(DLA)1/2005:

> 'The word in the legislation is 'normal' and requirements may be normal notwithstanding that fewer than half the total number of children have them. However, there comes a point where the proportion of children who have the requirements is so small that the requirements can no longer be said to be normal, even though the total number of children affected may still be quite substantial.'

14. An observation of Mr Commissioner Rowland in CA/92/1992 (at paragraph 5) which was not repeated in his later case, but neither did he retract from it, was the following valuable comment:

> '… attention or supervision may be required 'substantially in excess of that normally required' either by virtue of the time over which it is required or by virtue of the quality or degree of attention or supervision which is required.'

15. Mr Commissioner Rowland continued with an example of what he meant by the above at paragraph 6 of CA/92/1992:

> 'The idea of a greater quality or degree of attention can be illustrated by considering meal times. A young child may require attention in connection with eating because he or she requires the food to be cut up. A disabled child of the same age may require attention in excess of that normally required by a child of the same age because he or she not only requires the food to be cut up but also requires it to be spooned into the mouth …'

16. It was therefore an insufficiently specific answer by the tribunal (amounting to error in law), having regard to the fact it accepted the mother must ensure the daughter ate a diet appropriate to her condition, that (with which I agree) any mother of a child of such age has control of the child's diet; this does not address the argument that what is required to constitute such control may be significantly more laborious. The mother must demonstrate a degree and extent of such extra effort which is 'outside the whole range of attention that would normally be required by the average child'.

17. I conclude that the tribunal erred in its approach to the present appeal by failing clearly to answer each of the above steps in the affirmative and only then moving to a later stage of the process. For all these reasons, it is appropriate to set aside the tribunal's decision."

See also CDLA/2699/2005.

**9. Commissioner LT Parker 14.2.2005**

**children – the correct route**

R1/97(DLA) held that in cases involving a person under the age of 16 there may be up to four issues arising out of the additional tests in sections 72(6) and section 73(4). The Chief Commissioner held:

"8. … In such cases I would suggest that the following are the issues which, again depending upon the facts, may require consideration:

A. Has the child a physical or mental disability?

B. If so, is the disability such that the child has requirements:

(a) as in section 72(1)(a)(i) (attention in connection with bodily function for a significant portion of the day)

(b) as in section 72(1)(b) (frequent attention or continual supervision throughout the day)

(c) as in section 72(1)(c) (prolonged or repeated attention or a need to be watched over at night)

C. If the child has any requirements of the description mentioned at B(a), (b) or (c) above, are those substantially in excess of the normal requirements of persons of his age? This is the first test as laid down in section 72(6)(b)(i)…, and requirements of each description which are established will require to be considered. In order to make the necessary comparisons, the tribunal will have to consider what the requirements of a normal child would be, and it would be at this stage that the totality of the claimant's needs - both disability-related and normal - would be taken into account.

D. If the requirements would not apply to a normal child of the claimant's age; but would apply to a younger child, are they substantial requirements? This is the second test in section 72(6)(b)(ii).

If the claimant is between the ages of 5 and 16, and there is any indication that he is seeking or might be entitled to the mobility component, the possible additional issues, over and above those common to all claimants, concern a need for guidance or supervision when walking out of doors as laid down in section 73(1)(d)... In such cases the following issues may arise:

E. Is the claimant able to walk, but so severely disabled physically or mentally that he cannot walk out of doors over unfamiliar routes without guidance or supervision from another person most of the time? (Section 73(1)(d)…).

F. If so:

(a) Does he require substantially more guidance or supervision from another person than normal child of his age would require? This is the first test laid down in section 73(4)(a)…, or

(b) Are his requirements for guidance or supervision those which a normal child of his age would not have? This is the second test in section 73(4)(b)..."

The Chief Commissioner (paragraph 8) held that while the above was "a formidable and no doubt daunting list of the possible issues which may arise" where the claimant was under the age of 16 it was acknowledged that "in most cases only some" would be relevant.

**8. Chief Commissioner R R Chambers 13.2.1997**

**children – the correct route**

CDLA/2699/2005 concerned the case of a four-year-old who was "very disruptive" and suffered "behavioural problems" by reason of "severe learning difficulties". The tribunal rejected evidence that the child suffered from ADHD. It held that that although they suffered from behavioural problems the appeal failed because they had "not been diagnosed as suffering from a recognised medical condition".

The Commissioner set the tribunal's decision aside finding that the tribunal's reasons were wrong on several counts. He held that the tribunal erred in law by looking only at the "medical evidence" to establish disability, confirming that disability was not a medical question and that the tribunal should have taken all the evidence into account i.e. that given by the mother and childminder (or a social worker if so directed).

The Commissioner held that that error may have arisen from the error of looking for "a diagnosable disease or medical condition" rather than a "physical or mental disability" (CDLA/1721/2004 a decision of a Tribunal of Commissioners).

The Commissioner also criticised the tribunal for assessing the evidence by reference to a "severe physical or mental disability" providing that the test is whether there is a disability (or more than one) not that the disability was in some way "severe", the severity being tested when considering whether the claimant is entitled to a specific level of DLA. In seeking to provide guidance to the new tribunal the Commissioner made reference to CSDLA/829/2004 (Commissioner Parker) which held that there the correct route for deciding a DLA claim for a child was to determine: first, whether there is a physical or mental disablement; second, whether any of the regular statutory criteria for attention and supervision are met; third, whether the additional test in section 72(6) is met.

The Commissioner held that he agreed that there were three operative tests each requiring a decision. He held however, at paragraph 15, that he was not sure that the "three questions can be severed from each other and determined exclusively in a set order in the practical context of evidence taking at a hearing."

The Commissioner (paragraph 16) held that there were "inherent difficulties" in applying the statutory tests to a claim for Disability Living Allowance for any claimant aged under 5 and offered the following guidance:

"(1) The decision is for the whole tribunal, drawing on the combined insight of all its members, including their personal knowledge of the abilities of young children. It is an exercise in 'drawing the line' which the tribunal, with three members drawn from differing backgrounds, is uniquely qualified to perform.

(2) The tribunal's first concern is to consider if the young child has a physical or mental disablement. As the Commissioner stated in R(DLA)1/05, a young child's inability to perform functions due to immaturity is not disablement. Where there is evidence that a young child has disruptive behaviour, the tribunal must consider whether the child's behaviour evidences some underlying physical or mental disablement – some functional physical or mental impairment or incapacity. If, on the balance of probabilities, there is no impairment or incapacity, then the claim must fail. In practice, this question may overlap with the question of a young claimant's needs as compared with those of other children of the same age. The tribunal may need to look at all issues and evidence before returning to decide whether this fundamental requirement for a claim is met.

(3) The issue of disablement is one of fact to be decided in the light of all the evidence. It should take into account any medical diagnosis or evidence that a specific disability is not present. But it is not limited to that. It should also take into account evidence of parents or others responsible for the child (noting any comparative insights that they can offer about the claimant and other children). And there may be evidence about incapacity or impairment available from a social worker, or the staff of a nursery or nursery school, or a childminder with care of the claimant. Evidence from those sources is also valuable when the tribunal has to decide on the needs of the claimant as against needs of other children of the same age.

(4) If there is disablement present (and also where the matter is one of doubt), the tribunal must consider whether any of the specific tests for the allowance are met. This will need separate consideration of care needs and of supervision needs if both are in issue. (Mobility is not usually in issue for children under 5, and never for children under 3). The tribunal must decide if the evidence shows that the disablement (or alleged disablement) is so severe that it meets one of the relevant criteria for payment of the care component.

(5) The tribunal must also consider whether the child 'has requirements… substantially in excess of the normal requirements of persons of his age'. Is the attention or supervision needed 'outside the whole range of attention [or supervision] that would normally be required by the average child': R(DLA)1/05 and CSDLA/829/2004.

Although this is put as a separate test, it will in many cases overlap with deciding about the specific statutory tests and in some cases also with the question of the presence of disability. In difficult cases where there is no clear diagnosis or there are other doubts that the statutory requirements are met, it may be useful to deal with evidential issues by (a) identifying the actual (as against claimed) needs of the child claimant for personal care and supervision, (b) considering if those needs are substantially in excess of those to be expected for a child of that age, (c) considering whether the excess is evidence of an underlying disablement and, if so, (d) considering whether those needs meet one or more of the statutory tests. But the tribunal must address the statutory questions in making its decision.

(6) The tribunal must take a broad view of the application of the tests as emphasised by the House of Lords in *Moyna v Secretary of State*, R(DLA)7/03, and applied to all decisions on disability living allowance by R(DLA) 5/05."

**8. Commissioner David Williams 7.11.2005**

**children – correct approach to care needs**

CSDLA/535/2007 held:

"11. How to approach care needs for a child is excellently set out by Mr Commissioner Rowland at paragraph 9 of CDLA/4100/2004:

'9. As a matter of strict analysis, it was necessary for the tribunal first to consider whether, as a result of disability (i.e., ignoring needs due to simple immaturity), the claimant required attention, supervision or watching over sufficient to satisfy any of the conditions in section 72(1) (other than section 72(1)(a)(ii)) and, if so, whether the amount of such requirements was sufficient to satisfy the condition of section 72(6)(b) having regard to the needs that a claimant of her age in normal physical or mental health would in any event have had through simple immaturity.

Of course, there is no reason why a tribunal should rigidly apply that two-stage process if it appears unnecessary to answer the first question because the second question can clearly be decided against the claimant. Nonetheless, it can be useful to bear in mind that there are two stages and not just one and that in dealing with the first stage care needs due solely to immaturity are to be ignored'.

12. I agree with the above, except to note that it is actually a three stage process because the first stage itself correctly splits into two; as the Tribunal of Commissioners put it at paragraph 42 of R(DLA)3/06:

> 'Therefore, in our view, section 72 raises two issues. (i) Does the claimant have a disability, i.e. does he have a functional deficiency, physical or mental? (ii) If so, do the care needs to which the functional deficiency give rise satisfy any of paragraphs (i) or (ii) of section 72(1)(a) to (c), and if so, which? ...'.

13. I call the third stage 'the additional child condition'. As Mr Commissioner Rowland rightly says, the process does not have to be rigidly sequential; this is because a 'no' at any stage negates entitlement. It can, however, be useful for a tribunal to keep in mind the converse position: that entitlement requires a positive answer to each of the three questions, and that the first two steps in the process are the same whether a claimant is an adult or a child. I am not, of course, suggesting that the taking of evidence during the hearing is constrained by the above process; but in making its determinations on the totality of that information, the above statutory framework must underpin a tribunal's decision.

14. However, evidence on the difference in this child's needs to that of other children may itself inform the tribunal's conclusions, when it answers the correct statutory questions in sequence; thus it may assist on the question whether he or she does indeed have a functional deficiency which cannot be avoided such that it amounts to the necessary disability, or on the incidence of any resultant reasonable requirements for help and whether they fit the strict statutory criteria on the necessary pattern of help.

15. So far as the additional child condition is concerned, Mr Commissioner Rowland has made further valuable comments in other cases. Thus, at paragraph 7 of R(DLA)1/05, the Commissioner quotes from paragraph 9 of his earlier unreported decision, CA/92/1992, in which he said:

> 'Attention or supervision is not to be regarded as 'substantially' in excess of that normally required unless it is outside the whole range of attention that would normally be required by the average child.'

16. The point is further well made by Mr Commissioner Rowland at paragraph 10 of R(DLA)1/05:

> 'The word in the legislation is 'normal' and requirements may be normal notwithstanding that fewer than half the total number of children have them. However, there comes a point where the proportion of children who have the requirements is so small that the requirements can no longer be said to be normal, even though the total number of children affected may still be quite substantial.'

17. An observation of Mr Commissioner Rowland in CA/92/1992 (at paragraph 5) which was not repeated in his later case, but neither did he retract from it, was the following valuable comment:

> '… attention or supervision may be required 'substantially in excess of that normally required' either by virtue of the time over which it is required or by virtue of the quality or degree of attention or supervision which is required.'

18. The Commissioner then continued with an example of what he meant by the above at paragraph 6 of CA/92/1992:

> 'The idea of a greater quality or degree of attention can be illustrated by considering meal times. A young child may require attention in connection with eating because he or she requires the food to be cut up. A disabled child of the same age may require attention in excess of that normally required by a child of the same age because he or she not only requires the food to be cut up but also requires it to be spooned into the mouth …'."

…

19. The tribunal did not tackle the initial question of how far the child's sleeplessness related to her functional impairment. Only care needs to which a functional deficiency gives rise may be taken into account. It appears (but this is now an issue for the new tribunal) that the child's continued wearing of nappies at night, and screaming when she was changed, was not linked to a relevant disablement. However, there was evidence that, at least to a degree, her sleeplessness related to her disability (see for example page 26, where in the claim it was said: "restless if her leg is sore") and this needed to be addressed by the tribunal. I held in CSDLA/567/2005 that soothing a child back to sleep can count as attention with a bodily function, provided the sleeplessness is linked to a disability."

At paragraph 20. the Commissioner held " The extent and type of supervision or attention (and the two may not be aggregated for the purposes of the statutory tests) required by a child of the same age as the claimant but in normal physical or mental health, may be different to that which arises on account of disability. It then becomes an issue of fact for a tribunal whether the claimant child requires a greater quality or degree of supervision or attention, as distinct from the duration of this help, such that it can be considered outside the whole range of what would normally be required by the average child…"

**8. Commissioner L T Parker 7.12.2007**

**children – substantially in excess/substantial requirements**

CDLA/2699/2005 confirmed (at paragraph 14) the test in section 72(6) of the Social Security Contributions and Benefits Act 1992. It held that s72(6)(b)(i) requires the child to have "… requirements… substantially in excess of the normal requirements of the person of his or her age". Whereas s72(6)(b)(ii) provides an alternative test of having "substantial requirements" that a younger child may have, but not children of the claimant's age. The Commissioner provided that the latter will "… rarely assist" in cases of pre-school children.

**8. Commissioner David Williams 7.11.2005**

**late development – mental disablement (nocturnal enuresis)**

R(DLA)1/05 (CDLA/4149/2003 unreported) involved a six year old child who suffered, amongst other conditions, episodes of nocturnal enuresis. The decision (paragraph 15) held that "…, it seems plain that a young child's inability to perform functions due to immaturity is not disablement within the scope of section 72(1) and so, where there is no identifiable physical problem in an older child, it is necessary to distinguish between unexceptional developmental delay and delay due to some mental disorder".

At the appeal hearing the tribunal excluded physical disablement as a cause of the enuresis because evidence showed that the child did not soil or wet when she was at school. The tribunal went on however, to have accepted that the night-time incontinence was due to mental disablement, yet there was no explanation for the apparent acceptance.

The Commissioner (paragraph 16) held that in his view, the tribunal's reasoning for mental disability should have been along the following lines:

"Although it is not normal for six year olds to suffer from nocturnal enuresis, it does happen in a significant number of cases where there is no physical or mental disablement and in those circumstances, given also the lack of any other evidence of physical or mental disablement, it is not established that the nocturnal enuresis is caused by any physical or mental disablement in this claimant's case. However, if the problem persists, there will be a greater reason to suspect that there is physical or mental disablement and there should then be further investigation and a claim for benefit may be justified."

**7. Commissioner Mark Rowland 26.8.2004**

**children**

CDLA/4100/2004 held:

"9. As a matter of strict analysis, it was necessary for the tribunal first to consider whether, as a result of disability (i.e., ignoring needs due to simple immaturity), the claimant required attention, supervision or watching over sufficient to satisfy any of the conditions in section 72(1) (other than section 72(1)(a)(ii)) and, if so, whether the amount of such requirements was sufficient to satisfy the condition of section 72(6)(b) having regard to the needs that a claimant of her age in normal physical or mental health would in any event have had through simple immaturity. Of course, there is no reason why a tribunal should rigidly apply that two-stage process if it appears unnecessary to answer the first question because the second question can clearly be decided against the claimant. Nonetheless, it can be useful to bear in mind that there are two stages and not just one and that in dealing with the first stage care needs due solely to immaturity are to be ignored."

**7. Commissioner Mark Rowland 21.7.2004**

**children – attention**

CA/092/1992 (paragraph 6) held "The idea of a greater quality or degree of attention can be illustrated by considering meal times. A young child may require attention in connection with eating because he or she required the food to be cut up. A disabled child of the same age may require attention in excess of that normally required by a child of the same age because he or she not only required the food to be cut up but also required it to be spooned into the mouth. The fact that the child will be supervised anyway is irrelevant: there is still an additional requirement for attention. Whether such additional attention, taken with any other additional attention requirements is 'substantial' and 'frequent... throughout the day' are matters of judgment to be determined in each case…".

**3. Deputy Commissioner M Rowland 10.3.1993**

**children – supervision**

CA/092/1992 (paragraph 7) held "… Because young children normally require continual supervision throughout the day in order to avoid substantial danger to themselves, the focus will be on the quality or degree of supervision. Thus a very young, immobile baby or an older child might normally be regarded as being adequately supervised by a person who was getting on with his or her own chores in a different part of the home. On the other hand, a disabled child of the same age may need much closer supervision amounting, perhaps, to being watched over. That would be supervision in excess of that normally required. Again, it is necessary to consider whether such additional supervision is 'substantially' and 'continual… throughout the day' and those may be significant limiting factors."

**3. Deputy Commissioner M Rowland 10.3.1993**

**child – frequent attention/significant portion**

CDLA/3217/2004 involved a case of a child aged 3 years and six months who suffered "asthma, eczema and delayed speech development". The tribunal found that the child required assistance with "use of an inhaler, application of cream, and assistance with his language development" and held that whilst this amounted to frequent attention throughout the day the level of help was "not wholly outside the range of attention given to any child of 3½, without a disability". The tribunal also found that the child did not need "constant supervision in order to avoid danger to himself or others, of a quality different from any other 3½ year old without his disability."
Leave to appeal was granted by the chairman on grounds that the tribunal did not consider whether the child was entitled to the lowest rate of the care component by reason of a need for attention for a significant portion of the day.

The Commissioner held:

"6. The statement of reasons certainly contains no mention of the condition for the lowest rate. It may be that the tribunal reasoned, consciously or subconsciously, that since it was finding that that (*sic*) the claimant did require attention frequently throughout the day, but not substantially in excess of the normal requirements of persons of his age, it was implicit that his need for attention for a significant portion of the day was also not substantially in excess of the normal requirements of persons of his age. The condition in s.72(6)(b)(i) of the Social Security Contributions and Benefits Act 1992 is that "he has requirements of a description mentioned in subsection (1)(a), (b) or (c) above substantially in excess of the normal requirements of persons of his age." It must be the case that every child of the Claimant's age requires both frequent attention throughout the day and attention for a significant portion of the day. It is possible that a child of that age might, by reason of disability, require additional attention for only one part of the day (solely for an hour in the morning, for example). Such a child might, it seems to me, be held to qualify for the lowest rate of the care component without also being held to qualify for the middle rate of the care component. It is therefore possible, it seems, for a very young child, who necessarily requires frequent attention throughout the day, to be found entitled to the lowest but not the middle rate of the care component. In the claimant's case, however, there is the additional factor that the Tribunal did expressly find (… i.e. "use of an inhaler, application of cream, and assistance with his language development") that the additional attention which he required by reason of his disability was frequent throughout the day (but that his overall need for frequent attention throughout the day was nevertheless not substantially in excess of the normal requirements of a person of his age). It is perhaps arguable that it followed from that finding that his overall need for attention for a significant portion of the day was also not substantially in excess of the normal requirements of a person of his age. However, I do not think that did necessarily follow. The answer to the question what is substantially in excess of the normal requirements of a person of the claimant's age may differ according to whether one is looking at a need for attention frequently throughout the day or a need for attention for a significant portion of the day. If and so far, therefore, as the Tribunal did reason along the lines which I have indicated, I think that it needed to make that reasoning express. The conclusion did not necessarily follow from the express findings which it made about the middle rate. As the tribunal chairman gave permission to appeal on this ground, and the Secretary of State has supported the appeal on that ground, I think it right to set aside the Tribunal's decision on this ground."

**7. Commissioner Charles Turnbull 30.11.2004**

**terminal illness (child)**

R(DLA)1/99 (CDLA/1304/95*22/97 unreported) confirmed the following points:

- for the care component Section 72(5) (the "substantially in excess" rule etc) does not apply to a child who is terminally ill within the meaning of Section 66(2).
- for the lower mobility component Section 73(4) (the "substantially more guidance or supervision" rule) does apply in the case of a terminally ill child.
- the award of benefit under the terminally ill rules "should run from the date on which it could be said, with reasonable certainty, that the claimant was terminally ill and that is, under Section 66(2)(a), the first date on which the claimant's death, in consequence ....., could be reasonably anticipated".
- awards should not be for a period of six months but for the remainder of a claimant's life.

**4. Commissioner J M Henty 6.3.1997 (reported 9.3.1997)**

**assistance at school (blind child)**

R(DLA)1/04 (CDLA/3737/2002 unreported) concerned the case of a child who "suffers from Leber's hereditary optic neuropathy, a disease of the eyes which significantly limits both her distance and near vision". The evidence showed that the claimant required a variety of assistance when at school.

The questions which needed to be resolved were whether that assistance amounted to "attention" in connection with their "bodily functions" and whether an on-going award could be made because the need was only during term time.

The decision held:

"8. The Secretary of State's submission, in opposition to the appeal, is that the 'assistance required was with [the claimant's] educational needs rather than with any bodily function', and further (see the Secretary of State's further submission in response to my Direction dated 10 December 2002) that 'the use and provision of different forms of written materials does not meet the test in R(A)3/94'. That test was stated as follows: 'Attention is 'in connection with a bodily function' if it provides a substitute method of providing what the bodily function would provide if it were not totally or partially impaired.'

9. In my judgement there can be no doubt that the measures referred to in the report are 'in connection with' the bodily function of seeing. They enable the claimant to see more easily materials which she would otherwise have difficulty in seeing. The point made by the Secretary of State, as I understand it, is in effect that any school child would require a substantial degree of attention by a teacher, but that would be with reference to the function of education, not in connection with any bodily function.

However, that in my judgement misses the point that the specific measures outlined in the report are either to enable the claimant to see more easily exactly the same materials which the other children see, or to enable her to see substitute materials imparting the same information. If the measures amount to 'attention', for that reason they in my judgement clearly amount to attention 'in connection with a bodily function', namely the function of seeing.

10. Further, there can in my judgement be no doubt that the claimant's reason for wishing to see that information, namely in order to be educated at school, is well within the range of purposes for which assistance with bodily functions can reasonably be required for disability living allowance purposes. In *Fairey* R(A)2/98 it was held by the House of Lords that the yardstick of a 'normal life' was important. If assistance to undertake a reasonable degree of social activity can be reasonable, then assistance in order to enable a child to be educated efficiently must be.

11. The only question of difficulty is in my judgement the extent to which the relevant measures constitute 'attention'. It has been said many times that this concept involves personal service of an intimate nature. It need not involve actual physical contact, but must be carried out in the presence of the claimant (with perhaps certain very limited exceptions – see for example the recent decision of the Court of Appeal in *Ramsden v. Secretary of State for Work and Pensions* [2003] EWCA Civ 32, where previous authority is reviewed in some detail). I have no doubt that the *obtaining* or *preparation* of some of the materials recommended by the report (e.g. desk copies of board work, large print books etc) would not constitute "attention". Those operations could, and indeed for the most part would, be done in the absence of the claimant, indeed very probably outside school hours and to some extent outside the school premises. Similarly, in so far as the measures involve the initial devising and putting in place of a *system* which will assist the claimant e.g. that she always sits in a particular position, has access to certain materials etc, the element of personal service is absent, and in any event the initial putting in place and subsequent modification as necessary of the system would be unlikely to take place with sufficient frequency as to be significant for disability living allowance purposes. The subsequent monitoring of such systems (e.g. a teacher simply checking that the claimant is indeed sitting in the designated position) would also not generally, it seems to me, amount to 'attention', but rather to supervision. I have, however, come to the conclusion, looking at the matter broadly, that measures of the nature indicated in the report are likely to involve a teacher or classroom assistant actually intervening, with specific reference to the claimant, in a manner which amounts to 'attention', on a significant number of occasions throughout the average school day. The sort of examples I have in mind, arising from the measures outlined in the report, are (a) the need actually to hand to the claimant desk copies of board work etc on each occasion on which it is required, (b) the need actually to alter the claimant's seating position, whether in class or (perhaps more particularly) in other school activities, when it is found that she is not in fact in the most appropriate position (c) the need to check the claimant's work while she is doing it, to a perhaps greater extent than would be normal, to make sure that she is not in fact being disadvantaged (particularly in relation to the specific examples mentioned in the report of literacy and numeracy) and (d) the need to provide additional support during games and other communal activities. On balance, I conclude that attention of this nature would be needed frequently throughout the average school day, and would be required to an extent which is substantially in excess of that required by a child of the claimant's age without disability.

12. That level of attention is, however, required only on weekdays during the school term. I see no reason to depart from the tribunal's finding that, on other days, the only respects in which the claimant required attention in connection with the bodily function of seeing were with dressing and cutting up food, and that such attention would not be either for a significant portion of the day or frequently throughout the day.

13. The findings which I have made raise an issue as to the period (if any) for which an award of the middle rate of the care component could be made. By s.72(1) of the 1992 Act a person shall be entitled to the care component for 'any period throughout which' the relevant conditions are satisfied. By s.72(2) a person shall not be entitled to the care component unless (a) throughout the period of 3 months immediately preceding the date when the award would begin he has satisfied or is likely to satisfy the relevant conditions and (b) he is likely to continue to satisfy one or other of the relevant conditions throughout the period of 6 months beginning with that date.

14. In CDLA/6784/1999 Mr. Deputy Commissioner Mark held, on somewhat similar facts to those which I have found in the present case, that the conditions were satisfied 'throughout' the period from the beginning of the autumn term in each year to the end of the following summer term, but that they were not satisfied during the summer holidays. He held that the result was that entitlement ceased at the end of the summer term, and that the 3 month qualifying period in s.72(2) had to be satisfied from the beginning of each autumn term, so that entitlement did not begin again until about the beginning of December. There was therefore entitlement from about the beginning of December to the end of the summer term in each year, but not for the rest of the year.

15. That decision was set aside, with the consent of the parties, by the Court of Appeal, because, among other things, it overlooked Reg. 6 of the Social Security (Disability Living Allowance) Regulations 1991, which has the effect that where the conditions become satisfied again within two years of previous entitlement, the 3 month qualifying period need not be served again. It was also agreed, in the statement of reasons signed by the parties for making the Court of Appeal's consent order, that the Deputy Commissioner:

> 'did not adopt the correct approach when deciding if the claimant was entitled to the care component of DLA and as a result he failed to follow the decided cases. Instead of defining the 'period throughout which' the conditions in s.72(1)(b)(i) were satisfied as the four separate school years during the operation of the claim, he should have taken a broad view and considered if most of the time throughout the claim period 9 February 1996 to 20 September 1999, the claimant's care needs were sufficient to entitle him to an award. If appropriate, he should have made an award for the entire period.'

The agreed order was to remit the matter to a fresh appeal tribunal. The authority particularly relied upon was R(A)2/74, which concerned a person who required renal dialysis for about 10 hours a night on 3 days a week. The Chief Commissioner there said that a strictly mathematical approach was not necessarily appropriate, and that 'the delegate should take a broad view of the matter, asking himself some such question as whether in the whole circumstances the words in the statute do or do not as a matter of the ordinary use of the English language cover or apply to the facts'. I propose to direct myself in accordance with that view of the law.

16. On balance I take the view that, looking at an academic year (i.e. approximately from the beginning of September to the middle of July) broadly, the Claimant does require the necessary level of attention in connection with her bodily function of seeing throughout the year. Like Mr. Deputy Commissioner Mark, I have no great difficulty in reaching that result up until the end of the summer term, and on balance I do not think it would be right to separate out the summer holidays, notwithstanding that they form a continuous period of 6 weeks or so each year when, if looked at on its own, the conditions are not satisfied. It is in my judgement probably permissible (see para. 33 of R(A)2/74) to take into account the fact that the claimant has some attention needs in connection with her bodily function of seeing even when at home, albeit not sufficient to satisfy the care component conditions."

Note: The DWP appealed against this decision to the Court of Appeal (Secretary of State for Work and Pensions v Hughes (*minor*) [2004] EWCA Civ 16, Tuckey and Jacob L.JJ and Sir Martin Nourse – reported as R(DLA)1/04). The main area of dispute was the Commissioner's award of the middle rate care component. The DWP did not accept that attention needs at school amounted to attention throughout the day. In the course of the proceedings it was noted that the Secretary of State had not previously made submissions on this particular issue either before the tribunal or the Commissioner. The Court of Appeal stated that it was of the utmost value to have had the Commissioner's views on the matter and seeing as the point had not been raised this was not done. For these reasons the Court of Appeal declined to hear the case.

**6. Commissioner Charles Turnbull 26.2.2003**

**bodily functions – blind child**

CSDLA/655/2002 concerned a case involving a young child where it was accepted that they would "never have any vision". At the core of the decision was whether the assistance provided by the parents in relation to what they should do in raising a child with a sight disablement amounted to "attention in connection with (the claimant's) bodily functions".

The advice provided by a "visual impairment support teacher" included:

- not allowing the claimant to lie unattended in their cot while wakened, but to carry them around to introduce them to the world by tactile means
- constantly stimulating them by varying toys they are given
- to assist them to develop sitting up skills (a skill that a sighted child would develop at 6 to 8 months) by parent supporting them in a sitting position and then gradually reducing the amount of support and introducing/changing toys that would entice them to reach forward instead of back
- educating other members of the family in the appropriate ways of handling the claimant to ensure they did not become tactile defensive.

The decision held:

"12. I consider that carrying the child around to introduce her to the world by tactile means and what was involved to enable the claimant to sit up unsupported could properly be regarded as attention in connection with the bodily function of sight, if that evidence is accepted by the fresh tribunal. Both these matters seem to me to be consistent with the approach taken by the Court in *Cockburn* and *Mallinson*, although the tribunal will have to make clear findings as to what is actually done. It is not clear to me how constantly stimulating the claimant by varying the toys she is given could constitute attention for it is not clear to me what substitution is being provided in connection with the bodily function of sight. I accept Mr Bartos' [*representative for Advocate General*] submission that educating other members of the family cannot be regarded as attention in connection with the claimant's bodily functions for that is too remote from the claimant herself." [*My insert*]

**6. Commissioner D J May QC 29.4.2003**

**child – weight of school report**

CDLA/3779/2004 involved the case of a 10 year old boy who had albinism, asthma and partial sight. A school report provided to support the child's claim stated that the claimant needed "help when walking over rough terrain, that he had been taught road safety awareness and did have more falls than other children of his age due to his visual impairment, but which otherwise identified no particular attention or supervision needs". The child was awarded the lower rate care and lower rate mobility components. The mother wanted middle rate care arguing a need for continual supervision.

At the point of the decision being revised the mother had submitted a report from a "Young Persons Inclusion Worker", which stated "that the claimant had difficulty recognising him and setting out tasks which the claimant was unable to do for himself, and a copy of a letter which the claimant's mother had sent expressing concern about the number of injuries which the claimant was incurring at school". By the time of the appeal a report was submitted by the "consultant community paediatrician" who was treating the claimant. This set out the effects of the child's albinism, and stated that the child's glasses did not totally correct their vision.

The tribunal in dismissing the appeal confirmed the award of lower rate mobility but removed the award of the care component. In doing so they said that they preferred the "evidence of the school report to that of the GP, the claim form, the independent youth worker and the oral evidence. The report was impartial and based on the observations of the appellant during a school day."

The Commissioner held:

"8. The school report in this case was similar to school reports obtained in connection with disability living allowance claims in other cases such as this, in that it failed to identify any specific supervision needs. Such reports are sometimes used by decision makers as a basis for rejecting the evidence of other professionals concerned with the care of a child, and in this case actually led the tribunal to say that they rejected the evidence of a consultant community paediatrician who was treating the claimant (wrongly described by the tribunal as the claimant's general practitioner).

9. Although a school report will very frequently contain valuable evidence in a claim for disability living allowance by a school-age claimant, it is necessary to have particular regard to the nature of the school environment when evaluating such evidence in relation to the evidence of other witnesses. Young children at school have to be more or less continually supervised for the school to function properly, so that a child with a disability may not need supervision over and above that which is normally given to all other children while attending school. However, children with disabilities may need supervision beyond that needed by other children when outside the school environment in order to avoid substantial danger to themselves or others, and it is that supervision which needs to be considered when deciding entitlement to care component. Evidence from a school should therefore be considered along with all the other evidence concerning a child's care needs in deciding whether the claimant can safely be left unsupervised and whether the child requires substantially more care from another person than children of their age would normally require.

10. I do not regard the evidence from the school in this case as necessarily inconsistent with the evidence from other sources. The evidence from the Young Persons Inclusion Worker dealt with the specific tasks of making toast and hot drinks, which were not tasks the claimant would perform at school. The consultant community physician dealt with sensitivity to sunlight and impairment of the claimant's vision, neither of which were dealt with in detail by the school. The school confirmed that the claimant did have more falls than other children in the playground (perhaps suggesting a very significant degree of visual impairment), and the risk of such falls to the claimant needed to be evaluated in the light of the evidence of the claimant's mother that more precautions needed to be taken by the school. I can find nothing in the evidence given by the claimant's mother at the hearing of the appeal which was necessarily inconsistent with the school report. In rejecting the evidence of the claimant's mother and the evidence which supported her for that reason, I consider that the decision of the tribunal was erroneous in point of law."

See also CDLA/1797/2007.

**7. Commissioner E A L Bano 2.2.2005**

**conflicting evidence – school report vs. parental evidence (ADHD)**

CDLA/1797/2007 involved the case of a child with attention deficit hyperactivity disorder (ADHD). Following a claim for Disability Living Allowance the DWP obtained a report from the child's class teacher in which he/she described the child as being "a middle ability child [who] is making steady progress in [speech/language, communication and academic ability]" and "friendly, hardworking and likes to please".

The report added that the child could "call out rather a lot but that they were always on task and that this was probably due to enthusiasm rather than any underlying problem." In response to a standard question on attitudes to road safety the report described the child as "very sensible and reliable when taking part in trips out of school activities" (*sic*). The decision maker duly refused the claim.

The child's mother sought representation from the Citizens Advice Bureau (the CAB) who wrote to the DWP asking for the decision to be reconsidered, noting that the child had been diagnosed with ADHD, for which she was prescribed medication which had a limited effect, and that the child had regular consultations with a child psychiatrist. The letter explained that the child's mother had described in detail the problems the child experienced including difficulties in a lack of concentration and impulsiveness. It was explained that the child routinely breaks and smashes things up, fights and causes injury to her younger siblings and was unable to respond to even simple requests and instructions. It was also stated that the child had no sense of danger or fear and could not be trusted to complete even the most simple and straightforward of tasks without an argument or intensive one to one support.

The letter referred to further evidence being obtained, but this was not supplied. The decision was reconsidered but not revised, the decision maker accepting that the report from the school "where [the claimant] spends a great deal of her time indicates no additional supervision needs and road safety awareness appropriate for her age".

The child's mother appealed and asked for a paper hearing. There was no representation by either party at the tribunal. The appeal was heard and dismissed.

The statement of reasons recorded the child's difficulties as set out in the claim form, the class teacher's report and the letter from the CAB mentioned above. The tribunal observed:

> 'Having read all these papers, one would think that the CAB were describing an entirely different child to that described in [the teacher's] report. We are satisfied that [the teacher] will know [the claimant] very well; he is her class teacher; she will be under his care for may be 5 hours a day and he has not a single adverse comment to make. We are satisfied that his account is correct and accurately describes [the claimant] whilst at school. It is difficult to know what to make [of] the CAB's account because [the claimant's] mother has not attended the Tribunal and so an assessment of the credibility of her statement is difficult...'

The tribunal concluded that it appeared that the claim had been "substantially exaggerated", and that the child would "require the help and attention that any normal seven year old would require" but not more than that.

An appeal was made against this decision through the CAB, who submitted that the tribunal had addressed the question of the child's behaviour in relation to her care and supervision needs whilst at school and acknowledged that this dealt with her needs for approximately 5 hours during the day. However it had failed to take into account the points made in CDLA/3779/2004 (Commissioner Bano) and had failed to address the issue of the child's needs in relation to Disability Living Allowance whilst not at school.

In granting leave to appeal the Upper Tribunal Judge observed:

> "As the tribunal commented, on reading the papers one would think that the CAB was describing an entirely different child from that described by her class teacher. That does not appear to be an unknown phenomenon with ADHD. As the tribunal notes, the teacher sees the claimant for maybe 5 hours a day, not the whole day. Given the great disparity in the evidence, should the tribunal have considered an adjournment to give the claimant's appointee, her mother, an opportunity to attend and explain her assertions as to the claimant's behaviour?"

The decision held:

"8. The Secretary of State supports the appeal and that the tribunal should have adjourned, observing:

> '4. When faced with wildly conflicting evidence, it is often the case that a tribunal will find that part of the evidence it has rejected unconvincing and, in this instance, exaggerated. Granted this tribunal was given two sides to the story that on the face of it could not be reconciled, but, from just a paper hearing, was this line of thinking justified? Was there enough in the evidence to justify the tribunal in coming to the decision it did? Why was the claimant's mother's evidence considered to be exaggerated? On the one hand we have a teacher's report that describes almost exemplary behaviour by the claimant and on the other we have evidence from the claimant's mother and the Citizens Advice Bureau (CAB) describing a particularly disruptive child. In preferring the evidence of her school teacher, the tribunal reasoned that as the child was under his care for 5 hours per day and that he knew the child well then his account was correct. This, of course, is not a totally convincing argument, and such circumstances could equally be true of the claimant's mother. Outside of a school day too, there was sufficient hours left for other care and mobility needs (see pages 3 to 42) to reach the required threshold.'

9. He then sets out Mr Commissioner Bano's decision in CDLA/3779/2004 where he said:

> '9. Although a school report will very frequently contain valuable evidence in a claim for disability living allowance by a school-age claimant, it is necessary to have particular regard to the nature of the school environment when evaluating such evidence in relation to the evidence of other witnesses. Young children at school have to be more or less continually supervised for the school to function properly, so that a child with a disability may not need supervision over and above that which is normally given to all other children while attending school. However, children with disabilities may need supervision beyond that needed by other children when outside the school environment in order to avoid substantial danger to themselves or others, and it is that supervision which needs to be considered when deciding entitlement to care component. Evidence from a school should therefore be considered along with all the other evidence concerning a child's care needs in deciding whether the claimant can safely be left unsupervised and whether the child requires substantially more care from another person than children of their age would normally require'.

10. The Secretary of State also submits that whilst it may be true that the claimant has no specific supervisory or care needs at school, the additional attention that is said to be required getting the claimant in and out of bed and taking her medication might itself equate to sufficient periods during the day to qualify for the lowest rate of the care component. He also notes that the tribunal made no reference to the claimant's medication, although it could be inferred from page 20 that she was under medication whilst at school (in the claim form it is indicated the claimant has both day- and night-time medication). He posits that the question as to why the child's medication worked so well in school but maybe not at home would have been worthy of the tribunal's investigation, and, he submits, this could not have been answered without the direct input of the claimant's mother. I accept that it is not unknown for the effects of medication to wear off as the day proceeds. It is then a question of fact as to the claimant's behaviour later in the day when she is released from the confines of school to cope with the normal extra curricular activities, and whether she has attention or supervision needs which fall within the legislation, and if so, whether they arise from disablement. Without the mother's presence it was not possible to examine this aspect, which had been raised before the tribunal separately by both the mother and her representative.

11. As it was so contradictory, it was not sufficient for the tribunal simply to say that the teacher sees the child for 5 hours a day, and his evidence is therefore to be preferred to that of the mother whose claim was dismissed as 'substantially exaggerated' without any reason for this being given, particularly in the light of the claimant having been diagnosed as ADHD, being on medication and seeing a psychiatrist quarterly. Whilst it is not the diagnosis itself of a medical condition which will satisfy the criteria of an award of disability living allowance, when such aspects are present, there does need to be some reasoned explanation as to why the evidence submitted of problems is not accepted. For instance this may well be that although a child may have problems and needs substantially in excess of the normal requirements of persons of his/her age or that s/he has substantial requirements which younger persons in normal physical and mental health may also have but which persons of his/her age and in normal physical and mental health would not have, nonetheless these do not reasonably require attention from another person, or supervision, for a sufficient period of time during the day or night to enable him/her to satisfy the criteria for any award of either component of disability living allowance.

12. Given the stark contrast in the evidence, it would therefore have been proper for the tribunal to adjourn to allow the claimant's mother an opportunity to attend with or without the further evidence that had previously been suggested, to put her case. Even apart from that, the tribunal's reasons for accepting the teacher's evidence rather than that of the mother and her representatives, were not adequate, as they were simply not given."

The Upper Tribunal Judge set aside the decision of the tribunal and held that the appeal should be remitted to a differently constituted tribunal who should hold an oral hearing and make and record full findings of fact on all necessary points, with reasons for its acceptance of the evidence which is preferred and why the other evidence is rejected, and taking into consideration the Secretary of State's observations set out in paragraph 8 above and those of the Commissioner in CDLA/3779/2004 set out in paragraph 9.

See also CDLA/3779/2004.

**9. Commissioner E A Jupp 8.4.2008**

**needs at school – diabetes and continual supervision (child)**

CDLA/4961/01 serves to underline the requirement to examine attention/supervision needs when at school in terms of the "throughout the day" limb. The appeal concerned the case of a child (aged 14 at the date of appeal) who had diabetes. The Commissioner held that there was a need for "continual supervision" because the "diabetes was not controlled" and it was clear that the child needed and received supervision at school.

The Commissioner held:

"9. … (a) The blood levels fluctuate, and a constant eye has to be kept on the insulin dosage required. Further, I would add that it seems to me quite inappropriate that a girl of the claimant's age, who understandably dislikes injections, should be expected to supervise the necessary monitoring, or indeed possibly, even to give the injections by herself. This seems to me to be a *Moran* situation and the risks involved are certainly not too remote, since there appears to be evidence of quite frequent glyco attacks."

**6. Commissioner J M Henty 13.5.2002**

**lower mobility – familiar and unfamiliar routes?**

R4/04(DLA) (C21/03-04(DLA) unreported) concerned an appeal involving a profoundly deaf child, where the tribunal had held that the lower rate mobility component could not be awarded because it had not been demonstrated that the claimant's guidance or supervision needs on "unfamiliar routes" were substantially in excess of those required by a child of a similar age. The case centrally examined the extent to which the ability to walk (take advantage of the faculty of walking) on familiar and unfamiliar routes should be considered.

Following reference to a number of authorities including CDLA/4806/2002 (Deputy Commissioner Ovey) and R(DLA)4/01 (Commissioners Machin, Mesher and Lloyd-Davies) the decision held:

"27. It appears to me quite evident from the words in section 73(1)(d) that the overall ability of the disabled person to take advantage of the faculty of walking is the starting point. That being so this will involve considering the ability to do so whether on familiar or unfamiliar routes. If needs on unfamiliar routes only were to be considered there would be no need for the specific disregard of the ability to use familiar routes alone. The ability, if there is any, to use familiar routes on his own is then to be disregarded. This does not mean that a person who has no ability to use familiar routes is to have his needs for supervision considered only on unfamiliar routes. If he has an ability to use familiar routes on his own this ability to be disregarded. The disregard may be most helpful in deciding whether he requires guidance or supervision 'most of the time'. In practice it may avoid having to enter into examination of when familiar and unfamiliar routes are used and for how long.

28. As Deputy Commissioner Ovey stated this matter is unlikely to be of any great importance in the case of an adult claimant but it can be significant in the case of a disabled child. This is because of the comparison which is required to be made in the case of a child by section 73 (4). To give a hypothetical example, it may be that a non-disabled child would not be found to require supervision on familiar routes though would require supervision on unfamiliar routes whereas a disabled child might be considered to require supervision on both, i.e. there is no ability to be disregarded. The authorities are consistent, and I agree that the ability to use familiar routes on his own must be disregarded in the case of the non-disabled child, as in that of the disabled child. However when making the comparison demanded by section 73 (4) in the above example there will be no ability to be disregarded for the disabled child but an ability to be disregarded for the non-disabled child. I will try, as Mr Fletcher did in the written submissions, to give a numerically based illustration: -

Non-disabled child (NDC)

| | |
|---|---|
| Supervision (full ability on his own), requirement on familiar routes | = 0 |
| Supervision on unfamiliar routes | = 9 |
| | 9 |

Disabled child (DC)

| | |
|---|---|
| Supervision (no ability on his own), requirement on familiar routes | = 9 |
| Supervision on unfamiliar routes | = 9 |
| | 18 |

If NDC and DC are compared only over unfamiliar routes their supervision requirements are the same at 9 each. If they are compared over all routes their supervision requirements are very different. This remains so even when the ability to use familiar routes alone is disregarded, as it should be, in both cases. NDC has ability which is disregarded. DC has no ability to disregard.

29. In relation to this case I come to the Tribunal's reasons for the decision. The first paragraph of the reasoning reads: -

> 'Having heard all the evidence and having read the reports provided by [*the claimant and her husband*] we are not convinced that they have demonstrated that [*the claimant's son*] has needs substantially in excess of that required by a child of a similar age to [*the claimant's son*] but without [*the claimant's son's*] disability that means he needs guidance or supervision to enable him to get around on unfamiliar routes.'

As I stated above it does not appear from the evidence that any distinction was being made by the child's parents between his ability to walk unsupervised on familiar routes and on unfamiliar routes. They appear to me to be contending that his deafness essentially affected him in the same manner on whatever routes he was on. The first paragraph of the reasoning does, however, indicate that the Tribunal may well have been applying the wrong test, i.e. the test of considering only the ability to walk on unfamiliar routes. That is the incorrect starting point. The starting point is the child's ability on any routes whether familiar or unfamiliar. Then the ability to use familiar routes on his own is to be disregarded. If he has no such ability then there is no disregard to be made. The Tribunal here seems to have begun by considering only the ability to walk out of doors without guidance or supervision on unfamiliar routes. As stated above the matter becomes of particular relevance and importance when the comparison between the child with a disability and a child without a disability is made. The Tribunal here has stated:

> 'The Tribunal recognise that all children of 8 would on unfamiliar routes require guidance and supervision however [*the claimant and her husband*] did not demonstrate that any extra attention [*the claimant's son*] needed was substantially in excess of that required by other children.'

From that passage and the passage extracted earlier it appears that the Tribunal, in making the required comparison, did so only on the consideration of the needs on unfamiliar routes and did not deal with whether the disabled child or non-disabled child had such needs on familiar routes. That, in my view, is an error of law and I set the Tribunal's decision aside for that reason."

**7. Commissioner Moya F Brown 16.7.2004**

**substantially in excess test – the correct approach – six year old child**

BM v Secretary of State for Work and Pensions (DLA) – [2015] UKUT 0018 (AAC) – CDLA/3048/2013 held:

"21. The issue of the proper approach to section 72(1A)(b), and in particular the meaning of the two subparagraphs (i) and (ii) within the subsection, lay at the heart of this appeal.

22. The parties developed and modified their positions between the grant of permission to appeal and the hearing.

In essence Mr Robinson [*representative for the Secretary of State*] submitted that there is a difference between subparagraphs (i) and (ii) and that the First-tier Tribunal had erred in that it addressed the application of subparagraph (i), at paragraph 16 of its reasons, but had not addressed (ii). He submitted that subparagraph (ii) is more appropriate to the circumstances of a child with developmental delay. [*My insert*]

23. The Secretary of State's representative, in written submissions, submitted that the tests in (i) and (ii) are very similar so that if, as in this case, the tribunal finds that the claimant required no substantial extra care as compared to a 'normal' child of the same age then neither limb can be satisfied. He submitted that a child could satisfy (i) alone but not (ii) alone, so that if (i) does not apply the tribunal need not consider (ii). As to the former, he gave the example of a child who lost his legs, who would have requirements substantially in excess of the normal requirements of a child of that age but would not have the needs of a younger child in normal health. Mr Cooper [*representative for Secretary of State prior to Upper Tribunal appeal hearing*] first became involved in this appeal, acting for the Secretary of State, shortly before the hearing. He accepted that subparagraph (ii) must have a different meaning and effect to that of subparagraph (i) as the general presumption is that Parliament does not legislate in vain. Mr Cooper conceded that the First-tier Tribunal had not addressed both limbs of section 72(1A)(b) and thereby erred in law. However he found it difficult to identify what the difference was in practice between the two provisions. [*My insert*]

24. The parties were therefore in agreement that the appeal should be allowed on this ground. That is correct, for reasons which I now explain.

25. The original form of what is now section 72(1A) is found in section 35 of the Social Security Act 1975 (as modified by regulations of the same year) which provided for the conditions of entitlement to attendance allowance in similar but not identical terms to those for the care component of DLA and, in relation to children, included the words 'being [attention or supervision] substantially in excess of that normally required by a child of the same age and sex'. There was no equivalent to that now found in section 72(1A)(b)(ii). The Disability Living Allowance and Disability Working Allowance Act 1991 introduced DLA by amendment to the 1975 Act including the a newly formulated dual limb condition for children in relation (in section 35ZB(6)). The annotations to the 1991 Act in Current Law Statutes commented as follows:

> 'The new formulation … thus emphasises that disabled children should not be denied benefit merely because they have substantial care or attention needs which may be shared by younger but physically and mentally healthy children.'

26. The amendments introduced by the 1991 Act were almost immediately incorporated in the Social Security and Contributions Act 1992, the children conditions originally being in section 72(6) and now found in section 72(1A).

27. It should be presumed that Parliament introduced the dual limb child condition for a purpose. But despite the different emphasis identified by the annotations in Current Law Statutes, it is hard to discern what the effective difference is between the two limbs.

28. In CA/92/92 Deputy Commissioner Rowland (as he then was) considered the meaning of the phrase 'attention substantially in excess of that normally required by a child of the same age and sex' in section 35 of the 1975 Act. He said:

> '5. In the case of a child, it is to be noted that the attention or supervision required must be 'substantially in excess of that normally required by a child of the same age and sex' and there is a similar modification to section 35(1)(b)(ii). Attention or supervision may be required 'substantially in excess of that normally required' either by virtue of the time over which it is required or by virtue of the quality or degree of attention or supervision which is required.
>
> 6. The idea of a greater quality of degree of attention can be illustrated by considering meal times. A young child may require attention in connection with eating because he or she requires the food to be cut up. A disabled child of the same age may require attention in excess of that normally required by a child of the same age because he or she not only requires the food to be cut up but also requires it to be spooned into the mouth. The fact that the child will be supervised anyway is irrelevant: there is still an additional requirement for attention. Whether such additional attention, taken together with any other additional attention requirements, is 'substantial' and 'frequent … throughout the day' are matters of judgment to be determined in each case where the condition in section 35(1)(a)(i) is being considered. Those may be significant limiting factors.
>
> …
>
> 9. …It seems to me that the legislation contemplates a yardstick of an average child, neither particularly bright or well behaved nor particular dull or badly behaved, and then the attention or supervision required by the child whose case is being considered must be judged to decide whether it is 'substantially' more than would normally be required by the average child. That, I think, comes to much the same thing as saying that the attention or supervision required must be substantially more than that normally required by most children … Attention or supervision is not to be regarded as 'substantially' in excess of that normally required unless it is outside the whole range of attention or supervision that would normally be required by the average child.'

29. In R(DLA)1/05 Commissioner Rowland considered what was then section 72(6)(b) of the 1992 Act, which was in materially similar terms to what is now section 72(1A)(b). Having referred to his decision in CA/92/92, he said:

> '10. …The word in the legislation is 'normal' and requirements may be normal notwithstanding that fewer than half the total number of children have them. However, there comes a point where the proportion of children who have the requirements is so small that the requirements can no longer be said to be normal, even though the total number of children affected may still be quite substantial. It is important to bear in mind that, in section 72(6)(b)(i), 'normal' describes 'requirements' and not 'child'. This is in contrast to section 72(6)(b)(ii), where the word 'normal' describes 'physical and mental health'. Section 76(2)(b)(ii) applies only where no child of the claimant's age in normal physical and mental health would have the same type of requirements as the claimant.'

30. I respectfully agree with this. Although at first sight it appears to leave subparagraph (ii) as a subset of subparagraph (i) so that if (i) does not apply (ii) cannot, on closer analysis it can be seen that that is not the case. In referring to the comparison in subparagraph (ii) between the type of requirements of the claimant and those of other children, Commissioner Rowland highlighted that (ii) is concerned with requirements which are different from those of normally healthy children of the same age rather than requirements which are greater or higher than those of others. This is also noted by the Upper Tribunal in KM [*[2014] AACR 2 unreported KM (on behalf of ZM) v SSWP (DLA) – [2013] UKUT 159 (AAC) – CSDLA/252/2012*] at paragraph 20. The point is reinforced by the use of the words 'substantially in excess' in (i) as compared to 'substantial' in (ii). On the facts of a case, subparagraph (ii) might apply where a claimant has substantial requirements which are different to those of normally healthy children of the same age even though (i) does not apply because the claimant's requirements are not substantially in excess of the requirements of those other children.

31. Take Commissioner Rowland's example of a child to whom what is now subparagraph (i) would apply. If the disabled child is three years old, it might be said that his requirements are in excess of but not substantially in excess of the normal requirements of three year olds because a normally healthy three year old will require considerable supervision during a meal (even if not needing to be spoon fed), and so (i) would not apply. However, the requirement of a disabled three year old child to be spoon fed may be said to be 'substantial' and, although not required by three year olds in normal physical and mental health, it is required by 1 year olds. Hence the three year old child in this example might be held to fall within subparagraph (ii) but not (i).

32. An example which is closer to the facts of this appeal is that of a young child with developmental delay. All young children require assistance with reading. Different types of help are required depending on the age of the child, but the help for younger children is not necessarily greater than (rather than different from) that required by older ones. A child with developmental delay may require help of a type which is required by younger children in normal health. It is substantial help, it is different from the help required by children of the same age but is not substantially in excess of that help.

33. Therefore I conclude that there may be cases in which subparagraph (ii) applies to a child even though subparagraph (i) does not. There is nothing in the words of the provision which limits subparagraph (ii) to cases of children with developmental delay and, as illustrated by the above examples, it is not so limited. I reject Mr Robinson's submission to the contrary.

34. Once it has been determined that a claimant has requirements falling within section 72(1) (which I have assumed to be the case in the above hypothetical examples), the issues which arise for determination under section 72(1A)(b)(i) are: (a) what the relevant requirements are of normally healthy children of the same age; and (b) whether the claimant's requirements are substantially in excess of those in (a). Under section 72(1A)(b)(ii) the issues which arise are: (a) whether the claimant's requirements are substantial; (b) whether the claimant's requirements are different from those of children of the claimant's age in normal physical and mental health; (c) whether younger children in normal physical and mental health would have those requirements.

35. If a tribunal decides that one of the subparagraphs applies, there will be no need to consider the application of the other. It may be that on the facts of the case, it is not necessary to carry out a strictly sequential exercise in respect of the two subparagraphs but a decision that section 72(1A)(b) does not apply must demonstrate that both subparagraphs have been considered in substance." [*My insert*]

**11. Judge of the Upper Tribunal Kate Markus QC 14.1.2015**

**children – substantially in excess (lower mobility)**

CSDLA/91/03 held:

"3. A copy of CA/092/92 should have been included in the papers for the tribunal by the Secretary of State as it sets out the correct approach to child claimants on the point that needs which arise must be 'substantially in excess of the normal requirements of persons of [his] age'… It makes clear that attention or supervision may be required 'substantially in excess of that normally required', either by virtue of the time over which it is required or by virtue of the quality or degree of attention or supervision which is required. It is also emphasised that the yardstick against which those of the claimant's needs which result from disablement are to be measured is those which are required not simply by many but by most children in the same age group.

4. CA/092/92 relates to care needs. However, the additional child condition is also applicable to lower mobility, expressed in very similar statutory terms except that the latter refers to 'guidance or supervision' rather than attention or supervision. The point is the same in both components. The issue is the nature and extent of the help reasonably required by the claimant on account of his disablement, provided it first fits the general statutory criteria for entitlement, compared with that of a child of the same age in normal health.

5. For example, with respect to lower rate mobility component, a claimant's disablement may give rise to a need for guidance or supervision which is of a type beyond that which is expected in relation to a normal child of the same age. Thus, although one would certainly have to accompany any ten-year-old in unfamiliar surroundings, it would usually be sufficient to walk beside a child in normal health simply as a companion and guide. If more is reasonably required by the claimant and is due to his disablement, then the question is whether this is substantially in excess of what could be expected in relation to a normal child of the same age and is required for most of the time. This is a matter of judgement for a tribunal. However, as with all matters of judgement, it must be based on sufficient underpinning findings of primary fact.

6. For entitlement to the lower rate mobility component, ability to use familiar routes is to be ignored, but not an inability to use such routes if it derives from the claimant's physical or mental disability and fits the additional criteria applicable to children. In CDLA/42/94 the Commissioner said that supervision meant 'monitoring the claimant or the circumstances for signs of a need to intervene so as to prevent the claimant's ability to take advantage of the faculty of walking being compromised', and pointed out that such action, if established, is not precluded from being supervision because the claimant derives reassurance from the presence of another.

7. The tribunal erred in emphasising that most 'eleven year olds' (but in fact he was ten years old at the date of the adverse decision under appeal, which the tribunal has overlooked) are hardly ever on unfamiliar routes without an adult present. The tribunal is almost certainly right that any eleven year old on an unfamiliar route is at some risk. The critical question is therefore whether, when the claimant is out walking, on account of his disablement he requires extra guidance and supervision which is substantially in excess of those of other children of his age. His parents assert that he walks out in front of cars and has to be pulled back. That would not be a precaution ordinarily required for a ten year old child in normal health. What he does on familiar routes is evidentially relevant to what he might do on unfamiliar routes."

*The starting point is the claimant on his own.*

8. The tribunal accepts that the claimant 'presents handling difficulties because of his temper tantrums and need for attention' but appeared to decide against him so far as continual supervision is concerned because of lack of any evidence that any substantial danger had ever happened. However, the starting point is the claimant when on his own. What then are the risks? The help he actually receives is not determinative, although evidentially relevant, to the crucial question which is his reasonable requirement for supervision. But a claimant is not to be prejudiced when such help is provided and is what prevents or reduces the risk of danger so that it is less than substantial. The tribunal erred in too narrowly concentrating on whether circumstances had ever developed to produce actual substantial danger, without considering whether they would have done so had support not been there."

**6. Commissioner L T Parker 26.3.2003**

**children – attention deficit disorder (lower mobility)**

CDLA/4806/2002 (paragraph 14) confirmed that a child claimant would be entitled to the lower rate mobility component if:

" (1) he was able to walk but was so severely disabled physically or mentally that, disregarding any ability he might have had to use routes which were familiar to him on his own, he could not take advantage of the faculty out of doors without guidance or supervision from another person most of the time; and

(2) either he required substantially more guidance or supervision from another person than persons of his age in normal physical and mental health would require, or persons of his age in normal physical and mental health would not require such guidance or supervision."

The Deputy Commissioner outlined the approach to be taken. She held:

"15. It is not disputed that the claimant is able to walk and that he suffers from attention deficit disorder. The first question which needs to be answered is therefore whether the result of his attention deficit disorder is that, at the material time, he could not take advantage of the faculty of walking out of doors without guidance or supervision from another person most of the time. When the question is first posed, it is not necessary to introduce into it any consideration of the familiarity or unfamiliarity of a hypothetical route. That becomes an issue if a claimant asserting a need for guidance or supervision is met with the answer that he manages to get around perfectly well on his own. If the claimant can respond that he can only manage when the route is familiar, then his ability to get round on his own is to be disregarded. As a matter of fact, he will satisfy the statutory test by his need for guidance or supervision on unfamiliar routes, but that does not mean that it is part of the statutory test that the route should be unfamiliar.

16. The distinction may not be significant for an adult claimant, but it can be significant for a child claimant. In the present case, I understand that the mother is saying that the claimant cannot walk out of doors without guidance or supervision whether the route is familiar or unfamiliar, because he does not recognise the risks. His is not a case in which, but for the statutory disregard of familiar routes, he could be met with the answer that it is only on unfamiliar routes that he is in difficulty. He needs guidance or supervision in any case. It follows that when the comparison is made with a child of his age of normal physical and mental health, the question is not whether such a child would need guidance and supervision on unfamiliar routes, but whether he or she would need guidance and supervision on all routes, as the claimant's mother says he does. To put it more concretely, it might be asked, for example, whether a child in normal physical and mental health would be able to walk alone from the claimant's home to the claimant's school, once the route had become familiar.

17. It seems to me clear that the test the tribunal applied was whether the claimant required substantially more supervision or guidance in unfamiliar places and that the question of his total need for guidance and supervision out of doors by comparison with that of a child in normal physical and mental health was not addressed. It therefore follows that in my view the tribunal's decision was erroneous in point of law, because the test applied was not the statutory test…"

The Deputy Commissioner (paragraph 18) added that "…, although the question of the journey to school may be relevant, it is not the only journey which should be considered" as "The claimant's ability to use other possible routes such as a route to a friend or relative living nearby or to the local shops or recreation ground should also be considered as part of the whole picture."

See also CSDLA/91/03 on the question of the "substantially in excess" test.

**6. Deputy Commissioner Elisabeth Ovey 20.3.2003**

**children – awareness of traffic/danger and other common hazards**

CSDLA/76/98 (*53/98) held that the tribunal had erred in law by refusing the claimant's appeal on grounds that "most 7 year olds require supervision or guidance when using unfamiliar routes".

The Commissioner (paragraph 14) held that the tribunal should have compared the nature and extent of the guidance and supervision required by the claimant to that of a 7 year old in normal health. The tribunal found that the claimant had developed episodes of disorientation, had no awareness of the danger from traffic and other common hazards out of doors, could not supply his name and address if he got lost and had what was described as a "social age of 3 to 4 years".

The Commissioner (paragraph 11) held that these factors appear to give rise to a need for guidance and supervision beyond those which could be expected in relation to a normal 7 year old. He criticised the tribunal for making no attempt to explain why the requirements were not "substantially more" than required by a 7 year old without disability.

The Commissioner (paragraph 15) held that this element of the mobility component exists to "remedy the incapacity" continuing "… In these regards I agree with what was said by Mr Commissioner Rice in CDLA/757/94. Thus for the case he was deciding Mr Commissioner Rice considered that looking after a claimant when she fell would be too remote and I adopted that position in CSDLA/591/97 in respect of the rendering of aid to a claimant who had a migraine attack. In this case however if the fresh tribunal accepted, as the tribunal whose decision I have set aside did, that the claimant had no awareness of danger from traffic or other common hazards any requirement for supervision arising from this is of an entirely different nature. It is directly related to the faculty of walking and is also related to keeping the claimant metaphorically on a tight rein and to remedy the incapacity of unawareness of traffic dangers and other hazards. Guidance I consider should be approached on the basis that it is related to in respect of the ability to find one's way about in unfamiliar surroundings".

**4. Commissioner D J May QC 3.8.1998**

**child – behavioural problems – care and mobility components**

CP v Secretary of State for Work and Pensions (DLA) – [2013] UKUT 0230 (AAC) – CDLA/373/2012 involved the case of a 10 year old child whose claim had been made on the basis that he suffered from severe behavioural problems, developmental delay and a learning disability.

The claim form the child's mother, who was his appointee, stated that he:

- needed someone with him when he was outdoors in places he did not know well
- was easily led, gullible, not understanding consequences of putting himself in danger
- was not understanding of ulterior motive
- would climb on high walls, roots and trees
- had no fear or sense of danger
- would run off in a tantrum
- had had extreme tantrums and became violent
- needed things explained constantly because he did not understand
- could not generalise
- took things literally
- was selfish and had a problem with sharing
- had no stable friendships
- annoyed bullied and controlled
- interrupted and caused problems

The claimant's mother had identified a number of problems that the claimant had with particular activities: difficulties going to bed, tantrums when he was told it was bedtime, banging toys and furniture, name calling and challenging. She stated that it could take 1 to 2 hours to settle him down, 5 days a week. She stated that someone had to encourage her son to wash and that this could take 60 minutes, 3 days a week. She stated that someone had to encourage her son to get dressed because he could be stubborn and refuse to do so and that this could happen on 5 to 7 days a week, although no time estimate for each occasion was given. She also stated that he had some communication difficulties which meant that conversation had to be broken down and he had to be helped to tell something from the beginning which could happen 2 or 3 times a day, for 30 to 45 minutes. She also stated that all sharp objects had to be removed. The claimant's mother expressed mental health concerns, saying that he had a lot of severe tantrums where he could smash the house up on many occasions; he had told her he felt like killing himself; he kicked his bed repeatedly and could get physically aggressive: he threw items around, tried to climb out of his window and became dangerous. She stated that his tantrums could last 1-2 hours and he had at least one a day, sometimes more.

The Department for Work and Pensions (DWP) then obtained a report from the claimant's class teacher which described him as having average achievement for speech and language and communication and below average for academic ability. It stated that he was having four 10 minute reading sessions a week. It stated that he was aware of common dangers, had no dangerous tendencies or behavioural problems; usually took part in all school activities and had road safety awareness appropriate to his age.

The report, somewhat surprisingly, in the view of the Upper Tribunal Judge stated that he could not dress and undress, eat and drink or attend to his own toilet needs safely and without help from another person. It was the view of the Upper Tribunal that it seemed that the teacher was somewhat confused by the form and meant to say that the boy could do all those things.

The DWP accepted that the boy had some problems, but the final conclusion was that that was not enough to make an award of Disability Living Allowance.

The boy's mother, with the assistance of the Citizens Advice Bureau (CAB) requested a reconsideration of the decision. In doing so further information was provided in the form of a report surrounding the boy's behaviour and abilities from a consultant community paediatrician and a clinical psychologist. A social work report was also produced.

The Community paediatrician's report stated that it happened that the boy had 'learning difficulties' which affected his 'self-esteem' and that this was 'probably behind some of his challenging behaviour at home'. The report stated that the boy was 'well behaved at school' but was' "highly likely to be stressed by the school environment causing a need to release his tension when he gets home'. The report stated that whilst there was 'no evidence today in the clinic of any problems with attention or concentration' it was acknowledged that the assessment was a singular assessment in a quiet environment. The report stated that the boy's parents had consented to further investigations to see if the cause of the boy's learning difficulties could be established and to examine how his learning needs could be addressed at school to help him to get a sense of achievement and to improve his self-esteem. In the report produced by the clinical psychologist it was stated that the parents' predominant concern at earlier meetings was the boy's poor concentration and his difficulties within school. It recorded the parents' account that at home he never sat still, had to touch everything and was often quite destructive, breaking his toys, and their concerns of significant behavioural difficulties when the claimant could not get his own way, particularly tantrums at bedtime, involving kicking and pulling the mattress and bedsheets on to the floor. The results of a psychometric assessment indicated that the claimant has a global learning difficulty and a particular weakness in his verbal abilities. The assessment was indicative of an IQ below average and bordering on learning difficulties. The social work report was based on the findings of five home visits over a two month period. The report described the boy as struggling with his emotions and often getting angry and frustrated very quickly, which had repercussions for every member of his family.

In light of all this material the DWP referred the claim to a health care professional for advice on whether the claimant's condition gave rise to "significant care and mobility needs most of the time". The advice given was:

> "[The claimant] is a 10 year old boy who has behavioural problems. His academic ability although below average, is not of a severe nature and he is able to partake in all school activities. There appears to be issues around the family dynamics that appear to be contributing to behavioural issues, as within a strict schools environment [the claimant] is able to interact normally. Therefore I would advise that he does not have significant care or mobility problems"

The DWP reconsidered the refusal decision but did not change it. The boy's mother, assisted by the CAB, appealed seeking an award of the middle rate of the care component and lowest rate of the mobility comment, arguing that the boy required "constant supervision". The CAB made a submission arguing that in the light of CDLA/3779/2004 (Commissioner Bano – weight to be given to school reports) the other evidence provided should be relied upon in preference to school report. The DWP again reconsidered the decision but did not revise it on the grounds that whilst it was accepted that the boy needed some extra help, this was not thought to be "substantially in excess" of the help any child of his age would need.

Before the eventual appeal hearing the boy moved from his primary school to secondary school. An initial assessment report was prepared by a speech and language therapist and in due course was added to the tribunal papers. It underlined the claimant's difficulties with vocabulary, remembering and responding to verbal information and verbal reasoning skills. Although no CAB representative was able to attend the appeal hearing, the boy's mother and stepfather did attend with a representative form the Youth Offending Service (which the Upper Tribunal Judge wished to make clear was part of a preventative intervention strategy, not because the boy had committed any offences).

At the First-tier Tribunal appeal hearing the boy's mother gave oral evidence. She referred to the boy's footballing skills and said that his primary school teacher always said he was a normal child and that his behavioural problems were all at home. She went on to say that he could eat, drink and play normally at school, that he had always come home from school on his own and had to cross roads, that he walked to and from school with a school friend, and when he came in he would have a drink and something to eat. She stated that about twice a week he would smash things in his bedroom but that at weekends he was alright because he was playing football and he was in and out of doors playing with friends nearby. She added that he was a lot better at the date of the hearing because he was getting support at his secondary school.

The First-tier Tribunal dismissed the appeal. In its statement of reasons it held:

"2. The tribunal found as a fact that the appellant, who was born on 19 July 2000, has no physical disability. He can, before the onset of severe discomfort, walk a normal distance at a normal pace, with a normal gait and normal balance. [The tribunal summarised the evidence about playing football, walking to and from school, taking part in school activities and what the claimant's teacher said about road safety awareness.] On this evidence, the tribunal were satisfied that the appellant cannot satisfy the conditions for either rate of the mobility component and in particular the tribunal took the view that the appellant does not require guidance or supervision when out walking on unfamiliar routes which is substantially in excess of that required by any other child of his age.

3. The appellant's mother told the tribunal that he experiences behavioural problems which occur only at home. She told us that on about two occasions each week he may smash things in his bedroom but she did not describe any other behavioural problems. In her report dated 6 December 2010, the appellant's Consultant Paediatrician … describes the appellant as having learning difficulties which have affected his self-esteem and are probably behind some of his challenging behaviour at home. However, the appellant's school teacher in her report describes a child with below average academic ability who nevertheless is aware of common dangers appropriate to his age, does not have any dangerous tendencies or behavioural problems and can dress and undress, eat and drink and attend to his own toilet needs. This is confirmed by the Core Assessment Record dated 23 December 2010 in which it is recorded that the teacher has advised the Social Worker that the appellant responds well to boundaries and there is no disruptive behaviour by him. A very substantial part of that Assessment Record appears to be a record made by the Social Worker of statements by the appellant's parents, but we preferred the oral evidence given by the appellant's mother directly to us at the hearing. The tribunal also heard oral evidence from [the representative] from the … Youth Offending Service. [The representative] indicated to us that his organisation deals only with young people who are at risk of offending but despite this he does not work at all with the appellant and works only with the appellant's parents. The report by … [the ] Clinical Psychologist dated 19 October 2010 indicates that the appellant remained very quiet throughout the assessment but that he relaxed as the assessment progressed and completed all the tasks willingly, articulated well and responded well to prompts when more detail was needed. We accepted and found as fact the whole of this evidence. Taking the whole of the evidence into account, we concluded that the appellant does not have care needs which are <u>substantially</u> in excess of any other child of the same age in normal physical and mental health."

The Upper Tribunal Judge held that the decision of the First-tier Tribunal was erroneous in law and should be set aside because it made no findings of fact as to whether the boy had any mental functional deficiency. In the view of the Upper Tribunal Judge there was clear evidence that he did (referring to the report by the clinical psychologist) and no evidence to cast doubt on this view. It was noted that in fact the opposite was the case in that the evidence (in the reports from the community paediatrician and social worker) generally supported this view. In the view of the Upper Tribunal Judge, even the primary school teacher's assessment suggested some degree of a learning difficulty.

On the matter of entitlement to the **lower rate mobility component** the Upper Tribunal Judge held:

"32. Further, it follows from the way the tribunal in fact dealt with the mobility component in paragraph 2 of the statement of reasons that it is not clear whether the rejection of the claim to the mobility component was based on the absence of a functional deficiency or on a finding that the functional deficiency did not give rise to a need for guidance or supervision on unfamiliar routes or on a finding that although there was such a need, the guidance or supervision was not substantially in excess of that required by any other child of his age. Even assuming, as appears from paragraph 3 of the statement of reasons probably to be the case, that the tribunal accepted that the claimant has learning difficulties, it was necessary to identify his consequent needs, if any, and to compare them with those of a normal child of his age. The evidence of the claimant's ability to walk to and from school shed no light on his ability to use unfamiliar routes except in so far as it was consistent with his teacher's assessment of his road safety awareness.

The evidence was in any event given at the tribunal and the record of proceedings (p.104 of the bundle) does not show for how long the claimant had been walking to and from school with a friend. I note from the social worker's report at p.73 that in January 2011 there seemed to be some doubt about the claimant's ability to walk to school by himself, although other children did. It is not clear from that part of the report what was actually happening at the time. This uncertainty is material, since in the claim form the claimant's mother described the claimant as having no fear or sense of danger and identified that as one element of why he needed guidance or supervision out of doors. Some further exploration of this with the claimant's mother might have assisted the tribunal in considering whether it should accept the teacher's assessment of the claimant's road safety awareness without question, as it seems to have done.

33. In addition, however, the claimant's mother referred in the claim form to his being easily led, gullible, not understanding consequences and climbing on high walls, roofs and trees. These factors, coupled with the fact that in December 2010 he was functioning intellectually at an age significantly below his own, might go some way to suggesting that he would be more at risk out of doors on his own, whether or not using familiar routes, than other children of his age. I note that in R(DLA) 3/06, which concerned a girl aged 12 with difficulties having some similarity to those of the claimant, the view expressed by a medical expert who was a member of the Department of Work and Pensions Corporate Medical Group was that although the tribunal was probably correct in deciding that the needs of the claimant were not in excess of those of an able-bodied child of the same age, it would not be unreasonable to conclude that the claimant was at least entitled to the lower rate of the mobility component."

On the matter of entitlement to the **care component** the Upper tribunal Judge held:

"38. Clearly the question whether the claimant has a functional deficiency is relevant here also. It seems to me that the tribunal intended in paragraph 3 of its reasons to find as a fact that, at least for the purposes of the care component, the claimant had the learning difficulties affecting his self-esteem which were referred to by the consultant community paediatrician. I shall proceed on that basis.

39. Following *R(DLA)3/06*, the next question is whether the requirements to which that deficiency gave rise satisfied the requirements of s.72(1)(b)(i) or s.72(1)(b)(ii). There is evidence relevant to both paragraphs. As explained in paragraph 4 above, the claimant's mother referred in the claim form to difficulties with going to bed, washing and bathing, and getting dressed and undressed. Although the nature of the difficulties described arose from the claimant's behaviour, the needs themselves, if accepted, were needs for attention. At first sight, the teacher's report confirmed the existence of needs relating to dressing, although, as I have mentioned in paragraph 7, I suspect that the teacher completed the form wrongly. Even if that is assumed to be the case, however, there is no necessary inconsistency between the mother's account and the teacher's, because there was clear evidence that the behavioural problems did not occur at school. The tribunal did not explore this aspect with the claimant's mother when she gave evidence and said nothing at all about problems with going to bed and washing and bathing. Other than the reference to the claimant's ability to dress and undress, eat and drink and attend to his toilet needs, which the tribunal found as a fact without giving reasons, there are no findings of fact about the claimant's attendance needs or their relationship to the claimant's functional deficiency. This was an error of law.

40. As respects continual supervision, in the claim form the claimant's mother said that he had no sense of danger, had extreme tantrums, became violent, threw items around and tried climbing out of his window. She also said that they had to remove sharp objects such as scissors or razors (I think from the bathroom) and that the claimant had told her he felt like killing himself, and described him as a 'timebomb'. The consultant community paediatrician seems to have accepted that the claimant's behaviour at home was challenging. The social worker referred to concerns that the claimant's angry outbursts could put his siblings at risk (p.68) and to statements from the claimant's mother that he had physically attacked her, had tried strangling himself, had tried to jump out of a window, had threatened to run away and once had run away, although without getting far.

41. The tribunal appears to have given little or no weight to most of this material because:

(1) the claimant gave only one example of behavioural problems at the tribunal;

(2) the claimant's teacher said he did not have any dangerous tendencies or behavioural problems and in effect repeated that to the social worker;

(3) much of what appeared in the social worker's assessment consisted of statements made by the mother and the tribunal preferred the mother's oral evidence.

42. Unfortunately, this process of reasoning is not, in my view, adequate. It is true that the claimant's mother said little at the hearing. The record of proceedings in fact seems to show that she began by saying she had nothing to add. That does not suggest that she was intending to depart in any way from what was said in the claim form. She then did add some information, presumably in response to questions, but it does not appear that she was asked about the difference between the claimant's behaviour at home and at school, about incidents of aggression, about running away, about the need to hide sharp objects or about why official agencies had got a clinical psychologist, consultant community paediatrician, social worker and eventually Youth Offending Service involved. I note also that at the first hearing the claimant's stepfather referred to having lost his job because of the amount of time he had to spend helping to look after the claimant. These matters ought to have been explored, as ought the evidence that the claimant's behaviour and the family relationships generally had significantly improved. Further, there is a potential inconsistency between what the consultant community paediatrician said about challenging behaviour at home and what the teacher said about the claimant's behaviour, although the evidence of both was accepted and found as fact by the tribunal. Finally, there is force in the point made by the Citizens Advice Bureau that the social worker would have exercised her professional judgment about the mother's statements when making the assessment. That is borne out by the fact that the social worker felt a core assessment necessary (p.68).

43. Moreover, it is at this point that the decision relied on by the Citizens Advice Bureau, *CDLA/3779/2004*, is relevant. That was a case in which the tribunal preferred the evidence of the school report to the evidence of the G.P., the claim form, the evidence of an independent youth worker and the oral evidence. Mr. Commissioner Bano concluded that the evidence from the school report was not necessarily inconsistent with the evidence from other sources.

He pointed out that young children at school (the claimant was aged 10) have to be more or less continually supervised for the school to function properly, so a child with a disability may not need supervision over and above that which is given to all children when attending school. What also needs to be considered is whether, outside the school environment, such a child continues to need supervision beyond that needed by other children in order to avoid substantial danger to themselves or others. The evidence from the school should be considered along with all the other evidence. The tribunal in this case did not refer to the amount of continual supervision necessarily involved while the claimant was at school or to the possibility that a child who was well behaved at school might release the tension by bad behaviour at home, meaning that there was no conflict with the mother's evidence about the claimant's behaviour away from the school environment.

43. It follows that if paragraph 3 of the statement of reasons is to be understood as containing findings of fact relevant to supervision needs, their link with the claimant's functional deficiency was not considered and no adequate reasons for those findings of fact were given. This was an error of law.

44. There is therefore no adequate basis for the conclusion that the claimant does not have care needs falling within s.72(1(b) (whether for attention or supervision) which are substantially in excess of any other child of the same age in normal physical and mental health. Again, the tribunal has failed to separate the s.72(1)(b) and s.72(1A) elements of its conclusion. Incidentally, it appears to have applied part only of the s.72(1A) test, since it seems not to have considered para. (b)(ii), set out in paragraph 37 above.

45. Finally, I recognise that the claimant, by his mother and the Citizens Advice Bureau, asked for the middle rate of the care component. Under s.72(1)(a)(i) and (4), however, a person is entitled, subject to s.72(1A)(b), to the lowest rate of the care component if he is so severely disabled physically or mentally that:

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

In my view, given the attention needs referred to by the claimant's mother in the claim form, the tribunal ought to have considered whether the claimant might be entitled to the lowest rate of the care component on this basis."

Note: The paragraphs in the original decision are as set out above. There is two paragraphs 43.

**11. Judge of the Upper Tribunal E Ovey 9.5.2013**

**needs of profoundly deaf child**

CDLA/4100/2004 concerned a case involving a young profoundly deaf child. Examining the question of attention and supervision needs, the decision held:

"15. … It is recognised in chapter 39 of *The Disability Handbook* (2nd edition, TSO) that, if a severely deaf child "is to overcome the disability by being trained to develop social, self-care and learning skills, and effective means of communication, considerable attention must be given by others to this task." That seems wholly consistent with the submissions and evidence put forward on behalf of the claimant in this case. The medical advice received by the decision-maker seems to have been based on a view that the claimant's deafness was not all that severe and that her needs would largely be met by her hearing aids. It is pointed out on behalf of the claimant that hearing aids may still leave speech distorted but, in any event, the medical advice appears to have been given in ignorance of the true extent of the claimant's disability. It is difficult to assess hearing loss in very young children but the view of those concerned with this claimant's welfare appears clearly to have been that the degree of deafness was such that she required, and would continue to require, much more help than children who are not deaf to ensure she developed communication skills and, in particular, acquired language. By the time of the tribunal hearing, the claimant was receiving 'multiple weekly visits' and a substantial purpose of those visits was to equip her parents with the skills necessary to provide the additional attention the claimant required throughout the day. I have no doubt that the extent of the claimant's deafness is such that she reasonably requires such attention. At the age that the claimant was three months before the date of claim, a child without disability would have been learning to talk and I accept that the claimant required frequent attention throughout the day from then onwards as a result of her deafness and that her needs for attention were, and remain, substantially more than those of children without disabilities.

16. As to supervision, *The Disability Handbook* also recognises that, when they become mobile, severely deaf children may initially require substantially more supervision throughout the day than that required by children of the same age without disabilities because they cannot hear sounds warning of danger. In the present case, however, I am unsure whether the severity of the claimant's deafness is such that, with the hearing aids, there is sufficient useful hearing to mitigate the difficulty with the consequence that, at the date of the Secretary of State's decision, she did not require substantially more supervision than a child of her age without disabilities, given the amount of supervision that such a toddler requires. I would accept that the claimant's tendency to remove the hearing aid would lead to an additional need for supervision because, while I accept the Secretary of State's point that any child of her age would be inclined to put things in her mouth and would need supervising on that account, most parents would restrict the child's access to such small items and correspondingly reduce the need for supervision. Whether the additional element of supervision required by the claimant because of the risk from the hearing aids would be substantial is, of course, again another issue…"

**7. Commissioner Mark Rowland 21.7.2005**

**deaf child**

CDLA/2268/1999 involved the case of a profoundly deaf child who had been awarded the middle rate care component then sought the lower rate mobility component on the approach of his birthday.

The decision held:

"16. I do not need to go into the case law relevant to this appeal. It is well established… that a need for somebody to be on standby to intervene to avoid danger to a claimant is supervision within the meaning of Section 73(1)(d). Even without the documentary evidence in the bundle and the oral evidence given by the appointee it is clear that a child who is profoundly deaf will be at risk of physical injury from dangers which a child with normal hearing would avoid without the need for any adult intervention. For example, he will not hear dangers approaching from behind such as another child on a skateboard, other children running or warnings from somebody on a bicycle. The danger is compounded because frequently somebody approaching the claimant from behind in one of those ways and thinking that he is steering well clear of the claimant will be unaware that the claimant cannot hear and is liable to step into his path. I am satisfied, therefore, that there is a constant need for there to be somebody in close attendance on the claimant to 'watch his back' and ensure that he does not suffer injury, either because he cannot hear or because others do not realise that he cannot hear. That, in my view, amounts to supervision within the meaning of paragraph (d) of Section 73(1) and that without which the claimant is not able to exercise his faculty of walking out of doors.

17. A 5 year old child in normal health can be warned and directed by voice from a distance without the need for a supervisor to stay within touching distance or maintain eye contact with him. He can be allowed to make short journeys on foot on traffic free routes which are familiar to him and overlooked from a distance by adults, for example to a neighbour's house. I am satisfied, therefore, that the close and constant supervision required by the claimant when out of doors is substantially more than that which would be required by a child of the same age with normal hearing."

**5. Commissioner R J C Angus 24.2.2000 (signed 31.3.2000)**

**nocturnal enuresis**

R(DLA)1/05 (CDLA/4149/2003 unreported) involved a six year old girl who suffered, amongst other conditions, episodes of nocturnal enuresis. The decision held:

"17. .. Moreover, even if the nocturnal enuresis could be ascribed to mental disablement, it is fairly clear that the problem did not at the time of the Secretary of State's decision give rise to sufficient attention needs to justify an award of disability living allowance. The evidence is that the enuresis was dealt with by the claimant sleeping in nappies (which distinguishes this case from CSDLA/555/01) and being bathed in the morning. The use of nappies may not be a practical or effective expedient for an older child but was reasonable when the claimant was aged six. There is no reason why a child in nappies should usually need attention at night in connection with enuresis. It may well be the case that the claimant did occasionally require attention at night in connection with enuresis when there was some substantial leakage from nappies or in connection with an atypical episode of faecal soiling, but such occasional attention is not a sufficient basis for entitlement to benefit. Putting a child in nappies when she goes to bed and bathing her in the morning are activities to be taken into account as day-time attention but do not amount to the provision of attention for a significant portion of the day or frequently throughout the day. Therefore, the attention required as a result of the enuresis appears not to have been sufficient to satisfy the conditions of section 72(1) even if the enuresis was due to mental disablement."

Note: The reference to CDLA/555/01 should I think be CSDLA/552/01, a decision of Commissioner Parker.

**7. Commissioner Mark Rowland 26.8.2004**