Tribunal Observations

tribunal ocular observations

R4/99(IB) held:

“21. In my view the Tribunal is entitled (as is any adjudicating body) to use all its senses in assessing evidence before it. The essential question in this case appears to me to be whether or not the observations which all the members of the Tribunal made were to be treated as evidence or as a part of ordinary common sense in assessing evidence which was already given. In my view what happened was the latter. As Mr McAvoy [*representing the Central Adjudication Services*] stated there was strong medical evidence against Mrs McG... [*the claimant*] in this case. The Tribunal recorded in its decision:-

> "The Tribunal decided on reading the medical evidence and hearing the Tribunal's Medical Assessor, that the appellant would suffer from pain and discomfort as a result of the osteoporosis. The difficulty for the Tribunal was matching the medical evidence to the allegations of limitation made by the appellant, particularly in light of the observations of the Examining Medical Officer ("Examining Medical Officer"). The Tribunal also found that its own observations were in contradiction of the appellant's evidence particularly with regard to sitting where each Tribunal member noted that the appellant sat easily, without any "shifting" in the seat or apparent discomfort and without the need to rise."

Later the Tribunal stated:-

> "In respect of "sitting" our own observations as well as those of the Examining Medical Officer, led us to award (e) which did not attract points".

Both these extracts are from the section headed "Findings of fact material to the decision".

Under "Reasons for decision" the Tribunal stated:-

> "The Tribunal in this case accepted that the appellant suffered from osteoporosis, from which she claimed back, neck and arm problems. What the Tribunal did not accept was the level of limitation alleged by the appellant as a result of her medical problems. The Tribunal as a whole felt her symptoms were exaggerated, especially in her questionnaire, but nonetheless also at the Tribunal hearing.
>
> The Tribunal members each remarked on discussion that the appellant sat without apparent discomfort for well over 30 minutes, without shifting or moving about the seat. We also took into account the clinical findings of the Examining Medical Officer as well as his observations in respect of her movements generally.
>
> We find that although this lady would have some pain and discomfort with her condition, this would not be to the extent required for her to pass the All Work Test. We noted her ability to faithfully swim and exercise as directed and believe if she could do these activities, even in some pain, then she could manage other activities. We note also that tabulations 1 and 3 refer only to back pain.
>
> In conclusion, on balance we accepted the evidence of the Examining Medical Officer for the most part, though we felt that the points awarded by the Examining Medical Officer and Adjudication Officer were a bit low".

22. Against that background it appears to me that what the Tribunal was doing was not introducing fresh evidence but using its observations as one means of assessing the evidence which was already before it.

23. Having read the record I do not consider that the Tribunal was in error of law in the method in which it conducted the hearing. I specifically do not conclude that there was any violation of the rules of natural justice in the Tribunal using its ocular observations as one of the methods of assessing the evidence already before it without specifically asking for comment on its ocular observations. The Tribunal was not itself providing evidence. Its duty was to adjudicate on the evidence before it but it was entitled to use its own observations in so doing. As the Commissioner stated in CDLA/021/1994:-

> "I remind myself of the words used by Birch J. in R .v. Madhub Chunder, (1874) 21 WRCR 13 at page 19: "For weighing evidence and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each common-sense and shrewdness must be brought to bear upon the facts elicited. If the tribunal were to rely on its own observation alone, where such observation was contrary to the medical evidence, then it seems to me that the weight would be negligible. However in the case before me the tribunal's observation was but one of the factors which brought them to the conclusion that the claimant did not satisfy the conditions....""

24. It appears to me also perfectly clear that the Tribunal's own observations were but one of the factors which brought it to the conclusion which it reached. The fact that the observation was so specific in terms of one of the descriptors does not mean that observation was qualitatively altered into evidence. It merely means that the observation pointed particularly sharply to the weight to be given to the evidence before it.

25. Ms Slevin [*claimant representative*] has made particular point of the weight which the Tribunal should have given to its own observation. She has stated that Mrs McG... was in tears during the Tribunal. This is not recorded by the Tribunal but detailed answers given to questions are recorded and Mrs McG... was represented. I am unable to comment as to whether or not Mrs McG... was distressed during the hearing. There is, however, nothing to indicate that the Tribunal gave undue weight to its own observations and in any event those observations were not evidence to which weight was or was not to be attributed. They merely assisted the Tribunal in giving weight to particular evidence which already existed and which Mrs McG... had seen and which related, inter alia, specifically to the activity of sitting." [*My inserts*].

Commissioner Moya F Brown 11.3.1999

tribunal's observations not medical examination

R(DLA)1/95 (CDLA/21/1994 unreported) held:

"5. I do not accept the submission. Section 55 of the Social Security Administration Act provides that a disability appeal tribunal is not to carry out a physical examination of the claimant; and further that they cannot require a claimant to undergo a physical test for the purpose of determining whether he satisfies the conditions mentioned in section 73(1)(a) of the Social Security Contributions and Benefits Act 1992. It is clear that when dealing with the mobility component the tribunal are unable to carry out a walking test in order to ascertain whether the claimant is suffering from physical disablement such that he is either unable to walk or virtually unable to do so. The tribunal are precluded from conducting a walking test or making a medical examination of the claimant. However it does not appear to me that the tribunal's ocular observation of the claimant can be said to amount to a physical examination nor can it be said that the claimant has been required to undergo any physical test. It does not seem to me that the tribunal were in breach of the prohibition contained in the section. I have considered whether the reliance by the members of the tribunal on their own observation of the claimant may be objectionable on other grounds. It seems to me that a tribunal are entitled to have regard to what they see provided that the weight to be accorded it is considered carefully. Disability appeal tribunals are not bound by the technical rules relating to admissibility of evidence and the answer depends on the weight to be attached to such observation. I remind myself of the words used by Birch *J in R. v. Madhub Chunder* [1874] 21 WRCR 13 at page 19. "For weighing evidence and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited. If the tribunal were to rely on its own observation alone, where such observation was contrary to the medical evidence, then it seems to me that the weight would be negligible."

Commissioner J J Skinner 13.5.1994

tribunal ocular observations

R1/01(IB)(T) held:

"13. Before turning to Article 20(3) itself, we wish to deal with one point. In paragraphs 21 to 24 of decision *R4/99(IB)*, Mrs Commissioner Brown held that a Tribunal, like any other adjudicating body, is entitled to use all its senses in assessing the evidence before it and may take account of what it sees as well as hears. She referred to decision *CDLA/021/1994* (now reported as *R(DLA)1/95*), in which a Great Britain Commissioner, Mr Commissioner Skinner, said: -

> "… The tribunal are precluded from conducting a walking test or making a medical examination of the claimant. However, it does not appear to me that the tribunal's ocular observation of the claimant can be said to amount to a physical examination nor can it be said that the claimant has been required to undergo any physical test. It does not seem to me that the tribunal [which took into account observations made by the members during the hearing] were in breach of the prohibition contained in the section. I have considered whether the reliance by the members of the tribunal on their own observation of the claimant may be objectionable on other grounds. It seems to me that a tribunal are entitled to have regard to what they see provided that the weight to be attached is considered carefully. …"

We agree with those views. In the context of a Tribunal hearing, sight is one of the more important senses. Observing the manner in which a witness gives his or her evidence and how he or she behaves or responds at other times is an important part of the process. Witness A may be wholly convincing while everyone who listens to and observes witness B soon becomes certain that he or she is lying. A Tribunal must, of course, consider its observations carefully and judiciously. The neatly dressed man who has said he is unable to look after himself may be lying. On the other hand, the Tribunal may be seeing the results of extensive efforts by his family or friends to tidy him up for the hearing. Further, a Tribunal which is going to base its decision, or an important part of its decision, on what it has seen should usually put its observations to the claimant and thereby give him an opportunity to comment. It will then be for the Tribunal to accept or reject the comments. Whether or not this is necessary will depend in a large measure on whether the Tribunal's observations raise a new issue or constitute fresh evidence or whether they merely confirm existing evidence."

Chief Commissioner J A H Martin, Commissioner M F Brown and Deputy Commissioner J P Powell 13.6.2001

tribunal observations – good practice…

DB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0041 (AAC) – CE/2831/2013 held:

"14. Observation evidence of an appellant within a tribunal context is permissible. The FTT [*First-tier Tribunal*] needs to bear a number of things in mind, however, if placing reliance on their observations. There needs to be clarity as to whether the current position is representative of that which was obtaining at the date of the decision. With regards to observation this tends to be more difficult where there has been an improvement, than where there has been deterioration. Nonetheless the issue needs to be addressed. Where reliance is placed upon the physical demonstration of ability during the hearing, generally an appellant ought to be given the opportunity to comment upon it. As an example if somebody who claims significant problems with manual dexterity is seen to handle papers, bags, gloves, buttons etc apparently normally, it is good practice to put that observation to the appellant for comment. That is not to say that it would always be a material error of law not to do so; the nature of the observation and the context is important. As I said in *KE v Secretary of State for Work and Pensions (DLA) [2013] UKUT 0532 (AAC)*

> *Credibility findings come both from impression and inconsistencies. It is not necessary even in respect of inconsistencies of physical behaviour to put every matter to an appellant, and in relation to impressions from the oral evidence which may be being formed by the tribunal during the hearing and which may only crystallise during the post- case discussion it is not to be expected.*

15. Once again, contrary to the submission of the appellant's representatives, in this case the type of observation does not amount to an examination of any sort, let alone one which is specifically precluded. A Tribunal is able to use all its senses, including what it observes from looking at an appellant, in considering whether or not the tests in relation to capability for work are satisfied. *((R1/01(IB)(T); R4/99(IB))*. It is also settled law that if an appellant invites specific observation by, for example pulling up his sleeve to show a burn or a rash, or inviting inspection of arthritic hands that does not amount to a physical examination, and the tribunal is entitled to observe and take into account those observations." [*My insert*]

Judge of the Upper Tribunal P A Gray 23.1.2014

tribunal decision based upon its observations of claimant behaviour and demeanour?

MH-v-Department for Social Development (DLA) – [2012] NICom 341 – C32/12-13(DLA) involved a case where the appeal tribunal removed an award of the lower rate care component and lower rate mobility component. One of the claimant's grounds for appeal related to the appeal tribunal's comments on her appearance and behaviour during the course of the appeal tribunal hearing. In the claimant's view the appeal tribunal's description of her behaviour seemed to have played a significant part in the appeal tribunal's assessment of her credibility or reliability. Yet despite this, the appeal tribunal did not seek clarification from her concerning their perception of her behaviour or demeanour.

The Chief Commissioner held:

"22. I turn to the submissions made by Mr Lafferty [*claimant representative*] in connection with the appeal tribunal's observations of the appellant and the comments made in the statement of reasons for the appeal tribunal's decision about her demeanour. In the statement of reasons for the appeal tribunal's decision, the appeal tribunal noted that:

> 'Appellant presented to the Tribunal with most unusual behaviour, grabbing/holding the left side of her neck frequently, looking to the ceiling and moaning/lamenting throughout the hearing, save for a brief period whilst the Presenting Officer was speaking. The Tribunal offered the Appellant an adjournment on a number of occasions and initially the case was passed *[sic]* whilst the Appellant considered her options. Both Representative and Appellant confirmed that the Appellant wished the hearing to proceed.'

23. The appeal tribunal then proceeded, within the statement of reasons, to undertake a rigorous and thorough analysis of all of the medical and other evidence which was before it. That analysis is set out in considerable detail. The appeal tribunal then noted that:

> 'Tribunal rejected Appellant's evidence as we believed same to be unreliable. We found nothing in the medical evidence to account for her presentation today. Appellant's evidence was somewhat conflicting and the medical records did not support her level of complaint.'

24. As was noted above, the appellant herself submitted that the appeal tribunal's description of her behaviour seemed to have played a significant part in the appeal tribunal's assessment of her credibility or reliability. Despite this, the appeal tribunal did not seek clarification from her concerning their perception of her behaviour or demeanour. With respect to this submission, I do not agree that the appeal tribunal placed the significant emphasis on the observed behaviour of the appellant, at the oral hearing of the appeal, as she submitted in her application for leave to appeal. The appellant's evidence which was rejected by the appeal tribunal was her evidence concerning her claimed level of disability. That evidence was rejected, not on the basis of her behaviour or demeanour but on the basis that the other evidence which was available to the appeal tribunal and which was subjected to extensive and detailed analysis, did not support that claimed level of disability and inability to function. Read as a whole, the statement of reasons for the appeal tribunal's decision provides a detailed explanation of the basis on which the appeal tribunal arrived at its conclusions on the issues before it." [*My insert*]

The Chief Commission held that accordingly there was no error in law in relation to this point.

Chief Commissioner Kenneth Mullan 26.11.2013

claimant opportunity to comment on tribunal's observations – guidance industrial injuries cases

MB v Department for Social Development (II) – [2010] NICom 133 – C1/10-11(II) held:

"14. The following question arises: What responsibility or duty does a tribunal have when significant findings are made by the medical members of the tribunal in an examination of a claimant? In my view, the basic principle must be that if a tribunal raises a new issue of significance, fairness must require that the parties to the proceedings have the opportunity to comment on it. This conclusion is consistent with the authorities cited by Mr Savage [*claimant's representative*], especially the general principle set out by *Gillen J in A & Ors*, Re Application for Judicial Review [2007] NIQB30 at paragraph 40, set out at paragraph 13(x) herein.

15. It must be remembered that the present practice is for the medical members to carry out an examination with the consent, of course, of the claimant. The chairman, who is the legally qualified panel member, must be informed by his colleagues of any significant findings after the examination, otherwise there is no point in the examination. If any such findings raise issues on which the claimant has not had an opportunity to make comments, what action should the tribunal take? The case of Evans and others v Secretary of State for Social Security, a case in the English Court of Appeal, reported at R(I)5/94, gives authority for the proposition that, where views are formed by a tribunal after a medical examination, "fairness points to the need for an adjournment so that, where possible, the tribunal's provisional view can be brought to the attention of the claimant's own advisers". In addition Park J, when dealing with a Pensions Appeal Tribunal case (Butterfield v Secretary of State for Defence [2002] EWHC 2247 (Admin)), a case before the nominated judge, also emphasised that, if in relation to a medical issue, a medical member of a tribunal takes on board a medical point which is new and "might in itself be decisive", fairness requires that such a point be explained to the appellant or to the appellant's representative and that the appellant should be given a realistic opportunity to consider it. Park J also stated that "in some cases, though I hope not many, this may require the offer of an adjournment, however inconvenient and irksome that may be."

16. It seems to me that it will be reasonable in most cases to expect the parties or the representatives to comment at the hearing on a point raised by the tribunal without having to adjourn the case. However, each case has to be dealt with in its own special circumstances. Nevertheless, when a new issue arises out of information gained by the medical tribunal members at a medical examination, at the very least the claimant or his advisers should be able to comment or explain to the full tribunal why any provisional finding made by the tribunal, as a result of the new issue arising, is not as significant as first thought.

17. I take the view that there need not always be an adjournment but the tribunal's provisional view should be put to a claimant and the claimant should then expressly be offered an adjournment if the claimant can persuade the tribunal that the adjournment might eventually result in the tribunal taking a different view to the provisional view already taken.

18. It is important to realise, however, that in Great Britain decision R(DLA)8/06 Mr Commissioner Jacobs held that there was not always a duty to put observations to a party where for example the observations merely confirm a view that the tribunal would have formed anyway. In such circumstances the observations do not raise a new issue. However, as Mr Commissioner Jacobs said at paragraph 19 of R(DLA)8/06:

> "… if an observation is one of the factors taken into account in reaching a conclusion, any failure in the tribunal's inquisitorial duty or violation of the right to a fair hearing will mean that the decision is wrong in law.""

In the present case the Tribunal in its reasons found that the claimant was "very well-muscled" in his upper and lower limbs and also found that he had "no muscle wasting". The Tribunal also noted in its reasons that he "moved onto (the examination) couch and sat without problems" and appeared "to be actively magnifying his symptoms during examination". In the view of the Chief Commissioner these findings came from the medical member of the tribunal.

The Chief Commissioner held, agreeing with the claimant's representative, that these issues ought to have been put to the claimant by the full tribunal to enable him to deal with the issue. In the view of the Chief Commissioner this was not a case of a claimant complaining because he failed to present his case to his own satisfaction. In the view of the Chief Commissioner, more accurately, the claimant was prevented from dealing with a point which had become a salient issue in the case. In the view of the Chief Commissioner to have given the claimant such an opportunity would not have result in 'a sterile' argument.

It was for these reasons the Chief Commissioner held that the Tribunal had erred in law by not specifically putting the issues of muscle wasting and symptom magnification to the claimant.

The Chief Commissioner held:

"21. In my view the difficulties that arose in the present case could be obviated by taking the steps set out below which could be described as "best practice". I emphasise that this is the best practice and is not the only practice, so that a tribunal is not necessarily at fault if this procedure is not followed, as particular factors and circumstances arise in every case. However, the recommended approach will help to ensure a fair hearing for both claimants and the Department.

22. At the outset two general but significant aspects of the conduct of medical examinations, as part of appeal proceedings in appeals involving industrial injuries disablement benefit, require to be appreciated and understood. Firstly, while regulation 52 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, permits the carrying out of a physical examination, it is important to note that a medical examination may not be required in every appeal relating to industrial injuries disablement benefit. The appeal tribunal may determine, at the outset of the appeal tribunal hearing, and on the advice of the medically qualified panel member(s), that there is sufficient evidence, including medical evidence, to enable it to determine the appeal. Nonetheless, it may become apparent, during the course of the oral hearing itself, that a medial (*sic*) examination is, in fact, required. Secondly, the carrying out of any medical examination is subject to the consent of the claimant.

23. The possibility of the carrying out of an examination should be explained to the claimant at the outset of the appeal tribunal hearing, as part of the general explanation of the appeal tribunal's procedures. The chairman, who is the legally qualified panel member, should, of course, explain that any examination will be subject to the consent of the claimant, and will be carried out by the medically qualified panel member(s) alone, and that the chairman will take no part in any such examination. At this stage, the consent, or otherwise, of the claimant to the carrying out of an examination may be determined. Determining whether the claimant does consent at this early stage in the appeal tribunal proceedings, may be beneficial in cases where the appeal tribunal has decided that an examination is required.

24. At or towards the end of the hearing, the question of a physical examination should be revisited by the chairman. Where such an examination is still required, the chairman should repeat the explanation given at the outset of the appeal tribunal hearing, and if still in issue, obtain the consent of the claimant to the examination. The chairman should also explain to the claimant that he will be given an opportunity to address the full tribunal on any issues arising out of the medical examination. The emphasis should be on issues arising out of the medical examination and the claimant should be informed that the appeal tribunal will not re-visit legal, factual or evidential issues already addressed. The claimant should also be informed that the tribunal will tell him if it considers that any issues have arisen as a result of the examination, and will invite further submissions from him on those issues.

25. In either circumstance the claimant will be entitled to return to the hearing room to make any relevant point or deal with any relevant questions, and the claimant should be informed of that fact. It is appropriate that the chairman, prior to the commencement of the medical examination, should inform the claimant that if he wishes to be recalled, because there are issues arising from the medical examination which he (the claimant) wishes to be addressed, the claimant should alert the clerk to the appeal tribunal to that fact. Where, following the completion of the medical examination, the medically qualified panel member(s) alert the chairman to any issues which have arisen from the medical examination and which require to be addressed with the claimant, the chairman, on behalf of the tribunal, should recall the claimant for that purpose.

26. The accepted practice, as I understand it, is that the chairman accepts the clinical findings on medical examination made by the medical members and incorporates the findings as findings of the tribunal. The significance of those clinical findings and, their relevance to the issues arising in the appeal, form part of the appeal tribunal's evidential assessment and reasoning. It must be remembered, however, that medical members should not take evidence during the examination that ought to be dealt with before the full tribunal. If the medical members consider that questions outside the scope of a medical examination ought to be asked, they should arrange through the chairman for the appellant/claimant to be recalled to deal with such matters before the full tribunal.

27. It is important to remember that if, on appeal, a claimant does not indicate that the opportunity to make comments would have led to the claimant making a contribution that might have made a difference to the outcome of the case, the claimant will not have suffered any unfairness, as procedural irregularities do not amount to errors of law unless they result in unfairness or injustice…".

Chief Commissioner J A H Martin QC 15.12.2010

tribunal observed that claimant sat without signs of discomfort …

CB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0545 (AAC) – CE/2025/2014 held:

"18. The Tribunal's finding that Mrs B [*the claimant*] sat without any obvious discomfort during the hearing might not, in more normal circumstances, be considered objectionable (although it is always good practice, and sometimes necessary to ensure fairness, to put this point to an appellant in case there is hidden pain and discomfort). However, in this case it was flawed because the Tribunal failed to record the duration of the hearing. [*My insert*]

19. The Tribunal had an obligation to record the duration of the hearing: the start and finish times. This obligation is derived from the Senior President of Tribunals' Practice Statement about the keeping of records of proceedings by the First-tier Tribunal.

20. Paragraph 2 of the Practice Statement requires a record to be made "of the proceedings". Paragraph 3 provides that the record must be "sufficient to indicate any evidence taken and submissions made". The duration of a hearing does not fall within paragraph 3. It does not amount to evidence that is "taken" nor, of course, is it a submission or application. But this does not matter.

21. Paragraph 3 of the Practice Statement does not set out exhaustively the content of the paragraph 2 obligation to keep a record. In fact, it refers to material which would have to be recorded in any event in order to discharge the paragraph 2 duty. Keeping a record of proceedings must inevitably include keeping a record of the evidence, submissions and applications. That is the basic stuff of proceedings. This point illuminates the function of paragraph 3 which is to ensure that the paragraph 2 duty is not construed as requiring a verbatim note of the evidence, submissions and applications. Paragraph 3 does not otherwise reduce the extent of the paragraph 2 obligation. A Tribunal of Social Security Commissioners arrived at a similar conclusion in *R(DLA)3/08* in relation to the similarly-worded duty to make a record of proceedings under the now revoked regulation 55 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991).

22. The basic obligation under paragraph 2 extends beyond keeping a note of evidence taken and submissions and applications made. Whatever needs to be recorded in order to convey what happened at the hearing, bearing in mind the purpose of keeping a record of proceedings, must be recorded. I do not attempt to give a full description of the purpose of keeping a record but there are two obvious significant purposes. The first is to ensure that the panel members, when they come to make their decision after the hearing, apply a more perfect recollection of the evidence, submissions and observed behaviour than if they relied on memory alone. The second is linked to the rule of law. Anything done or said, or any event, which may realistically have a bearing on the lawfulness of the proceedings must be recorded in sufficient detail. Details will be sufficient if they allow the onward appeal bodies to apply the legal standards governing decisions of the First-tier Tribunal.

This purpose was in fact identified by a Tribunal of Social Security Commissioners in *R(DLA)3/08* albeit they were concerned with the express legislative requirement for a record of proceedings to be made under the 1999 Regulations.

23. A record needed to be made of the times at which Mrs B's hearing started and finished. It was an essential part of the evidential context because it would have indicated the period for which Mrs B apparently sat without discomfort. But, even if sitting capacity is not a live issue on an appeal, the duration of a hearing must be recorded to demonstrate that the hearing did not begin before the notified time and was of sufficient length to allow the parties to put forward their cases. The present Tribunal therefore failed to comply with its obligations under the Practice Statement. And, in the circumstances of this case, that amounted to a material error of law.

24. If the Tribunal had recorded the duration of the hearing, its finding that Mrs B sat without apparent discomfort would have been read in that light. Given the non-technical way in which statements of reasons in this jurisdiction are to be read, it would have formed part of the Tribunal's explanation for the weight given to this evidential feature. And so the absence of a record of hearing duration means the Tribunal has not explained why it gave particular weight to this point. That amounts to an error of law."

Judge of the Upper Tribunal E Mitchell 5.12.2014

tribunal observations…

DB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0471 (AAC) – CE/1690/2014 held:

"8(2). The tribunal can rely on its own observations but should put those observations to the claimant for comment. I note, however, that there is no suggestion on this appeal that the claimant had any particular comment to make on what the tribunal observed. If a party wishes to complain on appeal that they were not given the opportunity to comment on some matter, then it seems to me that they should also explain what they would or might have said if given that opportunity. If they had nothing relevant to say that might have affected the outcome of the hearing, then they can hardly complain of an injustice in being deprived of the opportunity."

Judge of the Upper Tribunal Michael Mark 17.10.2014

tribunal observations – dirt under fingernails

ADR-v-Department for Social Development (DLA) – [2013] NICom 37 – C3/13-14(DLA) held:

"13. In his first ground, the applicant submits that the tribunal erred by considering his condition on the day of the hearing rather than at the relevant period under appeal. It is clear that the tribunal addressed certain matters arising from the applicant's observed appearance at the date of hearing. For example, he was observed to have dirt under his fingernails and dirty palms. He was asked about the condition of his hands and explained that he had been power hosing the front of his house the day before. He indicated that he had also been doing some carpentry. The tribunal did not rely on these answers in assessing the applicant's level of disability however. Nor can any criticism attach to the tribunal for putting its observations to the applicant for comment."

Commissioner O Stockman 29.5.2013

tribunal observations – carrying crutch and heavy bag

JV-v-Department for Social Development (DLA) – [2013] NICom 352 – C36/12-13(DLA) held:

"44. Mrs Carty [*claimant representative*] further questions the approach of the tribunal to its ocular observation of the appellant, as the tribunal's observation of him carrying a crutch and a 'heavy bag' was cited as a reason for not believing his account that he had problems using his arms. In his DLA434 supersession claim, the appellant has written 'I am unable to carry anything when walking'. In evidence to the tribunal the appellant is recorded as saying 'My arms are not functioning'. Mrs Carty submits that the tribunal should have put this apparent discrepancy to the appellant for comment, as per C87/10-11(DLA). She was instructed that the bag was not heavy, but contained the appellant's medication and Hungarian medical reports. [*My insert*]

45. In *R3/01(IB)(T)*, at paragraph 27 it was said that '… a tribunal can use its own observations in reaching an assessment on credibility. It is however, strongly desirable that a tribunal seek a comment from the parties on specific observations of activity as opposed to a more generalised impression of the witness'. Later it was said at paragraph 28 'Where, however, a tribunal makes an observation which is merely confirmatory of existing evidence it can use that observation as an aid to assessment of the evidence before it without necessarily having to seek comment. Much will depend on whether or not a new issue is raised by the observations made'.

46. No new issue was raised by the tribunal here, such as might lead to a reduction in the appellant's entitlement to DLA [*Disability Living Allowance*]. The tribunal had found the appellant's evidence to be inconsistent and not credible, citing his account of his wife needing to help him upstairs to the toilet. I consider that this is a case where the tribunal used its ocular observation to confirm its existing view of the appellant's evidence. The tribunal observed the appellant's arms functioning, contrary to his claim, and it observed him to carry a bag and his crutch when walking. It seems to me that the only explanation which could be advanced by the appellant for this inconsistency would be that his arm functioning had improved. However, this would rather tend to undermine his supersession request based on deterioration of his condition. Again, in the particular circumstances of this case, I do not consider that the tribunal has materially erred in law by failing to seek a comment from the appellant as to his ability to use his arms." [*My insert*]

Commissioner O Stockman 10.1.2013

tribunal observations

CSIB/457/02 involved a case where in its statement of reasons the tribunal held that it could not "accept that any points can be awarded under [*what was then*] descriptor 3 – he appeared to sit comfortably during the hearing and also appeared to rise from sitting without difficulty".

The Commissioner held:

"3. There is no indication in the record of proceedings that these observations of the tribunal were put to the claimant and his representative for comment during the hearing.

4. This is unfair. A tribunal is entitled to use its own observations as part of the evidence in deciding a case. But as a matter of natural justice, the claimant should know that adverse inferences are being drawn and have the opportunity to put his own explanation of the matter to the tribunal for consideration when the latter comes to decide the issue of his capabilities overall.

5. The tribunal's observations were relied on by it for its conclusions with respect to the activities of sitting and rising from sitting. The tribunal also relied in relation to sitting on the claimant's confirmation that he "spends quite a lot of time watching TV and reading". But there is no hint in the record of proceedings that the tribunal clarified with the claimant what type of chair he used at home. The relevant chair is:

> "an upright chair with a back but no arms.""

At paragraph 6 the Commissioner highlighted that it was also "not clear" what type of chair was used at the appeal hearing. She confirmed that the statutory test involved a chair with no arms and accused the tribunal of being "sloppy" for not making clear whether the chair on which it observed the claimant sitting was one without arms. The Commissioner held that to have added the words "in an upright chair with a back but no arms" to its description of how the claimant sat was "minuscule in terms of time but important in terms of effect". She referred to the decisions in *CSIB/379/97* (Commissioner Walker) and *CIB/6651/97* (Commissioner Gamble) in which the importance of a tribunal making clear that it had the right type of chair in mind was emphasised.

Commissioner L T Parker 7.8.2002

visual observation forbidden – analogous to medical examination

RV v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0056 (AAC) – CE/2827/2013 concerned a claimant who suffered "serious problems with her legs including deep vein thromboses" and her entitlement to be treated as having 'limited capability for work-related activity'. The claimant had sought an oral hearing before an Upper Tribunal Judge so that she could show how she struggled to walk and for the Judge to see her heavily bandaged legs. She wanted to show that she was not faking it. The Upper Tribunal Judge held that on his part there was no suggestion that she was faking anything. He stated that he accepted that she struggled to walk and that she had heavily bandaged legs.

On the issue of whether it was permissible for him (or a First-tier Tribunal) to look at the claimant's legs for evidential reasons the Upper Tribunal Judge held:

"3. The only point I can consider on this appeal is whether the tribunal made a mistake in law in its decision. I cannot consider the claimant's undoubted problems in relation to her benefit being apparently stopped since the tribunal gave its decision. Further, the tribunal had to decide what the claimant was entitled to in May 2012. Unless it was something that was the consequence of her condition at that date (and there was no medical evidence to that effect before the tribunal) any deterioration in her condition after that time was not relevant to her entitlement as at 3 May 2012. For this reason, as well as because it was <u>forbidden</u> to carry out any medical examination, it could not look at her legs as she invited it to do." [*My emphasis*].

Judge of the Upper Tribunal Michael Mark 4.2.2014

tribunal not required to put every inference to claimant…

CSA/993/02 held:

"14. Mr Orr [*claimant representative*] submitted that the tribunal erred by not putting to the appellant and her representative the following inference [*which was contained within the tribunal's statement of reasons following an oral hearing*] for comment before making it:

> "She had stated as a supplementary point that the number of times the help was needed varied depending on whether she needed to change to go out, but the Tribunal found the Appellant might reasonably anticipate outings and arrange to be helped to dress appropriately and found this attention to be required twice a day only."

15. I reject also this criticism. The tribunal is not required to put, for earlier comment, every inference it later draws. Such a process would stultify the tribunal system. What is required is that there is no breach of natural justice.

16. It is only where it is a new point, and where its adverse implications for her case might well not immediately strike either her or her representative, that it would be contrary to the rules of natural justice to decide the case without the party being given the opportunity of rebuttal.

This might arise, for example, where the inference is taken on account of special knowledge or expertise on the tribunal's part or it is not a point which is patent as a matter of common sense. But this inference is an obvious possibility and does not therefore require being drawn specifically to the attention of the parties." [*My inserts*]

Commissioner L T Parker

tribunal's observations

R(DLA)8/06 (CDLA/145/2006 unreported) held:

"9. Observations made by a tribunal are regularly the subject of applications for leave to appeal. I will, therefore, try to give some general guidance on how tribunals should deal with them. I do not consider that there is any difference in principle between general and specific observations.

10. It is pertinent to begin with the eloquently expressed passage from the judgement of Mr Justice Megarry in *John v Rees* [1970] Ch 345 at 402:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence events."

11. And as I said, less eloquently, in CDLA/4585/1997 at paragraph 17:

> "However, law is one thing; practice is another. It is always good practice at the end of a hearing to put to a claimant for comment any impression that may have been formed as a result of observations made during the hearing, so that the claimant may have a chance to comment."

12. Tribunals are not bound by the rules on admissibility of evidence. They may take observations made at the hearing into account. Doing so does not involve carrying out a physical examination of a claimant or making a claimant undergo a physical test for the purposes of section 20(3) of the Social Security Act 1998. See R(DLA)1/95 at paragraph 5.

13. Tribunals have an inquisitorial function and may fail to comply with that function if they neglect to make appropriate inquiries in the light of an observation made during the hearing. Tribunals must also ensure that the parties have a fair hearing and the failure to allow a claimant to comment on observations *may* be a violation of that duty, as in *CDLA/0440/1995* (cited by the Secretary of State).

14. Like all evidence, a tribunal must not take observations into account unless they are relevant and reliable. And, if they do take them into account, they must assess their proper significance. Depending on the circumstances, this may require further investigation, analysis and, if the chairman provides a full statement of the tribunal's decision, explanation. These stages are not entirely distinct, as the following discussion shows.

15. An observation must be *relevant* to an issue of fact that is before the tribunal and to the time of the decision under appeal under section 12(8)(b) of the Social Security Act 1998. The latter is the most obvious problem that arises with the relevance of observations, because they were made later than the time of the decision. The tribunal cannot rely on them, unless it is possible to relate them back to that time: *R(DLA) 2 and 3/01*. The tribunal will have to set the observations in the context of the evidence as a whole. If that evidence does not disclose whether there has been a change in the claimant's disablement, the tribunal cannot rely on the observations without further inquiry.

16. An observation can only be taken into account if it is *reliable*. The problem with an observation is that it is a limited snapshot on a particular day. It may not give a reliable picture of the claimant's disablement. Take as an example a claimant who has asthma. The claimant may walk into the tribunal room and talk without any sign of breathlessness. The claimant may have used an inhaler before coming into the room. And the waiting and hearing rooms are likely to be warm and dry. But that same claimant may be breathless without medication or in cold or damp conditions. In other words, the tribunal's observation is reliable only in the conditions and circumstances under which it was made. Another factor is that asthma is known to be variable in its effects. The observation may be an accurate picture of the claimant's disablement on a day when the effects of the asthma are not severe. But that same claimant might be severely breathless on a different day. In other words, the tribunal's observation does not give a picture of the claimant's overall disablement. The tribunal could not rely on the observation in this example without further inquiry.

17. The *significance* of an observation can only be assessed in the context of the evidence as a whole and that evidence may have to include the result of further inquiries into the issues of relevance and reliability. And the significance of the observation, once assessed, may vary. At one extreme, it may be of no significance at all. At the other extreme, it may alone be decisive on an issue. In between, it may tip the balance of other factors, be just one of a number of factors taken into account in an overall impression, or just confirm a conclusion that is based on all evidence. The extent to which further inquiries are appropriate may depend upon the significance that the observation is likely to have in the final deliberations.

18. The significance of an observation cannot in practice be separated from the chairman's explanation of how the tribunal reached its decision, because only by that explanation is it disclosed to anyone other than the panel members. It is unfortunate that chairmen are often not as precise as they could be in stating the significance attached to an observation.

It is seldom that the observation will have been decisive. It is more likely to be just one of a number of factors that were taken into account or merely confirmatory of a decision reached on other grounds.

19. If an observation is used purely as confirmation of a conclusion that the tribunal would have reached anyway, there is no need for a tribunal to investigate it further or for the claimant to have a chance to comment on it. However, if an observation is one of the factors taken into account in reaching a conclusion, any failure in the tribunal's inquisitorial duty or violation of the right to a fair hearing will mean that the decision is wrong in law. In *De Silva v Security Commissioner* [2001] EWCA Civ 539, the chairman recorded that the decision of the majority of the tribunal had been based on the evidence as a whole and referred to three pieces of evidence by way of example. The claimant challenged the provenance of one of those pieces of evidence. The chairman had attributed this evidence to the claimant, but he denied saying it, alleging that it was said by someone else at the hearing. I dismissed the claimant's appeal, saying that even if the tribunal did make the mistake alleged, it had not affected the outcome because it was only one of three factors listed and even together they were not comprehensive of the reasons for the tribunal's decision. The Court of Appeal decided that that was wrong. As Lord Justice Latham explained at paragraph 11:

> "Even though the Tribunal was careful to state that the decision was based upon all the evidence, the emphasis that it placed on this particular piece of evidence cannot be ignored. If it was a mistake, which was the assumption that the Commissioner was prepared to make for the purposes of his decision, it must have had an effect on the decision of the majority. That being so, I consider that the Commissioner's decision was wrong in law."

The Court of Appeal went on to decide whether the claimant had made the disputed statement and, having decided that he had, dismissed his appeal."

Applying these principles to the present case the Commissioner held:

"21. The tribunal observed the claimant as he arrived in the hearing room, during the hearing and at the end as he left. The tribunal took account of those observations in reaching its decision. They formed but one of a long list of factors identified by the chairman, but if the tribunal went wrong in law in dealing with the observations, its decision was, on the basis of *De Silva*, wrong in law.

22. The chairman put to the claimant the observations that the tribunal had made when he arrived and during the first 40 minutes of the hearing. He did not ask the claimant to comment on its observations of him as he left. However, those observations were to the same effect as those put to the claimant. If the tribunal dealt correctly with the other observations, it did not go wrong in law.

23. The claimant's representative is correct that the chairman did not ask specific questions on the matters identified in the grounds of appeal. He did not ask how long the claimant had taken to walk to the venue from the car. Nor did he ask how long he had sat before the start of the hearing. However, the chairman did not have to ask precise questions in order to fulfil the tribunal's inquisitorial function and afford the claimant a fair hearing. He did not have to anticipate the answers that the claimant might give or ask a series of questions covering every possibility. What he did was to ask an open question, leaving the claimant to make an appropriate response. That response could then have been followed up with appropriate, and perhaps more specific, questions. But the claimant did not give the explanations now provided by his representative.

24. The claimant's representative is also correct that the chairman did not point out to the claimant the significance of the observations that the tribunal had made. But the claimant must have realised this. He had presented his claim on the basis of pain and exhaustion and the observations were clearly directly relevant to that.

25. I consider that the chairman's questioning was sufficient even if the claimant had attended alone and unrepresented. But in this case the claimant was represented. His representative was present at the hearing and must, or should, have understood the significance of the chairman's questions. He could have asked the claimant further and more specific questions if he considered it appropriate or invited the tribunal to pursue specific inquiries. The record of proceedings shows that everyone had a chance to contribute and the representative has not alleged that the chairman prevented appropriate contributions from anyone present.

26. The representative has also challenged the accuracy of the observations, saying that the claimant did show signs of tiredness and fatigue. He does not say whether that was before or after the chairman put the observations to the claimant. If it was before, the claimant and his representative had a chance to point out that the observation was inaccurate, but neither did. If it was after, they both knew of the observations the tribunal had made and could have mentioned it to the tribunal, but again neither did. I notice that, towards the end of the hearing, the representative made a submission on the examining medical practitioner's comment that the claimant was not obviously in distress: 'Don't fall into trap – just because you can't see it, doesn't mean it's not there.' That was an ideal point at which he could have emphasised that the tribunal might fall into this trap from the observations that it had made, but he did not.

27. The chairman's explanation does not disclose the precise significance of the observations on the tribunal's decision. It is clear that they were not alone decisive. They may have done no more than confirm the effect of the other reasons set out by the chairman, but the chairman did not put it in that way. As presented, the observations were part of a parcel of factors that together led the tribunal to make its findings of fact. It was probably impossible to unravel with greater precision the effect that each of those factors had in the tribunal's reasoning. All that the chairman could say was that these in total were the factors that had led the tribunal to its conclusion. They were relevant to the findings, so the tribunal was not wrong to take them into account. There is nothing to suggest that the tribunal attributed to them an inappropriate significance.

28. Even if the tribunal had gone wrong in law in the way that it dealt with the observations, I would not have directed a rehearing. The record of proceedings shows that the claimant, his father and his representative had every chance to present their evidence and arguments in support of the claim for a disability living allowance. That same record shows the thoroughness of the tribunal's inquiries into the facts.

And the chairman's full statement of the tribunal's decision contains a clear and detailed account of how the tribunal came to its decisions. The other reasons given by the chairman are cumulatively persuasive, indeed compelling. In those circumstances, I would have substituted a decision to the same effect as the tribunal's rather than direct a rehearing."

The appeal was dismissed.

Commissioner E Jacobs 25.4.2006

tribunal may have regard to observations of claimant – no requirement to invite comment from appellant

CSDLA/463/2007 examined the issue of whether the tribunal was wrong in not putting its evidential observations to the claimant in the course of the appeal hearing. The tribunal used, for the purposes of the cooking test, its own observational evidence of the claimant using her mobile phone with her right hand against claims that the functional ability of her right hand was impaired.

The decision confirmed the position of R(DLA)1/95 (Commissioner Skinner) that a tribunal is entitled to observe the claimant providing that the weight accorded to what it sees is considered carefully. The Commissioner held that R(DLA)1/95 (Commissioner Skinner) did not however, suggest that the observations of a tribunal are required to be put to the claimant. On this point the Upper Tribunal Judge provided that not doing so did not automatically render a decision erroneous in law.

The Commissioner held:

"11. … In assessing evidence, an important element is observation of the demeanour of the witness. That will also include observation of physical capacity. The tribunal's observations are not of the nature of giving evidence to themselves but are part of the judicial process in assessing the evidence which is put before them. I cannot, in these circumstances, conceive that a tribunal is bound to put to a claimant in an appeal before them their thoughts in that process. I am fortified in that regard by what was said by Mrs Commissioner Brown in C2/99(IB) where she said:

> "I specifically do not conclude that there was any violation of the rules of natural justice in the Tribunal using its ocular observations as one of the methods of assessing the evidence already before it without specifically asking for comment on its ocular observations. The Tribunal was not itself providing evidence. Its duty was to adjudicate on the evidence before it but it was entitled to use its own observations in so doing."

She went on to say:

> "24. It appears to me also perfectly clear that the Tribunal's own observations were but one of the factors which brought it to the conclusion which it reached. The fact that the observation was so specific in terms of one of the descriptors does not mean that observation was qualitatively altered into evidence. It merely means that the observation pointed particularly sharply to the weight to be given to the evidence before it."

The tribunal must take care not to be seen to cross-examine a witness for that is not their function. What the tribunal saw in this case in relation to the claimant's capacity to open her handbag and take out her mobile phone, was material to the assessment of the evidence which they required to carry out for the purposes of making their findings in fact.

12. Their use of their own observations and the weight they attached to them seem to me to be within the parameters set out in R(DLA)1/95. It was not the case here that they relied upon their own observations only. I refer in particular to paragraphs… of the reasons. It follows in these circumstances that I do not accept what is said by Mrs Commissioner Parker in CSDLA/1288/2005 and the case cited therein. That decision did not, it appears to me, analyse what the tribunal were actually doing when relying upon their own observations.

13. It is also to be noted that the grounds of appeal nowhere assert that the claimant did not carry out the actions observed by the tribunal in the manner in which the tribunal observed. If the claimant is not seeking to deny the observations that were made, it is difficult to see how a failure to put the observation can be regarded as unfair to her and provide the foundation for an assertion that she did not receive a fair hearing. On that basis her appeal would be bound to fail in any event. It further seems to me that there were ample other reasons for rejecting the claimant's evidence as contained in the statement of reasons…".

See also R(DLA)8/06.

Commissioner D J May 28.10.2009

tribunal observations during appeal hearing

MC-v-Department for Social Development (DLA) – [2011] NICom 142 – C87/10-11(DLA) held:

"16. At paragraph 27 of R3/01(IB)(T) a Tribunal of Commissioners stated:

> '….we would state that a Tribunal can use its own observations in reaching an assessment of credibility. It is, however, strongly desirable that a Tribunal seek a comment from the parties on specific observations of activity as opposed to a more generalised impression of the witness. Comment on observations can be sought in an uncontroversial manner and it is up to the Tribunal whether or not it accepts any explanation which is given.

A Tribunal will not necessarily be in error if it does not seek such an explanation but it is much less likely to err if it does so. It may, of course be in error if the observations raise a fresh issue not already in contention and the Tribunal does not seek comment on them. For example if an Examining Medical Doctor opines that a claimant always has to hold on when rising from a chair and the decision maker so accepts and awards points accordingly and the Tribunal observes the claimant to rise without holding on, it must mention the observations and seek comment. Whether or not it accepts the explanation given is a matter for the Tribunal.'

17. In paragraphs 16 and 17 of R(DLA)8/06 Commissioner Jacobs stated:

'16. An observation can only be taken into account if it is reliable. The problem with an observation is that it is a limited snapshot on a particular day. It may not give a reliable picture of the claimant's disablement……..

17. The significance of an observation can only be assessed in the context of the evidence as a whole and the evidence may have to include the result of further inquiries into the issues of relevance and reliability…..'

18. In C26/10-11(DLA), I stated the following, at paragraph 23:

'23. The legal principles concerning the extent to which an appeal tribunal may take into account its observations of an appellant at an oral hearing are clear. In addition to those principles set out in R3/01(IB)(T) and R(DLA)8/06 cited by DMS, in R1/01 (IB)(T), a Tribunal of Commissioners stated, at paragraph 13:

'… we wish to deal with one point. In paragraphs 21 to 24 of decision R 4/99 (IB), Mrs Commissioner Brown held that a Tribunal, like any other adjudicating body, is entitled to use all its senses in assessing the evidence before it and may take account of what it sees as well as hears. She referred to decision CDLA/021/1994 (now reported as R(DLA)1/95), in which a Great Britain Commissioner, Mr Commissioner Skinner, said: -

'… The tribunal are precluded from conducting a walking test or making a medical examination of the claimant. However, it does not appear to me that the tribunal's ocular observation of the claimant can be said to amount to a physical examination nor can it be said that the claimant has been required to undergo any physical test. It does not seem to me that the tribunal [which took into account observations made by the members during the hearing] were in breach of the prohibition contained in the section. I have considered whether the reliance by the members of the tribunal on their own observation of the claimant may be objectionable on other grounds. It seems to me that a tribunal are entitled to have regard to what they see provided that the weight to be attached is considered carefully. …'

We agree with those views. In the context of a Tribunal hearing, sight is one of the more important senses. Observing the manner in which a witness gives his or her evidence and how he or she behaves or responds at other times is an important part of the process. Witness A may be wholly convincing while everyone who listens to and observes witness B soon becomes certain that he or she is lying. A Tribunal must, of course, consider its observations carefully and judiciously. The neatly dressed man who has said he is unable to look after himself may be lying. On the other hand, the Tribunal may be seeing the results of extensive efforts by his family or friends to tidy him up for the hearing. Further, a Tribunal which is going to base its decision, or an important part of its decision, on what it has seen should usually put its observations to the claimant and thereby give him an opportunity to comment. It will then be for the Tribunal to accept or reject the comments. Whether or not this is necessary will depend in a large measure on whether the Tribunal's observations raise a new issue or constitute fresh evidence or whether they merely confirm existing evidence.'

19. In the instant case, the appeal tribunal, in the statement of reasons for its decision in respect of the mobility component of DLA, stated that:

'On the day of the hearing (the claimant) entered and left the room with no discernible walking restriction and he carried no walking aid.'

20. It is clear to me that the appeal tribunal placed an emphasis on its ocular observations of the appellant's ability to walk in and out of the appeal tribunal hearing room with no restriction and with no walking aid. In those circumstances, it was, in my view, incumbent on the appeal tribunal to seek comment from the applicant. Its failure to do so renders its decision as being in error of law."

Commissioner K Mullan 4.2.2011

obviating need – allowing claimant to comment upon tribunal finding

R(DLA)3/07 (CDLA/2379/2005 unreported) concerned the issue of bias when an Examining Medical Practitioner has sat with the tribunal chairman on previous occasions. At the appeal before the Commissioner the claimant's representative also complained that the tribunal did not put to the claimant findings that they could avoid the risk of vomiting when they used their inhaler by using a spacer. On this point the Commissioner (paragraph 17) held that "… it would have been better had the point been put to the claimant: but in my judgment this minor error is not of such a material nature as to make the tribunal's decision erroneous in law."

See also R(DLA)8/06.

Commissioner A Lloyd-Davies 1.3.2007

tribunal observations

CI/01-02(IB)(T)(*97/01) held:

"23. … The request to look at his knee came from the claimant and related to the report of the Examining Medical Practitioner. In our view, it would have been legitimate for the Appeal Tribunal to have complied with that request provided that the members restricted themselves to looking and did not go further though it may of course ask questions on what it has observed. Indeed, we take the view that if the claimant had offered the Appeal Tribunal the opportunity to compare one knee with the other – something which he did not in fact do because of the Appeal Tribunal's refusal to look at the proffered knee – the members of the Appeal Tribunal could have legitimately availed themselves of that opportunity. The matter was important to the claimant and they should have either accepted his offer or given him the opportunity to obtain other evidence about his knee. They did not, however, consider doing so but proceeded with the hearing. That, in our view, was a breach of natural justice amounting to an error of law. For this reason we allow the appeal."

See also R(DLA)8/06.

Chief Commissioner John A H Martin QC, Commissioner Moya F Brown and Deputy Commissioner J P Powell 13.6.2001

tribunal – right to carry out physical examination

CDLA/433/1999(*57/99) held:

"14. The chairman's record of proceedings contains a statement that the medical member of the tribunal examined the claimant's hands. The full statement of the tribunal's decision records that the claimant allowed the doctor "to examine her hands which were not on the present occasion acutely affected." Little more could have been done than a visual examination of the claimant's hands. That is not very different from the claimant taking her gloves off and showing her hands to the tribunal without being asked. If that had been what happened, the members of the tribunal would have been entitled to take into account what they saw. However, the record and the statement both describe what took place as an examination and I deal with the case on that basis.

15. Section 55(2)(a) of the Social Security Administration Act 1992 provides that:

> 'At a hearing before a disability appeal tribunal, except in prescribed circumstances, the tribunal (a) may not carry out a physical examination of the claimant'.

16. The tribunal acted in breach of that prohibition. As Section 55 does not provide for the consequence of breach, the question for me is: does the carrying out of a physical examination amount to or involve an error of law?

17. My conclusion is this. The effect of Section 55(2)(a) is to restrict the evidence that may be taken into account by a tribunal. The carrying out of a physical examination is not an error of law that requires the tribunal's decision to be set aside. However, if the tribunal's decision is based on the evidence obtained from that examination, that is an error of law that requires the tribunal's decision to be set aside."

Commissioner Edward Jacobs 30.9.1999

tribunal observations vs. claimant own evidence

CDLA/4/1998 (paragraph 7) held that the tribunal had erred because having accepted the claimant's evidence that she could "walk approximately 40 yards and then needed a rest of about 4½ minutes before setting off again" and seemingly accepting that what stopped her from walking further was "severe discomfort", it also took account of its own observation of her ability to walk 10 or so yards. The tribunal's decision read "The appellant was observed to move freely in and out the tribunal room a distance of some 10 or so yards apparently quite freely and at what could be considered a normal pace. She did not appear to use a walking stick when entering or leaving the tribunal room". With reference to this the Commissioner held "It [*the tribunal*] is entitled to take account of its own observations, but since the claimant had never suggested that her ability to walk was limited to any distance less than 40 yards I do not see the relevance of the tribunal's observation in this case, and if the observation has affected its decision that the claimant is not entitled to a higher rate mobility component then that appears to me to be irrational". [*My insert*].

Commissioner H Levenson 18.12.1998

tribunal – carry out physical examination/physical test

R(DLA)5/03 (CDLA/3967/2002 unreported) held:

"8. The claimant's representative has asked me to deal with an issue of more general importance. This is the tribunal's power, on hearing a disability living allowance appeal, to carry out a physical examination or ask the claimant to undergo a physical test. The issue arose from an allegation that the tribunal had asked the claimant to pick up her handbag from the floor and tip out its contents. It has developed into a broader discussion of the tribunal's powers. As I have set the tribunal's decision aside on other grounds, I am not concerned with what the tribunal did; that can be dealt with under the tribunal's complaint procedure. I am concerned rather with directing the tribunal on its powers at the rehearing.

9. The claimant's representative has put her argument in different ways, but they all relate to section 20(3) of the Social Security Act 1998. This provides:

> "(3) At a hearing before an appeal tribunal, except in prescribed cases or circumstances, the tribunal –
>
> (a) may not carry out a physical examination of the person mentioned in subsection (2) above; and
>
> (b) may not require the person to undergo any physical test for the purpose of determining whether he satisfies the condition mentioned in section 73(1)(a) of the Contributions and Benefits Act."

This effectively re-enacts section 55(2) of the Social Security Administration Act 1992, which was limited to the former disability appeal tribunals. Section 73(1)(a) deals with actual and virtual inability to walk.

Physical examination

10. A tribunal is not entitled to carry out a physical examination of the claimant. That is prohibited by section 20(3)(a). What is a physical examination for the purposes of this provision? The nature of a physical examination was considered by the Tribunal of Commissioners in Northern Ireland in *C1/01-02(IB)* (*sic*). I respectfully agree with that decision. A physical examination is more than mere observation of an activity performed by a claimant at someone's request. A physical examination is a structured investigation applying medically recognised techniques in an attempt to elicit objective signs of injury, disease or dysfunction. These techniques may involve physical contact with the claimant, but this is not an essential feature of all examinations.

11. Asking questions at a hearing differs from an examination. The purpose of asking questions is not to identify objective physical signs. Rather, it is an attempt to elicit the claimants' symptoms or estimates of their own disablement.

12. Nor does it involve an examination to ask a claimant with a visual impairment "What can you see when you look at the panel members?", an example used by the claimant's representative. There is no difference between this and any other question. It is merely asking the claimant to give oral evidence in a way that will allow the answer to be most informative to the tribunal.

13. Watching a claimant perform an everyday function in the tribunal room is different from asking questions, but it does not involve carrying out a physical examination, because it is not applying medically recognised techniques.

14. So, I reject the argument that observing the performance of a task amounts to or involves carrying out a physical examination.

Physical test

15. A physical test, in the context of section 20(3)(b) and in contrast to physical examination, means performing an activity which demonstrates the extent of the claimant's ability to perform that activity or to perform an activity that involves similar or related functions.

16. If a claimant does something in view of the tribunal and without prompting or request by the tribunal, it is entitled to take account of its observations. The claimant's representative accepts that. This applies to something done by the claimant without appreciating its significance, such as the manner of walking into the hearing room. It also applies to something which the claimant volunteers to do, such as showing a swollen joint or demonstrating a difficulty with buttons.

17. The issue raised by the claimant's representative concerns an activity that the tribunal asks the claimant to perform. Of course, the tribunal cannot force a claimant to do something. But there is the risk that it might draw adverse conclusions from a failure to comply with a request. If the tribunal is entitled to require the claimant to undergo a physical test, it is entitled both to ask the claimant to do something and to draw appropriate inferences from a refusal.

18. Section 20(3)(b) only prohibits a tribunal from requiring a claimant to undergo a physical test in order to test for actual or virtual inability to walk. On the face of it, it leaves the tribunal free to require a claimant to undergo a physical test for other aspects of entitlement to a disability living allowance. However, that is not a correct interpretation. The provision must not be interpreted in isolation. It can only be properly understood in its historical context of the development of the law. The provision began as section 55(2) of the 1992 Act and was enacted in relation to the creation of disability appeal tribunals. When those tribunals were abolished and replaced by the appeal tribunals under the 1998 Act, the provision was repeated. Historically, the only tests that were carried out before 1992 were those carried out by the medical appeal tribunals. Those tribunals had the power to carry out a physical examination of a claimant. In the case of appeals relating to mobility allowance, the examination was usually supplemented by a walking test. Viewed in that context, section 55(2)(b) of the 1992 Act and section 20(3)(b) of the 1998 Act prohibit only the test that was formerly used by medical appeal tribunals. They prohibit only that test, because no other test was ever used. They are negative in their effect. It is not appropriate to interpret them to confer a positive statutory authority to require a claimant to undergo a physical test for other purposes.

19. However, that does not mean that appeal tribunals may not invite claimants to demonstrate an activity. Tribunals are entitled to ask claimants to explain how they do something. There is limited scope for this enquiry to be supplemented by a demonstration in the context of the mobility component at the lower rate or of the care component. But, to the extent that this may be possible, there is no reason why tribunals should not also ask claimants to demonstrate. Such requests must, of course, be limited to the proper scope of a hearing. It is the function of a tribunal to conduct a judicial enquiry, not to undertake an occupational therapy assessment. If a claimant refuses to accede to the tribunal's request, it may be entitled to draw inferences from that refusal. But this will depend on the reasonableness of the request and the reasons the claimant gives for refusing to comply.

Section 12(8)(b):

20. Although a tribunal is entitled to rely on its observations, they must be relevant and related to the period over which the tribunal has jurisdiction under section 12(8)(b) of the Social Security Act 1998".

Commissioner Edwards Jacobs 5.3.2003

tribunal's observations – claimant walking into room

CDLA/849/1999(*57/99) concerned an appeal against a tribunal's decision where, in agreeing with the Adjudication Officer's decision that the claimant was not entitled to the mobility component, it reasoned:

> "the tribunal is supported in its decision by its own observations of the appellant. She walked into the tribunal suite at normal speed, pulled up a chair, and sat in it without any apparent pain or difficulty. She reversed the process on leaving (smiling?)."

In regard to this reasoning the Commissioner held:

"5. I also agree with the claimant's representative that the tribunal erred in the way in which they dealt with their observations of the claimant at the hearing. Despite the prohibition on physical examinations and physical tests by a disability tribunal… , it was held in R(DLA) 1/95 that a tribunal is entitled to rely on ocular observation of a claimant. Observations of the claimant at an appeal hearing may raise relevant issues of fact, for example, in a case where a claimant who has been said always to need a walking stick enters the tribunal room unaided, and a tribunal is also entitled to have regard to the claimant's demeanour in assessing the claimant's credibility as a witness. However, tribunal should, in my view, be very slow to attempt anything in the nature of a medical diagnosis on the basis of visual observations of a claimant unassisted by any physical examination. The way in which a claimant presents at a hearing may also be misleading for many reasons, and tribunals should be astute to ensure that no breach of natural justice occurs because of any failure to give a claimant an opportunity of dealing with findings which the tribunal is minded to make based on, or supported by, their own observations.

6. The tribunal's reliance on their observations of the claimant in this case gave rise to three errors. First, although it is apparent from their decision that the tribunal regarded their observations of the claimant as relevant to some disputed issue, they did not state in their decision what that issue was. It may be that their own observations of the claimant led the tribunal to reject the claimant's own account of her difficulties in walking, but they did not make such a finding and the relevance which the tribunal themselves attributed to their observations is therefore not apparent. Secondly, I agree with the claimant's representative that the way in which the claimant entered and left the tribunal room was almost completely irrelevant to any question which the tribunal had to decide. Although the claimant stated on her claim form that she could only walk a short distance before feeling severe discomfort and pain, it has never been part of her case that she feels pain after only two or three steps and regulation… in any case, is concerned with ability to walk out of doors. Thirdly, I consider that the tribunal acted in breach of the requirements of natural justice by failing to give the claimant any opportunity to comment on the conclusions which they were minded to draw as a result of their observations of her in the tribunal room. The claimant in this case was therefore deprived of an opportunity of explaining to the tribunal how the way in which she entered the tribunal room and sat down was consistent with the difficulties in walking which she claimed. Although the word 'smiling' is not clear in the manuscript statement of facts and reasons, any reference to the claimant smiling when leaving the tribunal room carries the risk that the claimant may have been led to believe that she lost her appeal because of the pleasant way in which she conducted herself at the hearing."

Commissioner E A L Bano 3.7.2000

use of tribunal's observations

CDLA/0141/2001 concerned the judicial use of one tribunal's observations in another tribunal's decision. In 1996 the claimant lost an appeal for the highest rate care component when at the time he was getting the higher rate mobility component by way of a life time award. During the appeal the tribunal did not enquire into the mobility award.

The tribunal confined themselves to matters concerning the care component. After the appeal the tribunal members did make "detailed observations of the claimant walking a distance of approximately 70 metres, opening the tail-gate of his car, getting into the car, and turning in his seat to take a baby being passed to him by another person." These observations were later used by a different tribunal in a decision which resulted in the claimant losing his mobility component.

The question put to the Commissioner was whether rules were broken by the second tribunal. On this point the Commissioner held:

"20. In my opinion there was nothing at all improper about the course of action taken by the 1996 tribunal or in the fact that the 2000 tribunal relied on the observations of the former. I do not accept the argument that the independence of the later tribunal was circumscribed by considering evidence from a fellow tribunal, or by the fact that the chairman of the earlier tribunal has since become a Commissioner. The only challenge to the accuracy of the observations made by the 1996 tribunal was as to the distance over which the members watched the claimant. Even if it is the case that the relevant distance is 50 metres rather than 70 metres, that does not materially affect the relevance of the observations. Had the claimant challenged the veracity of the members of the 1996 tribunal, then steps would have had to be taken in relation to the composition of the later tribunal. However, that was not the basis on which the claimant's solicitors presented the case."

Commissioner H Levenson 19.3.2002

failure to comment on observations

C22/06-07(DLA) held:

"6. Although the matter has not been raised by the parties, I note that the tribunal relied, in refusing entitlement to the higher rate mobility component of disability living allowance (DLA), on the following observations made by itself:

> "Twice on getting up before the Tribunal, she rose quickly and walked confidently to the door and out of same, on one occasion bending quickly to lift her crutch".

There is no indication from the record of proceedings that these observations were put to the claimant for her comment. There is no obligation on a tribunal to accept a response that might have been made to such observations, but it must take it into consideration and briefly explain to her why it has made the findings it has, having regard both to its observations and her explanation."

Deputy Commissioner Parker 16.11.2006