

Fee Paid Member (Disability) of the Social Entitlement Chamber of the First Tier Tribunal

Qualifying Test – Guidance for applicants

The qualifying test will be the only method used to shortlist applicants for this selection exercise. Shortlisting is a competitive process, so the test is designed to be challenging, with time pressure. It will be sat under examination conditions, with up to 16 applicants sitting the test together in each session. Should you have requested reasonable adjustments to be made, the Candidate Services Team will contact you to make arrangements.

You will be required to read and assimilate a number of papers and apply – as appropriate – the information contained in them. **The time allowed for the test will be 90 minutes including reading time.** You will have the choice of writing your answers by hand or using a word processing package (MS Word) on a laptop supplied by the JAC.

You will be put in the position of Fee Paid Member (Disability) of the Tribunal and required to analyse the information provided, identify issues and apply the law to reach a reasoned decision. The test will specifically test the following qualities and abilities:

- **Intellectual Capacity: Ability quickly to absorb and analyse information**
- **Personal qualities: Sound judgement and objectivity**
- **Efficiency: Ability to work at speed and under pressure.**

The test has been devised by judges and is designed to be accessible to applicants from all backgrounds and in particular those who have experience of disability.

The test will be based on a case concerning **Disability Living Allowance or Attendance Allowance**. It is designed to assess appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

Depending on your previous knowledge of the jurisdiction, you may need to prepare in advance. Candidates are referred to the Guide to Disability Living Allowance Attendance Allowance at Annex A and the Benchbook at Annex C. The relevant legislative framework for Disability Living Allowance and Attendance Allowance is provided in the Guide referred to above.

The questions will require considered answers, and will ask you to demonstrate either competence in, or an ability to acquire knowledge of, disability issues and the law. One question will ask you to consider the factors that contribute to a decision concerning Disability Living Allowance. You will be provided with a submission from the Secretary of State similar to the one at Annex B. Another question will ask you to consider the various features of conflict of interest. You will be expected to produce answers using your own knowledge and the resources made available to you before and on the day.

GUIDE TO DISABILITY LIVING ALLOWANCE (DLA) AND ATTENDANCE ALLOWANCE (AA)

(Rates shown from April 2009, are normally up rated annually)

The Law:

Social Security Contributions and Benefits Act 1992 (as amended) - Sect 71-76

Social Security (Disability Living Allowance) Regulations 1991 (as amended)

- 1 This Guide is designed to give you a basic knowledge of the requirements of DLA and the confidence to tackle the exercises you will face during the selection process. It does not cover the many procedural complexities of the benefit, and will do no more than alert you to intricacies in the substantive law. We have deliberately left out references to case law. A note about AA is at the end of this document.
- 2 **Appeals** against decisions on awards, or the refusal of an award, are heard by a Tribunal consisting of a legally qualified Judge who chairs the Tribunal, a medically qualified Medical Member and Disability Member who is a person with experience of disability either in a personal or professional capacity. *These titles changed from 3 November 2008.*
- 3 **DLA** is a non-means tested and non-contributory benefit aimed at those below the age of 65 who are so severely disabled (mentally or physically) that they have either mobility or care needs, or both. It is a single benefit, divided into two components, **Mobility** and **Care**. Each component is divided into rates.
 - Care has 3 rates: lowest, middle and highest.
 - Mobility has 2 rates: higher and lower.
- 4 Qualifying periods: The claimant must have met the criteria for the component and rate claimed for a period of 3 months before the claim, and be expected to continue to fulfil the criteria for a period of 6 months afterwards.
- 5 Claim packs are based upon self-assessment, but the claimant may include evidence of his conditions and disability from others, such as a carer or GP. By the time an appeal reaches a tribunal, it may have reports from diverse sources.
- 6 To learn more and see the forms visit:
http://www.direct.gov.uk/en/DisabledPeople/FinancialSupport/DG_10011731
- 7 The Department of Work and Pensions (DWP) may also request medical or other reports for the purposes of the claim, such as a factual report from the claimant's GP or consultant, or a report from an Examining Medical Practitioner (EMP).
- 8 The DWP obtains its EMP reports from an independent contractor, 'ATOS', whose doctors have training in disability medicine and the application of the statutory criteria. The EMP, who normally makes a home visit, bases his report on interview, examination and observations. EMPs do not have the claimant's medical files available to them and will not have met the claimant before the examination takes place.

The Mobility Component:

- 9 There are two rates at which the mobility component may be paid – higher or lower. A claimant may be awarded one rate or the other but not both.
- 10 An award can only be made where the claimant will benefit from enhanced facilities for locomotion. This is liberally interpreted.
- 11 **Higher Rate (£49.10 per week):** This guide is confined to the criterion of virtual inability to walk as a route to entitlement to the higher rate of mobility. This is because the vast majority of appeals involve this issue.
- 12 **Virtual inability to walk:** The test is whether the claimant's **physical** condition, taken as a whole is such that ... :
- ◆ his ability to walk out of doors is so limited, as regards to
 - the distance over which; or
 - the speed at which; or
 - the length of time for which; or
 - the manner in which, he can make progress on foot without **severe discomfort**,
 - ◆ that he is virtually unable to walk.
- 13 The test envisages walking on ordinary pavements that are relatively flat. The claimant's individual circumstances are not taken into consideration. It is therefore irrelevant that he may live up a steep hill.
- 14 **Lower Rate (£18.65 per week):** The criteria is that the claimant is able to walk but is:
- so severely disabled physically *or mentally* that,
 - disregarding ability to walk on familiar routes on own
 - he cannot take advantage of the faculty of walking out of doors
 - without guidance or supervision from another person most of the time.
- 15 This rate applies to those with physical and/or mental disablement, and includes a wide range of problems such as blindness, agoraphobia, dizziness and disorientation arising from mental disability, epilepsy, and falling down while walking from a variety of causes. The list is open-ended.
- 16 Supervision may take various forms, but is basically passive. It may involve watching or monitoring to gauge the claimant's physical, mental or emotional state, a readiness to intervene and help, if needs be, to look out for obstacles or dangers, or distract, encourage, persuade or cajole him to walk or keep walking.
- 17 Guidance is more active, generally, and may entail physically leading the claimant or giving physical help with obstacles or dangers.
- 18 Where the reason a claimant cannot go out alone is fear or anxiety, the fear or anxiety must be, or proceed from, a mental disability.
- 19 Any walking on routes with which the claimant is familiar is disregarded. In other words, it is immaterial if the claimant can get to a local place that he knows well. On the other hand, it must be evidentially significant if he needs guidance or supervision even on familiar routes because of his disability.

- 20 The higher and lower rates of mobility have entirely distinct criteria. The lower rate cannot be awarded because the claimant has 'just missed' being virtually unable to walk.

The Care Component

- 21 There are three rates of this component - lowest, middle and highest.
- 22 **Lowest Rate (£18.65 per week):** This is for a person who either:
- requires attention from another person in connection with bodily function for a significant portion of the day, whether during a single period or a number of periods;
 - or,
 - cannot prepare a cooked main meal for himself if he has the ingredients (if 16 years of age or over).
- 23 **Middle Rate (£47.10 per week):** Entitlement can be based on fulfilment of either **day or night** conditions.
- 24 **Day conditions for the middle rate** are satisfied if the claimant has 'attention' or 'supervision' needs of the appropriate extent.
- 25 Daytime 'attention' needs are established when the claimant requires frequent attention throughout the day from another person in connection with bodily functions throughout the day.
- 26 Daytime 'supervision' needs are established when the claimant requires continual supervision throughout the day from another person to avoid substantial danger to himself or others.
- 27 A claimant cannot qualify for the middle rate of care by combining some daytime attention needs with some daytime supervision needs.
- 28 **Night conditions for the middle rate** are satisfied if the claimant shows *either* that:
- at night, he requires from another person prolonged or repeated attention in connection with bodily functions;
 - or,
 - at night, requires another person to be awake for a prolonged period, or at frequent intervals, to watch over him to avoid substantial danger to himself or others.
- 29 **Highest Rate (£70.35 per week):** This rate is payable to a claimant who has needs during the day and night such that he satisfies one of the daytime middle rate conditions and one night time condition.
- 30 The permutations:
- day attention + night attention

- day attention + night watching over
- day supervision + night attention
- day supervision + night watching over

31 Satisfaction of the lowest rate of care plus night needs does not lead to any extra benefit. The claimant will only be entitled to the higher of the two rates, viz. the middle rate based on night needs only.

The terminology

32 A disabled person's condition may vary over time, with good days and bad days. It is therefore a matter of judgment whether the claimant satisfies the conditions throughout the period. There is no arithmetical formula, and a broad view must be taken.

33 **Requires:** 'Requires' means '*reasonably* requires'. A claimant may be getting a great deal of attention from family, friends or carers, but looked at objectively, may not reasonably need it because simple aids and devices may be available to enable him to manage independently. Alternatively, a claimant may not be getting any assistance at all (perhaps because he lives alone), but looked at objectively, may reasonably require it. However, a person who *is* managing at home on his own may have developed coping strategies, adapted to his disabilities or acquired aids and equipment such that he does not reasonably require help.

34 **Day and night:** 'Day' does not refer to a period of 24 hours. It means the period in which, in accordance with the domestic routine of the household, the household becomes active in the morning until it closes down for the night. As a generality, night is measured from the time the household closes down for the night.

35 **Significant portion of the day:** There is no arithmetical approach to deciding what is significant.

36 **Cannot prepare a main meal for himself:** The 'main meal' or 'cooking' test is gauged against the tasks involved in making a meal for oneself. It is irrelevant that the claimant cannot or would not cook. The test presupposes that the ingredients, suitably sized pots, pans and plates plus a range of ordinary or commonly available utensils are already conveniently located in the kitchen.

37 The main meal contemplated is reasonably labour intensive, made with freshly prepared ingredients on a traditional cooker. It can be prepared on the hob. There is no requirement that the claimant can use an oven. An ability to cut, chop, peel, stand and sit while preparing and cooking, use a pot/pan safely and remove food from the pan (using a slotted spoon, if necessary) are plainly relevant.

38 The use of a microwave as a cooking tool may be considered, so long as it is used to prepare a fresh meal and not just to heat up pre-packed convenience foods. The ability to use a microwave may, in itself, indicate sufficient levels of dexterity, agility and concentration from which to infer that the claimant could prepare his meal in a more traditional way. Other activities in which the claimant engages may enable the decision maker to make similar inferences.

39 **Attention:** This imports service of a close and intimate nature carried out in the presence of the disabled person. Where there is a problem of faecal or bladder incontinence, attention may include help with the immediate aftermath of an

accident including helping the claimant to wash himself, change his clothes and bed linen and other essential cleaning up.

- 40 It is now beyond question that attention in connection with seeing (for the blind) and hearing (including communication, for the deaf) constitutes attention close and personal enough to count for the purposes of benefit.
- 41 **Bodily functions:** 'Bodily functions' connote the action of any organ or set of organs of the body, and include the operation of the senses. Non-technically, these are activities associated with personal care all of which a person who is not suffering from any disability does for himself. They do not include cleaning or shopping, as such are things normally done by one member of the household for the others.
- 42 Prompting and encouragement required to spur a disabled person to attend to his own bodily functions care *may* count towards attention needs. The level of the prompting/encouragement given, and whether they are reasonably required and stem from the disability, will obviously be crucial questions.
- 43 **Supervision:** Supervision is a more passive concept than attention, such as being in the same room with the disabled person and prepared to intervene if necessary, but not actually intervening save in an emergency. The supervisor must have a physical presence. It cannot be provided by telephone.
- 44 **'Continually'** is not the same as 'continuously'. The supervisor may be able to leave the claimant for short periods during which there will be no likelihood of danger, for example, leaving a person prone to falling sitting in an armchair for a short while, while the supervisor goes out on a quick errand.
- 45 **To prevent substantial danger to oneself or others:** This underlines the stringency of the test. If the claimant himself could take reasonable steps to eliminate a substantial danger, no supervision will be required. Where a person suffers falls in unpredictable situations, the question of whether supervision is required is acute.
- 46 **Night needs: prolonged or repeated attention:** The test is broad brush, and there is no inflexible benchmark in determining whether the criteria are met – all the circumstances must be considered.
- 47 **Watching over** – This test requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over the claimant.

Attendance Allowance (AA)

- 48 As described above DLA is paid to claimants aged under 65. It comprises two levels of Mobility Component, and three levels of Care Component.
- 49 AA is paid to claimants aged over 65. It has two levels, both based upon reasonably required care or supervision needs. The criteria are identical to those for the middle and highest levels of DLA.
- 50 Note - There are two significant differences between DLA and AA:

- There is no mobility component nor an equivalent to Lowest Rate Care Component, but awards of these components in DLA made before the 65th birthday continue in payment if the eligibility criteria remain satisfied.
- The claimant must have met the criteria for 6 (instead of 3) months before the claim.

Secretary of State's Submission

Section 1 – Personal Details

Name: Mrs A Sample

Address:

NINO:

Date of Birth:
(Age: 50)

Benefit: Disability Living Allowance

Date of claim: 17/03/2006

Date decision made: 25/05/2006

Date decision notified: 30/05/2006

Date Reconsideration notified: 10/07/2006

Date of Appeal: See section 4 31/10/2006

Secretary of State's Submission

Section 2 – Schedule of Evidence

Doc Numbers	Document Description	Dated
1-2	Appeal letter from The representative	21/09/2006
2A-2B	Letter containing grounds for the appeal	16/10/2006
3-41	New claim for Disability Living Allowance	17/03/2006
42-45	Medical report from GP	19/05/2006
46	Enquiry form	25/05/2006
47-52	New claim decision	25/05/2006
53	Request for decision to be looked at again	01/06/2006
54-55	Request for advice from Medical Services	24/06/2006
56-57	Advice from Medical Services	04/07/2006
58	Record of reconsideration	07/07/2006
59-61	Copy of a letter sent to Dr Who from The representative dated 04/09/2006	05/10/2006
62	Record of telephone call	13/10/2006
63	Letter from Tribunals Services	31/10/2006

NOTE: The evidence noted above is NOT included in this sample submission.

Section 3 - The decision

Mrs A Sample is not entitled to the mobility component of Disability Living Allowance from and including 17/03/2006, because from the information provided it has been established that Mrs A Sample does not satisfy the conditions.

Mrs A Sample is not entitled to the care component of Disability Living Allowance from and including 17/03/2006, because from the information provided it has been established that Mrs A Sample does not satisfy the conditions.

Section 4 - The appeal

The appeal is attached to this submission.

The late letter of appeal was received on 21/09/2006.

The letter giving the grounds for the appeal was received on 16/10/2006.

The time for appealing was extended by the Tribunals Service (doc 63 refers).

The appeal is accepted as duly made on 31/10/2006.

Section 5 - Facts of the case

Facts of the case

- 5.1** Mrs A Sample states she has incontinence & bowel problems, sinus problems, fibromyalgia, triglyceride in blood, osteoarthritis, lack of iron in blood, hypertension, dizzy spells, depression & panic attacks & paranoia, insomnia, acid reflux and water retention.
- 5.2** A new claim for Disability Living Allowance was made on 17/03/2006. (Docs 3 to 41)
- 5.3** A medical report dated 19/05/2006, was obtained from Mrs A Sample's GP. (Docs 42 to 45)
- 5.4** An enquiry form was received on 25/05/2006. (Doc 46)
- 5.5** A decision was made on Mrs A Sample's entitlement to Disability Living Allowance on 25/05/2006. Details of this decision are given at Section 3 of the submission. (Docs 47 to 52)
- 5.6** A request was made to look at the decision again on 01/06/2006. (Doc 53)
- 5.7** A request for advice from Medical Services was made on 24/06/2006 (Docs 54-55).
- 5.8** Advice, dated 04/07/2006 was obtained from Medical Services. (Docs 56 to 57)
- 5.9** The decision was reconsidered but not revised on 07/07/2006. A copy of this reconsideration is attached to this submission. (Doc 58)
- 5.10** On 11/07/2006 a written statement of reasons was requested.
- 5.11** On 12/07/2006 a written statement of reasons was sent to The representative.
- 5.12** A copy of a letter dated 04/09/2006 sent to Dr Who from The representative was received 05/10/2006. (Docs 59-61)
- 5.13** A letter of appeal from The representative was received on 21/09/2006. (Docs 1-2)
- 5.14** A telephone call was made to The representative on 13/10/2006. (Doc 62)
- 5.15** A letter giving the grounds for appeal was received on 16/10/2006. (Docs 2A-2B)
- 5.16** A letter from Tribunals Services was received on 31/10/2006. (Doc 63)

Reason for the decision

From the Medical report from GP (Docs 42 to 45) dated 19/05/2006 it has been established that Mrs A Sample does not satisfy the conditions for Disability Living Allowance.

An explanation of the reasons for the decision can be found in the New claim decision. (Docs 47 to 52)

Summary of the grounds of appeal

An appeal was made. In the letter it was stated that The representative disagreed with the decision because Mrs A Sample:

- A. Has difficulties walking as described.
- B. Has falls.
- C. Has the difficulties with personal care as described and needs the help with personal care as stated, has falls.
- D. Considers that the comments in the GP's report support her claim.
- E. Has the disabilities as stated.
- F. The GP report confirms the medication.

Section 6 - The Submission

Issues raised by the appeal

- A. To get the higher rate of Disability Living Allowance for help with getting around a person must be virtually unable to walk. Virtually unable to walk means that a person may be able to walk but their walking is so limited that they could be said to be hardly able to walk. Having taken into account the distance, speed, manner and time that Mrs A Sample can walk out of doors without severe discomfort, as advised by Medical Services, the decision is that Mrs A Sample's walking is not so limited that she can be accepted as virtually unable to walk for most of the time.
- B. To be entitled to the higher rate of the mobility component a person must be unable or virtually unable to walk. The starting point is a total inability to walk. A person whose problem is an occasional fall out of doors would not satisfy the criteria for higher rate mobility component. However, they may satisfy the criteria for the lower rate if as a result of the falls they require supervision to enable them to make use of the faculty of walking outdoors most of the time. It is submitted that in this case there is no such requirement.
- C. It is accepted that Mrs A Sample may not be able to manage her personal care as easily as a person without a disability. The information we have shows that the amount of help with personal care Mrs A Sample needs, changes. On bad days more help is needed than on other days when she can manage with very little help. We have decided that, looking at the needs on an overall basis, Mrs A Sample does not satisfy the conditions. The information we have shows that Mrs A Sample does not need to be constantly supervised during the day to avoid danger nor does she require someone to be awake during the night.
- D. All the information provided by Mrs A Sample in the claim pack has been considered as well as the evidence in the report from her doctor. After the

request for a reconsideration was made, advice was obtained from Medical Services (docs 56-57). We are therefore aware of Mrs A Sample's disabilities and how they affect her walking ability and care needs. It is submitted therefore that the decision maker did take into account the impact of all her disabilities. The advice from Medical Services has been accepted, as this is the opinion of a disability analyst having considered all the available information. The decision was reconsidered on 07/07/2006 but not changed.

- E. The representative disagrees with the decision because Mrs A Sample has the disabilities as stated. Entitlement to Disability Living Allowance depends on a person's need for help with personal care and help with getting around because of a disability. The effects of the condition are considered rather than the disability itself.
- F. It is argued that the decision is incorrect because the GP report confirms the medication. Entitlement to Disability Living Allowance depends upon a person's need for help with personal care or getting around because of a disability.

A full explanation of the reasons why Mrs A Sample does not satisfy the conditions of entitlement has already been given at document 52 of the submission.

The Tribunal is asked to consider and decide the following issues

1. Whether Mrs A Sample satisfies the conditions of entitlement for an award of any rate of the mobility component of Disability Living Allowance.
2. Whether Mrs A Sample satisfies the conditions of entitlement for an award of any rate of the care component of Disability Living Allowance.

The disputed decision was made in accordance with the following Acts and Regulations

Mobility Component

Higher rate conditions

To be entitled to the higher rate of the mobility component of Disability Living Allowance a person must:

- be unable to walk or virtually unable to walk because of a physical disability; **Social Security Contributions & Benefits Act 1992, section 73; Social Security (Disability Living Allowance) Regulations 1991, regulation 12**

Lower rate conditions

To get lower rate of the mobility component of Disability Living Allowance a person must be so severely disabled, physically or mentally that they need guidance or supervision from another person for most of the time when walking out of doors. Any ability a person has to walk on familiar routes without guidance or supervision is not taken into account.

A person who is able to walk is not to be taken as satisfying the condition of being so severely disabled physically or mentally, that he cannot take advantage of the faculty out of doors, without guidance or supervision from another person most of the time, if he does not take advantage of the faculty in such circumstances because of fear and anxiety.

The above paragraph shall not apply where the fear or anxiety is

- a symptom of a mental disability; and
- so severe as to prevent the person from taking advantage of the faculty in such circumstances.

**Social Security Contributions & Benefits Act 1992, section 73 (1)(d)
Social Security (Disability Living Allowance) Regulation 1991 regs 12(7) and (8)**

Unable or virtually unable to walk

People are considered to satisfy this criteria if their physical condition is such that:

- they are unable to walk at all; or
- their ability to walk out of doors is so limited, as regard the distance over which or the speed over which or the length of time for which or the manner in which they can make progress on foot without severe discomfort, that they are virtually unable to walk; or
- the effort needed to walk would put their life at risk or be likely to lead to a serious deterioration in their health.

Where a person lives or works, or the nature of the work they do cannot be taken into account.

Social Security (Disability Living Allowance) Regulations 1991, regulation 12

Virtually unable to walk

Virtually unable to walk means unable to walk to any appreciable extent or practically unable to walk. The base point is total inability to walk. This is extended to take in people who can technically walk but only to an insignificant extent.

Social Security Commissioner's decisions R (M) 1/78 and R (M) 1/91

Danger to life or serious deterioration in health

The exertion required to walk is the only consideration when deciding whether a person satisfies this condition.

Any serious deterioration in health is where there was a worsening of the condition from which:

- they would never recover; or
- they would recover after a significant period of time, for example 12 months; or
- recovery could only be made after medical intervention.

Social Security Commissioner's decisions R (M) 3/78 and R (M) 1/98

Aids and appliances

People cannot normally be treated as unable or virtually unable to walk if they can use an artificial limb or aid to help them walk unless they are without both legs.

Social Security (Disability Living Allowance) Regulations 1991, regulation 12(4)

Guidance

Guidance may be physically leading or directing the person or by oral suggestion or persuasion.

Supervision

For the lower rate of the mobility component supervision can be:

- when another person is monitoring the disabled person's physical or mental state for signs that some intervention may be needed to encourage the person to continue walking; or
- checking the route ahead for obstacles, dangers or places or situations which may upset the person.

Coaxing, encouraging, persuading or providing distraction by way of conversation may come within the meaning of "supervision".

Care Component

Lowest rate conditions

To get Disability Living Allowance for help with personal care at the lowest rate a person must be so severely disabled physically or mentally that they:

- need attention with bodily functions for a significant portion of the day; or
- if aged over 16, are unable to prepare a cooked main meal.

Social Security Contributions & Benefits Act 1992, section 72(1)(a)

Day conditions:

To satisfy the day care conditions for Disability Living Allowance for help with personal care a person must need from another person either:

- frequent attention with bodily functions throughout the day; or
- continual supervision throughout the day to avoid substantial danger to themselves or others.

Social Security Contribution & Benefits Act 1992, section 72(1)(b)

Night conditions

To satisfy the night care conditions for Disability Living Allowance for help with personal care a person must be so severely disabled physically or mentally that they need from another person either:

- prolonged or repeated attention at night in connection with bodily functions; or
- someone to be awake during the night for a prolonged period or at frequent intervals in order to avoid substantial danger to themselves or others.

Note: there are special conditions for some people on renal dialysis.

Social Security Contributions & Benefits Act 1992, section 72(1)(c)

Significant portion

The word “significant portion” should be given its ordinary meaning of not negligible or trivial. It refers only to the length of time a person requires attention. What amounts to a “significant portion of the day” depends largely on a person’s individual circumstances. An hour may be considered reasonable in many cases.

Bodily functions include such things as:

- eating and drinking
- washing and dressing
- using the toilet

Help with bodily functions does not normally include help with domestic duties, for example, shopping, cooking, or cleaning, but it could, for example, include help with laundry where this forms part of a continuous episode of attention of a personal and intimate nature in connection with a bodily function.

Social Security Commissioner’s decision R (A) 2/80 Appendix, Cockburn v Secretary of State for Social Security

Attention is some personal service of an active nature, which is reasonably required in connection with bodily functions and is given in the physical presence of the severely disabled person. This can include help by means of the spoken word, for example, persuading a person to do something like eating, or warning a visually impaired person of danger outdoors. Attention to enable a disabled person to take part in a reasonable level of social activity can be included.

Social Security Commissioner’s decision R (A) 2/80 Appendix, Secretary of State for Social Security v Fairey

Social Security (Disability Living Allowance) Regulations 1991, regulation 10C

Unable to cook a main meal

This is a hypothetical test of whether a person has the ability to perform the various tasks necessary to make a meal, if they had the ingredients. This includes the mental ability to plan a meal. It has nothing to do with a persons actual domestic arrangements.

Social Security Commissioner's decision R (DLA) 2/95

Frequent throughout the day

Frequent means several times not once or twice. Attention must be required throughout the day. The ordinary definition of frequent is "occurring often or in close succession". Whether attention is given frequently depends on the length of time which passes between each spell of attention. A person cannot get the middle or highest rates of the care component of Disability Living Allowance if the only help they need is with getting in and out of bed, or if they only need a little help when dressing and undressing in the morning and at night.

Social Security Commissioner's decision R (A) 2/80 Appendix

Continual means going on all the time, subject to brief interruptions only.

Supervision means staying close to people in order to be able to prevent or deal with substantial danger. It often means having to stay in the same room. Just being on hand does not count as supervision unless someone needs to be there to prevent a serious accident or other danger that is likely to happen. People who are mentally competent should be expected to arrange for supervision when undertaking any potentially dangerous activity such as bathing and so would not necessarily need continual supervision.

Social Security Commissioner's decision R (A) 1/88 Appendix and R (A) 5/90

Substantial danger

The phrase "substantial danger" should not be too narrowly construed. Substantial danger can result from a fall, exposure, neglect and in many other circumstances. The word "substantial" is left to discretion in each case.

Social Security Commissioner's decision R (A) 1/73

Watching over means that another person has to stay awake at frequent intervals or for a prolonged period during the night to be able to intervene and prevent or deal with substantial danger. It is not enough for the attendant to be asleep and ready to wake up and intervene when required.

Prolonged and repeated means that someone must need help at night for more than a few minutes, or that it is needed several times. 'Prolonged' has been interpreted as meaning 20 minutes or more; 'repeated' as twice or more.

Social Security Commissioner's decision R (A) 2/80 Appendix

1. ABSENCE OF APPELLANT

1. An oral hearing can proceed in the absence of the appellant provided it is established that he has been given due notice of the hearing at his last known address - see paragraph **35** below.
2. So if an appellant, having been given due notice, fails to attend the hearing without giving any explanation (whether or not the case has been previously adjourned or postponed) it will usually be right to proceed in his absence. An appellant always has the right to apply for the decision to be set aside when he has not been present - see paragraph **55** below.
3. If the file is available at the venue it should be checked, or alternatively enquiry should always be made of the clerk, to see whether the appellant has given an explanation for his absence. *At some venues the clerk will have a laptop which will enable him to access the electronic version of the file and the clerk should be to check* whether any letter or telephone call has been received, and whether any postponement request has been made. **DA Reg 51(2)** requires any such request, and any decision upon it, to be placed before the tribunal - see paragraph **43**.
4. If there has been any explanation for absence or a postponement request the tribunal must consider it before deciding how to proceed. If the appellant has indicated that he wants the hearing to proceed in his absence then of course there will be no problem, but if he is seeking an adjournment or postponement this must be considered and decided - in this case see paragraphs **4** and **43**.

In practice:

5. If a message has been received brief details should be noted on the record of proceedings, as should any decision of the tribunal in response to that message.
6. If no communication has been received from the appellant to explain his absence, and there is no presenting officer, see paragraph **29** as to how to proceed.
7. If there is a presenting officer it will in most cases probably be sufficient to wait for ten minutes or so after the time specified for the hearing of the appeal, e.g. if the appeal is listed for 10 am wait until 10.10 before starting the hearing.
8. If the appellant has not appeared by then the chairman should note on the record of proceedings the time the appeal was listed for hearing, the time the hearing actually commenced, and any information given concerning due notice, eg 'Appeal listed for 10.00 am, appellant not present by 10.10. Notice of hearing sent to appellant on [date].'
9. Even if the presenting officer has information about a change of address this will not prevent the tribunal from proceeding with the hearing as it is the address last known to the Tribunals Service which is relevant although if it is clear that the appellant has not received notice of the hearing at his current address it might be considered sensible to adjourn and direct re-service at the new address.

10. Provided notice was sent to the last-known address it is legally permissible to go ahead with the hearing even if the papers have been returned by the Post Office; the appellant can subsequently apply to set aside, but see 9 above.
11. For what to do if the appellant arrives part-way through the hearing or after the hearing has been concluded see paragraph **29** below.

4. ADJOURNMENT

1. Adjourment differs from postponement in that a decision to postpone is for a clerk or chairman alone before the hearing starts (but see below and also paragraph **43**) whereas adjournment is for the whole tribunal to decide on and usually arises after the hearing has commenced, either on request from one of the parties or as a result of the tribunal themselves deciding that they require something further, eg further evidence to be produced, before they can properly make a decision.
2. Sometimes a tribunal may wish to adjourn a hearing part-way through in order to discuss a particular issue, eg as to whether **Regulation 10** applies to an incapacity benefit case, before going on to deal with the personal capability assessment. In this situation it will of course only be necessary to send the parties out of the room and the hearing will resume when the discussion has concluded. This is not therefore a true adjournment as it does not involve putting the case off to another day. A note of any such event, possibly using the word 'recess' rather than 'adjournment', should be made on the record of proceedings: see paragraph **48** below.
- 2A. For discussion on whether to adjourn a paper hearing for an oral hearing see paragraph **39** below.
3. Possible reasons for adjournment -
 - (i) a tribunal **must** adjourn if there is any doubt as to whether a party has been given due notice of the hearing - see paragraph **35** below;
 - (ii) if the tribunal requires additional evidence or substantiation of some fact from eg someone from the local office of the Department or Jobcentre Plus that person may be asked to attend as a witness or the chairman may direct a further submission dealing with the issue and the hearing adjourned for that purpose. However consider this carefully, particularly if the appellant has already been kept waiting some time for the hearing - it may often be preferable to carry on and decide the case on the available evidence, bearing in mind the burden of proof – the mere fact that there is no presenting officer is not a ground to adjourn;
 - (iii) if the chairman or a member finds that he is personally acquainted with an appellant - see paragraph **7** below;
 - (iv) a tribunal might wish to adjourn in order to obtain further submissions concerning relevant Court or Commissioners' decisions (see paragraph **9** below) when these are not immediately available;
 - (v) a tribunal may wish to adjourn at the appellant's request to enable him to obtain representation - however consider whether he has already had sufficient time to obtain advice and bear in mind that it is the appellant from whom you want to hear the evidence. There is no right to be represented, even under the Human Rights Act.

Tribunals are advised not to take the initiative and suggest an adjournment to enable an appellant to seek representation if it appears that he would have difficulty in representing himself. On the one hand it

may be thought that an appellant might be disadvantaged by having to represent himself and so may benefit from being represented; on the other hand it is not of course possible for a tribunal to **direct** an appellant to obtain representation, they can only advise him to do so, and if he is in fact inadequate or incapable he may never get round to it. There will inevitably be delay and the possibility that the appellant, having appeared once and been sent away, may not bother to turn up on the next occasion. On balance, although this is a matter for the discretion of the tribunal, it is considered better practice **not** to adjourn for representation unless there are very compelling reasons for doing so - it is after all the responsibility of the tribunal (in the exercise of their inquisitorial role – see paragraph **26** below) to enable the appellant to put his case;

- (vi) if an entirely fresh argument (eg on a complex point of law) is raised for the first time in the course of a hearing, so that a party has not had time to consider it, it would probably be necessary for the tribunal to adjourn; refusal could be a breach of the rules of natural justice. This would apply for instance if an appellant wished to raise an argument based on the Human Rights Act, as to which see paragraph **18**.

(And it is particularly important that an appellant is put on notice and given an adjournment if any question arises of reviewing a component of disability living allowance not previously in issue in the appeal).

Similarly if substantial fresh evidence such as a lengthy medical report is presented to the tribunal (especially in the absence of one of the parties) an adjournment might be required - but see paragraph **23** below, and if such evidence is produced in the absence of a presenting officer think carefully before deciding whether to adjourn or not – it is arguable that the Agency have made a conscious decision not to send a representative and so have only themselves to blame if they do not see the new evidence.

4. If a representative asks for an adjournment to await the outcome of another tribunal hearing, (eg where there has been an alleged overpayment of invalid care allowance and a pending DAT which might award back-dated attendance allowance and so remove the overpayment) the request should generally be refused; the tribunal should proceed to decide the issue on the available evidence, as their decision can always be superseded if the subsequent DAT appeal is successful.
5. And a request by a representative to adjourn in order to await the outcome of an appeal to the Commissioner on a similar issue should also generally not be granted. If there are a number of cases which are likely to be affected by a Commissioner's decision then TS already have procedures in place to delay listing of those cases; and if these procedures are not appropriate it is better for the tribunal to proceed on the present law as they understand it. There might be significant delay before the appeal gets to the Commissioner, and the Commissioner might not ultimately deal with the specific issue (he may for example decide the appeal on other grounds). The tribunal have a 50/50 chance of getting it right and if their decision does subsequently turn out to be wrong because of a later Commissioner's decision it can be set aside in appropriate circumstances.

6. A request for an adjournment to await a criminal prosecution or unfair dismissal hearing is more problematic, as of course a conviction in a criminal court or a finding that an appellant was fairly or unfairly dismissed might be highly relevant to the issue in the appeal; in addition there is protection against self-incrimination in the criminal courts, which does not apply in tribunals, so that there might be a risk, if the tribunal proceeds, of an appellant having to give evidence which might subsequently be used against him in the criminal proceedings. (On the other hand a conviction may shift the burden of proof, so that in an overpayment case for example it may not necessarily be fair to the appellant to adjourn). The current procedure is that when the Secretary of State notifies TS that court proceedings are pending the clerk will ask the appellant whether he wishes the appeal to be stayed; if the appellant says he does then the appeal is not listed and the clerk has instructions to chase the Secretary of State for information regarding the court proceedings. If the appellant wants the appeal to go ahead the file will be referred to a District Chairman for decision – that decision, and possibly the reasons for it, will be in the file at the venue.

In practice:

7. The speedy and efficient despatch of tribunal business is in the interests of all appellants so that adjournments should only be granted if absolutely necessary to achieve justice. Each case must of course be dealt with on its merits but think carefully and judicially when considering adjourning - it will inevitably mean delay in someone else's appeal as they would otherwise have had the slot that the adjourned hearing will now take, and consider what purpose will be served by the adjournment. Has a party already had ample time to obtain whatever further evidence they are now awaiting? Will the further evidence be readily obtainable? Will it assist the tribunal in coming to a decision? See paragraphs **14A** and **23** below.
8. If after taking into account the above matters an adjournment is granted, an **adjournment decision notice** must be completed and consideration should be given to the question of whether any **directions** could usefully be given in order to assist the next tribunal; eg should the case be listed for a longer time than normal, should a presenting officer be asked to attend, should it be listed before a district chairman, should TS obtain further medical evidence, should the Secretary of State be given the opportunity to file a further submission dealing with the new evidence etc. See paragraph **14A** below for further discussion on directions.
 - 1.
 9. Make it absolutely clear whose responsibility it is to obtain the further evidence and if directing someone to do something, put a time limit on it. Do not for example simply direct "medical report to be obtained" as this will simply cause confusion as to whether it is for the appellant or the secretary of state or TS to obtain it. In such a case (but see paragraph **23** below) you must say by whom, from whom and within what time limit.
 10. And try to avoid shorthand or jargon when giving directions – try to explain them (particularly if the appellant has not attended the hearing) in terms which the appellant can understand. It may be very tempting just to say "Obtain EMP report" because everyone in TS will know what this means, but the appellant won't, and could be confused or distressed by such wording.

11. When making a direction as to re-listing, if it is possible to arrange a date for the adjourned hearing immediately, by asking the clerk to contact Allocations at the appropriate Regional Centre, this should always be done. The appellant will go away happier if he has been given a specific date for the next hearing rather than simply being told it will be 'in a few weeks'.
12. If in an exceptional case it is not possible to arrange a specific date for the next hearing, make your re-listing direction unambiguous – if you direct "List after four weeks" this might mean (a) you want the case listed for further hearing in four weeks time or (b) you want the clerk to wait four weeks before re-listing, which might result in the next hearing date being eight weeks ahead.

It is better to say either "Re-list on first available date" or if further evidence is to be obtained "Re-list on first available date after the 15th September" using whatever date you think is appropriate to give enough time for the evidence to be obtained. Or, if there is real doubt about how long it might take "if the [report] has not been lodged with the Tribunals Service by [four weeks] from today, refer the file to a District Chairman for further directions as to listing".
13. So if an adjournment is to be granted, try to use such adjournment constructively by giving the subsequent tribunal as much help as possible and avoid the need for any further adjournments.
14. Remember that if adjourning you should not normally make any findings of fact, as this might embarrass the tribunal who ultimately hear the case (as such findings are not binding on them and they may take a different view). It is permissible in a disability living allowance appeal to award one component and adjourn the other if this is considered appropriate although this power should be used sparingly and it will usually be better to adjourn the whole case.
15. Try to avoid adjourning with a direction that the appeal be re-listed before the same tribunal, in the case of a three-person tribunal at any rate, as this is likely to cause administrative difficulties and delay. (And see paragraph 3 above.) On the other hand if a chairman is sitting alone and has had to adjourn part-heard through lack of time it is preferable for the adjourned hearing to come back to him to avoid someone else having to start again – this is especially so if the case is complex.
16. And if the hearing is adjourned an appellant has no right to a full statement (see paragraph 22 below). A decision to adjourn is not a final decision (and so is not appealable to the Commissioners) and a request for a full statement when the case is adjourned should therefore be refused.
17. **NOTE:** In some overpayment cases, although the tribunal is satisfied that there has been an overpayment, they may be unable to confirm the exact amount because information required to carry out the arithmetic is not available. In this situation, after recording the finding that there has been a recoverable overpayment, the following formula might be used: 'The question of re-calculation is referred for agreement between the parties. In default of agreement either party may within (eg) three months apply in writing to restore the appeal for further hearing as to amount only.' This is **not** an adjournment, it is a final decision (which can accordingly be appealed to the Commissioners) and so if the amount cannot be agreed the next tribunal only

has power to deal with amount, not recoverability. Alternatively you can say, after referring the calculation for agreement: - 'The new calculation will give rise to a new decision which will itself carry appeal rights. If therefore the appellant cannot agree the re-calculation he will have a fresh right of appeal against it.' That formula will dispose of the current appeal altogether: CG/5631/1999.

18. And in child support departure or variation cases it will be necessary to make a provisional decision if the effect of the decision on the maintenance calculation cannot be accurately assessed, because in such circumstances it will not be possible to determine whether the proposed departure or variation will be just and equitable. The CSA should therefore be asked to re-calculate the maintenance in accordance with the provisional decision and both parties must then be given an opportunity to make representations as to whether it would be just and equitable to impose that direction. See also paragraph **14.15** below.

7. BIAS OR PERSONAL CONNECTION

1. If a chairman or member finds that he is personally acquainted with an appellant, presenting officer, representative or witness, and the connection is strong enough to give the appearance of bias, he should consider whether it would be proper for him to adjudicate on the appeal. (And of course the earlier any such difficulty is noted and passed to the clerk the better, so as to enable the administration to find a replacement member – so please let the clerk know of any potential problem as soon as you notice it).
2. If the connection is that of the chairman he should explain the position to the members and suggest that the hearing be adjourned to come before another chairman. It would be sensible to adjourn in such circumstances even if the parties themselves are willing to proceed.
3. If the connection is that of a member, eg if the appellant is or has been a patient of the doctor member, the same procedure should be followed. The hearing would then have to be adjourned (unless possibly the tribunal was hearing an appeal relating to industrial disablement benefit - ie it was an 'MAT' - and had been constituted with two doctor members - it could perhaps proceed with just one doctor).
4. A barrister solicitor or advocate who has acted for or against an appellant should not preside as chairman of a tribunal and nor should a member who has represented an appellant act as a member.
5. And if a medical report in the case has been prepared by a partner of the doctor member, it would be a breach of the rules of natural justice (see paragraphs **20** and **45** below) for the doctor to hear the appeal.
6. In the case of remoter connections it may be sufficient for the chairman or member concerned to declare the matter at the beginning of the hearing but thereafter to take part in the hearing in the absence of any objection, the chairman making an appropriate note in the record of proceedings.
7. Whether or not a particular connection should disqualify is a question of degree for the chairman to decide in the exercise of his power to regulate procedure, applying the test confirmed by the House of Lords in **Lawal -v- Northern Spirit Limited** [2004] 1 AER 187, namely 'whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.
8. The fact that the same chairman or member has previously heard an appeal from the appellant will not necessarily mean that they cannot sit again. Such a situation can arise from time to time, particularly in appeals relating to disability living allowance where claimants can often make repeat claims. An appellant may feel that it is unfair, where a tribunal has dismissed an earlier appeal against decision A, that the same chairman or members are to hear his later appeal against decision B. However, the same problem arises in the courts, where a judge or magistrate may have dealt with the same party or defendant on a previous occasion, and the general rule is that a party to proceedings is not entitled to 'shop around' in order to find a judge who may be more sympathetic. This general rule has been confirmed by the Court of Appeal in **Locabail (UK) Limited -v- Bayfield Properties** (2000) 1 AER 65, where it was said that no sustainable objection can arise merely because, in

the same case or a previous case, the judge has commented adversely on a party or a witness, or found their evidence to be unreliable, unless the judge has expressed his views in such extreme and unbalanced terms that they cast doubt on his ability to try the issue with an objective judicial mind. And in the more recent case of **Dobbs –v- Triados Bank NV** [2005] EWCA Civ 468, 15 April 2005, Chadwick LJ confirmed that a judge should not recuse himself from hearing a case simply because he has been criticised by a litigant; even though such a course might be tempting it should be resisted as otherwise litigants would be able to select their preferred judge simply by criticising all the judges that they did not want to hear their case.

9. If something is said in the course of the hearing by the chairman or a member which gives an indication of bias the safest course is probably to adjourn the hearing to a differently constituted tribunal.
10. See also paragraph **20** below.

11. A DATE OF THE DECISION APPEALED AGAINST

1. Although the date of the decision appealed against will usually be straightforward there can be difficulties, particularly when dealing with DLA appeals, where the decision-making process can be quite convoluted.
2. The date is significant because **section 12(8) SSA 1998** states:-

'In deciding an appeal under this section, an appeal tribunal – ... (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made'.

3. In addition **section 8(2)** of the Act says:

'Where at any time a claim ... is decided by the Secretary of State –

(a) the claim shall not be regarded as subsisting after that time, and
(b) accordingly the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.

4. So any change of circumstances after the decision cannot be taken into account by the tribunal which can only look at the circumstances obtaining prior to that date of that decision (although it can consider evidence obtained later so long as that evidence is relevant to that date – see paragraph 17 below for further discussion on this.)

5. Note that it is the date on which the decision is **made** which is relevant and that this will not necessarily be the date on which that decision is **notified** to the claimant.

6. In particular the process of 'reconsideration', undertaken in every case, raises difficulties. What is its status in the process; does it have any legal standing or is it just an administrative step which does not amount to either revision or supersession? The answer to this question is of course relevant to the operation of section 12(8)(b) of the 1998 Act which prevents the tribunal considering any circumstances not obtaining at the date of the decision appealed against.

7. Consider the following examples -

EXAMPLE A

A claims disability living allowance on 1 January and is disallowed on 1 February.

On 2 February he suffers a stroke.

On 3 February he receives the disallowance decision.

On 1 March he appeals.

The tribunal cannot take the stroke into account since the date of the decision is the date it was made, ie 1 February, not the date it was communicated to A.

EXAMPLE B

A claims disability living allowance as before and is refused on 1 February.

On 2 February he suffers a stroke.
On 3 February he receives the disallowance decision.
On 1 March he appeals.
On 4 March the decision-maker reconsiders the disallowance but confirms it.

The tribunal still cannot take the stroke into account as the appeal was against the disallowance decision of 1 February and sections 8(2)(a) and (b) of the SSA make it clear that a change of circumstances which occurs after the date of the decision cannot give rise to entitlement under the claim. .

EXAMPLE C

A claims DLA as before and is refused on 1 February.
On 2 February he suffers a stroke.
On 3 February he receives the disallowance decision and does not appeal it but asks for it to be looked at again.
On 4 March the decision-maker reconsiders the disallowance but confirms it.
On 7 March A appeals.

The tribunal still cannot take the stroke into account because of the operation of section 8(2). See also **DA Regs 6(3) and 3(9)**.

And a 'reconsideration' has no legal status unless it results in a revision or supersession.

8. See paragraph **24A** below for a discussion on identifying the decision appealed against.
9. NOTE also the following points -

(1) It is not possible to supersede a disallowance

So if a claimant deteriorates after his claim has been disallowed in total (a 'nil award') he must make a new claim.

This is consistent with section 12(8)(b) Social Security Act 1998.

EXAMPLE D

Claim made	12 December 2006
Disallowed	01 January 2007
Claimant has stroke	01 February 2007

New claim required if stroke is to be taken into account, tribunal can only consider circumstances as at 01 January 2007. (Same as Example A above).

(2) It is not possible to revise an award on the ground of change of circumstances – this can only be dealt with by way of supersession, as in (3) below.

Revision is only available for official error or mistake or ignorance of or mistake as to material fact and a revised decision replaces the original decision altogether.

There is no right of appeal against a decision to revise or to refuse to revise – any appeal is against the original decision as revised (or not revised), and so the tribunal can only look at the circumstances as at the date of that decision and are unable to take account of any change of circumstances which may have occurred after the original decision: **R(CS)1/03**.

EXAMPLE E

Claim made	12 December 2006
Disallowed	01 January 2007
Stroke	01 February 2007
Revised	02 February 2007 (on mistake as to material fact)

Tribunal must consider the circumstances as at 01 January 2007 even though the actual date of the revision is later.

(3) An existing award can be superseded on change of circumstances and there is a right of appeal against a decision to supersede or not to supersede.

If claimant has been given say lowest rate care and then deteriorates he can ask for a supersession on the basis that he should now be entitled to middle rate care and the Department must consider that application and decide whether to supersede or not.

If they agree with the claimant - no problem, they will award middle rate care from when the deterioration took place (or the date of application if this is more than a month after the change of circumstances unless time can be extended under reg 8 D&A Regs) subject to the three month qualifying period.

But if they refuse to supersede, or 'supersede at the same rate', i.e. leave the award at lowest care, then that new decision will be the decision appealed against. And section 12(8)(b) will apply to that date.

EXAMPLE F

Claim made	01 December 2006
Award LR care	01 January 2007
Stroke	01 February 2007
Decision not to supersede	12 February 2007

The tribunal can now look at the circumstances obtaining as at 12 February 2007 as that is the date of the decision appealed against.

17. DOWN TO DATE OF DECISION

1. A tribunal can only take into account the circumstances obtaining at (or before) the date of the decision appealed against (as to which see **paragraph 11A** above) by virtue of **s 12(8)(b) SSA 1998** (or **s 20(7)(b) Child Support Act** in child support appeals).
2. This means that the tribunal cannot take into account any changes of circumstances which have occurred since the date of the decision appealed against, but it does not mean that evidence obtained after that date must be ignored – see 4 below.
3. So for example in habitual residence or child support cases it will be the circumstances obtaining at the date of the decision appealed against which will be relevant, and changes of circumstance since the date of the decision cannot be considered. And in incapacity and disability living allowance appeals any deterioration or new medical condition since the date of the decision will be irrelevant - it might therefore be suggested to such appellants that they should submit a new claim while at the same time making it clear that the tribunal cannot give any assurance as to whether such claim will be successful, this being entirely a matter for the secretary of state to decide and not the tribunal.
4. Despite this rule do not necessarily exclude evidence which has only come into existence since the date of the decision, as it will still be relevant if it can be related to facts or situations existing at the decision date; so for example a medical report may have only been obtained for the purposes of the appeal, but it must nevertheless be taken into account if it either
 - (i) specifically deals with the appellant's medical condition at the date of the decision, or
 - (ii) corroborates earlier statements by the appellant; eg the appellant says 'I scored myself at 20 points in my questionnaire; here is a report from my doctor dated three months after the SEMA report which also scores me at 20 points; my condition did not alter in those three months'.
5. The issue therefore is 'In the circumstances which we now find to have existed at the date of the decision, was the decision correct?'
6. **Note** that a Tribunal of Commissioners have held that this rule applies even where the decision was taken some time before a disability living allowance renewal date and that the previous Commissioner's decision to the contrary was wrong. So if an award is due to expire on 31 October and a decision not to renew is made on 31 August the tribunal can only consider the circumstances obtaining as at 31 August.

19. EVIDENCE

1. A tribunal is not bound by the technical rules of evidence which apply to court proceedings. Its task is to decide the facts of the case and then apply the relevant law to those facts.
2. So questions of admissibility of evidence will not arise in tribunals, since all relevant evidence, whether oral or documentary, is admissible; what will have to be decided by the tribunal is the **weight** to be given to the evidence in question. (For further discussion concerning this, see paragraph **22** below).
3. Where there is disagreement between the parties as to the facts the tribunal must hear evidence to enable it to decide what is the true position. Such evidence may consist either of oral evidence from a party or a witness, or documentary evidence, or both. The only real rule is that the evidence must be relevant, ie directed towards assisting the tribunal to decide the matter in issue.
4. Clearly most weight will be attached to **direct evidence**, i.e. the evidence of a person speaking about matters which are within his own knowledge or the evidence contained in an original contemporaneous document. This is because direct oral evidence can be tested by questioning and by observation of the witness; and contemporary documentary evidence is more likely to be reliable than documents which came into existence solely for the purposes of the appeal.
5. Any person who can give evidence can be called by a party to do so, and a tribunal cannot prevent anyone from giving evidence subject to the orderly conduct of proceedings – so a representative who wishes to give evidence is entitled to do so insofar as he is telling the tribunal about matters within his own knowledge. The mere fact that he is a representative does not prevent him giving evidence and a tribunal is not entitled to discount his evidence simply because he is a representative but must weigh it in exactly the same way as all the other evidence. Care should be taken however to differentiate, both in the minds of the tribunal and on the record of proceedings, between evidence and submissions. And if the representative gives evidence he can of course be questioned by the other party or the tribunal in order to test or clarify his evidence.
6. And there is power, under **DA Reg 43(5)**, to require evidence to be given on oath if felt appropriate (see paragraph **36** below) and to issue a witness summons under **DA Reg 43(1)**; this latter power should be exercised very sparingly as there is no effective sanction to enforce compliance.
7. **Hearsay evidence**, ie what someone has been told by a third party who is not present at the hearing, is admissible in tribunals, but it may of course be unreliable (as it is second-hand and its reliability cannot be tested by questioning) and it should therefore be treated with caution and common sense.
8. **Anonymous evidence**, eg that an appellant is cohabiting, is admissible since it is relevant to the issue, but it should of course be treated with particular caution as again its reliability cannot be tested.
- 8A. **Opinion evidence** can be given by any person whether he is recognised or qualified as an expert or not, and so should not be dismissed out of hand by a

tribunal, but clearly if given by a non-expert it will carry less weight than if given by an expert.

9. A mere **assertion** of fact by a party or his representative, of which he has no direct or indirect knowledge, is not evidence at all, and in the absence of any supporting oral or documentary evidence, should be disregarded.
10. The **submission** prepared by eg the social security office for the purposes of the appeal is not itself evidence (although the appeal bundle may well include evidence such as claim forms, correspondence etc). If however the appellant or his representative agrees or concedes facts contained in the submission then such facts do not have to be proved (and such agreement or concession should of course be recorded on the record of proceedings - see paragraph **48** below) but by the same token any assertion in the submission which is contested by the appellant must be supported by evidence before the tribunal can accept it.
11. There is no legal requirement that an appellant's evidence must be **corroborated** (ie supported by some other evidence), and so lack of corroboration is not of itself a ground for disbelieving it. However a tribunal is entitled to take note of the fact that there is no corroboration in circumstances where corroboration might reasonably be expected, and to decide the issue accordingly. So for example if an appellant alleges that he is suffering from a certain medical condition, but this is not mentioned on the medical certificate signed by his doctor, the tribunal might reasonably reject the allegation on the basis that if true it would have been supported by the doctor.
12. Similarly a tribunal is entitled, in the absence of a credible explanation, to draw **adverse inferences** from
 - (i) the fact that enquiries that should have been made have not been made; eg an executor failing to make reasonable enquiries about money in the estate in order to establish the date from which the deceased possessed it; or
 - (ii) the fact that documents have not been produced which would normally be available to support a particular contention, eg a loan agreement or property transfer; or
 - (iii) the fact that directions made by a previous tribunal, eg as to production of further evidence, have not been complied with.

13. Where there is a **conflict of evidence** the tribunal may rely on its assessment of the credibility and reliability of the persons giving evidence; such assessment should be adequately explained in any full statement (see paragraph **22** below). See also paragraph **37** below.
14. A previous decision of one tribunal on a similar issue is not binding on any other tribunal. So for example an award of mobility component by a DAT does not bind a tribunal subsequently considering the walking descriptor in an incapacity appeal; they are free to ignore the DAT decision if they feel the evidence warrants it.
15. However, it is **permissible** to accept the findings of other judicial bodies as evidence, eg the findings of an employment tribunal in a jobseeker's allowance disqualification, or a magistrates court conviction in a fraud case although it must be borne in mind that the issue before the other body may not always be the same (eg in unfair dismissal cases the tribunal may have considered the conduct of the employer as much as that of the employee). But if the issue is the same then a full hearing resulting in for example a conviction will be cogent evidence; an acquittal on the other hand will not necessarily absolve the appellant because of the different standard of proof. (See paragraph **4** above as to whether to adjourn to await the outcome of other proceedings.)
16. **DWP leaflets** should not be relied on as evidence; although their reliability has improved in recent years they are not authoritative and can sometimes be misleading; other official publications such as guidance on prescribed diseases are again not binding but may contain useful material. If there is ambiguity the reports of the Social Security Advisory Committee prior to the making of Regulations can legitimately be consulted, as can Hansard, in order to decide the meaning or purpose of particular Regulations; the need for such consultation is however likely to be rare.
17. If as quite often happens **late evidence** is presented to the tribunal, perhaps as the hearing starts, the tribunal has three choices - to admit it, which could lead to delay while the evidence is circulated and read; to adjourn the case to another date; or to stand the case down until later in the list and tell the appellant that the tribunal will deal with the case if they have time to do so. It is not permissible to refuse to admit the evidence and proceed with the hearing without it.
18. Which of these alternatives is adopted will very much depend on the quantity of the evidence and the state of the list; the interests of the secretary of state must also be considered, ie if there is a presenting officer in attendance he must be given the opportunity to consider the evidence and possibly an adjournment if he has insufficient time to do so properly. If however there is no presenting officer the tribunal could take the view that the adjudication officer has chosen not to be represented at the hearing and accordingly not adjourn for that purpose.
19. The tribunal is not necessarily bound by **concessions** or **agreements** between the parties as the proceedings are inquisitorial in nature (see paragraph **26** below) but in practice if an experienced representative makes a concession (eg that only certain all work test descriptors are relevant) a

tribunal is unlikely to be criticised for accepting this unless of course there is evidence to the contrary. And once an appellant has appointed a representative he will normally be bound by the way the representative handles the case. Any concessions etc should be recorded on the record of proceedings and noted at the beginning of the full statement.

20. Bear in mind the **standard of proof**, which in tribunal cases is always *the civil standard*, on a balance of probabilities, ie 'more likely than not.'
21. So far as the **burden of proof** is concerned the traditional view has been, as in civil law generally, that 'he who asserts must prove'. Thus it is for the claimant to prove a claim but if the decision is a supersession then the burden is on the party seeking the supersession. So where a claimant first makes a claim for benefit the burden is upon him to establish entitlement; whereas if he has been in receipt of a benefit and it is then alleged that he is no longer entitled the burden rests upon the secretary of state to establish grounds on which the award can be superseded.
22. However in **Kerr –v- Department of Social Development for Northern Ireland** [2004] UKHL 23 , an appeal relating to a social fund funeral payment, the House of Lords doubted that the concept of the burden of proof was always relevant in inquisitorial proceedings.

Lady Hale said 'Ever since the decision of the Divisional Court in R –v- Medical Appeal Tribunal(North Midland Region), Ex parte Hubble [1958] 2 QB 228 it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim at page 240 – "A claim by an insured person to be under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds ... Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation the minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action."

'What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

'If that sensible approach is taken it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all that they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998, "a claimant must to the best of his or her ability give such information as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself.'

23. Although this approach may well be useful in certain appeals there will still be cases where the burden of proof will play a part, particularly where the facts are evenly balanced or there is no evidence at all about a particular issue – see 23 below. And in a sense to say for example that a claimant has failed to do all he reasonably could and should do to establish his claim is analogous to saying that he has failed to discharge the burden of proof.
24. Sometimes the burden will shift from one party to the other. So for example, if there is an allegation of failure to attend a medical examination without good cause the burden lies initially on the Secretary of State to prove that notice of the appointment was sent to the claimant, but if that is established it is then for the claimant to prove good cause for not attending.
25. It is for the Agency to prove issues such as overpayments and cohabitation, and in jobseeker's allowance cases misconduct and leaving voluntarily (although claimants must prove just cause).
26. If there is sufficient evidence to find facts the burden of proof will not normally be an important issue; it will only become crucial if the case is balanced 50/50 or there is no or no reliable evidence on the issue - in this event findings of fact cannot be made and therefore cannot be included in the decision.

This situation will undoubtedly only occur on rare occasions; a possible method of recording it might be:

'In this case there is no reliable evidence before us as to ... [OR] 'We have been unable to determine the conflict between the evidence of X and Y. Accordingly the appeal succeeds/fails as the burden of proof rests upon the Secretary of State/appellant to satisfy us on the issue on a balance of probabilities and he has failed to do so.'

20. EXCLUSIONS

1. There are certain situations where members should not or must not sit on a particular appeal, quite apart from the issue of bias or personal connection dealt with at paragraph 7 above.
2. If a tribunal has determined an appeal and there has been a subsequent successful appeal to the Commissioners, then no member of the original tribunal must sit on any re-hearing. (Note however that if a District Chairman has set aside the decision under s 13 he does have power to remit the case to the same tribunal – see paragraph 55.12 below).
3. Following a successful appeal to the Commissioner the administration will try to ensure the automatic exclusion of any members who sat on the original tribunal, but mistakes occasionally occur - if such a situation arises the clerk should be notified immediately so that attempts to find a substitute member can be made - if this cannot be achieved then the case will have to be postponed.
4. And following the setting aside of a tribunal decision for procedural error (see paragraph 54 below) the re-hearing should also be before a completely different tribunal.
5. If an appeal has been adjourned part-heard (i.e after hearing some evidence) the new tribunal for the adjourned hearing must either consist of exactly the same members or must be wholly differently constituted. See paragraph 3.
6. The mere fact that a chairman or member has heard (and perhaps dismissed) a previous appeal from the same appellant is not of itself a reason for exclusion. Many judges and magistrates will see the same customers over and over again but that does not disqualify them – and it is not open to an appellant to shop around until he finds a tribunal that suits him! The basic guidelines were set out in the **Lawal** decision – see paragraph 7.7 above.
7. With regard to medical members the objection to doctors who carried out regular EMP reports sitting on DLA/AA appeals has now been held by the House of Lords to be unjustified, in the case of Gillies –v- Secretary of State for Work and Pensions, 26 January 2006. As a result the Scottish decision in **CSDLA/444/2002**, confirmed on appeal by the Court of Session in **Secretary of State –v- Cunningham**, where familiarity with EMPs who sat on appeals was held capable of giving rise to a perception of bias on the part of the chairman and disability member who had sat with a particular EMP on quite a few occasions and had accepted her report in preference to other medical evidence which included other EMPs, although not referred to in Gillies, must also now be questionable. The President has directed that any such objection must be dealt with on its merits.
8. A doctor must be excluded if he has prepared a report on the particular appellant whose appeal is being heard, or if a partner of his has reported on the appellant - a tribunal decision was set aside by a Commissioner for that reason on the basis that this was a breach of the rules of natural justice. Medical members should check, on receipt of their papers, that they have no connection with any of the doctors who have prepared reports, and chairmen might also wish to check this before the hearing starts. If such a problem does

arise it might be possible, in a multi-tribunal venue, to exchange doctors with another tribunal.

Note that following Gillies it is permissible for doctors who do personal capability assessments for incapacity benefit to sit on incapacity benefit appeals *as well as on DLA/AA* appeals.

32. MAJORITY DECISION

1. If a **three-person tribunal** is not unanimous a majority decision is acceptable. (And in the case of a two person tribunal the chairman has the casting vote – see 5 below.) In this situation **DA Reg 53(5)** states that the summary decision notice must record the fact that a member dissented.

In practice:

2. If there is disagreement as to what the decision should be, discuss it to see if unanimity can be reached but if it cannot then accept the situation - there is no stigma attached to a majority decision, and neither the dissenting member nor the other members should take it personally. The dissenting member should not be asked to give a full statement of his reasons, but simply to indicate briefly what his reasons are so that these can be incorporated into any subsequent full statement – and he should not be identified by name or description but simply referred to as 'the dissenting member.'
3. Indeed he should take part in all aspects of the decision so that for example in a DLA case a dissenting member who considers that the appellant does not qualify must still participate in the discussion about how long the award should be for.
4. The fact that the decision is by majority will as stated above be recorded on the summary decision *and* the reasons for dissent must be included in the full statement (see paragraph 22 above) if one is subsequently requested: **DA Reg 53(5)**. Failure to do so will constitute an error of law.
5. In the case of a **two-person tribunal** the chairman has the casting vote in the case of disagreement: **s 7(3)(c) Social Security Act 1998**.

34. NATURAL JUSTICE

1. A term which is often misunderstood and prayed in aid when not relevant, eg whenever an appellant loses he is likely to allege a breach of natural justice, by which he means it is unfair that he lost.
2. Natural justice is in fact quite a limited concept (sometimes described as 'fair play in action') which involves certain basic rules of fairness which should always be observed, namely
 - (i) a party should know what case he has to meet; ie an appellant should be given the reasons both factual and legal for the decision he is objecting to so that he has prior knowledge of the case against him and is able to prepare his case; so it might for example be necessary to adjourn a CSAT if one party produces substantial quantities of further evidence at the last minute, in fairness to the other party;
 - (ii) a party is entitled to put his side of the argument by presenting his case to the tribunal and calling whatever relevant evidence he wishes; and
 - (iii) a party is entitled to a fair hearing before an unbiased and independent tribunal who will decide the outcome solely on the evidence rather than on any prejudices, pre-conceptions or other undisclosed knowledge they might have - but see paragraphs **37** and **38** below.

In practice:

3. Sometimes a tribunal concludes that an appellant should have an award removed or reduced. Do not do so unless the appellant has been warned that the tribunal is seriously considering that course and he has been given an opportunity to make further representations, seek an adjournment or withdraw (see para **61** for further discussion as to warnings and paragraph **63** for withdrawal).

38. OWN KNOWLEDGE, USE OF

1. Although clearly a tribunal is entitled to use its own common sense and experience when deciding an appeal, it is essential that the parties have the opportunity to deal with specific matters within the knowledge of the tribunal which may be felt to be relevant to the appeal.
2. So, if the chairman or members have some particular *factual* knowledge or information which has a bearing on the proceedings (eg knowledge of a local area or employment conditions in a particular factory), they must say so during the hearing and give both parties the opportunity to comment upon it. It must not be introduced only at the decision stage when the parties will not be able to comment.

In practice:

3. So, for example, if one of the members sees an appellant prior to the hearing and he appears to have been walking without difficulty, whereas at the hearing he is alleging a virtual inability to walk, the sighting must be put to him and he should be given the opportunity to explain the apparent discrepancy. Or if a member knows where a particular supermarket or shopping precinct is he should say so and comment on any matters raised which he feels may be inaccurate.
4. If the issue is not raised during the hearing it will be unfair and a probable breach of the rules of natural justice (see paragraph **34** above) for the tribunal to rely upon it in reaching their decision. If such an issue is raised by a member for the first time during deliberations the parties should be called back in for the point to be dealt with.
5. This does not however mean that a medical member must disclose the source of his medical knowledge, e.g. by producing text-books to support his opinions. He is entitled to use his general medical expertise, e.g. as to the likely effects of particular medications, without having to justify it, since he is not giving evidence. Although if the tribunal is minded to draw adverse inferences arising from expert knowledge, it will be necessary to put this to the appellant in order to avoid a breach of natural justice. For example, if the appellant says a particular tablet causes a side-effect which is not known to be caused by that tablet.