DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(a)(i) of the Social Security Act 1998:

I SET ASIDE the decision of the Manchester appeal tribunal, held on 12 June 2006 under reference U/06/929/2005/04463, because it is erroneous in point of law.

I give the decision that the appeal tribunal should have given, without making fresh or further findings of fact.

My DECISION is this:

There are grounds to revise the decision awarding a disability living allowance to the claimant on and from 5 May 1995. Those grounds are found in regulation 3(5)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

The revised decision is that the claimant was not entitled to a disability living allowance on and from 5 May 1995.

As a result, the claimant has been overpaid. I refer to the Secretary of State the calculation of that overpayment.

The overpayment in respect of the period from 5 May 1995 to 16 August 2005 inclusive is recoverable from the claimant on the ground that she misrepresented the nature and extent of her disabilities in 1995.

Any dispute on issues of calculation arising from my decision may be referred to me or to another Commissioner.

The original claim

2. The claimant submitted a claim for a disability living allowance in May 1995. She identified her illnesses as brain damage due to a road traffic accident in October 1992, hypersomnia, amnesia and arthritis. However, she left most of the sections in the claim pack blank. No doubt because of that, the Secretary of State obtained a report from an examining medical practitioner. In accordance with the standard practice, the doctor took a statement from the claimant before examining her, recording the findings on that examination and setting out opinions on the nature and extent of the claimant's disablement. On 7 July 1995, an adjudication officer made a life award of a disability living allowance consisting of the mobility component at the higher rate and the care component at the lowest rate.

The examining medical practitioner's report

3. The adjudication officer's award can only have been based on the examining medical practitioner's report. It is important to note the evidence that was taken to support that award.

4. On mobility, the claimant told the doctor:

> 'I have variable walking ability on a good day I can walk 200 yards but when pain in my back is severe I cannot walk at all. I need my friend Mandy to walk out with me we link arms as I am unsteady. It takes about 30 minutes to walk 200 yards on a good day.'

On examination, the doctor found substantial impairment from pain in the right leg, but full function in the left leg. The doctor's opinion was that the claimant's walking was variable and that she tried to walk 200 yards on most days. I cannot read the doctor's opinion on how long it would take to walk that distance, but her speed was walking was said to be slow and she would stop as a result of pain in her back and hips at about 50 yards. She had a heavy limping gait and held onto the furniture in the house or linked arms when out.

5. On preparing a cooked meal, the claimant told the doctor:

> 'I have difficulty getting the pans out from the cupboard. I can use the cooker and cook.'

On examination, the doctor found that the claimant had slight weakness in her left arm, hand and wrist and reduced grip on that side. The doctor's opinion was that the claimant could not lift heavy hot pans.

6. On attention, the claimant told the doctor that she needed assistance with getting out of bed, dressing, using stairs, her medication, and turning on the gas fire. On examination, the doctor found substantial impairment from pain in the right leg, but full function in the left leg. The doctor's opinion was that the claimant needed help to rise from a chair, when using stairs and, sometimes, when dressing.

The review

7. In February 1998, the claimant said that she wanted her case looked at again, no doubt with a view to obtaining a higher rate of the care component. In pursuit of that, she submitted a claim pack in March 1998. Under the procedure at the time, a claim submitted during the period of an award was treated as an application for review (section 30(12) of the Social Security Administration Act 1992). This time, the claim pack contained more detail, but the adjudication officer did not change the award and this was confirmed, by a different officer, under the second-tier review procedure that applied at the time under section 30(1).

The investigation

8. In 2005, the claimant was investigated. There are witness statements about, and photographs of, her driving and undertaking cleaning work. She was twice interviewed under caution on 10 August 2005.

The supersession and overpayment decisions

9. On 26 September 2005 following the investigation, a decision-maker decided on supersession that the claimant was not entitled to a disability living allowance on and from 1 July 2001. That was approximately the date when she began to work as a cleaner. On 5 October 2005, a different decision-maker decided that the resulting overpayment was recoverable from the claimant on the ground that she had failed to disclose an improvement in her condition.

The appeal to the appeal tribunal

10. The claimant exercised her right of appeal against both decisions with the assistance of a specialist welfare rights representative. The representative produced a detailed analysis of the evidence in support of the claimant's appeal. She also obtained two letters containing medical evidence. One letter was from a GP, stating that the claimant would struggle to plan or prepare a cooked main meal and to walk up and down stairs, and that she could only walk up to 50 metres before the onset of severe discomfort. The other letter was from a Consultant Orthopaedic Surgeon, stating that she would have difficulty with peeling and chopping, lifting pans, getting in and out of bed, dressing and undressing, walking up and down stairs, and walking while carrying an object. He set her walking distance at between 50 and 100 metres.

11. The tribunal dismissed the appeal. The chairman provided a closely-argued full statement of her tribunal's decision running to four pages. The tribunal decided that the claimant's condition had not improved since the award was made in 1995 and that there were, therefore, no grounds for supersession. However, there were grounds for revision in that the award was made in mistake or ignorance of fact. On that basis, the tribunal decided that the claimant had not been entitled to a disability living allowance from the effective date of the award. On the claimant's evidence, her abilities had not improved since 1995. That evidence allowed the tribunal to relate the evidence to the whole period of the award, specifically (i) the observations and witness statements, (ii) the claimant's ability to walk on the day of the hearing and (iii) her admitted activities such as the housework and ironing that she did for her mother. The tribunal then dealt with recoverability of the resulting overpayment. It found that the overpayment had arisen from misrepresentation by the claimant in her original claim, which she had continued on her application for a review. Despite the logic of its reasoning, the tribunal then confined its decision to the period covered by the decision under appeal, saying that it was not obliged to deal with the period between 1995 and 2001.

12. (It is, of course, possible for a tribunal to find that a claimant's condition and abilities have changed, for better or worse, despite the claimant's own assertion to the contrary. However, there has to be evidence on which the tribunal can make that finding and the evidence did not allow that approach in this case.)

The claimant's grounds of appeal to the Commissioner

13. The grounds of appeal criticise the tribunal for not dealing with the effect of severe discomfort on the claimant's mobility, specifically in relation to her walking on the day of the hearing. I reject this criticism. The tribunal noted that the claimant had walked between 250 and 350 metres before arriving and being shown at once into the tribunal room, but that she showed no signs of discomfort or distress from her exertion. That observation was sufficient to refute any suggestion that the claimant was walking through her discomfort.

14. The grounds of appeal then criticise the tribunal for not showing that the adjudication officer in 1995 was ignorant or mistaken as to the facts. All that the tribunal had done, the representative argued, was to show that it 'would not have agreed with the adjudication officer of 1995 in deeming [the claimant] entitled to the higher rate of the mobility component on the basis of [the examining medical practitioner's] report in view of the distance she was found to be able to walk.' The distance referred to is the 200 yards mentioned by the claimant and the examining medical practitioner. I reject this criticism. The point the representative is making is that different decision-makers may legitimately come to different conclusions on

the same facts. It that is what the tribunal decided, it would have been wrong to find that there had been a mistake or ignorance as to the facts. But that is not what the tribunal did. It did not simply decide that it would not have made the decision that the adjudication officer did on the facts as the officer believed them to be. What it decided was that the claimant's mobility was not affected by severe discomfort up to a distance of at least 250 metres. That was at variance with the facts as found or assumed by the adjudication officer, which were that the claimant could not walk more than 50 metres without stopping as a result of pain. The tribunal's decision was the inevitable consequence of the case that the claimant presented. She argued that she had not improved and that, if anything, she had deteriorated. That allowed the tribunal to relate all evidence about her present disablement to the whole of the period from 1995. Once it found that the claimant's walking fell well outside the scope of being virtually unable to walk, it followed ineluctably that the adjudication officer had been mistaken to decide otherwise in 1995.

15. I will deal with other two grounds of appeal under the headings of The revision issue and Disposal.

My grant of leave

16. The claimant, by her representative, applied for leave to appeal. This was refused by the chairman of the tribunal and renewed to the Commissioner. I gave leave to appeal, but not on the grounds set out by the representative. My reasons were:

> 'In this case, there is a realistic prospect that the decision was wrong in law for this reason. I am concerned about the overpayment decision. This was originally based on the claimant's failure to disclose that her disablement had improved. The tribunal found that it had not improved, but had instead deteriorated. However, it also found that the claimant had never satisfied the conditions for an award of a disability living allowance. That required the tribunal to consider the grounds on which an overpayment might be recoverable. It could not simply rely on the grounds used by the Secretary of State. It did this in the penultimate paragraph of the full statement of the tribunal's decision on page 329. However, it is arguable that the report of the examining medical practitioner did not disclose a proper factual basis for an award and that the adjudication officer's award, in so far as it was based on those opinions, was wrong. In other words, even if the claimant did mislead the examining medical practitioner, the adjudication officer's unjustified generosity was the cause of the overpayment, not the claimant's statements or the doctor's opinions. If that is correct, the overpayment would not recoverable unless some other basis can be identified.
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> 'I would be grateful if the Secretary of State's representative would also deal with the claimant's grounds of appeal at pages 330 to 332.'

The causation issue

17. The Secretary of State's representative does not support the point on causation that I made in my grant of leave. The claimant's representative has not commented on it, although the covering letter sent to the parties by the Commissioners' office when issuing the Secretary of State's observations warns that the Commissioner may not accept what the Secretary of State suggests. I will deal with mobility and care separately.

18. As to mobility, it is reasonable to infer that the adjudication officer in 1995 relied on the report of the examining medical practitioner and, specifically, on the doctor's opinion rather than on what the claimant had said to the doctor. It is unfortunate that the doctor did not answer the questions asked. The 200 yards is recorded under the distance the claimant could walk before severe discomfort and 50 yards under the halts that would be expected, by implication before severe discomfort occurred. That would suggest that the pain which caused the claimant to stop at 50 yards was not severe discomfort. That is how I read the report when granting leave. I now realise that that was not right. The reference to 200 yards is merely a report of how far the claimant tried to walk each day, not an answer to the question on the form. The reference to 50 yards is most likely to the distance before severe discomfort. On that reading, the adjudication officer was entitled to find that the claimant was virtually unable to walk.

19. As to care, the examining medical practitioner's opinion on cooking did not support an award of the care component at the lowest rate. It mentioned only difficulties with heavy pans, whereas the legal test applies to a meal for one person only, meaning that the pans would not be heavy. However, the care component at the lowest rate can also be awarded for attention for a significant portion of the day. The records kept in 1995 did not distinguish between these two different bases for the care component at the lowest rate. I consider that the help identified by the examining medical practitioner could be sufficient to show that the claimant satisfied this alternative basis for an award.

20. Accordingly, I conclude that there is nothing in the causation point.

The revision issue

21. The Secretary of State supports the appeal on the ground that the tribunal did not deal adequately with regulation 3(5)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This was the authority under which the tribunal revised the decision awarding a disability living allowance in 1995. This allows a decision to be revised

> '(c) where the decision is a disability benefit decision ... which was made in ignorance of, or was based upon a mistake as to, some material fact in relation to a disability determination embodied in or necessary to the disability benefit decision ... and
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> (i) as a result of that ignorance of or mistake as to that fact the decision was more advantageous to the claimant than it would otherwise have been but for that ignorance or mistake and,
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> (ii) the Secretary of State is satisfied that at the time the decision was made the claimant or payee knew or could reasonably have been expected at the time the decision was made to know of the fact in question and that it was relevant to the decision.'

22. The Secretary of State's representative submits that the tribunal did not deal with head (ii) and that, if that provision is not satisfied, the decision awarding the disability living allowance should have been superseded under regulation 6(2)(b). He invites me to remit the case for rehearing.

23. The representative raised this point in the grounds of appeal. She argued that the claimant 'could not have known the factual basis of the decision and could not reasonably have been expected to know what fact or facts on which the decision was based that were mistaken or erroneous.'

24. I reject these submissions. The tribunal did not in terms address regulation 3(5)(c)(ii), but it did so in substance. The tribunal found that the claimant's mobility and her ability to cook and self-care were not affected by her medical condition sufficiently to qualify for a disability living allowance. The claimant's mental state is not such that she cannot understand what she is and is not able to do. Accordingly, on the tribunal's approach to the case, the claimant did know of the facts in question. Also, she could at least reasonably have been expected to know that they were relevant, even if she did not actually realise this. She could and should have known of their relevance from the terms of the questions on the claim form and from the questions she was asked by the examining medical practitioner.

25. The claimant's representative has relied on two passages from the decision of Mr Commissioner Rowland in *CDLA/1823/2004*. I will quote the relevant paragraphs in full and italicise the passages relied on:

> '11. If those considerations suggest that it would have been better to terminate the award on the ground of mistake of fact rather than change of circumstances, difficulties remain. Supersession under regulation 6(2)(b)(i) of the 1999 Regulations on the ground of mistake of fact would, by virtue of section 10(5) of the 1998 Act, be effective from the date of the decision. Revision under regulation 3(5)(c) of the 1999 Regulations on the ground of mistake of fact would be effective from the beginning of the period of the award (see section 9(3) of the 1998 Act) but would be possible only if –
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> > "at the time the decision was made the claimant ... knew of could reasonably have been expected to know the fact in question and that it was relevant to the decision".
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> *The claimant may have known in general terms of his capacity to walk and its relevance to his entitlement to disability living allowance, but it would be hard to say that he should have known whether or not he qualified for the allowance, which is what regulation 3(5)(c) appears to be driving at. Even regulation 12(1)(a)(ii) of the 1991 Regulations forbears from laying down any precise standards for determining whether or not a person is virtually unable to walk.*
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> '12. Even if the award were revised, any overpayment resulting from the revision might well not be recoverable under section 71(1) of the 1992 Act. *Generally, a claimant's statement as to the distance he can walk cannot be taken as purporting to be anything other than an honest opinion and, in those circumstances, even if it turns out to be wrong, it is difficult to regard it as amounting either to a failure to disclose a material fact or a misrepresentation, unless the Secretary of State or an appeal tribunal is satisfied that the claimant in fact made the statement dishonestly (see CDLA/5803/99). Furthermore, the award of benefit in this case was almost certainly based on the examining medical practitioner's estimate, which was different from, and might not necessarily have been influenced by, the claimant's estimate.*'

I do not consider that this decision supports the claimant's case.

26. As to the passage in paragraph 11, I respectfully disagree that it is necessary that the claimant knew or could reasonably be expected to have known that she was not entitled. That is not what the legislation requires. It only requires that the claimant should know or reasonably be expected to know of the facts and their relevance.

27. As to the passage in paragraph 12, I respectfully agree with it. However, it does not affect my decision in this case. The difference between the claimant's statements in 1995 and the tribunal's findings on her abilities at that time are so at variance that they cannot be described as matters of perception or honest opinion.

28. It would have been better if the chairman had expressly dealt with regulation 3(5)(c)(ii), but its application is fairly apparent from what she did record. I reject this ground of appeal and the Secretary of State's support for it.

How the tribunal went wrong

29. Nevertheless, the tribunal went wrong in law. It did so by failing to follow the logic of its reasoning. If there were grounds to revise from the effective date of the award, those grounds applied from that date. They could not be limited to a period that began in 2001. An entitlement decision taking effect from 2001 assumes a change of circumstances in 2001, not an error from the very beginning of the award. The tribunal was wrong to decide that it had a discretion not to deal with the earlier period. The discretion to which the chairman referred underlies section 12(8)(a) of the Social Security Act 1998:

> 'In deciding an appeal under this section, an appeal tribunal-
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> (a) need not consider any issue that is not raised by the appeal'.

I will assume for the sake of argument that the tribunal was correct that the period before 2001 was not an issue that was raised by the appeal. That left the tribunal with a discretion whether or not to deal with it. That discretion had to be exercised judicially.

30. The issue, even if not raised by the appeal, was nevertheless an issue that arose from the case presented by the claimant. By denying any improvement and in the absence of any evidence showing a change of circumstances, she inevitably forced the tribunal to accept that she was entitled throughout or not at all. She may not have realised that or its potential consequences, but a CAB representative should surely have done so. It may be that she did not raise the issue on the appeal, but her case meant that the issue did arise.

31. The tribunal was under a judicial duty to make a decision. It could not refuse to do so on the ground that, of the two possible decisions open to it, one was not justified by the evidence (that there had been a change of circumstances) and the other was not raised by the appeal (that the claimant had never been entitled to an allowance). The only other possible decision was to deal with the claimant's entitlement for the whole period of the award. That was the only proper approach on the facts as found by the tribunal and that required the tribunal to exercise its discretion to deal with an issue not raised by the appeal.

Disposal

32. As the tribunal went wrong in law, I must allow the appeal and set aside its decision. A rehearing is not necessary, as I can and do substitute the decision that the tribunal should have given on its findings of fact. That decision is set out in paragraph 1 of this decision and follows through, as the tribunal should have done, the logic of its decision.

33. As to entitlement, the tribunal found that the claimant had never been entitled to either rate of a disability living allowance. Its analysis of the evidence is rational and supports that conclusion. The claimant's representative criticises the tribunal for not dealing with the evidence from her GP and Consultant. However, that evidence was clearly at variance with, and had to give way to, the evidence of the walking and other activities that the claimant had undertaken. My decision is based on the tribunal's findings.

34. As to revision, I have already explained how and why regulation 3(5)(c) is satisfied given the tribunal's findings.

35. As to recoverability, this is based on misrepresentation. Again, this is the logic of the tribunal's reasoning. The evidence did not justify and the tribunal did not so find, that the claimant was unaware of the nature and extent of her disabilities. It followed, therefore, that she misrepresented those matters to the adjudication officer and to the examining medical practitioner. And the examining medical practitioner in turned relied in part on the claimant's account to form the opinions expressed in the report. The doctor's findings on grip and weakness in the right leg, in particular, are dependent on the claimant's report and performance at examination. I notice that the doctor did not record any muscle wasting. So, even if the adjudication officer relied exclusively on what the examining medical practitioner said and ignored the claimant's statement, what she had told the doctor did affect the doctor's findings and opinions. That is a sufficient misrepresentation to found recovery.

36. As to causation, I am prepared to accept that the examining medical practitioner may have been at fault in identifying too great a level of disability and that this influenced the adjudication officer. However, I have just explained that the claimant contributed through what she told the doctor and how she presented on examination. At most, the doctor's report was a contributory cause of the overpayment. However, the claimant's misrepresentation was also contributory and that is sufficient (*Duggan v Chief Adjudication Officer* reported as the appendix to *R(SB) 13/89*).

37. The overpayment is recoverable only to 16 August 2005, as the Secretary of State could and should have terminated her payment with effect from that date. The remainder of the overpayment is not recoverable from the claimant.

38. In the ground of appeal, the claimant's representative criticised the tribunal on the recoverability issue. Misrepresentation, she says, was not discussed and the tribunal failed to justify its conclusions on misrepresentation. It would have been better if the tribunal had allowed the claimant's representative a chance to comment on the change in the basis of recoverability. However, what could she have said that might have affected the outcome? The claimant's case presented the tribunal with only two alternatives: she was either entitled throughout or not at all. And if she was not entitled at all, she must at least have misled the doctor.

39. I am sure that the claimant will not be pleased that I have given the decision that I have, especially as I have been told that she has had a favourable report from an examining medical practitioner on a later claim. However, that report was not in evidence before the tribunal and, as her representative rightly concedes, is not relevant to this appeal. As I have explained a number of times, the outcome of this appeal is in part a result of the way she presented her case, specifically by refusing to admit to any improvement. It is also the nature of an appeal, whether to an appeal tribunal or a Commissioner, that either party may find that the outcome is not favourable.

Signed on original
on 13 March 2007

Edward Jacobs
Commissioner