Bulletin 174

CSHM 3

CI/1800/2001

# DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Nottingham appeal tribunal dated 15 February 2001 is erroneous in point of law, for the reasons given below, and I set it aside. The case is referred to a differently constituted appeal tribunal for determination in accordance with the directions given in paragraphs 29 to 34 below (Social Security Act 1998, section 14(8)(b)).

## The background

2. This case concerns an industrial accident on 31 August 1991, when the claimant injured her neck, and possibly her back. The appeal tribunal dealt with the case at the same time as that related to an industrial accident on 11 October 1990, when the claimant injured her back. The appeal to the Commissioner in the other case is CI/2376/2001. The present case stems from a claim form for disablement benefit received on 6 July 1999. On the form the claimant ticked that she had not claimed disablement benefit before. The medical adviser who examined the claimant on 29 February 2000 gave the opinion that the injury suffered was a soft tissue injury to the neck, resulting in painful and restricted movements of the neck, but that the effects of the accident of 31 August 1991 resolved well within the 90 days following that date. On 14 March 2000 the decision was issued that the claimant could not get disablement benefit because there was no loss of faculty from 14 December 1991.

3. Part of the evidence noted as considered by the medical adviser were the appeal documents (including consultant reports) and the decision of a medical appeal tribunal (MAT) of 28 September 1994 on an earlier claim for disablement benefit in respect of the accident of 31 August 1991. None of those documents were included in the papers before the appeal tribunal, but it is now known that the MAT confirmed the decision of an adjudicating medical authority (AMA) that there was no loss of faculty resulting from the accident from 14 December 1991.

4. The claimant appealed against the decision issued on 14 March 2000. She attended the hearing on 15 February 2001, gave evidence and was examined by the medically qualified member of the appeal tribunal. She has complained bitterly of pain and exacerbation of her condition caused by that examination. As it turns out, I do not have to reach any conclusions on that complaint for the purposes of the present appeal.

## The appeal tribunal's decision

5. The appeal tribunal did not confirm the Secretary of State's decision on disablement. It found that there was a loss of faculty (impaired neck function) from 31 August 1991 and, according to the decision notice, that the resulting disablement was to be assessed at 5% for the period from 1 December 1991 to 30 November 1993 (in the statement of reasons the assessment ran from 14 December 1991 for two years). It was said that after that date the effect of the injury would have worn off and the claimant's ongoing symptoms were due to underlying

degeneration. There does not appear to have been any decision notice on the issue of entitlement to disablement benefit. Nor did the joint statement of reasons covering both cases refer to the issue of entitlement. However, as the assessment for the accident of 11 October 1990 was 8%, the aggregation of the two assessments for overlapping periods would only have given 13%, insufficient for entitlement to disablement benefit, regardless of the problem of the time-limit for claiming.

**The appeal to the Commissioner**

6. The claimant was granted leave to appeal against the appeal tribunal's decision by Mr Commissioner Pacey, after an oral hearing. That was not on the basis of the claimant's arguments (about the nature and adequacy of the medical examination on 15 February 2001 and on all of her current problems stemming from the two accidents), but on the grounds that the appeal tribunal might have gone wrong in law in failing to consider the effect of regulation 11 of the Social Security (General Benefit) Regulations 1982 on a possible interaction/connection with the effects of the accident of 11 October 1990 and in failing to deal with the argument that pre-existing degenerative changes might have remained asymptomatic but for the industrial accident.

7. The written submission dated 20 December 2001 on behalf of the Secretary of State did not support either of the grounds mentioned by Mr Commissioner Pacey. It was said that there was no interaction between problems in the back and problems in the neck. It was though submitted that the appeal tribunal erred in law because there was no evidence to support a decision that there was any loss of faculty resulting from the accident of 31 August 1991 after 14 December 1991. The submission relied in particular on the consultant's report of 30 November 1998. The claimant's request for an oral hearing of the appeal was granted by Mr Commissioner Pacey.

8. The hearing took place at Doncaster County Court on 3 April 2002. The claimant attended and was not represented. The Secretary of State was represented by Miss Deborah Haywood of the Office of the Solicitor to the Department for Work and Pensions, accompanied by Dr Susan Reed of the Department's Medical Policy Group. I am grateful for the assistance of all those present.

9. Following the request I made at the oral hearing, a copy of the record of proceedings and decision of the MAT of 28 September 1994 was provided, with the information that the claim had been made on 2 October 1991 and that the AMA's decision had been made on or about 1 June 1992. Because of the problems raised by the existence of that decision of no loss of faculty, I directed a further submission from the Secretary of State. I had intended that a copy of the documents from 28 September 1994 were to be added to the papers and issued to the claimant with my direction. Unfortunately, that does not seem to have been done. That obviously made it difficult for the claimant to reply to the Secretary of State's submission dated 13 May 2002. However, I consider that I can deal fairly with the points of law involved without the need to give the claimant another opportunity to comment.

**Errors of law by the appeal tribunal**

No decision on entitlement

10. In my judgment the appeal tribunal erred in law in several ways. First, it should have expressly recorded a decision on the claimant's entitlement to disablement benefit, in the light of its conclusions on the assessment of disablement. The claimant's appeal covered the decisions on both of those issues. Although it followed inevitably from the appeal tribunal's assessments of disablement that the claimant would not be entitled to disablement benefit, she was entitled to a statement of that conclusion and an explanation.

No consideration of regulation 11 of the General Benefit Regulations

11. Second, on the basis of the assessments made by the appeal tribunal, there should have been a consideration of the effect of regulation 11 of the General Benefit Regulations in relation to the disablement from the two accidents. It was submitted strenuously for the Secretary of State that the functions of the neck and of the lumbar spine are distinct and separate, so that there was no need for the appeal tribunal to consider whether the accident 11 October 1990 could be regarded as an additional cause of the disabilities resulting from the accident of 31 August 1991. I accept that the separation of functions means that pain and limitation of movement in the neck is properly regarded as a separate loss of faculty from pain and limitation of movement in the lumbar spine. However, I cannot accept that there can be no interaction in the effect on what a claimant can do in carrying out ordinary everyday activities. Regulation 11 applies where there is another cause of the disabilities resulting from the relevant loss of faculty. It seems to me a feature of common experience that when carrying out activities which involve the bending and rotation of the lumbar spine, there is often a need to move the neck or to brace the neck and shoulders in a way which is restricted if pain is suffered in the neck. The question of interaction at the level of disability is one that should be expressly dealt with where the evidence warrants it. The evidence in the present case did warrant it.

Inadequate explanation of decision

12. Third, the appeal tribunal did not adequately explain what it considered the nature of the claimant's injury to be (eg was it a soft tissue injury as found by the medical adviser or was it something else?) and why any resulting loss of faculty and disablement was restricted to two years after the 90 days from the accident. That required some further explanation of the effect of any pre-existing degenerative changes in the cervical spine. This error merges into the more general point made on behalf of the Secretary of State. That is that the appeal tribunal did not, in the light of the consultant's report of 30 November 1998 (which it did not mention at all in its reasons), the findings on examination on 15 February 2001 and all the medical evidence, adequately explain why it found that any of the claimant's symptoms were due to either of the industrial accidents. I agree that there was a need for further explanation of those matters, in particular the consultant's report with its findings of functional overlay and inappropriate signs and responses.

Giving a decision on a period covered by an earlier decision

13. There is, though, a more fundamental error of law arising from the existence of the earlier decisions of the AMA and the MAT. I agree with Secretary of State's representative in the submission of 13 May 2002 that it follows from section 47(5)(b) of the Social Security Administration Act 1992 and the decision of the Tribunal of Commissioners in CI/3700/2000

(to be reported as R(I) 5/02) that the decision of the MAT of 28 September 1994 has a final and ongoing effect that is not altered by the coming into force of the Social Security Act 1998. Section 47(5) provided:

> "(5) Where in connection with a claim for disablement benefit made after 25th August 1953 it is decided that the relevant accident has not resulted in a loss of faculty, the decision--
> (a) may be reviewed under subsection (4) above as if it were an assessment of the extent of disablement resulting from a relevant loss of faculty; but
> (b) subject to any further decision on appeal or review, shall be treated as deciding the question whether the relevant accident had so resulted both for the time about which the decision was given and for any subsequent time."

If any further authority is needed for the conclusion in R(IS) 5/02 about the ongoing effect given by section 47(5)(b), it lies in section 16 of the Interpretation Act 1978. The repeal of section 47(5) with the rest of Part II of the Administration Act did not affect the status given to the decision of the MAT of 28 September 1994 by the legislation in force at that date, as there was nothing in the repealing legislation to show an intention to do so.

14. Under the Administration Act adjudication regime, it was the MAT's decision which was operative, even though it confirmed the AMA's decision (see the provisions in section 47 of the Administration Act on the need for leave from a MAT to review a MAT's decision for unforeseen aggravation and the discussion in R(I) 9/63, paragraph 19, and R(I) 4/95). The MAT's decision that there was no loss of faculty resulting from the accident of 31 August 1991 from 14 December 1991 continues to be operative until, under the 1998 Act regime, it is revised or superseded. On the other hand, the decision which must have been given in 1992 disallowing the claim for disablement benefit does not have any ongoing effect beyond the date of the decision. Its existence does not prevent another claim for disablement benefit being made in respect of the accident of 31 August 1991. But since a new claim would be bound to fail while the decision of no loss of faculty was still operative, the claim of 6 July 1999 has to be interpreted as including an application to supersede the decision of the MAT of 28 September 1994. That is so even though the claimant ticked that she had not claimed disablement benefit before.

15. The result is that the appeal tribunal made a decision that it had no power to make (and that would have been so even if there had been no references in the papers to alert it to the existence of the decision of the MAT of 28 September 1994). It purported to make a decision on loss of faculty for the period from 14 December 1991 to 13 December 1993, a period which was covered by the MAT's decision. That was not legally possible unless the MAT's decision were superseded or set aside by some other mechanism (R(I) 9/63, paragraphs 18 and 24). The failure to consider supersession was an error of law. For reasons given below, my judgment is that the appeal tribunal should have considered and dealt with the issue of supersession of the MAT's decision and should not simply have declared that the Secretary of State had failed to make a properly based decision.

Can a MAT's decision be superseded?

16. There is, however, another point which might arguably affect what the appeal tribunal ought to have done. This is whether, contrary to the assumption in the Secretary of State's submission of 13 May 2002, the legislation in force from 5 July 1999 (the commencement date of the Social Security Act 1998 for purposes of industrial injuries benefits) allows the supersession of a MAT's decision of no loss of faculty. The problem arises because section 10 of the 1998 Act, giving the power to supersede, applies expressly only to the supersession of decisions of the Secretary of State under section 8 of the 1998 Act or of appeal tribunals or Commissioners under Chapter II of the 1998 Act, ie to supersession of decisions made under the regime in force from 5 July 1999. If supersession is to apply to decisions made under the pre-1998 Act regime, that can only be by legislation treating those decisions as if made under the new regime. Such provisions are found in the various Commencement Orders for the 1998 Act. The relevant order for industrial injuries benefits is the Social Security Act 1998 (Commencement No 8, and Savings and Consequential and Transitional Provisions) Order 1999.

17. Paragraph 4(1) of Schedule 12 to the Order provides:

> "(1) Where, before 5th July 1999, a decision has been made by an adjudicating authority in relation to a relevant benefit, that decision shall be treated on or after that date as a decision of the Secretary of State under paragraph (a) or, as the case may be, paragraph (c) of section 8(1)."

In paragraph 1(1) of Schedule 12 "adjudicating authority" is defined, unless the context otherwise requires, as "an adjudication officer, an adjudicating medical practitioner, a specially qualified adjudicating medical practitioner, a medical board or a special medical board". The Tribunal of Commissioners in R(I) 5/02 explained that paragraph 4(1) operates to "re-base" the decisions of such authorities so as to allow the terms of the 1998 Act regime to apply to them. Paragraph 11(1) of Schedule 12 provides:

> "(1) Subject to sub-paragraph (2) below, any decision of an appellate authority shall, for the purposes of section 13 and 14, be treated as a decision of an appeal tribunal."

Paragraph 11(2) is not relevant to the present case. The definition of "appellate authority" in paragraph 1(1) is "a medical appeal tribunal or a social security appeal tribunal". However, sections 13 and 14 of the 1998 are to do with appeals from appeal tribunals and not with the supersession of the decisions of appeal tribunals. There is nothing else in Schedule 12 touching the issue of supervision.

18. It thus appears at first sight that there is no provision allowing a supersession of a decision of a MAT in industrial injuries benefit cases. Paragraph 11(1) of Schedule 12 is narrowly limited to purposes which do not extend to supersession under section 10 of the 1998 Act and paragraph 4(1) applies only to adjudicating authorities, as distinct from appellate authorities. But that conclusion cannot possibly be right. Before the abolition of the pre-1998 Act regime, claimants had the right to apply for review of a MAT's decision of no loss of

faculty on the grounds of ignorance or mistake of material fact or, with leave, of unforeseen aggravation (Administration Act, section 47(1) and (4) to (7)). It cannot be the case that on 5 July 1999 claimants were deprived of the equivalent of that right. Nor, since supersession of AMA decisions is allowed by paragraph 4(1) of Schedule 12, can it be right that a claimant who appealed against an AMA decision to a MAT is left worse off than a claimant who did not appeal. Schedule 12 must, if possible, be interpreted to avoid those results.

19. I do not think that it is possible to ignore the express limitation of the effect of paragraph 11(1) of Schedule 12. However, the definitions of "adjudicating authority" and "appellate authority" in paragraph 1(1) do not apply if the context otherwise requires. In my judgment, the context of paragraph 4(1) does require giving the phrase "adjudicating authority" a wider meaning than that set in paragraph 1(1). That is necessary in order to avoid the results mentioned in the previous paragraph and to avoid unfair differences in the treatment of claimants. I ought not to attempt to say exactly how far paragraph 4(1) might apply in other circumstances. It is enough for me to decide that in the circumstances of a MAT having made a decision which has a final and ongoing effect under section 47(5)(b) of the Administration Act, the MAT is an adjudicating authority within paragraph 4(1). It may seem odd for a MAT's decision to be treated as a decision of the Secretary of State, but as explained by the Tribunal of Commissioners in R(I) 5/02 the effect is a notional one for the purpose of applying the 1998 Act procedures. It does not mean that the true nature of the decision and of MATs should be ignored.

20. Thus I conclude that the 1998 Act does allow the supersession of decisions of MATs that there is no loss of faculty resulting from a relevant accident. The appeal tribunal should therefore have expressly considered the issue of supersession.

**Setting aside of the appeal tribunal's decision**

21. For those reasons, the decision of the appeal tribunal of 15 February 2001 must be set aside as erroneous in point of law. There is then an issue as to whether I should refer the case to another appeal tribunal for rehearing or substitute my own decision on the appeal. That depends on the effect on the Secretary of State's decision under appeal of the error of law identified in paragraphs 13 to 15 above.

**Reference to a new appeal tribunal**

22. As explained in those paragraphs, the claim made on 6 July 1999 in respect of the accident on 31 August 1991 has to be treated as including an application to supersede the MAT's decision of 28 September 1994. The Secretary of State's decision, so far as one can tell from the letter issued on 14 March 2000, was made on the mistaken assumption that the claim was the first one made in respect of that accident. It included a decision that there was no loss of faculty from 14 December 1991 and a decision that as a result the claimant was not entitled to disablement benefit. The Secretary of State's decision was defective, but was it so defective in substance as to make it invalid or of no effect?

23. In my judgment it was not. The position under the 1998 adjudication regime, where the Secretary of State determining a claim for disablement benefit decides all the questions relevant

to entitlement, is fundamentally different from that under the pre-1998 adjudication regime, with its division between medical questions and other questions. The principles laid down by the Tribunal of Commissioners in decision R(I) 9/63 no longer apply in their entirety. In that case on a claim for disablement benefit in 1955 it was found by a medical board that the relevant accident had resulted in no loss of faculty. In 1961 the claimant made a fresh claim for disablement benefit arising out of the same accident. It was not noticed that this was so. The case was referred to a medical board as a fresh claim. The board made an assessment of disablement for a period from the end of the injury benefit period. The Minister caused the board's decision to be referred to a MAT, which declined to treat the board's decision as a nullity, but on the merits decided that there was no loss of faculty. The Tribunal of Commissioners stated that the 1961 claim could, with the claimant's consent, have been treated as an application for review of the 1955 decision, but that had not been done. No opinion was expressed on whether or not the MAT had had power to treat the board's decision as one given on review. On the basis that a claim was under consideration, the board's decision was given without jurisdiction. It was held that the only decision which the MAT could have given was that it was not open to the board to consider the question whether there was any loss of faculty, as that question had already been decided in a final decision.

24. The circumstances of R(I) 9/63 are very similar to those of the present case. But there the only possible source of the 1961 medical board's jurisdiction was in the power to decide the medical question of whether there was a loss of faculty. In the present case, the Secretary of State undoubtedly had jurisdiction to determine whether the claimant was entitled to disablement benefit on the claim made on 6 July 1999. If that claim had been approached as not including an application for supersession, the only decision could have been the same as that issued on 14 March 2000, ie that the claimant was not entitled to disablement benefit. But the grounds would have been different, that it had already been determined that there was no loss of faculty resulting from the relevant accident, rather than the making of a new decision on the merits that there was no loss of faculty. Equally, if the claim had been approached as including an application for supersession and it had been decided either that the superseding decision was to the same effect or that there were no grounds to supersede (whatever is the proper analysis), the decision would have been the same, ie that the claimant was not entitled to disablement benefit. The grounds then would have been either the new superseding decision or the non-supersession of the decision of the MAT of 28 September 1994.

25. What actually happened in the present case was that the Secretary of State looked at the case as from 14 December 1991, as he would have had to do if the claim had been treated as including an application for supersession either on the ground that the MAT of 28 September 1994 had been ignorant of or mistaken as to some material fact or on the ground that there had subsequently been a relevant change of circumstances (eg the development of a relevant loss of faculty). He then decided that the evidence did not support the claimant's case, in a way which would not have led to any supersession operating to the claimant's benefit.

26. In those circumstances, I am satisfied first that the Secretary of State had jurisdiction to determine the claim of 6 July 1999. I am satisfied second that, although the Secretary of State's decision was defective, in that it failed to give consideration to an implied application to

supersede the decision of the MAT of 28 September 1994 or to give proper effect to the existence of that decision, it was not so defective in substance that the only decision which could have been given by the appeal tribunal of 15 February 2001 was that the Secretary of State had no legal power to decide the claim. It was possible for the defects to be corrected by the appeal tribunal carrying out a rehearing of the case before the Secretary of State.

27. I thus conclude that this is not a case where the only possible decision for the appeal tribunal was to declare the Secretary of State's decision to be of no legal effect. If my conclusion had been the other way, I would have had to substitute such a decision. As it is, it seems to me that, in fairness to the claimant, her arguments that all her current problems stem from the two accidents and that the further documents she has produced support her case should be evaluated by a body with the medical expertise and experience of an appeal tribunal, rather than by a Commissioner with no such expertise and experience.

28. Accordingly, the claimant's appeal must be referred to a differently constituted appeal tribunal for determination in accordance with the directions below. Consideration should be given to having two medically qualified panel members on the new appeal tribunal, as allowed by regulation 36(2)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The appeal should be reheard at the same time as that in case CI/2376/2001.

**Directions to the new appeal tribunal**

29. There must be a complete rehearing of the appeal on the evidence presented and submissions made to the new appeal tribunal, which will not be bound by any findings made or conclusions expressed by the appeal tribunal of 15 February 2001. The evidence will include all the documents already in the papers and the documents sent in to the Commissioners' office by the claimant and received on 25 June 2002. It can also of course include evidence given in person by the claimant at the rehearing and the results of any medical examination on that occasion.

30. The new appeal tribunal must first consider the question of whether the decision of the MAT of 28 September 1994 should be superseded and, if so, whether the superseding decision is to be any different in effect. The potentially available grounds of supersession seem to be ignorance or mistake of material fact by the MAT (regulation 6(2)(b) or (c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) and a relevant change of circumstances since the MAT's decision was made (regulation 6(2)(a)).

31. That will involve the new appeal tribunal in looking at afresh and evaluating all the evidence as to whether the claimant has suffered any loss of faculty as a result of the accident of 31 August 1991 at any time from 14 December 1991 onwards. The new appeal tribunal must also of course evaluate the submissions made by the parties about the effect of the evidence, and the Secretary of State's submission can include the written analysis by Dr Reed produced to me at the oral hearing. If the new appeal tribunal concludes that there should be a superseding decision that the claimant has suffered a loss of faculty it must go on and make an assessment of the extent of the resulting disablement. In doing so, it must consider regulation 11 of the Social Security (General Benefit) Regulations 1982 in the light of what I have said in paragraph 11

above and what the new appeal tribunal decides about the accident of 11 October 1990 in the linked appeal.

32. The new appeal tribunal must also consider the date from which any superseding decision could take effect. The general rule in section 10(5) of the Social Security Act 1998 is that the effective date is the date of the decision or, where applicable, the date of the application for supersession. In the present case, that would indicate the earliest date as being 6 July 1999, the date of the claimant's implied application for supersession. There is nothing in regulation 7 of the Decisions and Appeals Regulations to displace that general rule where the ground of supersession is mistake or ignorance of material fact (even if the proper ground were regulation 6(2)(c) there can be no backdating under regulation 7(5) unless the superseding decision is less advantageous to the claimant). Where the ground of supersession is relevant change of circumstances, the general rule applies unless a claimant gets within the rules on prompt notification of the change (regulations 7(2)(a) and 8).

33. Whatever the outcome of the questions mentioned above, the new appeal tribunal must come to and record a decision on the claimant's entitlement to disablement benefit on the claim made on 6 July 1999. It must not be forgotten that there can be no entitlement to disablement benefit on that claim for any period earlier than 6 April 1999 (Social Security (Claims and Payments) Regulations 1987, regulation 19 and Schedule 4, paragraph 3). And there can only be entitlement for any day from 6 April 1999 if there is an assessment or assessments of disablement covering that day which in aggregate amount to 14% or more. It might well be the case that, because of the rules in paragraph 32 above, even if the claimant were successful in having the MAT's decision of 28 September 1994 superseded, any assessment of disablement (however far back it was justified on the evidence) could not take effect before 6 July 1999.

34. The evaluation of all the evidence will be entirely a matter for the judgment of the members of the new appeal tribunal. The decisions on the facts in this case remain open.

**(Signed)** J Mesher
**Commissioner**

**Date:** 7 August 2002