Bulletin 176

[CS Hunt]

DECISION OF SOCIAL SECURITY COMMISSIONER

Commissioner's Case No: CSDLA/264/2002

1. My decision is that the decision of the tribunal given at Ayr on 17 December 2001 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted appeal tribunal for a rehearing.

2. The claimant has appealed to the Commissioner against the decision of the tribunal which is set out at page 154 and is that the claimant is not entitled to an award of the mobility component of disability living allowance (DLA) nor the middle or higher rate of the care component of DLA from and including 6 August 2001. The grounds of appeal are set out at pages 385 and 386. The Secretary of State has supported the appeal for reasons set out in paragraph 4.5 of his submission to the Commissioner at page 605. In a response to the Secretary of State's submission, the claimant simply supports the Secretary of State's submission, in particular paragraphs 4.5 and 4.6.

3. When I granted leave to appeal in this case, however, I also raised in a direction with the Secretary of State the issue of supersession in the light of my decision in CSDLA/1068/01. He dealt with this issue in his submission.

4. In this case the claimant had an award of the lowest rate of the care component from and including 10 September 1999 which had been awarded by a tribunal whose decision is recorded at page 77. There is a record at page 81 of a call from the claimant's wife in the following terms:-

> "The customer's health has been deteriorating over the last 9 months. He has angina and has a crumbling disc in his spine which requires an operation. Health warning and dispute period given."

Thereafter, the claimant filled in a form numbered DLA434 which is headed:-

> "Looking at your claim for DISABILITY LIVING ALLOWANCE again"

This heading is misleading in respect that it does not tell the claimant that before the merits of whether the claimant satisfies conditions for any element of either component of disability living allowance there requires to be satisfaction of one or more of the statutory conditions for supersession. These statutory grounds are not addressed in terms on the form.

A medical report was obtained from the claimant's general practitioner and that is recorded at pages 121-123. Thereafter, an examining medical practitioner examined the claimant and his report is at pages 124-148.

5. At pages 149-152 there is what bears to be a supersession of the awarding decision. However, nowhere in that decision is the relevant threshold criterion identified. It does not form part of the tick box pro forma and, in giving reasons for the decision, the decision-maker has simply set out his views on the merits as to whether the claimant satisfies the conditions for the mobility and care components of the allowance.

6. The terms of the tribunal decision equally do not demonstrate that the issue of supersession has been addressed. The statement of reasons for the decision does not address the supersession criterion directly, though, in relation to the mobility component, the tribunal appear to be ambivalent as to whether there was a change of circumstances from the time of the awarding decision in respect that they say:-

> "Dr Baktar's conclusions about [the claimant's] ability are broadly the same as they had been the previous year and also similar to those of Dr Dowell the previous year. We conclude therefore that [the claimant's] walking ability has not deteriorated substantially if at all since his first claim."

7. The Secretary of State in his submission dealt with the issue of supersession as follows:-

> "4.1 I submit that this case differs to that of CSDLA/1068/01. In CSDLA/1068/01 the Commissioner held that the supersession decision by the decision-maker (DM) was inept as there had been no valid supersession application, and therefore the DM's position was 'doubtful' in proceeding with the supersession. The Commissioner stated that the threshold criterion for supersession as set out in CDLA/3466/00 was not satisfied. Also, the tribunal which then dealt with the appeal in this case failed to address this issue and purely considered the merits of the case rather than the basis for the supersession.
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> 4.2 However, in this case the claimant informed the department that his condition had deteriorated and the he was also due to have an operation (the latter suggesting there may be some improvement or temporary worsening in his condition, page 81). In CDLA/3466/00 it was held:
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> > *'... there will be an application. It will contain an assertion, for example that there has been a change of circumstances. That is sufficient to satisfy a threshold criterion for entry into supersession procedures. Once within these procedures, the Secretary of State has to investigate and determine the facts.' [para.40]*
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> Therefore I submit that the information provided by the claimant was sufficient to satisfy the entry into the supersession process based on this reasoning given above.
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> 4.3 The application from the claimant resulted in the sending of a claim form and completed further identified the alleged deterioration in the claimant's condition. For example, in his previous claim pack he had reported no falls or stumbles, no help with toilet needs and no problems with cooking, however in his recent claim he reports problems with all of these (pages 97, 106 and 109 respectively).
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> 4.4 Although the tribunal in their statement of facts and reasons have not directly referred to 'supersession', I submit they did, at the outset, identify that this is an appeal following a request from the claimant for his present award to be looked at again. I submit that it was sufficient for the tribunal to refer to the decision which was under appeal and accept it without having to make further findings and substantiate the basis for such a supersession. This approach was recently upheld in CDLA/4644/0, where Commissioner Pacey stated:

> *'The second submission made on behalf of the Secretary of State argues that in upholding the decision on supersession the tribunal implicitly concurred with the grounds given. A parallel is drawn in relation to CDLA/3845/00. Although that case addressed the procedure under the old system of review the parallel is to my mind reasonable and appropriate. As in that case the instant tribunal addressed the decision under appeal which decision had referred to a basis for supersession. Furthemore, as in CDLA/3845/00, it is manifest from the decision of the tribunal that the claimant was no longer entitled to the benefit, that factor alone suggesting a relevant change of circumstances. I see no error of law on the part of the tribunal in this respect.'* [para.12]"

8. I do not accept that submission as advanced. In respect of paragraph 4.3, it is apparent that falls and assistance with toileting needs were in issue before the tribunal made the award. I refer in that connection to the findings in fact 8 and 9 of that tribunal and what they say in the second and third paragraphs of the reasons at pages 79 and 80. Further, assistance with cooking would not be a material change of circumstances in respect that the lowest rate of the care component was awarded by the tribunal of 13 December 2000. I do, however, concede that the report of the telephone call from the claimant's wife did indicate a deterioration. Thus the position was different to the situation in CSDLA/1068/01 in respect that there was an identifiable change of circumstances asserted by the claimant, though, as I have indicated, the examples of the effect of the deterioration submitted by the Secretary of State to me to have been asserted by the claimant, do not in fact appear to be material changes. I do not propose to hold, as I did in CSDLA/168/01, that the decision of the decision maker was inept as in this case there was an application, however imprecise, to which he responded with a same rate supersession. It does, however, seem to me that the decision itself was defective in regard to the fact that the threshold criterion used by the decision maker is not specifically identified nor do the reasons given for the decision disclose what it was.

9. It is clear that the tribunal did not address the threshold criterion other than in the limited manner they did in respect of the mobility component. In that regard they were ambivalent as to whether the threshold criterion was satisfied.

10. In my view what was said in CSDLA/1068/01 has application to the extent that it demonstrates why the establishment of the basis of supersession is of crucial importance. In paragraphs 9 and 10 of that decision I said:-

> "9. Section 17(1) of the Social Security Act 1998 provides that subject to the provisions of the chapter of the Act in which the section is placed any decision made in accordance with these provisions shall be final. These provisions followed the now repealed provisions of section 60 of the Social Security Administration Act 1992 which they replaced. In a decision by a Tribunal of Commissioners in R(IS)2/97 it was said, in the appendix to that decision, that such decisions are made final and indisputable by section 60 subject to the provisions in the 1992 Act for appeal and review. It was accepted by Mr Brodie and not disputed by Miss Whitfield that the same principles applied under the new scheme whereby supersession replaced review.
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> 10. In these circumstances, by virtue of transitional provisions, which it is not necessary to go into for they are not in dispute, the decision of 4 August 1992, the award of disability living allowance in favour of the claimant, as it was not appealed, could be altered only if there was a basis for superseding it. This is of crucial

> importance for, without a basis for superseding it, it could not simply be altered by a fresh determination relating to the merits of the case. That was the import of R(DLA)1/96 in relation to review. That approach was followed in relation to supersession by a Tribunal of Commissioners in CDLA/3466/00. In that case there was an assertion of a change of circumstances and the Tribunal of Commissioners accepted that there was. In these circumstances, the Tribunal of Commissioners directed the tribunal to whom they remitted the case to make a finding as to whether the claimant satisfied a threshold criterion in regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. They directed the tribunal to find that she did, upon satisfaction of regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999."

11. I do not accept the submission made by the Secretary of State at paragraph 4.4 and I do not accept that the comments of Mr Commissioner Pacey, quoted in that paragraph from CDLA/4644/00, assist. The reason for that is that in the instant case the decision maker did not set out any grounds for supersession in his own decision and the tribunal themselves cannot be said to have implicitly concurred by virtue of the absence of grounds in the Secretary of State's decision and also by virtue of the question mark they themselves raised in respect of whether, in relation to the mobility component, any threshold criterion had been reached. It follows, accordingly, that the decision of the tribunal errs in law and must be set aside.

12. The grounds of appeal and the support for them are not related to this issue at all. They are related to the facts and reasons for the tribunal's decision in relation to the merits, particularly in relation to the mobility component. Having identified a fundamental error in the tribunal's decision, it is not necessary for me to deal with these grounds and the support for them, as the appeal to the tribunal will be subject to a complete rehearing, and submissions on the merits, if that stage is reached in the appeal, can be made at that time.

13. In remitting the case to a freshly constituted tribunal, I direct them to investigate and determine whether the claimant has established a threshold criterion specifically relating to whether the conditions of the higher rate of the mobility component and the highest and middle rate of the care component have been reached. They can consider the merits as to whether the claimant satisfied the conditions for the higher rate of the mobility component and the highest and middle rates of the care component only if they are satisfied that a threshold criterion has been reached. I am of the view that if they reach the conclusion that a threshold criterion for supersession has not been met, the decision they ought to make is that there are no grounds to supersede the awarding decision and the existing award by the tribunal stands. That in my view is not inconsistent with the position adopted by the Tribunal of Commissioners in CDLA/3466/2000 as they proceed in that case on a direction to the fresh tribunal that one of the conditions for supersession has been satisfied. If they reach the conclusion that a threshold criterion for supersession has been met but that on consideration of the merits the conditions satisfied remain those of the awarding decision, they should supersede the awarding decision setting out the grounds for supersession and make an award at the same rate. If on the other hand they find grounds for supersession satisfied and that the conditions satisfied are different from the awarding decision they should supersede the awarding decision setting out the grounds for supersession and setting out the fresh award. The Tribunal of Commissioners set out how to determine the effective date of their supersession decision at paragraph 1.3, to be found as page 612.

14. I permit myself the further observations. The correct operation of the supersession procedures set out in the Social Security Act 1998 is essential for the proper running of the scheme laid down by the Act. I have noticed when determining many appeals that the procedures are not being properly understood by claimants, their representatives, decision makers and tribunals. There is a simple and comprehensible logic to the provisions which is escaping those whose function is to operate them. This in part I consider is due to the standard forms currently being used. I have already referred to form DLA434 but DMN DEL5 does not focus the threshold criteria and neither does the appeals service decision notice form. If the forms focussed on the essential requirements of supersession then it seems to me that decision makers and tribunals would be likely to reach decisions which focussed on the correct issues and obviate errors of the type I have identified in this case.

15. The appeal succeeds.

(Signed)
D J MAY QC
Commissioner
Date: 24 September 2002