THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/637/2006

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

Appellant: Secretary of State

Respondent: Sandra Martin as appointee for Patricia Martin

Tribunal: Glasgow

Tribunal Case No: U/05/896/2005/01313

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. I find no error of law in the decision of a tribunal sitting in Glasgow on 24 April 2006 (the tribunal). The tribunal's decision therefore stands.

2. The appellant to the Commissioner is the Secretary of State, to whom leave was given by a district chairman. The claimant's representative requested an oral hearing, which request was granted by a legal officer.

The issues

3. Regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the regulations) is to the following effect, so far as relevant:

> "(1) Subject to the following provisions of this regulation, for the purposes of section 10 [of the Social Security Act 1998], the cases and circumstances in which a decision may be superseded under that section are set out in paragraphs (2) to (4).
> (2) A decision under section 10 may be made on the Secretary of State's ... own initiative or on an application made for the purpose on the basis that the decision to be superseded -
> (a) is one in respect of which –
> (i) there has been a relevant change of circumstances since the decision had effect ...
> (b) is a decision of the Secretary of State ... and-
> (i) the decision was erroneous in point of law, or it was made in ignorance of, or was based upon a mistake as to, some material fact ...
> (c) is a decision of an appeal tribunal or of a Commissioner-
> (i) that was made in ignorance of, or was based upon a mistake as to, some material fact; ..."

4. Before the tribunal was an adverse supersession (with a linked recoverable overpayment decision), made on behalf of the Secretary of State by a decision maker (DM), of an award of disability living allowance (DLA) given by an earlier tribunal on 15 June 2001, such supersession being based on a relevant change of circumstances. Was the tribunal's decision, setting aside the DM's supersession, erroneous in law because, as is argued by the Secretary of State:

> (a) the tribunal did not give clear reasons why there had been no reduction of care needs such that a serious question was now raised as to whether the claimant was still entitled to the highest rate care component of DLA,
> (b) the tribunal failed to make adequate findings about what was the change in care needs compared to those which, on a balance of probabilities, were found by the appeal tribunal in 2001 to underpin the statement on the latter's decision notice that "frequent attention throughout the day and prolonged attention at night" were required,
> (c) the tribunal did not use the right test to assess whether there had been a relevant change of circumstances under regulation 6(2)(a)(i) of the regulations?

Oral hearing

5. The case came before me on 5 March 2007. The Secretary of State was represented by Mr Bartos, Advocate, instructed by Mr Brown, Solicitor, of the Office of the Solicitor to the Advocate General. The claimant and her appointee, who is her mother, (both, in effect, the respondents, as the resultant overpayment recovery decision, was issued against them both) were represented, as they were also before the tribunal, by Mr Orr, a welfare rights officer with the Social Work Services of Glasgow City Council.

Background

6. All the extant available evidence is presumably in the voluminous appeal papers before the tribunal. The claimant was born on 2 September 1982 but, at the time of the tribunal hearing, still had her mother as appointee. This was authorised by a visiting officer in 1999 on the basis of the appointee's evidence that the claimant still "gets forgetful and confused at times" and with the claimant's consent. As the facts of the appellant's medical condition, and the procedural and evidential history which her claim for DLA has taken, have not been disputed, I set out those facts as taken from the tribunal's statement:

> "The claimant has obesity, acanthosis nigricans, polycystic ovaries, type A insulin resistance and diabetes mellitus. Her medical conditions constitute a rare clinical syndrome in which diabetes is due to absence/reduction of cellular insulin receptors. Treatment with insulin injections is ineffective and she receives metformin. The course of her medical condition is uncertain but it is likely that as she gets older metabolic problems will be encountered.
>
> Her mother ... made a claim to Disability Living Allowance on her behalf and she was awarded the middle rate of the care component and the lowest *[sic]* rate of the mobility component from 2 August 1992 to 2 September 1994. On application for extension of that award ... a further award was refused. This decision was appealed to a Tribunal which awarded the middle rate of the care component and the lowest *[sic]* rate of the mobility component from 3 September 1994 to 21 September 1998. When she applied for extension of that award ... her application was disallowed. An appeal ... resulted in an award by a Tribunal on 9 November 1999 of the highest rate of the care component and the lowest *[sic]* rate of the mobility component for the period 22 September 1998 to 21 September 2002.
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> ... On 27 September 2000 the claimant's appointee advised the Benefits Agency that the claimant had started work and a letter ... confirmed that she was employed by [a data firm] in the capacity of telemarketing from 9.30 am until 1.00 pm Monday to Friday and the job involved calling people by telephone and carrying out surveys. The job did not involve lifting, bending, stretching or walking and no special adaptations had been made to her working environment. ... Arrangements were made by the Secretary of State for the claimant to be examined by an examining medical practitioner and on receipt of his report dated 30 November 2000 a decision maker considered there had been some improvement in the claimant's conditions with a reduction in care needs and the Tribunal's decision of 9 November 1999 was superseded and benefit disallowed from and including 19 December 2000 ... This decision was appealed and by decision dated 15 June 2001 a Tribunal reinstated the award of the lower rate of the mobility component and the highest rate of the care component, but for an indefinite period.

Between September 2000 and August 2002 the claimant had two or three periods of employment in the capacity of receptionist/office person and in August 2002 she started a course in ladies hairdressing at college, which course continued until June 2004. In September 2004 she applied for a job ... with [a car firm] ...

... There was evidence from a [Miss H], an accountant employed by [the car firm] that the claimant had been employed between 20 September 2004 and 10 May 2005 as a receptionist/administrator, working Monday to Friday 8.30am until 5.30pm ... and that the main reason for her dismissal was a very poor attitude towards her duties and a lack of application in her job. [Miss H] had stated that the claimant did not require to be helped in her duties, that she was unaware that the claimant had any disabilities, that the claimant did not have problems walking or rising from a seated position, that she had never witnessed or heard of the claimant falling or taking 'hypos', and that she was not aware that the claimant was on any medication ... the claimant came to work and went home on the bus alone, that on her first day the claimant got on the wrong bus and had to walk approximately two miles to get to work; that the claimant attended a gym at lunchtimes, that she walked at a normal pace and that she never appeared breathless after walking ... that the claimant's main duty was interacting with members of the public and other staff which she was able to do but in a very poor way, due to her poor attitude ... that the claimant never needed help with going to the toilet and that there had been no adaptations made at work to cater for her ... that the claimant had to be encouraged because of poor attitude and that she did not take much time off ...

...[T]he claimant's mother was asked at interview about her daughter's entitlement to Disability Living Allowance. Her replies were to the effect that her daughter's condition had not improved ... that her mobility was still restricted such that she could not walk far, her pace was slow, that she became breathless and 'sweaty', had pain in her legs and knees and required to stop and rest a lot ... that her daughter could go to her work or college course on the bus lone *[sic]* although the tenor of her evidence was that this was a familiar route, the bus stop being across the road from the house ... that she continued to have dizzy spells two or three times a week, that her daughter could manage in and out of a chair unaided, and could move around indoors without assistance, that she needed help in and out of a bath because of her size, although could wash herself when in the bath, but needed prompting and encouragement to do things because of poor concentration (which she maintained had resulted in her losing the various jobs she had undertaken since leaving school) and suffered from low mood resulting in the GP diagnosing clinical depression.

It is clear taking a broad view of the interview with the claimant's mother that she did not think her daughter's care/mobility needs had changed significantly ... her daughter was trying to live a normal live *[sic]* as she had been encouraged to do, not only by her medical advisors, but also by Tribunal members ... although in her opinion her daughter's efforts had not been entirely successful as she had been sacked from each job she started due to lack of concentration and had missed a lot of days whilst at the college course. Although her interview initially suggests less assistance was needed during the night because of irritable bowel syndrome, later ... she states that her daughter still required help because of profuse sweating, which was a longstanding complaint.

> On 25 August 2005 ... the Secretary of State superseded the Tribunal's award of Disability Living Allowance with effect from 20 September 2004 ... and decided that £3,612.50 had been overpaid and was recoverable ..."

7. Neither the tribunal of 9 November 1999 (the 1999 tribunal) nor that of 15 June 2001 (the 2001 tribunal) was asked by the Secretary of State to provide a statement of reasons, nor was a copy of the record of proceedings requested in either case. This was despite the fact that, before the 1999 tribunal, there were reports from a consultant physician and from an examining medical practitioner (EMP1) which did not support DLA, either component at any rate; furthermore, the supersession by the DM, against which appeal was taken to the 2001 tribunal, was clearly triggered by the claimant's disclosure of her then part-time work and bolstered by another unfavourable report from an examining medical practitioner (EMP2). There is therefore no evidence *in the appeal papers* compatible with the award made by the 2001 tribunal.

The tribunal decision

8. Mr Orr submitted that the onus lay on the Secretary of State to show the relevant change of circumstances on which the DM's supersession was founded but, as the basis of the decision of the 2001 tribunal was not known, it could not be said what had since changed.

9. In his written submission to the tribunal, Mr Orr argued:

> "The only material that was before the Tribunal that made the award superseded by the decision maker is the unfavourable EMP report.
>
> How can the decision maker extrapolate from an unfavourable EMP report the findings of fact made by the Tribunal such that they can then say that there has been a mistake to *[sic]* the material fact or a change of circumstances.
>
> Working itself is not a change of circumstances.
> ...
>
> The department do not assert what has changed. This must be so given that they do not know the conditions under which the award was made.
>
> To say that my client doesn't qualify now fails to answer the point made by the Commissioners. What we may have here is just a different opinion on the merits. It may be that the awarding Tribunal made an error of law but that of course cannot be a ground of supersession."

10. On behalf of the Secretary of State, the presenting officer (PO) pointed to the evidence given by Miss H as indicating the current condition of the claimant when at work full-time five days a week; he said that this demonstrated the reduced care and mobility needs which constituted the relevant change of circumstances from when that work began.

11. The tribunal allowed the appeal to it in full, having concluded:

> "We were not satisfied, on the balance of probabilities ... that the claimant's ... needs had significantly changed since the decision of the Tribunal awarding benefit on 15 June 2001. At the time that decision was made ... the claimant had been working as a receptionist, which job involved the use of computers and telecommunications and

> notwithstanding the medical evidence in the papers, in particular the recent report from [EMP2], the Tribunal had awarded highest rate care and lowest rate mobility indefinitely. We were not satisfied from the evidence of [Miss H] and the recorded interview with the claimant's mother, that there had been any significant change in the claimant's care and mobility needs since June 2001 affording grounds to supersede the awarding decision.
>
> ...
>
> It flows *[sic]* ... from that decision that the appeal against the overpayment ... should also be allowed."

Appeal to the Commissioner

12. The main arguments advanced by Mr Bartos on behalf of the Secretary of State are those recorded above as the relevant issues. To some extent, the three points inter-relate and, in any event, are more logically dealt with in reverse order.

What qualifies as a "relevant change of circumstances"

13. Mr Bartos relies on paragraph 4 of the decision of Mr Commissioner Sanders in R(A)2/90 as setting out the correct test for a "relevant change of circumstances":

> "... a change of circumstances must be such that the board giving the decision on review would need to give those circumstances serious consideration to the extent that they might well affect the board's decision ... the change of circumstances does not have to produce a different outcome from that of the original decision before it can be said to be relevant."

Mr Bartos submits that, standing the claimant's full time work with no observed problem, these were circumstances which required the said serious consideration.

14. However, in paragraph 5, after emphasising that "whether there has been a change of circumstances is a pure question of fact", the Commissioner said that, using the right test, the adjudicator would not have concluded that an increase in putting a child back to bed after a screaming attack, from once a month to two or three nights a week, was "a *relevant* change" (his exact emphasis), because such new circumstances were "not within sight of suggesting that the night attention condition might be satisfied"; as the Commissioner had already put it at paragraph 4:

> "... the new circumstances must not only be in their substance in the area of what is relevant but there must also be sufficiency with regard to quantity. It is thus not enough that the new circumstances relate to night attention ..."

It may be considered doubtful whether Miss H's evidence is sufficient enough with regard to quantity and quality to suggest a relevant change.

15. In any event, what is markedly different to the facts in R(A)2/90, is that the tribunal was not satisfied that there had been any *change* of circumstances, let alone a relevant one. The Commissioner's point, that whether there has been a change of circumstances is a pure question of fact, was reiterated by the Court of Appeal in *Cooke v. Secretary of State for*

Social Security [2001] EWCA Civ 734, also reported at R(DLA)6/01. At paragraph 12, Hale LJ (as she then was), giving the judgement of the Court, said:

> "However, it is clear ... that the tribunal did compare what the claimant herself had said about her condition in 1996 with what they found the facts to be in 1998 ... There were two crucial points. Firstly, on the mobility component the claimant must be virtually unable to walk. It is an accepted benchmark of that ability to be able to walk for 50 metres. In 1996 she had said that she experienced severe discomfort as soon as she started walking. In 1998 she had said that on good days she could walk to the end of the road. The tribunal found that she could walk for 50 metres and then a further 50 metres after a rest. Secondly, for the higher rate care component the claimant must need prolonged or repeated attention at night. In 1996 she had said that she needed help getting to and using the lavatory. In 1998 she had given somewhat confusing answers to Dr. Spielmann but the first had been "I can get to the toilet and can use it by myself." The tribunal found that she did not need help day or night. The tribunal were not invited, and were not prepared uninvited, to hold that she had been mistaken or untruthful in what she had said in 1996. That being so, on the basis of those differences they were bound to conclude that there had been a change. That was a finding of fact which could not be challenged on appeal."

16. The Court of Appeal's decision thus confirms two important points; firstly, whether there has been a change of circumstances is a question of fact (so that it can be challenged on appeal only if irrational) and, secondly, that it is necessary to compare the circumstances as they were at the time of the award with those at the time of the supersession. Hale LJ was directly responding to the claimant's argument in that case summarised at paragraph 11:

> "... the appellant criticises the tribunal for not following the two stage process through properly. It did not first ask whether there were grounds for review and then ask whether the claimant was now entitled. It did not expressly compare the circumstances as they existed in 1996 with those as they existed in 1998."

17. I am unable to understand how the tribunal, as Mr Bartos submits in the present case was a failure on its part, could make findings on the change in the claimant's care needs, once the tribunal concluded that no such change had or could be demonstrated because there was no evidence to support the 2001 award from which it could infer what the facts then were. Mr Bartos founds on the tribunal's use of the word "significant", ("we were not satisfied ... that there had been any significant change in care and mobility needs since June 2001 ..."); in context, however, it seems wholly apparent that "significant" was merely an alternative to saying "more than trivial". As the tribunal was not satisfied, in effect, that any greater change than minimal had been demonstrated, it follows that it did not err in its application of the legal test governing when a new circumstance is a relevant one.

A change must be demonstrated by a comparative exercise

18. Mr Bartos submits that it is not essential for supersession that an adjudicating authority is able to infer, on a balance of probabilities, what were the facts supporting the original award, provided the evidence is now such that it can be concluded there is no longer entitlement, which necessarily then means (if ignorance or mistake of fact on the earlier occasion is not suggested) that there has been a relevant change of circumstances. He contends that the tribunal ought to have made findings on the claimant's present needs. Mr Bartos primarily relies on the dismissal, of an application for judicial review against Mr Commissioner Levenson, by Mr Justice Maurice Kay in the unreported decision of *R v The*

Social Security Commissioner ex parte Barbara May Hoare [2001] EWHC Admin 32, a copy of which he produced at the oral hearing. I am not bound by this decision, although I must and do accord it great weight. However, it is readily distinguishable from the appeal before me.

19. When a challenge is brought to the refusal of leave by a Commissioner, the onus lies on the applicant to show that there are no good grounds on which the Commissioner would have been entitled to refuse leave in the proper exercise of his discretion. Secondly, Maurice Kay J judged at paragraph 29 that:

> "... the Commissioner was entitled to conclude that, notwithstanding the absence of express comparative language, the DAT found a material change in circumstances."

This does not inevitably imply that no factual comparison was necessary in order to show the relevant change in circumstances. The claimant in *Hoare* had originally requested a review which led to the award (given by a DM not a tribunal) later made subject to adverse review and revisal; that unfavourable outcome was then appealed to a tribunal where she argued that her evidence pointed rather to a deterioration since the original award than to an improvement. However, the disability appeal tribunal (DAT) concluded to the contrary; the DAT expressly said that it had considered all the evidence but that it based its findings on what she could and could not do in reliance on the most recent medical report.

20. At paragraph 29 of his judgement, Mr Justice Maurice Kay said:

> "What the DAT permissibly found to be the present facts was only consistent with there having been a significant change of circumstances since [the original award]",

but this is in the context that it is probable the review request was available in the appeal papers and that from it the DAT could legitimately infer the original circumstances compatible with the award made and thus conclude that there had been a relevant change.

21. A tribunal may look at all the evidence before it determines, firstly, whether a basis for supersession has been made out and, secondly, if yes, what is the result. I do not quite agree with Mr Commissioner May QC insofar as he seems to suggest in CSDLA/765/2004, (included by Mr Orr as part of the papers before the tribunal), that the taking of evidence must be restricted initially to that applicable to a supersession ground and only thereafter, once such is established, moving on to consider material on the merits of current entitlement. It is sensible rather that a tribunal hears all the evidence, including what is potentially relevant to current entitlement, but without yet making a final determination with respect to that, in order to compare present circumstances with those which surrounded the original award. This is the very approach endorsed by the Court of Appeal in *Cooke,* as set out above in my paragraph 15: the Court of Appeal compared the facts of that claimant's later functional impairment with what it had been at the time of the original award, using the bench marks of the appropriate legal tests as an aid to assess how relevant were the differences.

22. *Hoare* was decided before *Cooke*, and, in my view, is inconsistent with *Cooke*, if the former is regarded as authority for dispensing with the need for a comparison in order to conclude there has been a change. I am bound to follow a decision of the Court of Appeal. Moreover, another Court of Appeal decision, *Ashraf v The Secretary of State for Social Security*, issued on 2 December 1999 (reported in *The Times* on 1 November 2000) and referred to in *Hoare* although not raised with me, is relevant. In the penultimate paragraph of

the judgement of Tuckey LJ, with which the other two Lord Justices of Appeal agreed, he confirmed:

> "If the matter was considered on the basis of relevant change of circumstances, a comparative exercise had to be performed."

23. Whether a claimant is entitled, for example, to highest rate care, because it results from the application of a statutory test is a question of fact, but one of secondary fact. If, as Mr Bartos submits, it is sufficient for the purposes of supersession where a tribunal is able to find that, although formerly she was awarded highest rate care, now she does not require frequent attention throughout the day or prolonged attention at night, then this would allow a different view on the merits to constitute a relevant change of circumstance; but this is not permissible (as was confirmed in *Cooke*). What is required for a relevant change of circumstance is that there must be identified an alteration in some primary fact. As Mr Commissioner Jacobs said at paragraph 15 of CDLA/1820/1998 (a decision relied upon by Maurice Kay J in *Hoare* and by Mr Bartos today), decision makers rarely record any findings of fact on which an award is based, which makes it difficult for tribunals to know the basis on which the award was made; but I do not accept that a tribunal is thereby relieved of the duty of making appropriate primary findings on the balance of probabilities. Provided it has sufficient evidence compatible with the award, then it may infer such findings, and this is so even if the evidence available is not consistent.

24. Mr Bartos refers to the following passage in CDLA/1820/1998 at paragraph 16 to urge that review may be carried out in the following circumstances:

> "Where the factual basis of the adjudication officer's award is not known, it is sufficient for the tribunal to make findings of fact which show that the claimant is not entitled to the award."

But, in my judgement, the following sentence of Mr Commissioner Jacobs puts a different complexion on the preceding comments. He continues:

> "These findings will show that there must have been either an error of fact or law made by the adjudication officer who made the award or a subsequent change of circumstances."

25. If it is self-evident that a claimant does not now fulfil the criteria for an award, a legitimate inference arises that, if there was no initial error of fact and no subsequent change of circumstances, then a DM must have erred in law in making the original award; this could be because the wrong legal test was applied or because the DM made a decision unsupported by the evidence. As a DM's award may be superseded for any of these alternatives, at least one of these modes of supersession is probably therefore justified and it follows that it does not too much matter which.

26. I agree with Mr Orr that it is equally likely that the 2001 tribunal erred in law as that there has been a relevant change of circumstances. However, crucially, unlike a DM's award, a tribunal award cannot be superseded for error of law (and revision of a tribunal award is legally impermissible). Mr Bartos argues that, standing that the decision of the 2001 tribunal was not appealed, it must be assumed to be correct in law. I am unable to agree such a result follows from the premise. The Secretary of State chose, despite the history of the present claim, not to seek statements of the tribunal's reasoning in either 1999 or 2001 nor to ask for

copies of the relevant records of proceedings. Whether there was an error of fact or law by either tribunal or a relevant change of circumstances since 2001 is mere speculation.

27. The tribunal had no evidence compatible with the favourable award made by the 2001 tribunal from which it could deduce any primary facts about circumstances which had subsequently changed in any, or in any relevant, way, and having regard to the burden which lay on the Secretary of State; the tribunal therefore made its finding that there had been no such change. Unless that conclusion is one which no rational tribunal could make, then such a finding cannot be criticised as being one in error of law. To the contrary, given that the Secretary of State made no attempt to set out what were the primary facts (as distinct from deductions of secondary fact arising from the application of the statutory tests) underpinning the 2001 award, nor to suggest any difference which then arose on comparing these with appropriate primary facts at the time of supersession in 2005, I judge that the tribunal was bound to conclude as it did. Moreover, once it found no change could be demonstrated due to the paucity of information consistent with the original award, it was fruitless for the tribunal to investigate the claimant's current care needs any further or make findings on their extent.

Adequacy of reasons

28. Furthermore, the tribunal's reasons were adequate. Such adequacy can be judged only in the context of the evidence and submissions as a whole, and against that background and assuming an informed reader, the reasons given were sufficient. It was crystal clear why the Secretary of State's case was rejected by the tribunal.

Summary

29. It is undesirable that any claimant should continue to receive benefit when he or she would not satisfy the criteria for entitlement were a new claim required. However, it is also undesirable that, having regard to the finality of decisions afforded by s.17 of the Social Security Act 1998 subject to limited exceptions, an award should be removed without such statutory safeguards being demonstrated. The remedy lies in the Secretary of State's own hands. Evidence justifying awards by DMs should be retained. If a tribunal makes an award in circumstances, as here, where the previous objective written information did not support it, then the relevant papers should be kept, including any evidence lodged at the hearing, and both a copy of the record of proceedings and a statement of the tribunal's reasoning sought. This is so that the primary facts underpinning the award, expressed or implied, are available if subsequently required, against which it may be judged whether there has been ignorance or mistake of fact or a relevant change of circumstances; alternatively, if any arguable error of law is raised, consideration may be timeously given to an application to appeal.

30. There was insufficient known about the award here to establish that an appropriate ground for superseding it had been made out. It is not my role to second-guess the judgement of the tribunal and in no way was it irrational for the tribunal to conclude that the Secretary of State (on whom lay the onus) had failed to demonstrate an allowable ground for supersession of another tribunal's decision. The appeal to a Commissioner, therefore, does not succeed.

(signed)
L T PARKER
Commissioner
Date: 20 March 2007