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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSDLA/822/06

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Appellant: Margaret Cohen *Respondent: Secretary of State*

Tribunal: Glasgow *Tribunal Case No: U/05/893/2006/00229*

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of a tribunal sitting in Glasgow on 14 June 2006 (the second tribunal) under case reference U/05/893/2006/00229, is in error of law. Using my powers under s.14(a) of the Social Security Act 1998, I substitute the decision which I consider the tribunal should have given in the light of the evidence, which substituted decision is as follows:

> **The appeal to the tribunal is allowed. The Secretary of State has not demonstrated an appropriate ground to supersede the award made by a tribunal on 31 July 2002 (the first tribunal) of the middle rate care component of disability living allowance (DLA) from 9 January 2002 for an indefinite period. Such DLA award made by the first tribunal therefore stands.**

2. The representative on behalf of the appellant who has represented her throughout the history of her claim (the representative) requested an oral hearing of the appeal; however, I am satisfied that the proceedings can properly be determined without such.

Background

3. In the original claim for DLA, made on 9 January 2002, the appellant said she had difficulties with walking, with cooking and that she required someone to keep an eye on her during the day. She made no mention of any night needs.

4. A decision maker (DM) on behalf of the Secretary of State arranged for her to be seen by an examining medical practitioner (EMP1) who examined her and reported on 13 February 2002. The appellant told EMP1 she had no need of any help at night. She asserted the same difficulties to him as set out on her claim form; but EMP1's opinion was unsupportive of any entitlement to DLA, either component at any rate and that opinion was endorsed by a DM on 27 February 2002, disallowing all entitlement to DLA.

5. Her appeal to the first tribunal, made by the representative on her behalf on 13 March 2002, scored out any assertion on the *pro forma* setting out her written grounds that she should be entitled to "night time attention, night time supervision". In the present appeal file, there is no copy of the first tribunal's record of proceedings nor its statement of reasons but its decision notice is to the following effect and given as a majority decision of the first tribunal:

> "The Appeal is allowed.
>
> [The appellant] is entitled to the care component at the middle rate with effect from 09/01/2002 for an indefinite period. This is because she requires prolonged or repeated attention, or watching over, at night.
>
> She does not satisfy the statutory criteria for an award of the mobility component at any rate."

6. In 2005 the appellant was required by the Secretary of State to complete an enquiry form, a request with which she complied by form received on 19 December 2005. She did

not now complain of walking difficulties, but her asserted care needs were substantially similar. Again, she did not suggest she had any night needs. She was seen and examined by a second examining medical practitioner (EMP2) on 9 January 2006. The complaints made to EMP2 were in line with those given in response to the enquiry form and included the confirmation that she had no night needs. EMP2's opinion was unfavourable, in similar terms to that of EMP1, with respect to satisfaction of DLA at any rate of either component. On 18 January 2006, the appellant's DLA award was superseded from that date on the ground that "...the decision in 2002 was made in ignorance of, or mistake as, to the material fact customer does not require any care during the night". On supersession, the decision was that there was no entitlement to DLA, either component at any rate, from 18 January 2006.

7. The claimant appealed to the second tribunal which unanimously refused her appeal. While the second tribunal's decision notice does not refer to supersssion, its statement of reasons does so. The crux of its reasoning is this:

> "The representative submitted the decision maker had not been presented with any new material facts justifying a supersession. We disagreed with this. We were not privy to what information was put before the tribunal in July 2002 but nevertheless there was an up to date examining doctor's report dated 9.1.06 which found [the appellant] to be independent as far as self care was concerned. This was confirmed by the lady herself at the hearing. The tribunal found that there were material facts justifying a supersession."

Appeal to the Commissioner

8. The grounds of the appeal are these:

> "(1) The tribunal has failed to specify an appropriate ground for supersession, under the terms of regulation 6 of the Social Security (Decisions & Appeals) Regulations 1999.
>
> (2) The tribunal has failed to establish the relevance of any alleged facts to the decision awarding benefit."

9. Leave to appeal was given by a District Chairman. The Secretary of State does not support the appeal:

> "It is clear from the supersession...and the submission before the tribunal...that the tribunal decision dated 31/07/02 awarding DLA middle rate care component from and including 09/01/02 had been superseded based on the conclusion that that tribunal had been ignorant of, or made a mistake as to a material fact. Unfortunately, there is no statement of reasons available from the tribunal hearing of 31/07/02 recording the grounds for their decision and the dissenting opinion. It is not known why this is so as, I submit, the tribunal decision should have prompted the decision maker to request a statement of reasons on that occasion...
>
> ...As the claimant's statements of her care needs and the medical evidence available in 2002 and those available in 2006 showed very similar levels of need the decision maker concluded the *[sic]* "As current needs first arose in 2001 the decision in 2002

was made in ignorance of or mistake as to the material fact that the customer does not require any care during the night"...

...I submit that the tribunal on 14/06/06, in stating "The appeal is refused. [The claimant] is not entitled to either component of DLA with effect from 18/01/06", have confirmed the decision maker's decision, and confirmed that they agree the grounds for the supersession are that the earlier tribunal had been in ignorance of, or made a mistake as to, a material fact."

My Conclusions and Reasons

The Law

10. 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; ..."

11. It is trite law that the onus of proof to make out the grounds for supersession lies on the one who initiates it, in this case the Secretary of State. So far as ignorance of, or a mistake as to, some material fact is concerned, it was established by the Court of Appeal in *Saker v. Secretary of State for Social Services* (reported as an appendix to R(I)2/88) that a fact is material if it would lead the decision making body to give serious consideration to the correctness of the original decision.

12. At paragraph 16 of CDLA/1820/1998, Mr Commissioner Jacobs said that review (now revision or supersession) 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. These findings will show that there must have been either an error or fact or law made by the adjudication officer who made the award or a subsequent change of circumstances".

13. However, the Commissioner's remarks refer to alteration of a DM's decision; as a DM's decision may be superseded for any of the above alternatives, it can be sufficient to show that current non-entitlement is so clear that, on a balance of probabilities, it follows that at least one of the enumerated modes of supersession is justified and it does not matter too much which.

14. The present appeal is, however, concerned with the first tribunal's award under potential supersession. Crucially, a tribunal's decision may not be superseded for error of law nor is revision ever possible. Therefore, it is essential for the Secretary of State to demonstrate that there has been either ignorance or mistake of fact, or alternatively, a relevant change of circumstances. That can not be done in the present case, because the facts underpinning the award of DLA made by the first tribunal which was based on night time needs are unknown and cannot be inferred from the underlying information. There is no evidence whatsoever compatible with such an award, so it is impossible to say what is the material, or primary fact, about which the first tribunal was ignorant, or mistaken, or that there has been any change of circumstance since. No identification of primary fact, (as distinct from a conclusion of secondary fact arising from the application of a statutory test), underpinning the award made by the first tribunal has ever been suggested by the Secretary of State; yet such is essential.

15. The Secretary of State seems to consider that because, if the appellant now made a new claim, she clearly does not satisfy the criteria for DLA at the middle rate based on night attention, this is sufficient to establish that the original decision was made in ignorance of, or mistake as to, a material fact. But it does not follow. Based on what is plausible, the more likely explanation is that the first tribunal struck out the wrong section on the decision notice and that the chairman failed to notice this when scrutinising the typed version. The Secretary of State could have asked for correction at the time, or for a statement of reasons and then pursued the appeal process. What is not established is that the first tribunal decision was made under ignorance or mistake of material fact nor that there has been any subsequent change of circumstances. With respect to the latter, no suggestion has been made of any way in which the appellant's care needs have changed, nor has this been substantiated. As the Secretary of State cannot show that either ignorance or mistake of fact or a relevant change of circumstances, is more likely than an error of law by the first tribunal, (and in my judgement, error of law is inherently more probable), supersession is not possible under the present statutory rules and having regard to the evidence.

Summary

16. The second tribunal erred in law because it adopted the wrong approach. That on the evidence the second tribunal find that the appellant is currently independent as far as self care is concerned does not establish that the first tribunal was in ignorance of, or mistaken as to, some material fact, or even that there has since been a relevant change of circumstance (an issue not addressed by the second tribunal). Given the lack of any contemporaneous evidence at the time of the first tribunal's award, either supporting or suggesting night attention needs, any other conclusion but that the first tribunal erred in law seems to me perverse.

17. I therefore set aside the second tribunal's decision and substitute my own in its place, as given in paragraph 1 above.

18. I can only repeat what I said in the penultimate paragraph of CSDLA/637/2006:

> "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."

L T PARKER
Commissioner
Date: 20 March 2007