Bulletin 167 (7)

**SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS**

**Commissioner's File No.: CDLA/9/01**

# Starred Decision No: 131/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*Ms Kimberli Jones,*
*Office of the Social Security and Child Support Commissioners,*
*5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

**so as to arrive by 6th March 2002**

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The appellant is appealing with my permission against the decision of the Sutton appeal tribunal on 1 May 2000 confirming the decision of the Secretary of State. The tribunal decided (or purported to decide) that the appellant was not entitled to either component of disability living allowance from and including 7 January 2000.

3 For the reasons below, the tribunal's decision is erroneous in law. I set it aside. It is expedient that I take the decision that the tribunal should have taken. My decision is:

**The Secretary of State has failed to establish that there was any ground to supersede the decision of the adjudication officer on 16 October 1995 awarding the higher rate of the mobility component to the claimant from and including 23 June 1995. Accordingly, I set aside the decision of the Secretary of State superseding that decision, which accordingly remains in force.**

*Background to the appeal*

4 On 16 October 1995, following a letter from the claimant, an adjudication officer reviewed a previous award of the lower rate of the mobility component to the claimant to replace it with an award of the higher rate of the mobility component. The reason given was that the claimant satisfied the conditions for entitlement. The application for review and the evidence on which the adjudication officer reached the decision are in the papers. On 7 January 2000, an officer asked a decision maker on behalf of the Secretary of State to consider superseding the decision of 16 October 1995 for "possible reduction in mobility needs". No decision was endorsed on the form LT 54 used, and none is included in the papers. But the claimant was told that a decision was taken to stop his benefit. His daughter protested. When he was then told by letter that "our decision" (again unstated) had not changed, the claimant appealed.

*The tribunal decision*

5 The claimant asked for a paper hearing, provided that his latest correspondence (including a letter of a given date) was in front of the tribunal. The tribunal heard the case in August 2000. The letter was not, as far as I can see, put before the tribunal. That itself may be a ground for setting aside this decision, but I do not decide the appeal on that ground. Having considered the papers, the tribunal dismissed the appeal and produced a statement of material facts and reasons for the decision. The decision and statement both read as thought the tribunal was deciding a new claim. When the matter came before me to consider leave to appeal, I raised two points: Where is the decision of the Secretary of State identifying the grounds under regulation 6 of the DMA Regulations under which the decision was superseded? Where is the consideration by the tribunal of valid grounds for supersession?

*What was the decision under appeal?*

6 In reply to the first question, the Secretary of State's representative conceded that: "the tribunal has evidently not obtained a full copy of the decision under appeal to it, that decision not being in the bundle." That, without more, is a ground for setting aside this decision. A tribunal cannot confirm a decision if it does not know what it is. The tribunal is under a duty to establish the terms of the decision that the claimant wished to challenge. It should never guess or rely on secondhand accounts if the terms of the decision are or should be available. That is fundamental to ensuring fairness in any judicial appeal system. And it is for that reason the duty of the Secretary of State to ensure that the tribunal is provided with the terms of the decision. In this case the tribunal did not know, and was not told, the terms of the decision. All it had before it were standard letters and forms about "our decision", none of which stated what that decision was. The tribunal should have directed that the Secretary of State produce the full decision. If the decision could not be produced in sufficient detail, it should have set the decision aside for lack of grounds or uncertainty, or concluded that there was no decision.

7 The Secretary of State's representative did not take that view. On behalf of the Secretary of State it was submitted:

> "the matter of whether the decision under appeal was adequately framed was ultimately irrelevant to that rehearing and need not detain the tribunal. Furthermore, the Secretary of State's submission to the tribunal could properly be taken to convey the substance of the decision, with the result that sight of the decision itself need not be insisted on."

That submission, in my view, suggests a total failure to comprehend what this appeal is about. It is about a supersession decision, not a decision on a new claim. The Secretary of State's powers to revise or supersede awards of benefit are not matters of discretion, but are set out in legislation. Claimants challenging supersession decisions are entitled to be told under what provision a decision is made, and why. A tribunal considering a supersession decision is challenged is failing in its duty to hear an appeal independently and impartially if it fails to establish under what provision the Secretary of State acted, and itself considers if the Secretary of State was entitled to act under that provision.

8 The suggestion that the tribunal could rely on the Secretary of State's submission in this case for the "substance of the decision" is wrong for several reasons. In this case, it suggests a failure to read it. Nowhere in the submission to the tribunal is the "substance" of the decision (that is, the ground for supersession used) indicated. Instead, it gives entirely the wrong impression. At the front it states: "existing entitlement: none". That is incorrect. The "existing entitlement" was to the higher rate of the mobility component.

*The substance of the decision?*

9 The submission is also wrong for more fundamental reasons. The Secretary of State's representative has referred to the issue decided as "a matter of substance", and also to "the substance of the decision", and indicated that the "form" of the decision is a "trivial matter", and that these matters need not detain tribunals. That language and

approach are misconceived. In *IRC v Duke of Westminster* [1936] AC 1, Lord Tomlin, in a much quoted judgment, stated:

> "... it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter" ... This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the incertain and crooked cord of discretion" for "the golden and streight metewand of the law".

That judgment (but not the quotations from Lord Coke CJ) was concerned with whether a court should look at the form or substance of a transaction for tax purposes. I respectfully adopt those words, intended to protect the individual as taxpayer, also to protect the individual as claimant. I do so lest the temptation to argue the "substance" of "outcome decisions" be regarded, as the Secretary of State's representative seems to be arguing in this case, as an adequate way of dealing with supersession decisions.

10 The reasons why the tribunal must look at the actual decision, and not merely at its supposed substance, are emphasised in the standard reference works on administrative law. In *Wade and Forsyth, Administrative Law, 8th edition (p 229)*, the authors state:

> "Procedural safeguards, which are so often imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them."

Among the authorities quoted in support of the proposition is Danckwerts LJ in *Bradbury v Enfield LBC* [1967] 1 WLR 1311 at 1325:

> "... it is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law..."

The argument that this may be administratively inconvenient is addressed in *De Smith, Woolf and Jowell, 5th edition, para 5-067*:

> "The task ... of deciding the force of a statutory provision does not involve judicial discretion. It involves the faithful construction of the objects and purposes of an act of Parliament in the context of that particular decision. Although aspects of public policy may play a part in this exercise, it would be wrong of the courts to impute any general implication that Parliament may intend administrative inconvenience to excuse in advance the violation of its statutes. Such an implication invites careless administration and assumes that the legislature would too easily excuse a breach of its statutes. It is suggested, therefore, that administrative inconvenience is not normally a proper criterion to guide the question of whether a statutory provision is "mandatory".

I adopt that approach. The tribunal must look at the powers given to the Secretary of State and how they have, or have not, been exercised, and not merely the "substance" of the claimant's entitlement.

*Were there valid grounds for supersession?*

11 In reply to my second question, the Secretary of State's representative conceded that: "the tribunal has not expressly identified the grounds on which the claimant's award of the higher rate of the mobility component fell to be superseded." That confirms that the tribunal failed properly to consider the decision under appeal. The Secretary of State's representative nonetheless attempted to support the decision on the grounds that the decision under supersession:

> "included no findings of fact and no meaningful statement of the grounds on which it was given ... as a matter of substance, the tribunal has clearly superseded the decision of 16.10.95 ... and done so on the ground that a relevant change of circumstances has occurred... Any deficiencies in the form of the tribunal's decision are trivial and not, in my submission, grounds for concluding that the tribunal's decision was erroneous in point of law."

I reject each element of that submission. The 1995 decision was taken following the claimant's letter and associated evidence, all of which are on file. The grounds for the decision are clear, and no guessing is needed. That being so, the Secretary of State must identify the circumstances that have changed, or some other ground, if he wishes to supersede that decision. If challenged, he must satisfy a tribunal on the balance of probabilities about the identified ground for supersession, and the tribunal must decide if he has done so. In this case, the tribunal has failed to consider this.

*The "real" reason for decision?*

12 The Secretary of State's representative then attempts to justify the tribunal decision on the alternative ground that:

> "Clearly the tribunal reasoned that the claimant cannot continue to receive the award of the higher rate of the mobility component when the requirements for it manifestly are not satisfied."

I reject that approach also. If that was the "real" reason for the tribunal's decision, then it erred by considering an irrelevant issue (at any rate, before it had decided whether there were grounds to supersede). The tribunal was not asked to decide a new claim but to deal with a supersession decision. It must therefore consider whether there are grounds to supersede, and only if there are should it consider whether the claimant is entitled to benefit. In this case, if the requirements were "manifestly" not satisfied in 2000, then they were "manifestly" not satisfied in 1995. If that is so, the 1995 decision should be set aside by revision or supersession on grounds of official ignorance of, or mistake as to, a material fact - if there was a mistake or official ignorance - or on grounds of error of law. The Secretary of State cannot make, nor a tribunal confirm, a supersession decision on the grounds of "change of circumstances" when there is no relevant change of

circumstances. It is not an administratively convenient way of correcting other kinds of error or of imposing a different view about a claimant's entitlement to that previously taken. The law provides specific routes for correcting past errors and the use of those routes, and only those routes, must be properly observed.

13 If there are no mistakes or errors and no official ignorance, and there are no changes of circumstances, and the law itself has not changed, then a disability living allowance claimant has a legitimate expectation that his or her benefit will continue to be paid for life or for the period awarded. The procedure of revision and supersession, with attendant appeal rights, exists to protect those expectations. It is for that reason that a tribunal must be told, and must consider, the supersession decision itself in a case like this. The claimant and his daughter were fully entitled to protest in the terms they did about the decision being withdrawn in the way it was. I set aside the tribunal decision.

*My decision*

14 Unfortunately, recent correspondence from the claimant and his representative suggest that the claimant's medical condition has seriously deteriorated. I consider it right for that reason both to expedite this decision and to deal with it without the oral hearing that I would have otherwise directed. It is also appropriate that I take the decision that the tribunal should have taken without further delay. I do this without sight of the decision of the Secretary of State because I set it aside in any event. The Secretary of State has failed to establish that there were any grounds for superseding the decision of 16 October 1995. Was there a relevant change of circumstances? There is medical evidence about the positions in 1995 and in 2000. This suggests no change of circumstances since 1995 that suggest that the award of the higher rate of the mobility component, having been made, should stop. On the contrary, the evidence is that the claimant's walking ability was worse in 2000 than it was in 1995. Nor do I consider that there can be any question of official ignorance of, or mistake as to, any material facts about his walking ability given the evidence on file. This is not a case where the only information was that in a claim pack from a claimant. Nor do I consider that the original decision, while perhaps generous, was such that it was wrong in law when made. I expressly reject the suggestion that it was "manifestly wrong" - the term of the Secretary of State's representative. The 1995 decision was not a decision such that no reasonable adjudication officer could have made that decision in 1995. The burden of proof lies on the Secretary of State, and the Secretary of State has failed to meet it. The supersession decision is set aside and the original decision awarding higher rate of the mobility component is thereby restored.

15 For the avoidance of doubt, the care component of disability living allowance was never in issue in this case, and the tribunal's decision was in error of law on that ground also.

David Williams
Commissioner
5 June 2001