Bulletin 182 [CSDM?]

CDLA 1821 2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal. For the reasons below, the decision of the tribunal is wrong in law. But I replace it with a decision to similar effect to that of the tribunal, and this does not advantage the claimant. This is:

> **Appeal dismissed. The appellant is entitled to the higher rate of the mobility component and middle rate of the care component from 19 March 2002 to 24 June 2005, and not from an earlier date. This decision has no effect on the decision awarding the lower rate of the mobility component to 18 March 2002.**

2 The claimant and appellant (Ms B) is appealing with permission of a chairman against the decision of the Liverpool appeal tribunal on 19 February 2003 under reference U 06 068 2002 02227.

REASONS FOR THIS DECISION

3 Ms B was awarded the lowest rate of the care component of disability living allowance on 4 July 2000. (The papers are not clear on that date - it might have been 7 July 2000, or possibly a date in June 2000 but as nothing turns on it I refer to that date only). She sent in another claim form DLA580 on 19 March 2002. After considerable correspondence this resulted in an award of the higher rate of the mobility component and middle rate of the care component (day attention) from and including 19 March 2002 to 24 June 2005.

4 The appeal to the tribunal, and from it to the Commissioner, concerns the application by the solicitors for Ms B to have the higher award backdated to 4 July 2000. This involved an application that the tribunal replace the supersession decision made by the Secretary of State with a decision revising the original decision. Conduct of the case was held up as the Secretary of State took the point that the tribunal might not have jurisdiction to replace a supersession decision taken by the Secretary of State with effect from March 2002 with a revision decision with effect from the date of the original decision. For this the Secretary of State relied, as he was entitled to, on my decision CDLA 2722 2002. In that case I took the view that there is a fundamental difference between supersession decisions and revisions of decisions. I was wrong. A Tribunal of Commissioners in CIB 4751 2002 and related decisions decided that a tribunal has, as the Secretary of State now acknowledges, jurisdiction to do this. The questions therefore become: can it do that here? And if it can, should it?

5 Regulation 6(3) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 provides that "a decision which may be revised under regulation 3 may not be superseded..." save in limited circumstances not relevant here. [All references to regulations in this decision are to these Regulations.] I do not need to set out the full text of regulation 3. No point has been taken on this appeal save as to regulation 3(5)(a). This provides that:

> "a decision of the Secretary of State under section 8 or 10 which arose from an official error ... may be revised at any time by the Secretary of State."

CIB 4751 2002 effectively adds to the end of that provision: "or a tribunal". Read with regulation 3(5) and CIB 4751 2003, the effect of regulation 6(3) means that a tribunal must, if

the point is in issue before it or if it identifies the point as significant, consider any revision necessary to correct an official error in a decision before it, subject to the parties being given the necessary notice. But there is an important exception. This was decided by the Tribunal of Commissioners in CIS 4 2003. There can be no appeal against a decision of the Secretary of State not to revise an earlier decision on the grounds of official error under regulation 3(5)(a). The only effect of such a decision is that it extends the appeal period from the original decision as provided in regulation 31. However, it would appear from the reasoning of those decisions that a tribunal can, and in appropriate cases should, consider whether there has been an official error when the Secretary of State has not decided the point. Further, there is no time limit on such consideration.

6 It is accepted for the claimant that unless regulation 3(5)(a) applies then there can be no revision. This is because regulation 4 imposes a 13 month absolute time limit on an appeal seeking a revision on any other ground.

7 "Official error" is defined by regulation 2. The relevant parts of the definition are:

> "official error" means an error made by ... an officer of the Department for Work and Pensions ... which no person outside the Department ... caused or to which no person outside the Department ... materially contributed ... but excludes any error which is shown to have been an error by virtue of a subsequent decision of a Commissioner or the Court."

Putting that with regulation 3(5)(a), it follows that a revision may be made at any time by a tribunal to a decision if an officer made an error to which no one outside the Department materially contributed, the decision arose from the error, and the Secretary of State has taken no formal decision about the error.

8 What was the error? The submission is that the Secretary of State erred in not following proper procedure in looking at the decision awarding disability living allowance to the claimant again once the general practitioner's report was received. The "proper procedure" is not in the Regulations (nor would I expect it to be) and, as far as I can see, is not published in the Department for Work and Pensions' *Decision Maker's Guide* or elsewhere. The secretary of state's representative tells me that the procedure is:

> "When a form is issued to a GP, a case control is set for 14 days. If the report is not received by the time the case control appears on the Work Available Report the surgery should be telephoned to establish when it will be returned or a reminder form should be issued.
>
> If the delay is likely to be more than three weeks, the case should be returned to a decision maker to make the decision on the available evidence. If the delay is likely to be less than three weeks, ca case control should be reset for the expected date of receipt. If the report has still not been received by the time the case control appears on the Work Available Report again, the case should be referred to a decision maker to make a decision on the available evidence.
>
> If the completed report is returned after a decision has been given, the file should be recalled and referred back to the decision maker who gave the decision to establish if this evidence changes the decision."

9 The DWP procedure for asking a general practitioner for a medical opinion about a patient in connection with the patient's claim is not laid down in statute or regulation. The Department's power to ask the general practitioner derives from what is now the National Health Services (General Medical Services Contracts) Regulations 2004 (SI 2004/291), Schedule 6, paragraph 80. This imposes on a general practitioner the obligation to make a written report to a Department officer "within such reasonable period as that officer ... shall specify". The Department's power to ask derives from the declaration that a claimant signs at the end of a DLA580 claim form.

10 Little can now be established about the original decision-making process. The claim form and papers have been destroyed or lost and the secretary of state's representative understands that the original decision was on the claim form. What is known is that a decision was taken on 4 July 2000 (on which see above) on a claim received in June 2000. There is a report from a general practitioner datestamped as received on 12 July 2000. The date of signing is missing from the photocopy of the form, and there is no covering letter showing when it was sent to the general practitioner. Nor does the copy show when the general practitioner was asked to return it. Whatever its date, that report contains information that would require some thought whether there were grounds to reconsider the level of award made or to make further enquiries.

11 On these facts, there may have been an official error in deciding the case without allowing the general practitioner the statutory time (or if different and greater the time provided in the procedure) to return the form, or possibly in not giving the general practitioner a set time. I have no evidence of that and am not likely to be able to obtain it. That is an important point. The possible existence of official error before the decision was taken is speculation only. There is no evidence on the point.

12 There was an error in not looking at the file after the medical report was received. This was a breach of departmental procedure. This procedure, in my view, does no more than state what should happen as a matter of the legitimate expectation of the claimant once the general practitioner had been consulted and had replied. As such, it was a clear error. The Department asked the general practitioner for a report, and it should have considered that report when it received it. It did not. The precise error was the failure to ask the decision maker whether the original decision should be revised in the light of the general practitioner report. That is purely an internal error and is therefore a clear official error.

13 I do not agree with the approach taken by the tribunal on this point. The tribunal took a view on the facts that no reasonable decision maker would have revised the original decision on the basis of the medical report. That is only part of the issue. As the tribunal itself noted, the general practitioner's report raised rather than answered some relevant questions. At that point the decision maker might (in accordance with departmental procedure) have asked for an examining medical practitioner report to deal with those uncertainties, as none was available. Or advice of a medical adviser might have been sought. But that also is speculation. The error had already occurred when there was a failure to ask that the decision be considered for revision. Had the decision maker done this and refused to revise, then that would have had an effect in extending the appeal period and putting Ms B back on notice about the issue.

14 On the face of it, there is substance to the case being pursued by the claimant's solicitor. As the Tribunal of Commissioners put it in CIB 4751 2003, paragraph 25:

"Taking the simple case of an appeal against a decision on an initial claim, in our view the appeal tribunal has power to consider any issue and make any decision on the claim which the decision maker could have considered and made. "

Applying this to the present context the Tribunal decided (paragraph 191):

"On an appeal against a decision under section 10 superseding or refusing to supersede an original decision, if it finds that the original decision ought to have been revised, the appeal tribunal has jurisdiction to make a decision under Section 9 revising the original decision."

15 There are two problems about applying that wide power to this case. The first is that it is subject, as the Tribunal of Commissioners makes clear, to other statutory provisions. Those provisions include the 13 month time limit already noted. That does not, however, apply to decisions about official error. But there is another problem in applying the approach to an alleged error. The supersession decision under appeal cannot be linked to the original decision by reference to a contention that the original decision arose from an official error because whether there was one is mere speculation. Nor can it be made out by reference to a failure to consider a revision decision a week after the original decision was made. The official error that has been established occurred after the original decision, so could not give rise to it.

16 My conclusion is that there was an official error, in so far as that matter falls to be decided, but that there was no basis to link the error to the decision under appeal. That being so, the tribunal came to the right answer for the wrong reason. It is expedient that I deal with the matter without reference to a new tribunal.

17 That does not help the claimant. But it may be that the clear official error could be a basis for an application to the Department for financial redress. See the DWP *Guide to Financial Redress of Maladministration.* The matter may also be within the jurisdiction of the Parliamentary Ombudsman. The solicitors will know how to make any necessary application. But neither is within my jurisdiction or that of an appeal tribunal, so I cannot comment further.

David Williams
Commissioner

20 May 2004

[Signed on the original on the date shown]