Bulletin 174

CSHC-J

CDLA/2050/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Middlesbrough appeal tribunal dated 6 March 2002 and I refer the case to a tribunal, which shall be comprised of persons who did not sit on either the tribunal whose decision I have set aside or the tribunal which sat on 9 April 2001 to consider an earlier appeal of the claimant's, for determination. **I direct the Secretary of State** to make by 28 February 2003 a submission to the tribunal, giving details of any claim for disability living allowance made by the claimant since the beginning of 2002 and the decision made upon any such claim and stating clearly the decision the Secretary of State now wishes the tribunal to give in the light of all the evidence in this case. The submission should have attached to it any medical evidence obtained in connection with any claim made since the beginning of 2002.

REASONS

2. I held an oral hearing of this appeal. The claimant was represented by Mrs Hazel Hutchings of the Middlesbrough citizens' advice bureau. The Secretary of State was represented by Mr S. Papadopoulos of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions. I am grateful to both advocates for their clear and helpful submissions.

3. The first ground of appeal raises a procedural issue that requires consideration of the procedural history of this case. This task is not made easier by the fact that a few of the material documents are missing from the bundle before me and those that are there are not always in chronological order, but I am fairly confident that I have managed to piece together what has happened. The claimant suffered an industrial accident in 1995 in which his right ankle was injured. He also suffers from depression. At some time he claimed and was awarded disability living allowance. The earliest document before me is a renewal claim made in 1999, which resulted in an award of disability living allowance consisting of the lowest rate of the care component and the higher rate of the mobility component for a year until 23 July 2000. In his claim, the claimant stated that he always used crutches. By the time a further renewal claim was being considered in 2000, some doubt had arisen as to whether he did always use crutches. However, in a report dated 4 April 2000 the claimant's general practitioner said:

> "He has discomfort on walking about and is able to walk about 100 yards. He uses crutches to get around outdoors."

The Secretary of State decided on 19 April 2000 to award only the lowest rate of the care component from 24 July 2000 to 23 July 2002. The mobility component was not awarded. The claimant did not appeal but, on 4 August 2000, he asked for the decision to be reconsidered. He later submitted a letter dated 9 August 2000 from his general practitioner stating that the pain in his ankle had become more intense since 4 April 2000. If any separate decision was ever made on that request, it did not result in

any change (but the request may have been subsumed into the matters considered on 20 December 2000).

4. On 24 November 2000 the claimant again asked for his award, based on the decision of 19 April 2000, to be reconsidered. On 20 December 2000, the award was superseded at the same rate. On 25 January 2001, the claimant appealed, arguing that he was entitled to the mobility component. While the appeal was pending, the claimant's general practitioner wrote a letter dated 12 March 2001 stating that the claimant could walk only 20 metres. Knowing that, by virtue of section 12(8)(b) of the Social Security Act 1998, the tribunal could not take account of any change of circumstances since 20 December 2000, Mrs Hutchings, who was by then assisting the claimant, both arranged for the claimant to submit that letter to the tribunal as evidence of his condition on 20 December 2000 and also put in a further request for supersession of the decision of 20 December 2000 on the ground of a subsequent change of circumstances. That request was sent by fax on 15 March 2001. On 9 April 2001, the tribunal dismissed the claimant's appeal. On 18 April 2001, further evidence, in the form of a statement from a neighbour was submitted in support of the application for supersession and, on 30 April 2001, the claimant submitted a new form outlining all his needs for care and mobility. On 23 May 2001, he was seen by an examining medical practitioner. On 20 June 2001, the Secretary of State gave a decision, notice of which was given the following day, apparently superseding the decision of 19 April 2001 without changing it. Reasons for that decision were communicated to the claimant by letter dated 9 July 2001 in which it was said:

> "You have reported a deterioration since the decision of 19.4.01 [sic]. However, on 9.4.01 the tribunal upheld this decision.
>
> "The tribunal was aware of this reported change of circumstances and considered the facts relating to it. There are no facts of which the tribunal were unaware nor is there a change of circumstances which has not been considered. As such there are no grounds to change the decision of the tribunal."

5. On 13 July 2001, the claimant asked for the decision of 20 June 2001 to be reconsidered. Mrs Hutchings told me that that led to a new form DLA434 being issued to the claimant so that he could fill it in and send it back. On 16 August 2001, the claimant submitted the form DLA434. The decision given on 31 August 2001 was that the claimant was entitled to the lowest rate of the care component from 31 August 2001 to 23 July 2002 but was not entitled to the mobility component for that period. By notice dated 11 September 2001, the claimant appealed, identifying the decision notified to him on 4 September 2001 (presumably that of 31 August 2001) as the decision under appeal. The decision was reconsidered but not revised. Mrs Hutchings submitted grounds of appeal that were plainly directed towards the decision of 20 June 2001. The tribunal sat on 6 March 2002 and decided that the claimant was not entitled to the mobility component of disability living allowance from 24 July 2000, but did not interfere with the award of the care component. The claimant now appeals with the leave of a Commissioner.

6. The tribunal treated the form DLA434 as an application for supersession dated 16 August 2001 and therefore treated the decision of 31 August 2001 as a

supersession at the same rate and regarded that as the decision that was under appeal. Mrs Hutchings submits that that was not correct. She submits that the form DLA434 was merely further evidence in support of the request for reconsideration made on 13 July 2001, which ought to have been treated as an application for revision of the decision of 21 June 2001 because it was made within a month of the reasons for that decision being issued (see section 9 of the Social Security Act 1998 and regulation 3(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999). It follows, she submits, that the decision of 31 August 2001 ought to have been a refusal to revise the decision of 20 June 2001 and that the decision under appeal was therefore the decision of 20 June 2001, which arose out of the application dated 15 March 2001. That is because no appeal lies against a refusal to revise but, instead, the time for appealing is extended (see regulation 31(2) of the 1999 Regulations). The Secretary of State agrees with this analysis and so do I. It is regrettable that the tribunal were misled by the submission made to them by the Secretary of State, by the fact that the letter of 13 July 2001 was out of sequence in the bundle of documents and by the fact that the decision of 31 August 2001 was made on a process action sheet that appears not to have been capable of producing a decision in the form of a refusal to revise (although it was capable of producing a refusal to supersede, which is a species of decision the existence of which the Secretary of State is usually at pains to deny).

7. It is further submitted by the Secretary of State that the decision dated 31 August 2001 was invalid because it purported to make an award in respect of a period already covered by the decision of 20 December 2000 as upheld by the tribunal on 9 April 2001. I do not agree with this submission because the decision-maker appears to have thought he was giving a supersession decision and it is in the nature of a supersession that a new decision is made to replace the decision being superseded, at least for part of the period covered by the earlier decision. Of course, the whole form of the decision was wrong. It ought not to have been a supersession in respect of any period. It ought just to have been a refusal to revise. This is a mater of form rather than of substance because the Secretary of State's position has always been that the claimant was not entitled to the mobility component of disability living allowance and was entitled only to the lowest rate of the care component. All that is in issue here is the form in which that view should have been expressed on 31 August 2001, given the procedural steps that had led to the decision. The form is important because, until the decision is expressed correctly, the issues before the tribunal cannot be identified. However, the decision was not invalid merely because it was expressed in the wrong form. The tribunal were entitled to recast the decision in the form in which it should have been expressed (CSIB/1266/00) and, on this appeal, I can do so. In addition to being a supersession, the decision of 31 August 2001 may be treated as the refusal to revise it ought to have been, so that the decisions under appeal to the tribunal may be identified as both the decision of 20 June 2001 and the decision of 31 August 2001.

8. It is common ground that the decision of 20 June 2001 was flawed. Mrs Hutchings had been wise to lodge an application for supersession of the decision of 20 December 2000 while the appeal against that decision was pending, because the evidence she submitted with it was capable either of showing that circumstances on 20 December 2000 justified the appeal being allowed or of showing that there had been a change of circumstances since that date. As she was aware, section 12(8)(b) of the 1998 Act prevented the tribunal from having any regard to circumstances that had

changed since 20 December 2000. The problem was that by the time the decision came to be made on the supersession application, the appeal had been determined. It seems to me that it was therefore the tribunal's decision that had to be superseded. That must certainly be the case where a decision has varied the decision under appeal or where the grounds of supersession is mistake or ignorance of a material fact. The same approach must be appropriate where a decision has simply been dismissed and the ground of supersession is change of circumstances. However, regulation 6(2)(a) of the 1999 Regulations provides:

> "A decision under section 10 [i.e., a supersession] may be made on the Secretary of State's or the Board'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 was made; or
> (ii) it is anticipated that a relevant change of circumstances will occur".

If the change must have taken place since the decision was made and the relevant decision is that of a tribunal that was unable to take account of any change of circumstances arising between the date of the decision under appeal to them and the date of their decision, how can any supersession be based on a change of circumstances arising during that period ? The answer, it seems to me, must be that, where the decision to be superseded is that of a tribunal, "the decision" in head (i) must refer, not to the decision to be superseded, but to the decision of the Secretary of State that was under appeal to the tribunal. Grammatically, that is permissible because there is no more reason why "the decision" in head (i) should refer back to "the decision to be superseded" than that it should refer back to "[a] decision under section 10". The provision makes practical sense only if "the decision" in head (i) does not refer back to either of the decisions mentioned in the opening words of paragraph (2) but refers instead to the last decision covering the relevant period in which no account could be taken of the change of circumstances.

9. Therefore, the issue before the tribunal on appeal from the decision of 20 June 2001 was whether there had been a change of circumstances between 20 December 2000 and 20 June 2001, justifying an award of the mobility component of disability living allowance. In addition, the tribunal could consider the position down to 31 August 2001 in the context of the appeal against the supersession on that date.

10. The tribunal plainly erred in identifying the only decision under appeal before them as that of 31 August 2001. Their decision must be set aside. However, the only practical effect of the tribunal's error seems to me to be that the tribunal were looking at the wrong period. As there is no suggestion that the claimant was entitled to benefit for only a short period at the beginning of 2001, it seems to me that this error is not of any practical significance in this particular case. The reality is that, if as the tribunal decided, the claimant did not satisfy the criteria for entitlement to the mobility component on 31 August 2001, he also did not satisfy them during any earlier period that might have been considered by the tribunal. Accordingly, in the absence of any other error of law, I would adopt the tribunal's findings of fact, apply them to the earlier period and give a decision to the same effect as the tribunal's. I

must therefore consider the claimant's other grounds of appeal in order to see whether the tribunal's findings of fact are sustainable.

11. The claimant's second ground of appeal alleges a breach of the rules of natural justice in that the medically qualified panel member and panel member with a disability qualification sitting on the tribunal had also been members of the tribunal that had sat on 9 April 2001. In particular, Mrs Hutchings argued that there was unfairness because the tribunal sitting on 9 April 2001 had made an adverse finding as to the claimant's credibility. Mr Papadopoulos submitted that there was no general rule that a person who had sat on one tribunal should not sit on another tribunal hearing an appeal by the same claimant and he drew my attention to *Regina v. Oxford Regional Mental Health Review Tribunal, ex parte Mackman* (22 May 1986, reported in *The Times* on 2 June 1986), where it was held by McNeill J that the fact that a member of a tribunal had been party to determining an earlier case against an applicant would not cause a reasonable fair-minded person to believe that the applicant would not have a fair hearing of another case, even though the applicant might form another view.

12. It is true that *Mackman* concerned the legally qualified president of the tribunal, rather than a lay-person but I do not consider that that is a ground for distinguishing the case. Non-lawyers appointed to tribunals ought to be presumed to be capable of determining cases according to the evidence. I accept Mr Papadopoulos' main point that there is no general rule that a person may not sit to hear an appeal by a person against whom he or she has made a previous determination. However, there may be cases where it is undesirable that one member of a tribunal who has sat before should sit with other members who have not, since what happened or was said at a previous hearing may be material and all members of the tribunal should have heard the same evidence (R(U) 3/88). It is unnecessary for me to determine whether this was such a case.

13. The Secretary of State also pointed out that the claimant had been aware that two members of the tribunal had sat on his earlier case and that there had been no challenge to the constitution of the tribunal at the time of the hearing. He referred to CIS/343/94 where the Commissioner said:

> "It is not generally open to claimants, who are dissatisfied with the way the proceedings have been conducted, to sit back doing nothing awaiting the outcome of the decision, and when it is adverse to them, then and then only to complain."

However, the use of the word "generally" is important and it must be noted that, in that case, the relevant complaint about the tribunal was made for the first time at the oral hearing before the Commissioner. A failure to raise a point before a tribunal may not always be taken to amount to a waiver of the objection. Much will depend on the circumstances of the case but it will always be wise for the claimant to raise any complaint about the constitution of the tribunal at, or before, the tribunal's hearing, particularly in a case where the tribunal may reasonably be unaware that the claimant is concerned about its constitution

14. It is unnecessary for me to consider whether there really was a breach of the rules of natural justice in the present case and whether the failure to raise the point at the hearing before the tribunal is of any significance. This is because I am satisfied that there is another ground for not adopting the tribunal's findings. However, for the avoidance of further argument, I direct that no member of the tribunal who sat on 9 April 2001 should sit on the tribunal to whom I now refer this case.

15. The third ground of appeal is an allegation that the tribunal did not give adequate or proper reasons for their decision. In one respect at least, this ground might be recast as an allegation that the tribunal's findings were not supported by evidence. In particular, the tribunal's statement of reasons says of the letter from the claimant's general practitioner dated 12 March 2001:

> "The tribunal formed the impression that this letter was simply recording information told to [the doctor] by the Appellant, rather than it being based upon any examination or clinical finding and for this reason preferred the evidence of the Examining Medical Practitioner as this was based upon examination and clinical findings."

Mr Papadopoulos supported the claimant's appeal on the basis that there was no justification for the tribunal's impression. He pointed out that the claimant was not asked whether the doctor had examined him and he submitted that diagnosis would not be taken lightly and that weight had to be given to the fact that the doctor was familiar with his patient. I accept these submissions. It seems to me that no reason was given for the tribunal's impression because there was no rational basis for it. The truth may have been that the doctor's statement as to the distance the claimant could walk was an estimate, as the examining medical practitioner's would also have been, but, even if primarily based on the claimant's statement to him, the doctor's adoption of that statement must be taken at least to be show that the doctor did not regard the statement as inconsistent with his own knowledge of the claimant's condition. There was evidence that the doctor had never examined the claimant and the claimant had not been given the opportunity of giving evidence on the point.

16. The parties are also at one in arguing that the tribunal ought to have referred to the statement of the claimant's neighbour submitted on 18 April 2001 and explained why either they had rejected it or had not considered it compelling evidence in the claimant's favour. The neighbour reported in some detail how he had told the claimant on 22 February 2001 that his sister, who lived a few doors away, was having a heart attack and how the claimant had tried walking to her home but had been unable to do so because of the pain in his ankle. I agree that the tribunal should have given reasons for apparently not accepting the claimant's submission that that evidence greatly supported his case.

17. The fourth ground of appeal is that, having accepted the examining medical practitioner's view that the claimant could walk 50 metres without severe discomfort, but very slowly and with a slight limp, they ought, in the light of CDLA/4388/99, to have gone on and considered whether the claimant could, after a short pause, walk further or whether that really was the absolute limit of the claimant's capacity to walk. Mr Papadopoulos resiled from the Secretary of State's written submission and supported the claimant's appeal on this point. Given the neighbour's statement,

which implied that the claimant's ability to continue after a pause was limited, I accept these submissions.

18. Mrs Hutchings submitted that, in the light of all the evidence, I should award the mobility component. Mr Papadopoulos, however, submitted that the case was near the borderline. He said that he was not instructed to concede the case on the facts and he submitted that I should refer it to another tribunal because the expertise of the two non-lawyer members of the tribunal would be important. In the particular circumstances of this case, I do not find the argument that the tribunal has special expertise, as they do, a particularly convincing reason for referring this case to another tribunal. On the other hand, the claimant was not present at the hearing before me and it seems to me that, if the Secretary of State does not concede the case, he is entitled to the opportunity of cross-examining the claimant or at least of having a tribunal ask the claimant about matters that were not explored at the last hearing. I am therefore prepared to refer this case to another tribunal, who will no doubt expect the Secretary of State to be represented to make the case against the claimant. The Secretary of State must place before the tribunal any medical evidence obtained in connection with the renewal claim, which I presume was made in 2002, and must inform the tribunal of the decision on that claim. It will be open to the claimant to secure the attendance of his neighbour as a witness and to obtain more detailed medical evidence, although I appreciate that the latter may not be possible without cost. Any new evidence can, of course, only be taken into account insofar as it throws light on the claimant's condition before 31 August 2001.

(signed) **MARK ROWLAND**
Commissioner
31 January 2003