DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since I consider it expedient to do so, I substitute my own decision that there was no entitlement to supersede the decision made on 4 May 2001 awarding the claimant the highest rate of care component and the lower rate of mobility component of disability living allowance from 9 January 2001 to 8 January 2003, and that the claimant was entitled to the lower rate of the mobility component and the lowest rate of the care component of disability living allowance from 9 January 2003 to 8 April 2003, both dates inclusive.

2. The claimant has a lumbar spinal injury and suffers from agoraphobia and depression. On 4 May 2001 she was awarded the highest rate of the care component and the lower rate of the mobility component of disability living allowance from 9 January 2001 until 8 January 2003. That award is said by the claimant's representative to have followed an examination by an examining medical officer, although there is no confirmation of that fact in the case papers relating to this appeal.

3. On 24 July 2002 the claimant completed another disability living allowance application pack. She did not identify any attention needs, but stated that she could only walk 5 to 7 yards, taking on average 20 minutes to do so, that she required physical or mental support when walking out of doors because of her agoraphobia, and that she sometimes fell or stumbled due to numbness in her feet or legs, or as a result of pain across her back. On 5 August the claimant wrote a letter, in reply to a letter which has not been included in the case papers, which suggests that she completed the application pack on 24 July 2002 solely in order to inform the Department of a change of address. In her letter the claimant stated that her health and difficulties were still the same, if not worse.

4. On 27 August 2002 the claimant was again examined by an examining medical officer, who assessed her as having no care needs and as being able to walk 200 meters at a slow speed before the onset of severe discomfort, although he also stated that the claimant was reluctant to go outdoors by herself because she suffered from panic attacks. On the basis of that report, decisions were made on 4 September 2002 superseding and terminating the existing award of benefit from the date of the supersession decision, treating the renewal claim as effective from 4 September 2002, and refusing benefit on the claim.

5. On 15 October 2002 the claimant appealed against the decisions made on 4 September. Those decisions were not revised on reconsideration and the Secretary of State made a written submission on the appeal. The submission recorded the decision under appeal as a decision that the claimant was not entitled to disability living allowance from and including 04/09/02 and made no reference to the earlier award. It concluded by stating that the issues which the tribunal had to consider and decide were whether the claimant satisfied the conditions of entitlement to an award of any rate of the mobility component or care component of disability living allowance, and no reference was made in the submission to any supersession issue.

6. The claimant did not attend the hearing of the appeal on 3 February 2003, which therefore proceeded as a 'paper' hearing. The tribunal accepted the examining medical officer's assessment and upheld the supersession decision on the ground of a relevant change of circumstances since the awarding decision on 4 May 2001, on the basis that: "on the claimant's own account she no longer had any care needs". The tribunal also upheld the refusal of an award of benefit on the renewal claim. The claimant, through her solicitors, appealed on the ground that the tribunal had not identified a sufficient change of circumstances to support a supersession decision. I granted leave to appeal on 18 July 2003 and the Secretary of State's representative supported the appeal in a submission dated 29 August 2003 on the ground that the tribunal has made insufficient findings of fact in relation to the claimant's supervision requirements.

7. Regulation 6(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, made under section 10(1)(a) of the Social Security Act 1998, provides for a decision to be superseded on the basis that it is "one in respect of which there has been a relevant change of circumstances since the decision was made". In *Saker v Secretary of State for Social* Services (reported as an Appendix to *R(I)2/88*) it was held that under section 110(1) of the Social Security Act 1975, which provided for the review of decisions of medical boards and medical appeal tribunals, a 'material fact' was one which would have called for serious consideration by the authority which made the decision and which might well have affected its decision. In *R(A)2/90* it was held that the test of whether a change of circumstances is a 'relevant' change is the same as the test of whether a fact is a 'material' fact for the purposes of the review provisions in the 1975 Act.

8. Regulation 6(2) of the Decisions and Appeals Regulations is in virtually identical terms to section 25(1)(b) of the Social Security Administration Act 1992, which re-enacted section 104(1) of the Social Security Act 1975. In *Wood v Secretary of State for Work and Pensions* [2003] All ER(D) 330 the Court of Appeal, in accepting that the supersession grounds under the Social Security Act 1998 were not merely 'threshold' criteria, gave as one of the reasons for doing so the established jurisprudence under section 25(1) of the 1992 Act to the effect that the former review provisions ensured that decisions enjoyed a degree of finality-see the judgment of Rix LJ at para. 23. The position therefore remains that a decision can only be superseded on the ground of a relevant change of circumstances if there has, in fact, been a change of circumstances which is relevant to the decision under which benefit was awarded, in the sense that the changed circumstances would have called for serious consideration by the authority which made the decision awarding benefit and might well have affected the decision.

9. The difficulty for the tribunal in this case was that not only did the submission fail to identify the supersession issue, but it also did not include any documents relating to the earlier award. The only details of the award are to be found in the Process Action Sheet (Form DBD 600) relating to the supersession decision, which gives the reason code for the award of lower rate mobility component as M41 and for the award of highest rate care component as C94. Those codes stand for 'limited mobility needs' and 'night watching over/day supervision', but only someone with that knowledge would know that the claimant's award of highest rate care component was on the basis of her supervision and 'watching over' requirements.

10. The claimant stated in her claim form that she was liable to fall without warning because of numbness in her legs and feet (page 23), that she had moved from a three bed room house to an adapted ground floor flat (pages 3, 23 and 72), and she told the examining medical officer that she had blackouts lasting one minute when she was stressed. In addition, the claimant stated in her appeal form that fear caused her to be incontinent both during the day and night. There was also evidence of an incident of self-harm.

11. In a passage in the statement of reasons dealing with care needs, the tribunal dealt with attention requirements, which they appear to have treated as being the same as care needs, and in holding that on the claimant's own account she no longer had any care needs, the tribunal may have overlooked the claimant's letter of 5 August 2002 stating that her health was the same as before, if not worse. However, in my judgment, there was a more fundamental error in the tribunal's decision in relation to the supersession issue. Since the award of the care component had been on the basis of the claimant's requirements for supervision during the day and watching over at night, it was changes of circumstances which affected the claimant's supervision or 'watching over' requirements, rather than her attention requirements, which were relevant to the supersession issue.

12. The tribunal's statement of reasons refers to the incident of self harm, which the tribunal did not consider to be a continuing problem, and sets out its conclusion that "there did not appear to be any need for continual supervision throughout the day". That conclusion was flawed by the tribunal's failure to make specific findings of fact with regard to supervision needs resulting from the risk of falls or blackouts, but in any case the tribunal's conclusion may simply have represented a different evaluation of the claimant's supervision requirements from that made by the decision maker who awarded benefit. Since the tribunal made no finding of any change of circumstances relevant to the claimant's requirements for supervision by day, or 'watching over' at night, and no such finding can be inferred from the tribunal's conclusions, I therefore agree with the claimant's representative that the tribunal's decision does not contain findings sufficient to justify supersession of the decision awarding benefit of 4 May 2001. I am therefore satisfied that the tribunal's decision was erroneous in point of law.

13. In *CDLA/3875/ 2001* Mr Commissioner Rowland drew attention to the need to keep records of decisions which go beyond a mere statement of outcomes. As the Commissioner pointed out (paragraph 13), if a claimant does not currently satisfy the qualifying conditions for an award of benefit, it may be important to determine whether the awarding decision was based on an error of fact or law, or whether there has been a change of circumstances, in order to fix the date from which the award is to be altered, particularly if recovery of an overpayment is sought. In some disability living allowance cases the basis of any previous award may be obvious from the nature of the claimant's physical condition, and it will also often be possible to conclude on the basis of the claimant's present condition alone that a previous award must have been based on an error of fact or law, or has ceased to be valid because of a change of circumstances. However, there are other cases, such as this, where there is doubt as to the basis of the award, and in such cases it will be necessary to provide sufficient details of the decision awarding benefit to identify the basis on which the award was made in order for there to be a valid supersession.

14. The duty of fairness to a claimant both under domestic law and under the European Convention on Human Rights requires that the relevant facts and issues in an appeal are set out in a way which he or she can reasonably be expected to understand, and in *Dombo Beheer BV v The Netherlands* 18 E.H.R.R. 213 the principle of 'equality of arms' was stated as requiring that: "...each party shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent" (paragraph 33 of the judgment) Although it is not necessary to express a concluded view on the matter in this case, it seems to me that there is a real risk of unfairness if matters which are relevant to an appeal are recorded and communicated to a claimant by means of internal Departmental codes without any explanation of what the codes mean.

15. I therefore allow the appeal and set aside the tribunal's decision. The decision maker's reasons for superseding the award of the highest rate care component do not refer to any changes of circumstances relevant to the claimant's day time supervision requirements or her requirement to be watched over at night. The decision maker found that the claimant "prefers someone with her outdoors because of panic attacks", but that does not necessarily mean that there has been a change of circumstances affecting the claimant's entitlement to lower rate mobility component. It seems clear that the award of both care and mobility components was primarily on the basis of the claimant's mental condition and, although the claimant's attention requirements may have reduced as a result of her move to a ground floor flat, there is nothing to suggest that her mental condition improved in the period between the award of benefit and the supersession decision. I therefore consider that I am justified in substituting for the tribunal's decision my own decision that there was no entitlement to supersede the decision of 4 May 2001 awarding highest rate care and lower rate mobility component.

16. So far as the renewal claim is concerned, the claimant was awarded lower rate mobility component and lowest rate care component on a new claim from 9 April 2003 to 8 August 2005. That award must have been based on an assessment of the claimant's condition at about the time the old award would have expired but for the supersession decision. I therefore make the same award for the period from the end of the old award, which I have restored, to the beginning of the new award.

(Signed) E A L BANO
Commissioner

6 October 2003