Bulletin 157

CDLA/2328/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(b) of the Social Security Act 1998:

I SET ASIDE the decision of the Stoke-on-Trent appeal tribunal, held on 10 March 2006 under reference U/04/049/2003/01281, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT that tribunal to conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the 1998 Act, any other issues that merit consideration.

What this case is about

2. This case concerns a recoverable overpayment decision. The decision-maker decided that the claimant was not entitled to a disability living allowance for the inclusive period 9 August 2000 to 22 May 2001 and that the resulting overpayment of (£2,125,80) was recoverable from the claimant on the ground that he had failed to disclose that his condition had improved. In particular, it raises the issue of the interpretation of the duty to report changes of circumstances.

History and background

3. The claimant was awarded mobility allowance on a claim made on 10 August 1982. In accordance with the practice at the time, the award was made by an adjudication officer following an interview and examination by a medical board. The board's report is at pages 193 to 196. The claimant signed a statement that he could 'walk only about 60 yards maximum'. The examining practitioner found that the claimant had a 'very stiff' back, reduced flexion of both hips and knees, worse on the right, and shortening of the right leg by 1¼ inches. Based on a diagnosis of osteoarthritis of the right hip and spine, the board found that the claimant could walk a maximum of about 50 yards with fair balance. It decided that he was virtually unable to walk.

4. The award of mobility allowance became an award of the mobility component of disability living allowance at the higher rate from 6 April 1992. And from 1 July 1992 the award included the care component at the lowest rate: see page 184, Section 4.

5. The claimant had a hip replacement on 6 May 2000. Following an allegation from a member of the public, the claimant was observed by officers of the Department. He was later interviewed under caution and, on 16 May 2001, the Secretary of State decided, on supersession, that the claimant was not entitled to a disability living allowance from 6 August 2000.

6. The claimant's appeal against that decision was dismissed by an appeal tribunal on 28 June 2002. The further appeal to a Commissioner was dismissed by Mr Commissioner Pacey on 22 January 2003 under reference *CDLA/3833/2002*.

7. On 8 April 2003, the decision-maker decided that the overpayment that arose was recoverable from the claimant. The ground for recovery was that the claimant had failed to report that he had undergone a hip replacement in May 2000, which had reduced his disabilities. The claimant appealed against that decision to an appeal tribunal. That appeal was dismissed by an appeal tribunal on 20 November 2003, but its decision was set aside on 2 February 2004 by a district chairman acting under section 13(2) of the Social Security Act 1998. The case was relisted for 8 April 2004. The hearing was adjourned on that day and resumed on 23 August 2004, when the appeal was again dismissed. An application for leave to appeal to a Commissioner was made, but this lapsed when the tribunal's decision was again set aside on 4 July 2004 by a district chairman acting under regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The case next came before a tribunal on 29 September 2005 which adjourned with directions as to the constitution at the resumed hearing. The case then came before a tribunal on 10 March 2006, when the appeal was again dismissed. Mrs Commissioner Jupp gave the claimant leave to appeal and the Secretary of State has supported the appeal, but invited the Commissioner to substitute a decision confirming the Secretary of State's overpayment decision. The claimant's representative has made detailed comments in response and requested a rehearing.

8. Mrs Jupp has transferred the case to me for decision.

Adjudication procedures

9. It is worth emphasising the difference between the adjudication procedures for mobility allowance and those for disability living allowance.

10. For mobility allowance, the nature and extent of the claimant's disablement was a medical question that was decided by a medical board under regulations 29 and 53 of the Social Security (Adjudication) Regulations 1995). The adjudication officer then decided that the other conditions of entitlement were met and awarded a mobility allowance to the claimant. An appeal against the board's decision lay to a medical appeal tribunal under regulation 60, but was not pursued as the outcome was favourable to the claimant.

11. The claimant made a statement to the medical board, but the adjudication officer's decision was based on the board's decision rather than on anything that the claimant said. And the board's decision was based on its clinical findings and opinions, which were likely to represent a snapshot of the claimant on the day of the examination. The claimant's statement may have influenced the board's decision, but the extent to which that was so is not apparent from the record. It is worth noting that the doctor did not accept the claimant's statement of 60 yards and suggested a shorter distance of about 50 yards. That may have reflected the legal test, which only takes account of walking that is undertaken without severe discomfort.

12. When disability living allowance was introduced in April 1992, there was a change of approach. Medical examinations were no longer essential or even routine, although they were still allowed. And in order to obtain a more accurate overall picture of the claimant's condition and disablement, a detailed, structured statement was obtained from the claimant in the claim pack. This is the system that still applies.

13. I emphasise this difference in adjudication, because the claimant's statement to the examining doctor has received repeated and detailed attention in the course of the appeal. It

was discussed at the interview under caution, which may explain the references to it in the tribunal's reasons and in the written submissions by the claimant's representative to the tribunal and to the Commissioner. This attention was probably dictated by the duty which was put to the claimant in the course of the interview, which was to report any change of circumstances that might affect his entitlement. That led to a comparison between the claimant's condition at the time of the award of mobility allowance and his condition in August 2000. I suspect that the officers who interviewed the claimant did not have in mind the adjudication procedures that applied before April 1992.

Failure to disclose

14. I am not aware of any evidence that the claimant made a misrepresentation. So the Secretary of State can only rely on failure to disclose as a basis for the recovery of the overpayment that arose.

15. The law on failure to disclose has been authoritatively restated by the Court of Appeal in *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, to be reported as *R(IS) 9/06*. The Court (at paragraph 40) also approved the reasoning of the Tribunal of Commissioners that was under appeal: *CDLA/4348/2003*.

The duties in legislation

16. The first step is to identify the relevant legal duties owed by the claimant. The source of any duty in this case is regulation 32 of the Social Security (Claims and Payments) Regulations 1987:

> '**Information to be given and changes to be notified**
>
> **32.** ...
>
> (1A) Every beneficiary and every person by whom, or on whose behalf, sums payable by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded.
>
> (1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect-
>
> (a) the continuance of entitlement to benefit; or
>
> (b) the payment of benefit
>
> as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office ...'

The tribunal's reasons

17. The tribunal did not refer expressly to either paragraph (1A) or (1B). The tribunal's reasons do not expressly refer to either paragraph (1A) or (1B). However, the wording at the middle of page 3 of the reasons (page 208) is consistent with the tribunal applying paragraph (1B). But there is a later suggestion that the tribunal was applying paragraph (1A).

18. In its penultimate paragraph, the tribunal referred to the claimant's statement to the medical board and to the evidence of the distances that the claimant had been observed to walk. The tribunal then noted that the claimant was, on the basis of recent observations, able to walk considerably in excess of anything that might be virtually unable to walk. So far, so good. However, the tribunal then concluded that the claimant 'should have realised that he had had a substantial improvement in his walking ability which clearly was very good news for him and that he should reasonably have brought that to the attention of the Secretary of State's officers.' Previously, the emphasis had been on a duty to report any changes that might affect entitlement. However, this sentence introduces the idea of improvement. Read in isolation from the submissions to the tribunal that may not seem exceptional. However, those submissions cast it in a different light. At the hearing, the presenting officer for the Secretary of State had identified the relevant duty as notified in notes given to the claimant:

> 'We need to know if anything you told us changes about how your illness or disability affects you. Please tell us if things get easier or more difficult for you. And tell us if you need more or less help.'

The word 'improvement' suggests that the tribunal may have drifted from paragraph (1B) into paragraph (1B). However, the tribunal then refers again to reasonableness. I am left uncertain which duty the tribunal applied or with the possibility that it ran the two together. As I explain further below, the focus of attention is different depending on which duty is in issue. For this reason, the tribunal went wrong in law and I must set aside its decision.

The interrelation of paragraph (1A) and (1B)

19. The Secretary of State's submission to the Commissioner relies on paragraph (1A) and the note that I have quoted which was made under that authority. As the Court of Appeal decided in *B*, it is irrelevant whether the claimant could reasonably have been expected to report a change or to realise that the change might affect entitlement to benefit.

20. The Secretary of State's representative submits that the tribunal went wrong by not considering paragraph (1A). She submits that the tribunal should have dealt with the case under that paragraph and not by reference to reasonableness, which is relevant only under paragraph (1B). I reject that argument. There is nothing wrong in a tribunal relying on one paragraph rather than the other. The duties under paragraphs (1A) and (1B) are cumulative. The tribunal was entitled to rely on either duty. A finding that a claimant was in breach of paragraph (1B) is not rendered wrong in law just because the claimant was also in breach of paragraph (1A). What the tribunal must do is rely on one or the other and make clear which. It is for this failure that I have set aside its decision.

The interpretation of the duty under paragraph (1A)

21. The claimant's representative argues that the duty under paragraph (1A) and the note relied on by the Secretary of State is a duty to report 'any *improvement* upon the position as it had been *when that decision* [i.e. the decision making the award] *was made*.' He says that the Secretary of State does not reject this proposition. Whatever the Secretary of State's position, I reject it for the following reasons.

22. As Mr Commissioner Rice once pointed out, the duties to report are designed to gather information on which a decision-maker can, perhaps after further inquiry, decide whether the claimant remains entitled to the award made. The duties to report are drafted more loosely than the conditions of entitlement. They do not spell out those conditions and impose the duty to report if the claimant no longer complies with any of them. That would impose too onerous a burden on claimants (i) to read the notes, which would be voluminous, (ii) to interpret and understand them, and (iii) to identify how they would apply to their circumstances. Instead the duties are written in looser terms. They identify *facts* that the claimant should report. These facts are ones that *might* show that the claimant's entitlement is affected, whether for better or worse. The responsibility then passes to the decision-maker (a) to investigate further, if necessary, and (b) to identify the precise facts relevant to the conditions of entitlement before (c) making a decision.

23. The interpretation of the duties must reflect their nature and purpose. So the duty to report 'if things get easier for you' is not a duty to report 'if you believe that you are no longer virtually unable to walk'. Nor does this duty necessarily require a comparison between the claimant's abilities and disabilities at the time of the original award and those current at the time when the Secretary of State says a change should have been reported. That comparison does not arise until the later decision-making stage. The notes deal only with the earlier information-gathering stage. It is important not to confuse the issue whether the claimant failed to report a change of circumstances (an information-gathering question) and the issue whether that change was material to his entitlement (a decision-making question).

24. The duty does not set the focus of comparison on the time of the original award. If it did, it would become increasingly burdensome as time passes. In this case it would require the claimant to remember precisely how disabled he had been 18 years previously. The duty, like all the duties, is continuously speaking. It is to report if at any time things are easier for the claimant. That means easier by reference to the preceding period. Obviously that has to be applied in a reasonable time frame. It would not be necessary to report if a claimant were feeling a bit better today than yesterday. The test has to be applied over a period that is sufficient to show overall a sustained improvement or deterioration, taking account of any usual variation. This is not precise, but that is because it is a matter of judgment for each case.

25. I am not going to attempt a more precise definition. Nor am I going to direct the tribunal more precisely how to apply the duty to this case. However, just by way of a possible example based on the circumstances of this case, it might be appropriate to ask whether things were easier for the claimant in August 2000 compared with how he was just before his hip operation. The claimant might say that there had been a significant deterioration leading up to his operation. There was no reason to report that deterioration, at least as far as the claimant's mobility was concerned, given that he already had the higher of the two rates. But once his mobility improved, he was bound by the duty to report it. it was not for him to make a

judgment whether he was now better or worse than when he was first awarded mobility allowance. That was for the decision-maker to decide. As I have said, information-gathering and decision-making are separate activities and the duties to report are concerned only with the former.

26. The claimant's representative argues that the instruction I have quoted from the notes must be read as a whole so that the reference in the opening sentence to 'anything you told us' governs the rest of the instruction. The result is that the claimant was only instructed to report if things got easier or more difficulty compared to something he had said before. I reject that interpretation. In this case, the interpretation would work to the claimant's advantage. But in other cases it would work to a claimant's disadvantage. It would impose an unrealistic burden on a claimant to remember what had and had not been said a long time before. The natural reading of the instruction is that it contains separate sentences that deal with three different possibilities.

The duty under paragraph (1B)

27. The claimant's representative argues that the duty under paragraph (1B) is defined by the instruction I have quoted. This argument depends for its relevance on the representative's interpretation of that instruction. I have already explained why I do not accept his interpretation. Even if I had accepted his interpretation, I would have rejected this argument.

28. I suspect that this argument is theoretical only. If the Secretary of State has issued an instruction to the claimant or to claimants generally, that will found a duty under paragraph (1A) and there should be no need to rely on paragraph (1B). There may be circumstances in which the Secretary of State could not rely on paragraph (1A) and could only rely on the instructions under paragraph (1B), but I have not been able to imagine one. But, assuming that this is possible, I accept that the notes issued by the Secretary of State are relevant under paragraph (1B). The instructions they contain may inform what is reasonable to expect a claimant to know. It would usually be reasonable for a claimant to know the contents of those instructions. (I do not exclude the possibility that it may not be reasonable for the claimant to know everything that is in the Secretary of State's notes. For example, this may, perhaps, not be reasonable on account of the claimant's mental state.) And the notes may be so comprehensive that, in a particular case, there is no need to consider anything else. But the duty under paragraph (1B) is defined by the terms of that paragraph. The instructions given to claimants do not define that duty. They are merely evidence of what it was reasonable to expect the claimant to know. And the duty to report may be wider than any instructions given by the Secretary of State. For example, it may be reasonable for the claimant to realise from questions in a claim pack that a particular matter is relevant to entitlement, even if the notes issued by the Secretary of State do not specifically refer to them.

29. For completeness, I will mention that the focus under paragraph (1B) is different from that under paragraph (1A). There the duty refers to entitlement, but only whether the claimant might reasonably be expected to know a change of circumstances *might* affect entitlement. It is not necessary for the claimant to understand the actual impact that a change will have, but the focus is different from that appropriate to the duty imposed under paragraph (1A). A comparison with his disablement at the time of the award may be justified. But it is also possible to envisage cases in which a claimant ought reasonably to realise that a change of circumstances might affect entitlement without undertaking a comparison with the time of the

award. For example, a claimant's mobility may improve to such an extent that no reasonable person would consider that the claimant was virtually unable to walk.

Findings made on the entitlement appeal

30. The papers contain a copy of my decision in *CIS/1330/2002*. I there decided that the findings of fact made on an entitlement appeal do not bind a tribunal that later hears an appeal against the resulting overpayment decision. In the context of this case, the effect is this. The claimant's entitlement has been decided and the tribunal at the rehearing cannot change that. However, the tribunal is free to decide that there were no facts that the claimant should have disclosed, even if that finding is contrary to the findings made in the entitlement appeal.

Disposal

31. Having set aside the tribunal's decision, I have to decide whether to substitute the decision that it should have given or to direct a rehearing. On the basis of what I have said so far, I could have substituted a decision without the need for a rehearing. However, the claimant's representative has raised other points of detail about the tribunal's reasoning and its failure to clarify matters that might be important. I do not accept all of them. Nor do I necessarily accept that they show that the tribunal went wrong *in law*. However, that does not matter at the disposal stage. It is sufficient for me to say that there is enough in the representative's arguments to persuade me that a rehearing is appropriate. Any mistakes that were made will be subsumed by a rehearing.

Signed on original
on 23 November 2006

Edward Jacobs
Commissioner