Commissioners file no: CDLA 2733 2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal in this case.

2 The claimant and appellant is appealing with my permission against the decision of the Warrington appeal tribunal on 6. 2. 2002 under reference U 06 078 2000 01442. I granted permission in this case and considered it together with the claimant's appeal in CDLA 1628 2002. My decision dismissing the appeal in that case is made by a separate decision on the same date. There is no common ground between the two decisions.

3 For the reasons below, the decision of the tribunal is erroneous in law. I set it aside. I refer the appeal to a differently constituted tribunal for determination in accordance with the directions given in this decision (Social Security Act 1998, section 14(8)(b) and (9)).

Background to the appeal

4 There are two decisions in issue in this appeal. The first is a revision decision made on 24. 5. 2000. It revised the underlying decision to the effect that the claimant is not entitled to either component of disability living allowance from and including 24. 1. 2000. The decision revised was dated 27. 3. 2000. The letter accompanying the decision of 25. 4. 2000 states that the decision is based, among other things, on the decision of the tribunal "held on 12. 4. 2000". This appears to refer to a tribunal hearing on 31. 3. 2000 about the claimant's claim for severe disablement allowance. It is not clear whether there has been any appeal against that decision. The second decision in issue is the refusal of a renewal claim made on 24. 1. 2000 with effect from 13. 6. 2001. I have for the sake of simplicity left out of the account various reconsiderations that did not lead to any change of substantive decision.

5 The decision of 27. 3. 2000 was a supersession decision superseding earlier decisions to the effect that the claimant was entitled to the higher rate of the mobility component and highest rate of the care component of disability living allowance from and including 24. 1. 2000 to 23. 1. 2002. The decisions superseded appear to be a decision awarding the lowest rate of the care component from and including 10. 11. 1998 to 12. 6. 2000, and another decision awarding the higher rate of the mobility component from and including 13. 6. 1998 to 13. 6. 2001. As the end dates of those two awards were inconsistent, whichever is the later was invalid. This does not seem to have been noticed at the time. The papers show that there was a decision on 30. 7. 1998 to award the higher rate of the mobility component for the period to 13. 6. 2001, and a later supersession decision on 3. 9. 1999 to award the lowest rate of the care component to 12. 6. 2000 but without adjusting the higher rate of the mobility component. It is the second decision that is invalid and the lowest rate of the care component should have been awarded to 13.6. 2001 (Social Security Contributions and Benefits Act 1992, section 71(3)).

6 The case came before a tribunal on 27. 3. 2001. There was an appeal against that decision. I allowed it on 24. 10. 2001 under decision CDLA 2254 2001. That decision, made with the consent of the parties, accepted the claimant's contention that certain aspects of the case (in particular, the last minute introduction of the Department's medical evidence) were unfair in the particular circumstances. I did not deal with the substance of the appeal.

7 The appeal went to a second tribunal on 6. 2. 2002. The tribunal identified the two decisions it was considering as a supersession of an award of the higher rate of the mobility component and lowest rate of the care component ending on 12. 6. 2000 and a refusal of a renewal application from that date. The tribunal considered evidence about entitlement and the power to supersede at some length. Despite noting that it was considering two appeals, it made only one decision, namely that the claimant was not entitled to an award of disability living allowance from and including 24. 1. 2000. It therefore made four errors. First, it treated a revision decision as a supersession decision. In doing so, it missed the point that the decision was patently inconsistent with the powers to revise in regulations 3 to 5 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Second, it left the appeal on the other decision undecided. I set out a full analysis of what I saw as the course of events in this case in a direction with my grant of permission to appeal. The secretary of state's representative accepts this analysis of the decisions as correct and supports the appeal. The claimant, not surprisingly, does not appear to have followed the point, but affirms she wants the decision set aside. Third, it failed to sort out what was the correct end date of the decisions being considered. This is important because the tribunal decided without reason that the decisions both ended on 12. 6. 2000, whereas they should both have ended on 12. 6. 2001. As a result, it does not appear technically to have considered the period from 13. 6. 2000 to 12. 6. 2001. Fourth (and linked with the third point), the revised decision under appeal was a fixed term decision, but the tribunal took an open ended decision. That added further uncertainty about the period covered. For those reasons, I set the decision aside for the reasons summarised above. But my main concern is how to move these appeals forward.

8 Noting both that this was a "second time around" appeal and also the apparent unresolved issues, I invited the secretary of state's representative to suggest the best course of action to get the cases sorted out. The representative suggested that I remit the case to the tribunal with directions to sort out the errors.

The tribunal's powers to correct erroneous decisions

9 The submission of the secretary of state's representative was supported by a reference to the decision of the Commissioner in CIB 2100 2001. In that case (at paragraph 25) the Commissioner accepted a submission that the tribunal could replace a faulty decision of the Secretary of State but could not make its own decision. The point needed thought after the introduction of the Social Security Act 1998. This is because the procedure sections of that Act repealed and did not replace the former powers of tribunals to deal with new questions (formerly in section 36 of the Social Security Administration Act 1992) and restricted the extent to which a tribunal can (to use the old word) review a previous decision. Nonetheless, provided that a tribunal is careful in noting which decisions it is considering and is careful to

stay within its limited powers, I agree with the Commissioner in CIB 2100 2001 that a tribunal has power to correct errors of this sort. But I must add some notes of caution.

10 First, a tribunal has no power to make a new decision. For example, it has power to correct a supersession decision, but not to take a supersession decision when none has been made by the Secretary of State. That is stated in clear terms by the Commissioner in CIB 2100 2001. I gave a short decision to that effect recently in CDLA 3135 2002. In that case I set aside with the consent of both parties a purported supersession decision introduced by a tribunal. It had found that the supersession decision of the Secretary of State was made without grounds and set it aside, but then went on to make a new and different supersession decision. I confirmed that it was right to set aside the original supersession decision, but I also set aside the tribunal's decision as without jurisdiction. Again with agreement of both parties, I reinstated the previous decision without supersession but referred the unresolved issues to the Secretary of State. In such a case, the only power of a tribunal is to set aside any erroneous decision that it cannot or does not revise, reinstate the previous decision or decisions and, if this leaves something unresolved, refer the matter back.

11 Second, there is a fundamental distinction between supersession decisions and revision decisions. This was completely ignored in this case. As sections 8, 9, 10 and 12 of the Social Security Act 1998 make clear, a revision decision takes effect as an alteration of the decision revised. It is not a new decision. A supersession decision is a new decision. Appeals run only against supersession decisions and original decisions (whether or not revised). An appeal against a revised decision is an appeal against the original decision as revised. In this case the appeal is against the decision of 27.3.2000 as revised, and not against the decision of 25. 4. 2000 to revise. One point of importance about this is that if the revision is found to be defective such that it must fall, then the unrevised decision comes automatically back into effect. The tribunal must therefore look through the revision to the underlying decision. If it find that the revision is faulty and cannot be corrected by revision, then it cannot replace it by a supersession decision operating from the date of the purported revision. That would be a new decision.

12 Third, the tribunal has the power to correct, not the duty to do so. Exercise of that power, as with all such powers, must be undertaken judicially. The tribunal must bear in mind its duty to act independently and impartially as between both parties. It is the task of the tribunal to decide the appeal, not simply to correct errors made by the Secretary of State or any other party. It must also bear in mind the requirements of a fair hearing. This is of importance if the tribunal is acting on its own initiative in correcting decisions, rather than on the submission of a party to the hearing. This is because it may be less obvious to a party that a new matter has been introduced if the other party does not raise it expressly. In particular, the tribunal should not itself introduce new elements that are prejudicial to a party without ensuring that the party has proper notice of them. If necessary, it must ensure that the party has given a full and informed consent to a new matter introduced without proper notice. That was an error noted in my previous decision on this appeal.

Directions to the new tribunal

13 I must apply those points. This decision gives the parties notice about the issues, so I do not need to consider that aspect further. The new tribunal is considering the decision of 27.3.2000 as revised, not the decision of 25. 4. 2000 in isolation. The purported revision of 25. 4. 2000 is patently wrong in law. It is inconsistent with regulations 3 to 5 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This is because it purports to operate from a date from which it cannot operate as a revision. I direct the tribunal to cancel the revision. It must consider the unrevised decision of 27. 3.2000.

14 The tribunal must take one of three courses of action with regard to the decision of 27. 3. 2000:
(1) It may confirm the decision of 27. 3. 2000 with the revision cancelled.
(2) It may revise the decision of 27. 3. 2000 in some way permitted by regulations 3 to 5 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. It may do this if it considers that the decision of 27. 3. 2000 is wrong in law or fact and it finds the basis for a valid revision.
(3) It may set aside the decision of 27. 3. 2000 as wrong in law if it so decides but it cannot or does not revise it. If it takes this course of action, it must reinstate the previous decisions that were subject to supersession, if it can. It will then be faced with the fact that one of the decisions superseded on 27. 3. 2000 is patently wrong in law and cannot be confirmed without itself being revised. So it will have to look into those issues as well. I have indicated above which of those decisions is in my view valid, and why.

15 Just as the tribunal cannot make a new decision, and can only consider an appeal against a decision, so equally it must consider the appeal against each decision before it separately and take a separate decision on each. The new tribunal must decide the undecided appeal, unless it is informed of a decision or supersession. This is the appeal against the refusal to award disability living allowance on the renewal claim with effect from 13 June 2000. That decision cannot be subsumed in the decision under appeal to the Commissioner. This is because it is a separate decision of the Secretary of State to that confirmed by that tribunal operating from a separate effective date.

Direction to the parties

16 I suspect the main problem in this case is that the submission originally made to the tribunal by the secretary of state's representative (documents 1b and 1c) is wrong in both law and fact and is also misleading. The submission to the tribunal was that the decision under appeal was that the appellant was not entitled from 24. 1. 2000. That is only one of the decisions under appeal. It is also stated wrongly (see document 137). Further, it is a revised decision. The submission totally fails to note this, or to note the other decision at all. The word used about the revision is "reconsideration". That is not a statutory word. It is ambiguous and should not be used in this context. As I have seen similar confusion introduced in other appeals by the use of non-statutory terms, I urge the Secretary of State to instruct his officers to use the language of the Social Security Act 1998 so as to avoid confusion and sloppy thinking. The formal submission to the tribunal should indicate both decisions. It should state that the first decision under appeal was a revised decision, indicating when and why there was a revision, and also the precise terms of the revisions and

what was the decision before revision. It should also state the terms of the other decision, indicating that it was a renewal decision. The first page of the submission states that the previous decisions both ended on 23. 1. 2000. That is also either wrong or misleading. Neither of them originally ended on that date. But these errors do perhaps explain where the tribunal went wrong.

17 I direct the secretary of state's representative to make a new, accurate and complete submission to the tribunal. The submission is to deal with the above points and advise of any relevant new decisions or changes. To allow a speedy rehearing, that submission is to be made within one month of this decision unless a district chairman directs otherwise.

18 The claimant did not have a representative at the previous hearing of this case. She may wish to consider asking a citizens advice bureau, welfare rights office, solicitor, or other professional adviser for help with the rehearing.

David Williams
Commissioner

2 October 2002

DECISION OF THE SOCIAL SECURITY COMIMISSIONER

Case Reference No.: CDLA 9 2001

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 though 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 produced 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] AC1, 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 Enfiled 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. I 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 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 had 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 had 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 the 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.

(Signed) David Williams
Commissioner

(Date) 5 June 2001