Bulletin 141
[Stats]

CDLA/2968/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the Peterborough appeal tribunal (tribunal registration number U/42/143/2003/00080) dated 9 June 2003.

REASONS

2. The claimant had been entitled to disability living allowance, comprised of the higher rate of the mobility component and the middle rate of the care component for two years until 22 April 1998 and then, under a new award, for a further three years from 23 April 1998 until 22 April 2001. On a renewal claim, the Secretary of State decided, on 3 April 2001, that she was not entitled to disability living allowance at all from 23 April 2001. She appealed. On 6 June 2002, a tribunal allowed her appeal only to the extent of awarding the lowest rate of the care component for a period of three years. On a further appeal brought with leave of a tribunal chairman, Mr Commissioner Jacobs set aside the tribunal's decision of 6 June 2002 and referred the case to a differently constituted appeal tribunal for determination (CDLA/4974/02). On 9 June 2003, a tribunal again awarded only the lowest rate of the care component for a period of three years from 23 April 2001 to 22 April 2004.

3. Meanwhile, on 30 July 2002, the claimant had written a letter that was taken as an application for supersession of the decision of the tribunal of 6 June 2002. The Secretary of State made a decision expressed as a supersession but making a new award from 30 July 2002 at the same rate as the one made by the tribunal on 6 June 2002. The claimant appealed and that appeal was, very sensibly, heard on 9 June 2003 at the same time as the appeal remitted by the Commissioner who had set aside the decision of 6 June 2002. In dismissing the appeal against the supersession decision, the tribunal found that there had been no change of circumstances between 6 June 2002 and 30 July 2002 and that the decision of the tribunal dated 6 June 2002 had not been based on a mistake of fact.

4. I have granted the claimant leave to appeal against both decisions of the tribunal. The appeal against the tribunal's decision to award only the lowest rate of the care component is before me on file CDLA/2969/03. The appeal with which I am concerned in the present decision is the appeal arising out of the application for supersession. I granted leave in this case only because it raises the question as to what happens to an appeal against a supersession decision when the decision that has been superseded (or has not been superseded) has been set aside on appeal by either a tribunal or a Commissioner.

5. Can the supersession decision survive the setting aside of the decision that has been superseded ? Can an appellate body sensibly decide whether or not a decision should have been superseded when it has already been decided that the original decision ought not to have been made and a new decision has been, or is to be, made in its place ? The traditional approach is that any appeal against a decision is effective only up to the date from which any supersession decision has been effective and that any challenge to an award from the effective date of the supersession decision must be made by appealing against the supersession decision. On that approach, the answer to each of the above two questions is "yes".

6. In the old days of "review", before the concept of supersession was introduced, there was much consideration of the extent to which an appeal caused a review to lapse and *vice versa*. There were a number of Commissioners' decisions on the issue (see, for instance, the decision of a Tribunal of Commissioners in R(A) 5/89), and there was legislation (see, for instance, paragraph 7 of Schedule 3 to the Social Security Act 1989) but neither the decisions nor the legislation tried to deal with all the circumstances that can arise. There is no point in analysing now the law as it existed before the Social Security Act 1998 came into force, but it is as well to remember that the relationship between pending appeals and new first instance decisions has long been regarded as complicated and there has never been a wholly satisfactory universal solution to the difficulties that can arise. It seems plain that there is no single simple rule that can be applied in all circumstances. Nonetheless, my view is that there *are* simple rules and that the number of such rules that between them cover all cases is small.

7. In this case, the Secretary of State's decision was made before the decision in *Wood v. Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (reported as R(DLA) 1/03) and, even though he found there to have been no relevant change of circumstances since, or no mistake of fact in, the decision of the tribunal dated 6 June 2002, his decision was expressed in terms of an award from 30 July 2002. By contrast, the tribunal held that there were no grounds for supersession and did not purport to make any award, leaving their decision allowing in part the claimant's appeal from the decision dated 3 April 2001 as the operative decision for the whole period of the award.

8. The traditional approach that an appeal against a decision is effective only until the effective date of any supersession of that decision works well in many – perhaps most – cases. This is often because the parties are content with the outcome of the supersession. In other cases, it may be plain that supersession would have been appropriate whatever the original decision and whatever the outcome of the appeal, because there has been an obvious change of circumstances that could not have been taken into account on the appeal due to the effect of section 12(8)(b) of the Social Security Act 1998. It may also work well where, in an incapacity benefit case, the supersession was under regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. I am not so sure that the traditional approach is always appropriate where the supersession was on the ground of ignorance of, or a mistake as to, a material fact.

9. However, it is unnecessary for me to consider in the present case the position where a supersession decision is in the form of a supersession. Since *Wood* was decided, it has become clear that a supersession decision can be in the form of a *refusal* to supersede. It is obvious that a refusal to supersede a decision cannot have the effect of limiting the period in issue on an appeal against the original decision, because the refusal to supersede does not result in any new award being made. That was the position before the tribunal in this case and it is the position before me. Consequently, I agree with the Secretary of State that dismissing the present appeal would not limit the period in issue in the appeal before me on file CDLA/2969/03.

10. It is arguable that, in the light of the legislation as it was in force at the time of the Secretary of State's decision on 30 July 2002, the tribunal erred in considering whether there had been a change of circumstances only between 6 June 2002 and 30 July 2002, rather than between 3 April 2001 and 30 July 2002 (see CDLA/2050/02). Since the Secretary of State made the decision in this case, regulation 6(2)(a)(i) of the 1999 Regulations has been amended

to make it clear that, on a supersession of a decision, regard can be had to any change of circumstances since the decision took effect. This makes it easier to treat an application for supersession of a tribunal's decision on the ground of change of circumstances as an application for supersession of the Secretary of State's decision that was appealed to the tribunal, which it seems to me is what must be done if the tribunal's decision is set aside. However, any error in the period considered by the tribunal in the present case is not important because the claimant did not in fact argue that there had been any change of circumstances between 3 April 2001 and 30 July 2002. Her case when she applied for supersession was really that there had not been any change of circumstances since the previous award of benefit in 1998 and that the tribunal's decision of 6 June 2002 was based on errors of fact. That ground for supersession ceased to have any relevance when the decision of 6 June 2002 was set aside by Mr Commissioner Jacobs because the tribunal sitting on 9 June 2003 had to make its own fresh findings of fact on the remitted appeal. It was unnecessary for the tribunal to consider separately, for the purposes of the supersession appeal, whether the decision of 6 June 2002 had been based on an error of fact.

11. The upshot of all this is that the tribunal were right to make their award of benefit on the remitted appeal against the decision of 3 April 2001 and not to make any award on the supersession appeal. The only circumstance in which it would have been right to make an award on the supersession appeal would have been if there had been a material change of circumstances that could not have been taken into account on the remitted appeal. Otherwise, the supersession proceedings could be treated as having lapsed upon the setting aside of the decision of the tribunal to which the application for supersession related. Similarly, as there is still no suggestion that there was any change of circumstances during any relevant period, I can dismiss the present appeal and deal with all the claimant's complaints about the award of benefit within the context of my decision on file CDLA/2969/03.

12. I referred earlier to simple rules. I suggest that three emerge from this decision.

1. An application for supersession that results in a refusal to supersede the original decision does not terminate the period under consideration on an appeal against the original decision.

2. Live proceedings arising out of an application for supersession based on ignorance of, or a mistake as to, a material fact lapse when the decision to be superseded is set aside on appeal (provided that there is no further appeal in respect of the original decision).

3. Live proceedings arising out of an application for supersession based on a change of circumstances do not lapse when the decision to be superseded is set aside on appeal (but the application may have to be treated as an application for supersession of a different decision or, perhaps, as a new claim, depending on the circumstances).

Other rules will be found in other decisions.

(Signed) MARK ROWLAND
Commissioner
16 January 2004