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CDLA/2999/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal held on 7 June 2004 is erroneous in law. I set it aside. I substitute the decision that the tribunal ought to have made namely:-

(a) the Secretary of State had no power to supersede the decision dated 15 August 1986 renewing the claimant's award of mobility allowance;

(b) there was no decision on a claim for, or made in relation to the claimant's award of, disability living allowance; and therefore there is no disability living allowance decision capable of being superseded; and

(c) accordingly, in the absence of any valid supersession decision or decisions, the Secretary of State had no power to determine that any overpayment of either mobility allowance or disability living allowance was recoverable from the claimant.

2. The claimant, a man born in 1956, suffered multiple serious injuries in a road traffic accident on 3 November 1982. So far as is relevant for the purposes of this case his right leg was severely fractured and, in 1986 (after a further operation in that year), he was left with a right knee which had a fixed arthrosis with lateral deviation; he also in 1986 was suffering from right foot drop with gross limitation of movements in his right ankle and right toes. It appears from the papers that he had had an award of mobility allowance prior to 1986. He made a renewal claim on 16 June 1986. On 14 July 1986 the claimant was examined by an examining medical practitioner ("EMP"), who appears to have been the claimant's own GP – see pages 8 and 12 of the case papers. The EMP made the findings I have referred to and recorded that the claimant could only walk with a calliper or stick and could only manage to walk 5 to 10 yards without severe discomfort. The EMP reported that the claimant was virtually unable to walk, but opined that the claimant's condition was likely to improve. The EMP advised that the claim to mobility allowance should be renewed for a period of two years from the date of expiry of the claimant's existing award, namely 6 September 1986. In fact on 15 August 1986 the claimant was awarded mobility allowance until the age of 75 (the maximum age permitted under the then legislation). The reason why the award was for the maximum period, rather than for merely the two years advised by the EMP, only became apparent at the hearing before me, when the Secretary of State's representative produced a document showing that the report of the EMP had been internally reviewed by the then mobility allowance unit on 15 August 1986: the advice was given that the conclusions of the EMP should not be accepted in their entirety, but that an award of mobility allowance should be made until the claimant's 75th birthday (presumably on the footing that the claimant's condition was unlikely to improve). This award was extended until the claimant's 80th birthday by virtue of section 8 of the Social Security Act 1989. The claimant's award of mobility allowance terminated immediately before 6 April 1992 by virtue of regulation 7(1) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991 ("the IDLA Regulations"). By virtue of regulation 8(1)(b) and regulation 8(3) of the IDLA Regulations the claimant was treated as having been awarded the higher rate of the mobility component of disability living allowance for life.

3. Following investigations by the Secretary of State in late 2003 and an interview with the claimant on 8 December 2003 it was discovered that the claimant had joined a local golf club as a full playing member on 21 June 1990 and had played regularly (without motorised assistance and pulling his own trolley) since that date: there were witness statements to the effect that the claimant, notwithstanding his pronounced limp, had not held play up. On 20 January 2004 a decision-maker on behalf of the Secretary of State made a decision to the effect that the decision of 15 August 1986 was superseded with effect from 21 June 1990 on the grounds of a relevant change of circumstances, namely the improvement in the claimant's condition. On 12 February 2004 the same decision-maker decided that there had been an overpayment of benefit in the sum of £24,143.35 for the period from 27 June 1990 to 13 January 2004 and that this was recoverable from the claimant on the grounds of his failure to notify the Department of the improvement in his condition. The claimant appealed this decision to a tribunal. The tribunal essentially found that the claimant's condition had, contrary to expectation, improved considerably by 1990 and that by 21 June 1990 he was not virtually unable to walk within the meaning of the statutory provisions. It further found that the claimant should reasonably have been expected to have reported the improvement to the Department by June 1990 (since it was a relevant change of circumstances) and that this failure to disclose meant that the overpaid benefit was recoverable from the claimant. The claimant appealed with my leave. The main grounds of the claimant's appeal were that the tribunal had not properly considered either what had caused the overpayment or whether, in the circumstances of this particular claimant, disclosure was reasonably expected to be made. During my consideration of the papers I raised the question whether there was in fact any legislative provision enabling the awards of benefit to be superseded. Having had written submissions on this, I directed an oral hearing.

4. At the oral hearing the claimant was represented by Mr Snaith of a local welfare rights service and the Secretary of State by Mr Cooper, a senior lawyer from the Department for Work and Pensions. I am grateful to them for their submissions, both written and oral. Following the oral hearing I issued two further directions raising additional points which had occurred to me. I regret the subsequent delay in the preparation of this decision: this has been partly occasioned by my reluctance to come to a conclusion which is counter-intuitive and which produces a wholly unsatisfactory result. I can, however, find no means of deciding this appeal other than in the terms that I have.

5. In order to put the problem that arises in this case in context, it is necessary to examine the legislative history. Mobility allowance was introduced by section 37A of the Social Security Act 1975 (inserted by section 22(1) of the Social Security Pensions Act 1975). The physical conditions for entitlement to benefit were that the claimant should be suffering from physical disablement such that he was either unable to walk or virtually unable to do so – see section 37A(1): regulation 3 of the Mobility Allowance Regulations 1975 prescribed the circumstances in which a claimant was to be treated or was not to be treated as suffering from such physical disablement. Decisions on awards of mobility allowance were originally made by insurance officers and then from 1983 by adjudication officers. Such decisions were susceptible of review on the grounds, inter alia, of a change of circumstances or ignorance or mistake as to a material fact. Section 37A of the Social Security Act 1975 was repealed by section 2(3) of the Disability Living Allowance and Disability Working Allowance Act 1991 ("the DLA Act") with effect from 6 April 1992.

6. The DLA Act introduced disability living allowance and disability working allowance. Instead of mobility allowance claimants became entitled to claim the higher rate of the mobility component of disability living allowance (and the lower rate of the mobility component of disability living allowance was introduced for the first time). Although the physical qualifications for entitlement to mobility allowance set out in regulation 3 of the Mobility Allowance Regulations 1975 were replicated in regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991, there were differences between the two benefits. There had been no qualifying period for mobility allowance, but in order to be entitled to an award it had to be predicated that the claimant would satisfy the conditions of entitlement for 12 months; with regard to the higher rate of the mobility component of disability living allowance a claimant has to show that he has satisfied the qualifying physical requirements for a period of three months prior to any entitlement arising and will continue to do so for a further period of six months. Further, mobility allowance could not be awarded beyond a fixed age (albeit progressively increased), whilst disability living allowance can be awarded for life.

7. The transition between the two benefits was effected by the IDLA Regulations (which are still in force). Regulation 7(1) provided:

> "Any award of mobility allowance to a person for a period part of which falls after 5 April 1992, shall terminate immediately before 6 April 1992."

Accordingly the award of mobility allowance to the claimant in the present case terminated immediately before 6 April 1992. Regulation 8 of the IDLA Regulations provided:-

> "(1) Subject to paragraph (4), a person whose award of mobility allowance is terminated in accordance with regulation 7(1) shall be treated as having been awarded the mobility component –
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> ....
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> (b) for life, where the award of mobility allowance was for, or had effect as if for, a period ending on the day before the day on which the person would have attained the age of 80."

Paragraph (4) of regulation 8 provided that disability living allowance awarded in accordance with regulation 8 should continue for the period of the award only so long as the person to whom the award was treated as made continued to satisfy the requirements for entitlement to award, including the requirement of being unable or virtually unable to walk. Regulation 8(3) provided that the rate of benefit should be the higher of the two rates of mobility component of disability living allowance.

8. The introduction of disability living allowance also resulted in the introduction of a species of review peculiar to disability living allowance and attendance allowance. The relevant provisions were to be found in sections 100A and 104A of the Social Security Act 1975 (which provisions subsequently became sections 30 and 35 of the Social Security Administration Act 1992.). The IDLA Regulations provided, by regulation 24(2), that any application for a review of an award of mobility allowance made after 9 February 1992 should

be subject to adjudication in accordance with the provisions relating to reviews of disability living allowance awards. As regards the award of disability living allowance treated as made by regulation 8, regulation 14 of the IDLA Regulations (to which I shall have to return in more detail later) deemed, for the purposes of review under section 100A and 104A of the Social Security Act 1975, the original decision on mobility allowance to be referable to the award of disability living allowance made by regulation 8.

9. It might be helpful if, at this stage, I summarise the position immediately prior to the consolidation effected by the consolidating legislation of 1992, which came into effect on 1 July 1992. The claimant's award of mobility allowance had terminated immediately before 6 April 1992. He was treated as having a life award of DLA by virtue of regulation 8 of the IDLA Regulations. Both awards were susceptible of review. Mobility allowance had been abolished for all practical purposes.

10. The 1992 consolidation made no relevant changes. The provisions relating to disability living allowance were to be found in sections 71 to 76 of the Social Security Contributions and Benefits Act 1992 ("the Contributions and Benefits Act") and the provisions relating to reviews of awards of disability living allowance were to be found in sections 30 and 35 of the Social Security Administration Act 1992 ("the Administration Act"). So far as I am aware there is no express (as opposed to referential) mention in any part of the 1992 consolidation to mobility allowance save in paragraph 22 of Schedule 3 to the Social Security (Consequential Provisions) Act 1992 (relating to a power to make regulations in relation to the substitution of disability living allowance for attendance allowance and mobility allowance) and in paragraph 21 of Schedule 4 to the same Act (which made a transitory amendment to section 129 of the Contributions and Benefits Act 1992 treating mobility allowance as a qualifying benefit for the purposes of disability working allowance).

11. There is no doubt but that, had the Secretary of State been aware of the claimant's circumstances prior to the coming into force of the reforms made by the Social Security Act 1998 ("the 1998 Act"), an adjudication officer would have had the power to review and revise the claimant's awards of mobility allowance and disability living allowance and to make a recoverable overpayment decision under section 71 of the Administration Act 1992 (a review being a necessary pre-condition to the making of any recoverable overpayment decision – see section 71(5A) of the Administration Act 1992 as in force prior to the amendments made by the 1998 Act). Any such review made prior to 1 June 1999 would have taken effect from the date of the change of circumstances identified by the adjudication officer – see regulation 59 of the Social Security (Adjudication) Regulations 1995: any such review taking place between 1 June 1999 and the date of the coming into force of the 1998 Act would have taken effect from the date upon which the claimant could reasonably have been expected to notify the change of circumstances – see regulation 59A of those Regulations. Equivalent review decisions and overpayment decision to those actually made in the present case could therefore have been taken prior to the coming into force of the 1998 Act. I use the words review decisions, rather than review decision, since it is clear from the IDLA Regulations that mobility allowance and disability living allowance (or the higher rate of the mobility component of it) were treated as two different benefits with different provisions relating to the review of each benefit (see regulations 7, 8, 14 and 24(2) of the IDLA Regulations). It cannot be said that the introduction of disability living allowance was a mere renaming or rebadging of the former mobility allowance. (I should mention that the benefits to which section 71 of the Administration Act applies include benefits as defined by section 122 of the Contributions

and Benefits Act 1992: see section 71(11)(a). The definition in section 122 includes not only benefits under Parts II to V of the Contributions and Benefits Act but also, for the period prior to 1 July 1992, benefit under Part II of the Social Security Act 1975 and hence includes mobility allowance.).

12. I now turn to the effect of the 1998 Act. The question that is central to this case is whether the legislation in force from 18 October 1999 (the commencement date of the 1998 Act for the purposes of attendance allowance, disability living allowance, invalid care allowance and jobseekers allowance) allows the supersession of any decision awarding the claimant either mobility allowance or the higher rate of the mobility component of disability living allowance, because section 71(5A) of the Administration Act (as amended by the 1998 Act) only permits a recoverable overpayment determination to be made in respect of any amount where the determination in pursuance of which the amount was paid has been reversed or varied on appeal or revised under section 9 or superseded under section 10 of the 1998 Act. In the present case it is necessary to identify a valid supersession decision under section 10 effectively taking away the claimant's awards of benefit from a retrospective date before any resultant recoverable payment decision could be made: such a supersession can be made as a result of a relevant change of circumstances (see regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) and would take effect from the date the claimant ought to have notified the change (see regulation 7(2)(c)(ii) of those Regulations).

13. The problem which arises is that section 10 of the 1998 Act, which gives the power to supersede, applies only to the supersession of the decisions of the Secretary of State under section 8 of the 1998 Act (or of appeal tribunals or Commissioners under Chapter II of the 1998 Act), that is to say to supersession of decisions made under the regime in force from 18 October 1999. If supersession is to be applied to decisions made under the adjudication regime in force before 18 October 1999, it can only be done by legislation treating pre-1998 Act decisions as if made under the 1998 Act. Such provisions are found in the Commencement Orders for the 1998 Act. The relevant order for current purposes is the Social Security Act 1998 (Commencement No. 11 [etc.]) Order 1999.

14. Paragraph 4(1) of Schedule 16 to this Order provides:-

> " (1) A decision (other than a decision of a social security appeal tribunal, a disability appeal tribunal, a medical appeal tribunal or a Commissioner made before 18 October 1999) –
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> (a) on a claim for; or
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> (b) under or by virtue of Part II of the Administration Act in relation to
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> a relevant benefit, shall be treated on or after that date as a decision of the Secretary of State under paragraph (a) or, as the case may be, paragraphs (c) of section 8(1) [of the 1998 Act]."

Article 1(2) of the Order provides, so far as is relevant,

"In this Order, unless the context otherwise requires –

...

(c) "relevant benefit" means any of the benefits to which Articles 2(c)(i) and (ii) of this Order refers ..."

Article 2(c)(i) refers to attendance allowance, disability living allowance and invalid care allowance under Part III of the Contributions and Benefits Act and Article 2(c)(ii) refers to jobseekers allowance under Part I of the Jobseekers Act 1995. There is no reference to mobility allowance. Accordingly, prima facie, the decision of 15 August 1986 awarding the claimant mobility allowance could not be "rebased" as a decision of the Secretary of State under section 8 of the 1998 Act, and hence be susceptible of supersession. Mr Cooper, on behalf of the Secretary of State, prayed in aid the words "unless the context otherwise requires" in Article 1(2) of the Order and submitted that the context required a reference to mobility allowance (as a statutory predecessor of disability living allowance) to be inserted in the definition of relevant benefit: he referred me to two decisions of Commissioners where the quoted words had been used by the Commissioner to insert words in a commencement order. In CIB/2161/2000 the Commissioner extended the definition of "relevant benefit", which expressly included incapacity benefit, to include entitlement to incapacity credits which were elsewhere mentioned in the relevant commencement order; and in CI/1800/2001 the Commissioner extended the definition of "adjudicating authority" in the commencement order to include, in addition to the authorities mentioned, a medical appeal tribunal. I consider that the Commissioners' decisions in the two cases I have cited can also be justified on the grounds set out by Lord Nicholls of Birkenhead in Inco Europe Ltd v. First Choice Distribution [2000] 1WLR 586 at 592-593 (not cited to me), relating to the reading in of words where the draftsman had clearly failed to give effect to the intended purpose.

15. In my judgment, however, neither the words "unless the context otherwise requires", nor the Commissioners' decisions, nor the principle set out by Lord Nicholls, nor section 87(3) of the 1998 Act (to which Mr Cooper referred me and which relates to the power to make "consequential provisions" in commencement orders) nor the reference which Mr Cooper made to Bennion's Statutory Interpretation (to be found at section 397 of the fourth edition), relating to implication where a statutory description is only partly met, assist the Secretary of State in the present case. Section 8(3) of the 1998 Act defines "relevant benefit" as meaning, so far as is material for present purposes, benefit under Parts II to V of the Contributions and Benefits Act and such other benefit as may be prescribed. Mobility allowance is not, and never has been, a benefit under Parts II to V of the Contributions and Benefits Act: its abolition preceded the coming into force of that Act. Nor has mobility allowance been prescribed for the purposes of section 8 of the 1998 Act. It is impossible, in my judgment, so to construe the meaning of "relevant benefit" in the Order as including a benefit to which the 1998 Act, under which the Order was made, does not extend. So to include mobility allowance would in effect be prescribing a benefit for the purposes of section 8(3) of the 1998 Act where no legislation making such prescription had been made: this would involve judicial legislation, rather than judicial interpretation. I therefore come to the conclusion that the decision awarding the claimant mobility allowance was not a decision relating to a relevant benefit within the Order and hence cannot be treated as a decision which has been "re-based" under section 8 of the 1998 Act. If there is no decision under section 8, whether actual or deemed, there can be no valid supersession of it and hence no recoverable

overpayment decision can be made. (In one of my directions made after the oral hearing I indicated that an anomaly might arise inasmuch as the wording of the Order might extend to both "old style" attendance allowance (which was also abolished by the DLA Act) as well as to the new style attendance allowance (available only to those who claim over the age of 65) brought in as a result of the DLA Act. I now consider that my suggestion was ill-founded. Article 2(c)(i) of the Order refers to attendance allowance, disability living allowance and invalid care allowance "under Part III of the Contribution and Benefits Act": "old style" attendance allowance is not a benefit under Part III of the Contributions and Benefits Act and does not fall within the ambit of section 8(3) of the 1998 Act.)

16. There is one remaining loose end relating to the award of mobility allowance. If, as I have held, the provisions of the 1998 Act were not brought into force in respect of mobility allowance on 18 October 1999, then the pre-1998 Act adjudication system still technically remained in force in relation to mobility allowance. However Part II of the Administration Act (so far as not previously repealed) was wholly repealed by, and the provisions of Chapter II of the Social Security Act 1998 (so far as previously not brought into force) were brought into force by, Article 2(1)(a) and Schedule 1 to the Social Security Act 1998 (Commencement No. 12 [etc.] Order 1999) which came into effect on 25 November 1999 – see also section 39(3) of the 1998 Act. Subject to the point dealt with in paragraph 22(b) below, there can therefore be no question of the regime of review subsisting in relation to mobility allowance after that date.

17. I now turn to the claimant's award of disability living allowance. As I have indicated above, this came about by virtue of operation of law under regulation 8 of the IDLA Regulations. Although disability living allowance is clearly a "relevant benefit" for the purposes of both the 1998 Act and Commencement Order No. 11, there was no actual decision on a claim for disability living allowance which could be re-based under paragraph 4(1)(a) of the Order and treated as a decision under section 8 of the 1998 Act. (Indeed the decision of 20 January 2004 purporting to supersede the claimant's awards of benefit referred only to the decision of 15 August 1986 awarding mobility allowance.).

18. I have considered regulation 14 of the IDLA Regulations. That regulation, so far as is relevant, provides:

> " (1) Where a person is treated as having been awarded disability living allowance under any of the preceding provisions of these Regulations, sections 100A(1), (2) and (4) and 104A(1) of the 1975 Act (reviews of decision given by the adjudication officer and the appellate authorities) shall have effect in his case as if the decision there mentioned was the decision which was referable to the award of disability living allowance.
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> (2) For the purposes of this regulation, a decision is referable to an award of disability living allowance if
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> (a) it was a decision awarding ... mobility allowance to such a person and the decision was terminated or cancelled in accordance with Part III [i.e. regulation 7] of these Regulations and replaced by the person's current award of disability living allowance ..."

(As I have previously mentioned the provisions of sections 100A and 104A of the 1975 Act became Sections 30 and 35 of the Administration Act 1992.) Regulation 14 in effect provides that, for the purposes of review under the old adjudication system, the original decision awarding mobility allowance was to be treated as if it was referable to the award of disability living allowance made under regulation 8. It is to be noted, however, that regulation 14 only applies for the purposes of "old style" review under the provisions of the pre-1998 Act scheme: it was not a general deeming provision. Although the IDLA Regulations were referred to in paragraphs 1 and 10 of Schedule 16 to Commencement Order No. 11, no amendment to regulation 14 was made by the 1998 Act or any subordinate legislation under that Act. In my judgment the references to the provisions relating to the review in regulation 14 cannot be read as references to revision or supersession under sections 9 or 10 of the 1998 Act. This is not a case where the original draftsman of the IDLA Regulations made a mistake: rather this is a case where an amendment to those Regulations should have been made which was not made and, again, I consider that that amendment is one that can only be made by legislation and not by judicial interpretation.

19. In my judgment the express terms of regulation 14 militate against any further implication of a deemed decision relating to the claimant's award of disability living allowance. Granted that there was no decision on a claim for disability living allowance, I have, however, (notwithstanding the view just expressed) further considered whether under the IDLA Regulations there could (contrary to my view) be implied a decision relating to that benefit which would fall within paragraph 4(1)(b) of Schedule 16 to Commencement Order No. 11 (see paragraph 14 above) as being a decision made "under or by virtue of Part II of the Administration Act" relating to disability living allowance. However, the regulation making power under which the IDLA Regulations were made (so far as concerns the conversion from mobility allowance to disability living allowance) was section 5 of the DLA Act. On the 1992 consolidation, section 5 became paragraph 22 of Schedule 3 to the Social Security Consequential Provisions Act 1992 and was not consolidated into the Administration Act. Therefore, for the purposes of paragraph 4(1)(b), any decision which might otherwise be implied under the IDLA Regulations in relation to the claimant's award of disability living allowance could not have arisen under or by virtue of the Administration Act.

20. Mr Cooper referred me to regulation 8(4) of the IDLA Regulations (which provides that any award made by virtue of regulation 8 should only continue so long as the person to whom the award was made continued to satisfy the conditions of entitlement). In my judgment, this provision did not provide a freestanding ground for termination of an award. Instead, it described the circumstances in which the award might be reviewed under the old law or superseded or revised under the new law (had that new law been properly applicable): compare the decision of a Tribunal of Commissioners in CSIS/137/94 at paragraph 23. In any event, if contrary to my view, regulation 8(4) could terminate the claimant's award of disability living allowance, that termination would not arise as a result of a supersession.

21. I therefore conclude that there is no decision on a claim for, or relating to the claimant's award of, disability living allowance which can be treated as made under section 8 of the 1998 Act; that no supersession is possible; and hence that no recoverable repayment decision can be made. I would point out that my conclusions in relation to the claimant's award of disability living allowance would still stand even if my conclusions in relation to his award of mobility allowance are wrong.

22. I now deal with Mr Cooper's more general arguments.

(a) He submitted that it was the clear overall intention of the draftsman of the 1998 Act and the subsidiary legislation under it that there should be a seamless transition from the old system of adjudication to the new system established by the 1998 Act: he pointed out that the grounds for supersession or revision mirrored those that existed for the purposes of review. I accept this. He further submitted that it would create a nonsense if awards of benefits which were susceptible of review prior to the coming into force of the 1998 legislation could not be susceptible of revision or supersession after that legislation had come into force. In general terms I also accept this. I further note that it is one of the duties of a Commissioner, when he or she is dealing with the complexities of the social security legislation, to try to produce a result which makes the system work. However there are limits to a Commissioner's jurisdiction: if in considering the relevant statutory provisions a Commissioner finds that what he or she is required to do goes beyond the permissible limits of judicial interpretation and requires him or her to exercise a legislative function, the Commissioner has to draw back, even if the result produced is a nonsense.

(b) Mr Cooper referred me to section 16(1) of the Interpretation Act 1978 relating to the preservation of rights subsisting under repealed enactments and remedies in respect of any such rights. He submitted that prior to the coming into force of the 1998 Act the claimant's awards were clearly susceptible to review and this was a right which could be preserved by virtue of section 16(1). I cannot accept this argument. Section 16(1) only applies "unless the contrary intention appears". The intention to sweep away the old adjudication system was manifest: see section 39(3) of the 1998 Act which provided that Part II of the Administration Act was "superseded" by the provisions of Chapter II of the 1998 Act and should cease to have effect.

(c) Finally Mr Cooper pointed out the lacuna that would remain if I should find against him. He submitted that the Secretary of State would not be able to recover overpayments based on decisions awarding mobility allowance (and possibly other decisions relating to benefits which were subsequently abolished and replaced). The Secretary of State would also lose the ability to correct such decisions which were manifestly wrong by means of revision for "official error" under section 9 of the 1998 Act. Mr Cooper submitted that this could not have been intended. However, if there is, as I have found, a lacuna with regard to mobility allowance and awards of disability living allowance flowing from an award of a mobility allowance, then I suggest that the lacuna could best be remedied by the Secretary of State making an amending regulation and making it clear that mobility allowance is a benefit to which the 1998 Act applies and providing that awards of disability living allowance arising under regulation 8 of the IDLA Regulations are susceptible of supersession. Once such amending legislation is in place, I can see no reason why the Secretary of State could not make appropriate fresh supersession decisions and overpayment decisions consequent upon them: such decisions would of course carry the usual rights of appeal.

23. In case this matter should go further and I am found to be wrong in the conclusions that I have so far reached, I deal with the grounds of appeal put forward by the claimant's representative. First, he submitted that the cause of the overpayment was the erroneous decision of the adjudication officer to award benefit until the claimant's 75th birthday rather than for the period of two years as suggested by the EMP. I do not accept this. If there was a relevant change of circumstances which affected the claimant's entitlement to benefit and which the claimant was under an obligation to disclose, and the claimant failed to disclose that change of circumstances, then, in my judgment, regardless of any error of judgment on the part of an adjudication officer in 1986, the failure to disclose was the cause of the overpayment.

24. The claimant's second ground of appeal was whether there was any change of circumstances that the claimant could reasonably be expected to notify. Before the tribunal it was accepted on behalf of the claimant that the claimant received annual letters from the Department warning the claimant that he should report changes of circumstances (the claimant had admitted in interview that he had received such letters). The presenting officer conceded that the letters did not ask the claimant whether he was still virtually unable to walk (see page 97 of the case papers and also paragraph 11 of the tribunal's decision): indeed there was no evidence as to the precise terms of the letters. Mr Snaith, on behalf of the claimant, referred me to regulation 7(2)(c)(ii) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. So far as is relevant, this provides that a supersession decision, which is not advantageous to the claimant and relates to disability living allowance, takes effect, where the claimant was under an obligation to notify a change of circumstances and failed to notify the change, from the date when the claimant knew or could reasonably have been expected to know that the change of circumstances should have been notified. There was no dispute that the claimant was under an obligation to notify changes of circumstances. The question which Mr Snaith posed was whether the claimant "knew or could reasonably have been expected to know that [a] change of circumstances should have been notified". Mr Snaith pointed out that the tribunal accepted that the claimant had been told in 1986 that his disability would remain the same, that the claimant had been awarded benefit (in the events which happened) for life, that the claimant still had a clearly observable physical disability to his right leg and walked with a pronounced limp, and that the claimant consistently reported discomfort on mobilising. He submitted, in effect, that although the claimant's ability to cope with his disability had improved, the underlying condition had not. He submitted that the claimant could not reasonably be expected to have realised that there was any change of circumstances which the claimant was under any obligation to report.

25. The tribunal found that the claimant was clearly entitled to mobility allowance in 1986 and that the claimant should not have been given an extended award in the light of advice in the EMP's report relating to possible improvement (which report the claimant had not in fact seen). It further found that the claimant worked hard at his own rehabilitation, so that by 1990 he ceased to have to use a calliper, crutches or stick; that the claimant must have known that his walking ability was adequate enough for him to become able to apply to join, and play at, a golf club where the golf course was some 6,500 yards long; and that between 1986 and 1990 there had been a sea change in the claimant's walking ability. It concluded that by the time the claimant joined the golf club he should have reported the improvement in his walking ability as a change of circumstances which he was under a duty to report. In my judgment the tribunal's decision on these issues was not in error of law. The claimant was awarded

mobility allowance; he must have realised that it was in connection with his inability to get around; at the time of the renewal of his award in 1986 he could only walk 5 to 10 yards; by 1990, the tribunal found that he could walk at least 150 to 200 yards without the onset of severe discomfort. The claimant must, by 1990, have realised that his ability to get around had improved. On the evidence before the tribunal, its decision as to whether there had been a change of circumstances and whether and when it should have been reported was one which it was entitled to reach.

26. I should point out that if my decision in paragraph 1 above stands, but amending legislation is made and further supersession and overpayment decisions are given, all factual matters will be at large before any new tribunal to which the claimant may appeal.

27. For the reasons given in paragraphs 2-22 of this decision I allow the claimant's appeal, and substitute the decision given in paragraph 1 above.

(Signed on the Original) A Lloyd-Davies
Commissioner

12 April 2006