Bulletin 170

[SHCN]

File no: CDLA 3364 2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The appellant is appealing with my permission against the decision of the Stockport appeal tribunal on 15 March 2001 under reference U 40 125 2001 00189. The decision of the tribunal is that the appellant is that the appellant is entitled to the lowest rate of the care component from and including 17. 11. 2000, but is not entitled to the mobility component of disability living allowance from that date.

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)).

The decision under appeal

4 This case is about a claim for an increase in disability living allowance made in 2000 by a claimant who has back and hip problems, is profoundly deaf in both ears, and is blind in one eye following a childhood accident and a later industrial accident. She is now over 65.

5 The decision under appeal to the tribunal was a supersession decision removing all entitlement to disability living allowance from and including 17. 11. 2000. The decision superseded was a tribunal decision made on 21 October 1998. It awarded the appellant the lower rate of the mobility component and the lowest rate of the care component from and including 19. 12. 1995 for life. The appellant asked for supersession of that decision to increase it on grounds of change of circumstances. In her view, her condition was worse. The decision taken was to supersede the decision to stop it. The ground given was also change of circumstances, because the appellant's care and mobility needs had decreased. The supersession decision form indicates that the appellant's new claim form was considered in making the supersession, so this is an outcome of her application.

The 2001 tribunal decision

6 The tribunal on 15 March 2001 found that the circumstances of the appellant had not changed either for the better or the worse since 1998. Consequently, the supersession decision could not be confirmed on those grounds. Instead, the tribunal concluded:

> "The appellant was clearly not entitled to the lower rate of the mobility component at the date of our hearing. There has been no material change of circumstances since the award was made. We concluded that the tribunal had made a mistake of fact as to the appellant's need for guidance and supervision when walking out of doors and that the award of the lower rate of the mobility component made by the DAT had been made in error."

It went on to decide that the same reasoning, when applied to the lowest rate of the care component, showed that there had been no change of circumstances, and that no error of fact could be identified so the award of the lowest rate of the care component should not have been superseded.

6 One ground of appeal was that the 2001 tribunal had not adequately established that the 1998 tribunal was wrong on the facts. When I granted permission to appeal, I directed that the secretary of state's representative deal with this point, and also produce the tribunal record. The secretary of state's representative advised me that the DLA Unit only kept a copy of the decision notice. So the Secretary of State could not supply me with the full papers. The appellant's representatives kept better records than the DLA Unit. They supplied me with a full set of documents from the 1998 tribunal. From these it is clear that the 1998 tribunal did consider the issue of the lower rate of the mobility component in reaching its decision and that the then adjudication officer did not challenge the appellant's entitlement to lower rate mobility component. With the benefit of those records it is clear that the 2001 tribunal was wrong to say that the 1998 tribunal made an error on the material facts about the lower rate of the mobility component, and it may also have been wrong to say that there was no change of circumstances. But the question for me is whether the 2001 tribunal erred in law in making that mistake. In my view it did, for several interlinking reasons.

The reasons for supersession

7 A decision that there is a change of circumstances is made under regulation 6(2)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the Regulations), regardless of whom made the previous decision. Regulation 6(2) makes separate provision for supersession on the grounds of ignorance of, or mistake as to, a material fact of decision of the Secretary of State (under regulation 6(2)(b)), and tribunals and Commissioners (under regulation 6(2)(c)). In this case the tribunal refused to confirm a decision made under regulation 6(2)(a) and instead made a decision under regulation 6(2)(c).

8 Regulation 7 of the Regulations (date from which a decision superseded under section 10 takes effect) makes different provision for the operative date of supersession under the different paragraphs and subparagraphs of regulation 6. If, as in this case, a tribunal is minded to replace a supersession decision made under one provision with a supersession decision made under another provision, then it must bear in mind that this may require it to think again about the date from which the decision operates. In particular, it must consider if any new provision under regulation 7 is to be applied. This may make new issues of fact and law relevant to its decision, and may require new evidence or submissions.

Operative dates of supersession

9 In general, section 10(5) of the Social Security Act 1998 provides that the date of a supersession decision is the date on which it was made or on which the application was made. This is subject to regulation 7 of the Regulations. If the supersession is based on a relevant change of circumstances, regulation 7(2) applies. If the supersession is under regulation 6(2)(b), regulation 7 makes no special provision and section 10(5) applies. If the supersession is under regulation 6(2)(c),

regulation 7(5) applies. This can provide, depending on further findings of fact, that the supersession backdates to the original decision superseded and is not made only at the date of decision.

10 In this case, if full backdating applied, the supersession could operate from December 1995 rather than November 2000. That might give rise to an overpayment of benefit of several thousand pounds. But the tribunal did not make, or even consider, the further findings of fact necessary to deal with this. Its decision was therefore wrong in law in basing the supersession under regulation 6(2)(c) without considering regulation 7(5).

11 The possible consequence to the appellant if the reasoning of the 2001 tribunal was right was that, far from gaining a level of allowance additional to that awarded by the 1998 tribunal, she ran the risk that she lost allowance retrospectively to 1995. Yet there is no suggestion in the tribunal record that this matter was put to the appellant and representative. That made the hearing unfair. The tribunal also erred in law for these reasons.

12 The 2001 tribunal took upon itself to decide that the 1998 tribunal had not done its job properly. That is the only reasonable conclusion where a later tribunal decides that an earlier tribunal made an error on the facts on an issue central to the decision of the earlier tribunal. It may be different if the basis of any supersession is ignorance of facts, and the new facts were identified. No new facts were identified here. It is clearly different if a change of circumstances is alleged. The second tribunal concluded that it had the right view of the appellant's condition and therefore the first tribunal must be wrong as it took a different view. But it did this not only without asking for any submission from either party about that, but also without checking to see if the full record of the 1998 tribunal decision was available.

13 Tribunals should always hesitate before superseding a decision of a previous tribunal under regulation 6(2)(c) on the grounds of error of fact by a previous tribunal where, as here, the issue must have been considered by the tribunal if it was doing its job properly. Tribunals should not undertake such criticism lightly. If the point is relevant, the tribunal should put the point to the parties and, if it does not have it, should also enquire if the full record of the previous tribunal can be obtained. If that full record is available it should in my view be obtained before the later tribunal ventures to criticise it. And, whether or not the full record is available, the new tribunal should bear in mind section 17 of the Social Security Act 1998. This gives finality to a decision, and both parties are entitled to rely on that finality unless a specific reason for upsetting it is shown.

Direction to the new tribunal

14 I refer the original supersession decision to a new tribunal to reconsider. The new tribunal must take into account the full record of the decision of the 1998 tribunal in considering if there are grounds to supersede it. It should also have in mind that the supersession started with an application by the appellant for the middle rate of the care component. If the tribunal finds that there should be a supersession on any ground other than that on which the decision under appeal was

based, the tribunal should also consider from what date the supersession decision applies, and make any necessary findings of fact.

15 Because I have based my decision on the errors of the previous tribunal in the way it considered supersession, I need not deal with the other points raised by the appellant or the arguments set against them by the secretary of state's representative. I draw both these sets of submissions to the attention of the new tribunal to be taken into account to the extent appropriate.

16 The appellant should treat this decision as notice that the new tribunal may consider supersession of the previous tribunal decision under either regulation 6(2)(a) or regulation 6(2)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. The appellant is also warned that the new tribunal may not agree with the previous tribunal to reinstate the award of the lowest rate of the care component.

David Williams
Commissioner

13 May 2002

[Signed on the original on the date shown]