Bulletin 167

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/3912/2001

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

Appellant:	
Respondent:	*Secretary of State*
Tribunal:	*Harlow*
Tribunal's Case No:	*U/42/133/2001/00304*

DECISION OF THE SOCIAL SECURITY COMMISSIONER

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

1.1. The decision of the Harlow appeal tribunal, held, on 8th June 2001, is erroneous in point of law.

1.2. I set it aside and remit the case to a differently constituted appeal tribunal.

12. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

The tribunal must follow the analysis of the supersession procedure laid down by the Tribunal of Commissioners in *CDLA/3466/2000* and *CI/3 700/2000.* The effective date of the decision given on the supersession must be fixed in accordance with section 10(5) of the Social Security Act 1998 and regulation 7 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

The tribunal must accept that the threshold criterion in regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 is satisfied.

The burden is on the claimant to show entitlement to the care component, but on the Secretary of State to justify the termination of the award. of the mobility component.

The appeal tribunal must not take account of circumstances that were not obtaining at the date of the decision under appeal: see section 12(8)(b) of the Social Security Act 1998, as interpreted in *R(DLA) 2 and 3/01* and *CJSA/2375/2000.*

The tribunal must determine the claimant's entitlement to both components of disability living allowance. In particular:

On the mobility component at the higher rate, the tribunal must follow my direction in paragraph 6.

Falls are relevant to the mobility component at the lower rate: see the decision of the Tribunal of Commissioners in *R(DLA) 4/01* They are also relevant to both supervision and attention under the care component. The risk of falls is relevant to supervision. For guidance on the correct approach see *R(A) 3/89* and *R(4) 5/90, paragraph 6.* assistance after falling may amount to attention. At the last hearing, the tribunal referred to assistance that might be given by a passer-by. The tribunal must consider whether that is realistic and practical

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of a district chairman of tribunals. The Secretary of State supports the appeal.

3. The district chairman granted leave to appeal, requesting the Commissioner to give guidance on cases in which a claimant, who has an award of a disability living allowance, has sought a more favourable award, but the Secretary of State had removed the existing award.

4. I directed an oral hearing of the case in order to consider, along with *CDLA/3111/2001* and *CDLA/3908/2001* how Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms applied to this type of case. At the oral hearing the claimant *was* represented by Mr B Jaffey of counsel. He disclaimed any reliance on human rights issues in view of the recent decision of Mr Justice Moses in *Hooper and others v Secretary of* State *for Work and pensions,* in which judgment had been given on 14th February 2002. I pointed out that the relevant part of the judgment was expressly not part of the binding decision in that case, but Mr Jaffey declined to argue the case on human rights grounds. Mr D Forsdick of counsel, appearing on behalf of the Secretary of State was instructed only on the human rights issue. However, as part of his duty as an advocate, he drew my attention to the decision in *R v Social Security Commissioner. ex parte Chamberlain,* in which judgment had been given on 7th July 2000. He invited me to give guidance on the authority of that decision following the decisions of the Tribunal of Commissioners on supersession in *CDLA/3466/2000* and *CI/3700/2000.*

The error of law

5. The Secretary of State's written observations in this case submit that the tribunal's decision went wrong in law. I accept that submission. The mistake made by the appeal tribunal was to concentrate on the distance that the claimant could walk without taking account of the manner of his walking.

6. The relevant provision is regulation 12(l)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. It provides that a person is virtually unable to walk if

> (a) his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to the place of residence or as to place of., or nature of, employment -
>
> (ii) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or thc manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk'.

The key word in head (ii) is 'or'. It contains 4 factors which have to taken into account – distance, speed, time, manner. It is sufficient for the claimant to be virtually unable to walk having regard to any one of them. The tribunal must take that approach at the rehearing.

The supersession process under the Tribunal of Commissioners' decision

7. Mr Jaffey told me that some representatives were finding it difficulty to understand how the supersession process worked under the Tribunal of Commissioners' analysis. In order to give an example of its operation, I analyse below the sequence of events in this case. This will go some way to meet the district chairman's request for guidance. However, the human rights aspect must await my decision, in *CDLA/3908/2001.*

The application for a supersession

8. The claimant had had a disability living allowance consisting of the mobility component at the higher rate from its inception in 1992. On 13th December 2000, he telephoned to ask for the care component to be included in the award. This telephone call was followed up by a form and an accompanying claim pack that were received on 8th January 2001.

9. So, the claimant had made an application for a supersession. The ground was that there had been a relevant change of circumstances in that he had care needs that might entitle him to have the care component included in his award. That is one of the grounds for supersession in regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Those grounds are merely threshold criteria. The application raised one of the grounds - the one in regulation 6(2)(a)(i). So, a threshold criterion to the supersession process was satisfied The claimant was within the supersession process under section 10 of the Social Security Act 1998.

10. That application had to be dealt with. It could not be ignored. The Secretary of State could not decline to act on the application.

11. The Secretary of State did act on the application, beginning by obtaining a report from the claimant's GP.

The criteria to be applied by the Secretary of State

12. Under the Tribunal of Commissioners' analysis, there are no legislative outcome criteria. The Secretary of State had to decide whether or not the conditions of entitlement for an award were satisfied.

13. Mr Jaffey suggested that that left claimants vulnerable to losing awards simply because a different decision-maker would apply the legislative criteria to the same facts differently. That argument presupposes that the facts are the same and undisputed both at the time when the award was made and at the time of the supersession. I accept that there are circumstances in which different decision-makers could apply the same law to those facts and reach opposite but legitimate conclusions. Neither conclusion would be erroneous in law.

14. There are three answers to Mr Jaffey's concern.

15. First, there is the practical answer that those cases are very rare and I have never seen a case (either as a chairman of tribunals or as a Commissioner) in which that had been done.

16. Second, a threshold criterion must be satisfied in every ease. The criteria apply both to cases where the supersession process is triggered by a claimant's application and to cases where the Secretary of State acts without an application. See the opening words of regulation 6(2). The Secretary of State cannot embark on the supersession process at whim. The decision-maker would have to identify a head under regulation 6(2) under which the Secretary of State's initiative could be exercised.

17. Third, once a threshold criterion has been satisfied, I do not accept that the claimant is, in these circumstances, unprotected by law. There is the concept of enmity between adjudicating authorities on the same level, under which decisions are not altered merely on

preference. There is also the burden of proof to take into account. If the Secretary of State wants to change an award to the claimant's detriment, the burden is on the Secretary of State to justify that change. Of course, the burden of proof is only relevant if the evidence is evenly balanced. But that is the position in the type of case to which Mr Jaffey referred I suspect that those cases are ones in which the burden could not be satisfied by the Secretary of State.

18. It is convenient at this point to deal with the relevance of *R v Social Security Commissioner, ex parte Chamberlain.* The case concerned the judicial review of a Commissioner's refusal of leave to appeal in an incapacity benefit case. The case turned on the well-established rule that a new medical opinion is not a change of circumstances. However, that has to be balanced by the possibility that the new opinion contains or evidences a change of circumstances. See paragraph 29 of the Appendix to the decision of the Tribunal of Commissioners in *R(IS) 2/97.*

19. In dealing with incapacity benefit, that decision must now be read subject to regulation 6(2)(g). In other cases, it remains correct that a new medical opinion is not of itself a change of circumstances. However, it also remains correct that it may contain or be evidence of a change.

The Secretary of State's decision

20. The Secretary of State made a decision on 9th March 2001. It is at pages 42 to 44 of the papers. It recorded that it was a decision on supersession. Its terms were that the claimant was not entitled to a disability living allowance from 9th March 2001. It expressly covered both care and mobility. The reasons recorded that the claimant's mobility and care needs were not sufficient to justify an award.

The mobility component

21. Once a case is within the supersession process, all aspects are open to consideration by the Secretary of State, whether or not they are favourable to the claimant. So, the mobility component could be terminated on the application; there was no need for this to be implemented separately on the Secretary of State's own initiative. There was no relevant provision governing the effective date of the termination in regulation 7 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. So, it had to be fixed under section 10(5) of the Social Security Act 1998. As there bad been an application, the effective date could have been the date on which that application was made. The Secretary of State actually used the date of the decision. That was wrong, unless the decision-maker decided to act on the Secretary of State's own initiative rather than on the application.

22. The Secretary of State might have fixed an earlier date under regulation 7(2)(c), but did not. There are two possible explanations. The first is that there was no evidence to show that the conditions in head (ii) of that subparagraph were satisfied. The second is that there was no point in investigating the issue, because recovery of any overpayment would not be pursued.

23. There is no legislative protection for existing awards. Previously there was protection that was built into the former review and revision procedures. That protection was removed along with the former adjudication procedure and there is no equivalent under the new procedures. The protection does not survive under section 16(1)(c) of the Interpretation Act 1978. See my decision in *CDLA/1000/2001 paragraph 8.*

24. I deal with the relevance of Article I of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms in *CDLA/3908/2001*.

The care component

25. The refusal to award the care component had to be given effect under the application. There is no relevant provision in regulation 7. So, the effective date had to be fixed under section *10(5)*. That date should have been the date of the application, not the date of the decision. The decision-maker used the date of decision. That was wrong and the tribunal should have corrected that mistake.

Signed on original

Edward Jacobs
Commissioner
28th February 2002