

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 Truro appeal tribunal under reference U/03/208/2002/00353, held on 23rd May 2002, is erroneous in point of law.
 - 1.2. I set it aside and remit the case to a differently constituted appeal tribunal.
 - 1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision. In particular:

The appeal tribunal must determine the claimant's entitlement to a disability living allowance on her application for a supersession that was made on 4th September 2001.

The tribunal must follow the analysis of the supersession procedure laid down by the Court of Appeal in *Wood v Secretary of State for Work and Pensions*. 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 Secretary of State made a supersession at the same rate decision. That is not a valid form of decision under *Wood*. However, the tribunal has power to substitute a supersession decision in valid form, including a refusal to supersede.

The claimant's award of the care component has now been increased to the highest rate from and including 23rd August 2002 (page 136). So, if the tribunal varies the claimant's award that was current when she made her application, the period of its jurisdiction ends on 22nd August 2002.

The appeal tribunal must not take account of circumstances that were not obtaining at the time of the decision under appeal, which was made on 7th January 2002: see section 12(8)(b) of the Social Security Act 1998, as interpreted in *R(DLA) 2 and 3/01*.

I also draw the tribunal's attention to my direction in paragraph 7 and to my analysis of section 20(3) of the Social Security Act 1998 in paragraphs 8 to 20.

I draw the regional or district chairman's attention to the outstanding complaint (paragraph 8).

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 my leave. The Secretary of State supports the appeal.

The history of the case

3. The claimant was awarded a disability living allowance from and including 4th February 1999. It consisted of the mobility component at the lower rate and the care component at the lowest rate.
4. On 4th September 2001, she applied for a supersession with a view to a more favourable award. She completed a claim pack as evidence of her current disablement and a report was obtained from her GP.
5. On 7th January 2002, a decision-maker for the Secretary of State made a same rate supersession decision.
6. The claimant exercised her right of appeal to an appeal tribunal, but the tribunal confirmed the Secretary of State's decision.
7. It is agreed by the parties that the tribunal went wrong in law. The error is identified in my grant of leave (page 115) and in the Secretary of State's observations (page 116). The Secretary of State has referred to a decision of mine, which appears at pages 117 to 129. **I direct the tribunal at the rehearing to follow the approach taken in that decision.** No purpose would be served by further identifying or explaining the mistake.

Physical examination and test of the claimant

8. The claimant's representative has asked me to deal with an issue of more general importance. This is the tribunal's power, on hearing a disability living allowance appeal, to carry out a physical examination or ask the claimant to undergo a physical test. The issue arose from an allegation that the tribunal had asked the claimant to pick up her handbag from the floor and tip out its contents. It has developed into a broader discussion of the tribunal's powers. As I have set the tribunal's decision aside on other grounds, I am not concerned with what the tribunal did; that can be dealt with under the tribunal's complaint procedure. I am concerned rather with directing the tribunal on its powers at the rehearing.
9. The claimant's representative has put her argument in different ways, but they all relate to section 20(3) of the Social Security Act 1998. This provides:

'(3) At a hearing before an appeal tribunal, except in prescribed cases or circumstances, the tribunal-

- (a) may not carry out a physical examination of the person mentioned in subsection (2) above; and
- (b) may not require the person to undergo any physical test for the purpose of determining whether he satisfies the condition mentioned in section 73(1)(a) of the Contributions and Benefits Act.'

This effectively re-enacts section 55(2) of the Social Security Administration Act 1992, which was limited to the former disability appeal tribunals. Section 73(1)(a) deals with actual and virtual inability to walk.

Physical examination

10. A tribunal is not entitled to carry out a physical examination of the claimant. That is prohibited by section 20(3)(a). What is a physical examination for the purposes of this provision? The nature of a physical examination was considered by the Tribunal of Commissioners in Northern Ireland in *C1/01-02(IB)*. I respectfully agree with that decision. A physical examination is more than mere observation of an activity performed by a claimant at someone's request. A physical examination is a structured investigation applying medically recognised techniques in an attempt to elicit objective signs of injury, disease or dysfunction. These techniques may involve physical contact with the claimant, but this is not an essential feature of all examinations.

11. Asking questions at a hearing differs from an examination. The purpose of asking questions is not to identify objective physical signs. Rather, it is an attempt to elicit the claimants' symptoms or estimates of their own disablement.

12. Nor does it involve an examination to ask a claimant with a visual impairment 'What can you see when you look at the panel members?', an example used by the claimant's representative. There is no difference between this and any other question. It is merely asking the claimant to give oral evidence in a way that will allow the answer to be most informative to the tribunal.

13. Watching a claimant perform an everyday function in the tribunal room is different from asking questions, but it does not involve carrying out a physical examination, because it is not applying medically recognised techniques.

14. So, I reject the argument that observing the performance of a task amounts to or involves carrying out a physical examination.

Physical test

15. A physical test, in the context of section 20(3)(b) and in contrast to physical examination, means performing an activity which demonstrates the extent of the claimant's ability to perform that activity or to perform an activity that involves similar or related functions.

16. If a claimant does something in view of the tribunal and without prompting or request by the tribunal, it is entitled to take account of its observations. The claimant's representative accepts that. This applies to something done by the claimant without appreciating its significance, such as the manner of walking into the hearing room. It also applies to something which the claimant volunteers to do, such as showing a swollen joint or demonstrating a difficulty with buttons.

17. The issue raised by the claimant's representative concerns an activity that the tribunal asks the claimant to perform. Of course, the tribunal cannot force a claimant to do something. But there is the risk that it might draw adverse conclusions from a failure to comply with a request. If the tribunal is entitled to require the claimant to undergo a physical test, it is entitled both to ask the claimant to do something and to draw appropriate inferences from a refusal.

18. Section 20(3)(b) only prohibits a tribunal from requiring a claimant to undergo a physical test in order to test for actual or virtual inability to walk. On the face of it, it leaves the tribunal free to require a claimant to undergo a physical test for other aspects of entitlement to a disability living allowance. However, that is not a correct interpretation. The provision must not be interpreted in isolation. It can only be properly understood in its historical context of the development of the law. The provision began as section 55(2) of the 1992 Act and was enacted in relation to the creation of disability appeal tribunals. When those tribunals were abolished and replaced by the appeal tribunals under the 1998 Act, the provision was repeated. Historically, the only tests that were carried out before 1992 were those carried out by the medical appeal tribunals. Those tribunals had the power to carry out a physical examination of a claimant. In the case of appeals relating to mobility allowance, the examination was usually supplemented by a walking test. Viewed in that context, section 55(2)(b) of the 1992 Act and section 20(3)(b) of the 1998 Act prohibit only the test that was formerly used by medical appeal tribunals. They prohibit only that test, because no other test was ever used. They are negative in their effect. It is not appropriate to interpret them to confer a positive statutory authority to require a claimant to undergo a physical test for other purposes.

19. However, that does not mean that appeal tribunals may not invite claimants to demonstrate an activity. Tribunals are entitled to ask claimants to explain how they do something. There is limited scope for this enquiry to be supplemented by a demonstration in the context of the mobility component at the lower rate or of the care component. But, to the extent that this may be possible, there is no reason why tribunals should not also ask claimants to demonstrate. Such requests must, of course, be limited to the proper scope of a hearing. It is the function of a tribunal to conduct a judicial enquiry, not to undertake an occupational therapy assessment. If a claimant refuses to accede to the tribunal's request, it may be entitled to draw inferences from that refusal. But this will depend on the reasonableness of the request and the reasons the claimant gives for refusing to comply.

Section 12(8)(b)

20. Although a tribunal is entitled to rely on its observations, they must be relevant and related to the period over which the tribunal has jurisdiction under section 12(8)(b) of the Social Security Act 1998.

Signed on original

**Edward Jacobs
Commissioner
5th March 2003**