Bulletin 170
[5 Hear]

CDLA/4217/2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is unsuccessful. I set aside the decision of the Portsmouth appeal tribunal dated 10 April 2001 but I substitute my own decision to the same effect. The claimant is not entitled to disability living allowance from 28 May 2000.

REASONS

2. On 15 October 1997, the claimant was awarded the higher rate of the mobility component and the lowest rate of the care component from 18 November 1996. On 24 February 2000, she asked "to be reassessed". She was told to complete a form DLA434, which she duly did. Her doctor was then asked to complete a factual report, answering the following questions.

> "1. Please state when the patient was last seen, list all significant disabling, ongoing conditions present and advise when the current disabling conditions commenced.
> "2. What is their prognosis, is the family aware of it, and is any further treatment planned?
> "3. Based on your knowledge of their exercie tolerance or functional impairment, please indicate which of the following they can do SAFELY AND WITHOUT THE HELP OF ANOTHER PERSON. [There followed a list of 8 activities that I need not set out.]
> "4. Please indicate the category below which most accurately describes the patient's USUAL walking ability before the onset of severe discomfort.[There followed 6 brackets of distance.]
> "5. Please describe the abnormality of their gait, balance or speed of walking.
> "6. Do they require continual supervision and, if so, for what reason?
> a) By day
> b) By night
> c) Outdoors
> "7. Do you consider it reasonable for them to safely administer any therapy or medication themselves, and if not, plea give your reasons?
> "8. Is there a risk of any falls, and if so, for what reason; if falls have occurred, have there been any substantial injuries?"

Dr Garratt, one of four partners in the practice, provided the answers.

> "1. Upset by daughter's accusations re family members. Mobility constant problem. But has been assessed by various consultants including neurologists and no identifiable cause for her necessity to use crutches has been identified. No history of significant falls or injuries sustained because of gait problem.

"2. Unlikely to see any significant improvement as motivation is very low and insight is non-existent. She appears to be unstable but has not incurred falls or injury.
"3. Complains of problems but no objective evidence.
"4. No discomfort walking etc. just gait abnormal.
"5. Lurches and uses crutches but no neurological/balance problem to identify problem.
"6. Has step brother staying for protection because of threats from previous husband.
"7. Can self administer medication.
"8. Risk of falls because of gait problems. No significant injuries."

On 28 May 2000, in the light of that information, the Secretary of State superseded the decision awarding disability living allowance and decided that the claimant was not entitled to disability living allowance at all from that date.

3. The claimant appealed. The bundle of papers supplied by the Secretary of State did not include any documents predating the claimant's letter of 24 February 2000. The claimant's representative quite rightly pointed out that Secretary of State had not identified any ground for the supersession and submitted that the case could not be determined without the earlier documents. On 2 March 2001, the case came before a tribunal who directed the Secretary of State to provide the claim form and other documents leading to the award from 18 November 1996 and indicated a desire for a report from the claimant's doctor and various documents from his files. Dr Coonan, another partner in the practice, provided a computer printout from the claimant's notes and answered standard questions posed by the Appeals Service –

"1. When did the patient last see you ?

5.3.01

"2. Please give a brief diagnosis of the main health problems affecting the patient and when they began.

Has a bizarre gait and adopted bilateral crutches. Claims to have chronic low back pain and to fall over. Depressed about housing situation and animosity of neighbours.

"3. Please explain any treatment or medication provided or planned.

The veracity of her symptoms is debatable – this I have already told [the claimant] – but she is prescribed antispasmatics and analgesics at her insistence.

"4. Is there anything on the notes to indicate the prognosis ?

No. Lives independently – often seen by me around town making adequate progress with her crutches. I feel that this is learnt behaviour which is not remedial."

The Secretary of State provided the documents relating to the original award of disability living allowance but made no attempt to identify any ground of supersession. When the case came before the tribunal on 10 April 2001, the Secretary of State was not represented. The record of proceedings shows that the claimant was carefully questioned by the tribunal. There is nothing in the record to suggest that the claimant's representative made any submission as to the grounds of supersession. She may have done so but she may quite properly have taken the view that it was for the Secretary of State to justify the decision under appeal. The claimant's case, obviously, was that, if there were grounds for supersession, they justified an increased award on the basis of a change of circumstances.

4. The tribunal dismissed the claimant's appeal. The statement of reasons provided by the tribunal chairman records the history of the case and summarises the claimant's evidence and then continues –

> "She says she is in pain all the time when walking and disagrees with Dr Garratt's opinion (page 45) that she has no discomfort walking – 'just gait abnormal'. She says that despite her asthma she does not get breathless. She has never been admitted to hospital on account of her asthma.
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> "She was questioned about her daily routine and personal care needs and agreed that she manages all the usual activities of rising, washing, dressing and meal making, slowly but unaided. Her niece calls once or sometimes twice a week and other members of the family visit sporadically. Although by no means a sophisticated person, we neither heard nor observed anything to suggest that she was unsafe to be left unsupervised in her home or to go wherever she wanted unaccompanied within the limits of her physical tolerance.
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> "The tribunal considered the totality of the evidence, including both the information given directly by [the claimant] and the medical reports included in the papers. We concluded that her perception of her level of disability, while probably honestly held, considerably exceeded her actual limitations.
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> "We are satisfied that neither her care not her mobility needs as at 28 May 2000 meet the criteria for an award of any component of Disability Living Allowance and accordingly this appeal fails."

The claimant now appeals against the tribunal's decision with the leave of a tribunal chairman.

5. Before I consider the supersession issue, I will deal with the other grounds of appeal raised on the claimant's behalf. It is suggested on the claimant's behalf that the tribunal recorded no findings of fact in relation to the test of virtual inability to walk in respect of the higher rate of the mobility component. It is said, in particular, that no finding has been made as to the point at which the claimant experienced discomfort with walking. The Secretary of State responds that the tribunal explained that they concluded on the doctors' evidence that there was no discomfort while walking. The claimant's representative has made no further comment. In fact, the statement of reasons does not expressly record that the tribunal accepted the doctors'

evidence. However, it is perfectly obvious, in the circumstances of this particular case, that the tribunal's finding that the claimant's perception of her level of disability considerably exceeded her actual limitations was based on an acceptance of the evidence of Dr Garratt and Dr Coonan and I agree with the Secretary of State that the answer to this ground of appeal is that the tribunal were not satisfied that the claimant did suffer discomfort while walking.

6. It is also argued on the claimant's behalf that the tribunal did not give reasons for finding that the claimant did not reasonable require attention in connection with her bodily functions. The Secretary of State rightly resists this ground too. The claimant herself had accepted that she did not require attention in connection with the tasks about which they asked her, although she could carry them out only slowly, and in the absence of any glaringly obvious reason or specific submission that the slowness or some other factor meant that attention was reasonably required, it was unnecessary for the tribunal to say any more on that aspect of the case.

7. I turn, therefore, to the supersession issue. The claimant's representative submits that the tribunal erred in failing to identify any ground for supersession "and therefore had no reason to consider [the claimant's] walking ability and care needs". The Secretary of State agrees that the tribunal erred in failing to identify any grounds for supersession. His representative points to the conflict between the doctors' evidence and the claimant's and says that there remains the question whether there were grounds for supersession under regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 and, specifically, whether there was any fact about which the earlier decision-maker (an adjudication officer) was ignorant or as to which he made a mistake or whether there had been any relevant change of circumstances since the earlier decision was made. The representative then goes on to say:

> "I do not submit that grounds cannot be identified, but that is a matter for fact finding by a further decision making body. Also, this submission must not be taken to mean that I support the claimant on the substantive issue. I do not. I submit that this too is a matter that must be determined afresh, if grounds for supersession are identified."

The claimant's representative has made no further comment.

8. The Secretary of State's representative's submission suggests a misunderstanding of the powers of a Commissioner. Section 14(8) of the Social Security Act 1998 provides:

> "Where the Commissioner holds that the decision appealed against was erroneous in point of law, he shall set it aside and –
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> (a) he shall have power
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> (i) to give the decision which he considers the tribunal should have given, if he can do so without making fresh or further findings of fact; or

(ii) if he considers it expedient, to make such findings and to give such decision as he considers appropriate in the light of them; and

(b) in any other case he shall refer the case to a tribunal with directions for its determination."

Thus, it is only where it is necessary for further findings to be made and it is not expedient for the Commissioner to make them himself that a case should be referred to another tribunal. The principal reason why it may be inexpedient for a Commissioner to make findings is that it may be necessary for there to be an oral hearing in order for a factual dispute between the parties to be resolved. However, where the findings on questions of primary fact made by the tribunal from whom the appeal is brought are adequate and the reasoning supporting those findings is also adequate, a Commissioner can rely on those findings as the basis for giving a final decision, even if it is necessary to draw some further conclusions from those findings.

9. I do not accept the claimant's submission that the tribunal were not entitled to consider the claimant's mobility and care requirements before deciding whether or not there were grounds for supersession. They were entitled to consider those matters for the purpose of deciding whether there were grounds for supersession or, in the light of R(DLA) 6/02, for the purpose of deciding whether a different decision was justified on supersession. As the Secretary of State representative rightly submitted that the tribunal's findings on issues of primary fact were adequate and well-founded and as he submitted that grounds for supersession could be found, the logical conclusion should have been that the Commissioner could find grounds for supersession and should give a final decision in the case rather than referring the case to another tribunal. In truth, it is perfectly obvious what grounds for supersession there are. Nonetheless, it is a matter of considerable regret that the Secretary of State representatives have failed to assist either the tribunal or me by identifying those grounds, despite the issue having been specifically raised by the claimant's representative.

10. The tribunal too erred in failing to identify the grounds of supersession when the issue had been expressly raised before them. For that reasons, I set aside their decision. However, I can substitute my own decision. It is plain that the original award of disability living allowance was made in the light of a medical report provided by the examining medical practitioner, Dr Black, on 2 January 1997. It looks as though the decision of 15 October 1997 was a review decision, because the original decision bears a different (but partly illegible) date. If so, I do not have before me the papers relating to that review decision or the review decision itself. However, as it was to the same effect as the original decision, I presume it was based on the same report. That report included findings as to the claimant's abilities that were largely based on what she told the doctor, although he no doubt also examined her. Dr Garratt had said, on 30 November 1996, that the claimant's main disabling condition was "unsteadiness of gait – no cause identified" and that she also suffered from "back pain" and he listed her medication. No further details were obtained from him. The tribunal's findings show that the claimant was not as disabled on 28 May 2000 as she had been found to be by Dr Black. In particular, Dr Black had accepted the claimant's contention that she could walk only 15 yards before stopping due to pain in her spine and breathlessness and that she needed help with getting in and out

of bed, washing and dressing.. Therefore, either there had been a change of circumstances or the decision of 15 October 1997 was based on a mistake as to the extent of the claimant's disablement. It does not seem to me to make any practical difference which of those alternatives is applicable but, on balance, I find that the decision of 15 October 1997 was based on a mistake of fact. It seems unlikely that the claimant's condition has improved. Dr Garratt and Dr Coonan plainly have known the claimant for some time and have a detailed knowledge of her medical history and various referrals that simply was not available to Dr Black or, therefore, the adjudication officer. As the Secretary of State has not suggested that the original award by the adjudication officer should have been revised under regulation 3(5)(c) of the 1999 Regulations, it falls to be superseded under regulation 6(2)(b).

11. Because there is no provision to the contrary in regulation 7 of those Regulations and as section 27 of the 1998 Act is not relevant to this case, the date from which the supersession is to be effective is to be determined in accordance with section 10(5) of the 1998 Act, which provides that, generally, "a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made". The Secretary of State rightly regarded the claimant's letter of 24 February 2000 as an application for supersession but I consider that he was also right to decide that the claimant ceased to be entitled to disability living allowance only on 28 May 2000, which was the date on which the supersession decision was made. It seems to me that, in the circumstances of this case, the Secretary of State ought to be taken to have superseded the decision of 15 October 1997 "at the same rate" as regards the claimant's application and then to have superseded it on his own initiative so as to terminate the award (and the claimant ought then to be taken to have appealed against both decisions).

12. Accordingly, I give the decision set out in paragraph 1 above.

(signed) **M. ROWLAND**
Commissioner
21 June 2002