DECISION OF THE SOCIAL SECURITY COMMISSIONER

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

1.1. The decision of the Newcastle appeal tribunal under reference U/44/228/2000/03734, held on 3rd October 2001, is erroneous in point of law.

1.2. I set it aside and give the decision that the appeal tribunal should have given without making fresh or further findings of fact.

1.3. My outcome decision is the same as the tribunal's. It is that the claimant is not entitled to a disability living allowance from and including 3rd May 2000. But, unlike the tribunal, I base my decision not on a change of circumstances, but on the ground that the decision awarding a disability living allowance to the claimant was made in error of fact.

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, but invites me to substitute a decision for that of the tribunal without directing a rehearing. The suggested decision is no more favourable to the claimant than that of the tribunal.

The history of the case

3. It is convenient to begin with the claimant's 'renewal claim' from the effective date of 3rd October 1995. At the time of that claim, the claimant had an award of the mobility component at the higher rate and the care component at the lowest rate. At first, the 'renewal claim' was refused. However, on review an award was made of the mobility component at the higher rate for life from the effective date of 3rd October 1995.

4. On what evidence was that award based?

4.1. In the 'renewal' claim pack, the claimant identified the cause of her disablement as an old fracture of her left ankle. In the mobility section of the pack, she wrote that she was limited by severe pain all the time. She was not able to walk any distance without severe discomfort.

4.2. A factual report from the claimant's GP gave diagnoses of asthma, anxiety and the left ankle fracture. On mobility, the doctor wrote that the claimant could walk, with a limp, for 400 yards on level ground in about 10 minutes. The question did not refer to severe discomfort.

4.3. Finally, there was a Consultant's report dated 27th November 1995. On mobility, he confirmed the fracture but was unable from his notes to answer the specific questions about distance, gait and speed of walking.

4.4. The adjudication officer's decision also refers to the claimant's application for a review. I have not seen a copy of that.

5. In accordance with standard practice, the adjudication officer did not explain why an award was made. The reasons for the decision are limited to explaining why no rate of the care component was included in the award.

6. The story moves on to 18th January 2000, when the claimant was visited by an examining medical practitioner. I assume that that was at the instigation of the Secretary of State in order to check on the claimant's continuing entitlement. On mobility, the examining medical practitioner's opinion was that the claimant would be able to walk 100 metres before the onset of severe discomfort at a slow speed, in about 4 to 5 minutes, with no halts and stable balance, but with a slight limp.

7. On 3rd May 2000, a decision-maker acting the name of the Secretary of State on supersession terminated the award of disability living allowance from and including that date.

8. The claimant exercised her right of appeal to an appeal tribunal. The decision reached at the first hearing was set aside by a district chairman under section 13(2) of the Social Security Act 1998. At the new hearing, a different tribunal confirmed the decision on supersession terminating the award. The tribunal rejected the claimant's own evidence. It relied on the evidence of the examining medical practitioner. However, it found that doctor's estimate of the claimant's speed of walking too conservative in view of the clinical findings on examination.

The handling of the evidence

9. The original grounds of appeal argued that the tribunal had ignored the evidence given by and in support of the claimant. I reject that argument. The tribunal did not ignore the evidence. It considered it, but rejected it for the reasons that it gave.

10. I suspect that these grounds were poorly expressed. The real complaint being made was probably not that the tribunal ignored the evidence, but that it did not give it sufficient weight. I also reject that formulation of the argument. The assessment of the probative worth of the evidence is a matter for the tribunal. It will not go wrong in law, unless its assessment is irrational or its preference is not adequately explained. Neither of those conditions applies. The tribunal gave a clear explanation that shows that its rejection of evidence was rational.

The proper approach to a defective supersession

11. The supplementary grounds of appeal contain a carefully constructed case that the nature of an appeal to an appeal tribunal has been fundamentally altered by the Social Security Act 1998 and the Human Rights Act 1998. As a result, the tribunal is unable to remedy defects in a decision given by the Secretary of State on a supersession. In this case, the supersession decision was defective. So, the tribunal had no alternative but to allow the appeal and restore the award. That leaves unspoken the possibility that the Secretary of State will undertake the supersession process again.

The Social Security Act 1998

12. Before the Social Security Act 1998, an appeal to the social security and related appeal tribunals was by way of rehearing. The tribunal had to take an inquisitorial approach. As part of that approach, it had to bring the decision up-to-date. That involved considering any

changes of circumstances down to the date of hearing or, if there had been a decision on a later claim, down to the date of that decision. Social security and disability appeal tribunals had power to consider and determine questions first arising in the course of the appeal. Social security appeal tribunals also had power to carry out a review, but only on a reference by an adjudication officer.

13. The claimant's representative argues that all of those features have been affected by the Social Security Act 1998. I accept that. The representative then argues that the cumulative effect of these changes is that the appeal is no longer a rehearing. I do not accept that.

14. The representative first refers to section 12(8) of the 1998 Act:

> '(8) In deciding an appeal under this section, an appeal tribunal-
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> (a) need not consider any issue that is not raised by the appeal; and
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> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

15. The representative argues that the effect of section 12(8)(a) is to remove the tribunal's inquisitorial duty. I disagree. The effect of the provision is to reduce the extent of that duty. Its effect in practice is not as extensive as it may appear for three reasons. First, under the previous law, the tribunal did not have to investigate every aspect of entitlement to the benefit in question. In practice, it limited itself to the issues raised by the parties and to issues that appeared to merit investigation from the material before the tribunal. The inquisitorial duty did not impose an obligation to consider every conceivable issue in the hope that it might prove to the claimant's advantage. That was so even in its most onerous form in the case of an unrepresented claimant with no knowledge or experience of the law. Second, the provision does not prevent a tribunal from investigating issues that were not raised by the appeal. It merely removes the duty to do that. So, it does not affect the extent of the tribunal's jurisdiction. Third, although it allows a tribunal to limit the range of issues it considers, it does not affect the inquisitorial approach to the issues that are considered.

16. The representative argues that the effect of section 12(8)(b) is to remove the duty to consider changes of circumstances down to the date of hearing or earlier decision. I accept that. However, it does not affect the duty of the tribunal in respect of the period that remains within its jurisdiction. That is affected only by section 12(8)(a).

17. Next, the representative points out that there is no equivalent in the 1998 Act to section 36 of the Social Security Administration Act 1992, which gave social security and disability appeal tribunals the power to consider and determine questions first arising in the course of the appeal. That is correct. However, even before that power was given, the tribunals had power to deal with any issue within the purview of the claim. See *CH/1229/2002, paragraph 12*. So, the practical significance of the lack of this power is not great.

18. Finally, the representative argues that the tribunal has no power to carry out a revision or a supersession. Those powers are given only to the Secretary of State. That is correct. However, there is no statutory prohibition on a tribunal remedying defects in a revision or supersession. The position is exactly as it was under review. If a tribunal had no power to

review or had no adjudication officer's reference before it, it could nonetheless remedy defects in the review decisions.

19. The representative has also relied on my decision in *R(DLA) 3/01*. Like the Secretary of State, I do not understand how anything I wrote in that decision supports the argument put by the representative.

The Human Rights Act 1998

20. The representative also relies on the Human Rights Act 1998. It is used in this way. Decisions about entitlement to benefit are civil rights. That gives the claimant a Convention right to a fair hearing under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. There must be an equality of arms between the parties. The tribunal must be impartial between the parties, both subjectively and objectively. I accept all of that.

21. The representative then refers to the procedural conditions for a valid appeal under regulation 33 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This leads the representative to the question: should not the Secretary of State be expected to meet equally stringent technical requirements in order for there to be a valid supersession?

22. I am not sure that the equality of arms aspect of the right to a fair hearing can be used in this way. However, even accepting the potential validity of the basis of the argument as put, I nonetheless reject it.

23. The representative describes regulation 33 as listing 'detailed formalistic requirements'. In fact, the regulation merely sets out some basic minimum requirements that have to be met whenever anyone wants to appeal. It is necessary to identify the decision under appeal and to say why it may be wrong. The appellant has to be told where to send the appeal. Finally, a signature is required as proof that the appeal is made with the appellant's approval. Those are not stringent requirements. They are essential. They are no more detailed than necessary. Their contents are appropriate given the nature of the subject matter and the appellant's likely degree of understanding of the legal issues. They are not demanding and are regularly met by claimants who have no experience of legal proceedings.

24. The representative also argues that correcting defects in a supersession carried out by the Secretary of State is not compatible with the impartiality of the appeal tribunal. I reject that argument. The issue for the tribunal is whether the law has been correctly applied. Its duty is to apply the law correctly to the extent that its jurisdiction and powers allow. Fulfilling that duty is not a violation of the Convention right to objective impartiality.

The nature of an appeal

25. The rehearing approach to an appeal to an appeal tribunal, coupled with the inquisitorial role, remains appropriate. It is not laid down by legislation. It never has been. It was derived from the nature of the jurisdiction exercised by tribunals dealing with social security cases. There is a bridge that has to be built in all litigation and adjudication. In order to determine an appeal, the law has to be applied to the facts. The tribunal knows the law. The claimant knows the facts. But the facts that are relevant are determined by the law. Somehow the claimant's lack of knowledge of the law has to be overcome so that the relevant facts can be found. In

litigation handled by lawyers, that task is undertaken outside the legal process as part of the lawyer's advice service to the client. In tribunals, claimants are often unrepresented. Some other way is needed of overcoming the claimant's lack of understanding of relevance. The solution is for the tribunal to investigate and to help the claimant in identifying relevant information.

26. The rehearing approach also reflects and counters the imbalance between the parties. The Secretary of State has a considerable advantage over the claimant in knowledge of the law and experience of its application. The rehearing, coupled with the inquisitorial role, is no more than an aspect of a domestic equality of arms by which the tribunal tries to maintain a balance of advantage between the parties.

27. The representative is correct that the legislation does not give an appeal tribunal the power to make a revision or supersession. If there has been no supersession, the tribunal cannot undertake one. Assume, for example, that the Secretary of State has dealt with a change of circumstances under the revision procedure. There is no power to do that. A change of circumstances cannot only be taken into account under a supersession: regulation 3(9)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. On appeal, the tribunal can only decide that the revision was made without legislative authority and was of no force or effect. That leaves the Secretary of State to undertake a supersession. The claimant will have a right of appeal against the outcome decision. The same applies in reverse if the Secretary of State has used the supersession procedure instead of the revision: see regulation 6(3) of the 1999 Regulations.

28. However, that does not mean that any defect, however minor and however insignificant, renders a decision of no force or effect, with the effect that the whole process must be undertaken afresh by the Secretary of State. As a matter of interpretation, so long as there has been a supersession or revision, the tribunal has jurisdiction to correct the defect. The issue for the tribunal is whether the defect is a correctable one. This is the terminology I suggested in *CCS/1992/1997, paragraphs 11 to 13*. An indication of the narrow limits within which a decision is not correctable by an appeal tribunal may be found in *R(CS) 7/99, paragraph 25*. Without claiming to provide a comprehensive statement, the Commissioner gave three instances of defects which would, in my suggested terminology, be uncorrectable: (a) where the decision was given by an officer who had no authority to make it; (b) where the decision had already been made by another officer; (c) there was an absence of some application, leave, notice or other step necessary to give the officer authority. (This list is similar to the cases in which a decision of a tribunal will be held to have been made without jurisdiction: see the decision of the Commissioner in *CI/79/1990, paragraph 30*.) That corresponds with the modern administrative law approach which emphasises substantial compliance as the test for whether procedural requirements have been satisfied. See *Haringey London Borough Council v Awaritefe* (1999) 32 Housing Law Reports 517 and *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All England Law Reports 231 at pages 238 to 239.

Conclusion on supersession

29. I agree with the Secretary of State that there was in fact no defect in the form of the Secretary of State's decision on supersession. The document belatedly produced by the Secretary of State shows that it was based on a change of circumstances. I also agree with the Secretary of State that that was the wrong ground, but the tribunal had power to correct that. I deal with that at the end of this decision.

Non-compliance with directions

30. At an earlier adjourned hearing, the appeal tribunal had directed the Secretary of State to produce information. The representative complains that the tribunal did not react properly to the delay in providing that information. He argues that the tribunal should have considered whether or not to admit the evidence when it was produced. He points out that delay in failing to comply with the direction by a claimant could result in an appeal being struck out. A decision on the admissibility of evidence was needed in order to provide equality of arms.

31. The striking out of an appeal is a drastic step, even when taken together with the power to reinstate. It is not a remedy of first resort. It is not appropriate to argue from the existence of that power to an equally draconian power in the event of the Secretary of State failing to comply timeously with a direction.

32. In practice, the deterrence against non-compliance is the risk that the tribunal will proceed on the information available, which may be disadvantageous to the party in breach. However, even if that is done, there remain the powers of the Secretary of State to supersede the tribunal's decision on grounds of error of fact. So, even taking that step may be only to the temporary disadvantage of the party in breach. This is a proper consideration to take into account when deciding on the appropriate reaction to a failure to comply.

33. It is correct that the ultimate remedy against the claimant has a greater impact than anything that can be used against the Secretary of State. However, that does not mean that there is an inequality. First, the Secretary of State in my experience does not engage in tactical manoeuvring. The Secretary of State produces information if directed to do so, provided that it can be found. Any delay arises from difficulties in locating the information or from inefficiency. In contrast, some claimants and some representatives fail to comply with directions as a tactical device to delay the progress of the case. Second, the striking out remedy is unique to the appellant claimant for a good reason. It was the claimant who brought the appeal. Failure to comply with a direction is an indication of failing to prosecute a case that may justify it being struck out from the appeal system.

34. It is important not to lose sight of the purpose behind directions such as those given by the tribunal in this case. They were not used as a first step towards the striking out of an appeal. Directions may sometimes be used with that purpose. These were not. They were used constructively to set out what the tribunal needed and who was to provide it.

35. If a party does not comply with a direction, any response by the tribunal must be taken in the context of the Convention right of both parties to a fair hearing. The response must be a proportionate response to the failure to comply. In gauging what is proportionate, it is proper to consider, among other matters: (a) the impact of the breach on the other party; (b) the purpose for which the direction was given; and (c) whether the response being considered would prolong proceedings in view of the Secretary of State's powers to correct errors of fact.

Was there a change of circumstances?

36. The claimant's representative has argued that the evidence did not show a change of circumstances. The Secretary of State argues that the change identified by the tribunal in fact took place before the decision that was superseded. I accept the Secretary of State's argument.

37. In my view, the tribunal analysed the evidence rationally and came to a conclusion that it was entitled to reach. However, the tribunal failed to realise that the change that it identified had occurred before the decision making the award. The tribunal's analysis supported the Secretary of State's outcome decision, but on a different ground. The proper ground for supersession was error of fact, not change of circumstances. I have substituted a decision based on that ground.

Signed on original

Edward Jacobs
Commissioner
23rd July 2002