Bulletin 178

THE SOCIAL SECURITY COMMISSIONERS

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SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ACT 1998

APPEAL FROM DECISIONS OF APPEAL TRIBUNALS ON QUESTIONS OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

COMMISSIONERS: HIS HONOUR JUDGE GARY HICKINBOTTOM
JOHN MESHER

CHARLES TURNBULL

Tribunal Register Nos: U/06/068/2002/00012
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Introduction

1. These appeals raise a number of common and important issues concerning the jurisdiction of appeal tribunals generally, and, in particular, a tribunal's powers on an appeal following a decision under Section 9 (revision) or Section 10 (supersession) of the Social Security Act 1998. These issues arise essentially from the creation by that Act of two different - albeit, at least in some respects, closely related - means of changing a previous benefit decision, in place of the single mechanism of review and revision which had been in existence for many years previously.

2. Although a benefit decision has to be taken on the basis of the claimant's circumstances at a particular moment in time, by their nature those circumstances (and hence potentially that claimant's entitlement to social security benefits) are constantly changing. Furthermore, the number of decisions which are required to be made by the Secretary of State, and the speed with which they are required to be made, mean that the decision maker will sometimes have less than full knowledge of the relevant circumstances when making a decision. As a consequence, decisions changing a claimant's entitlement to benefit are inevitably common, and such decisions form the basis of a considerable proportion of appeals to appeal tribunals. The issues raised in these appeals are therefore relevant to many claims, and many claimants. The importance and difficulty of these issues has been further reflected in the number (as well as the sophistication, complexity and diversity of reasoning) of decisions of individual Commissioners touching on them given in the four years or so since the new provisions came into force.

3. The four appeals were heard together, with a fifth appeal (CIS/4/2003) which, because it gave rise to a specific self-contained issue (as to whether a claimant has a right of appeal in the event of a refusal by the Secretary of State to revise a decision for "official error"), is the subject of a separate decision, deferred pending further submissions. In three of the four appeals, the claimant appellant was represented at the hearing by Richard Drabble QC, instructed by the Child Poverty Action Group ("CPAG"). In the other appeal (CDLA/4751/2002), the appellant (to whom we will refer as "Mr W") was not represented at the hearing, but we had the benefit of full written submissions on his behalf by his solicitors, Messrs Stephen D Brine of Liverpool. The Secretary of State was represented in all of the appeals by Miss Nathalie Lieven of Counsel, instructed by the Solicitor to the Department for Work and Pensions ("the DWP"). At the outset, we should like to express our gratitude for the considerable assistance which all of the legal representatives gave us, both in their extensive written submissions and during the hearing which extended over three days.

4. During the hearing, three primary issues were identified, which we have formulated as follows:

Issue 1: The general powers of an appeal tribunal on an appeal from a revision or supersession decision

On an appeal following a decision of the Secretary of State which changes (to use a neutral word) or refuses to change the effect of a previous decision, what is the extent of an appeal tribunal's power to substitute the decision which the appeal tribunal

considers the Secretary of State ought to have made, as opposed simply to declaring the Secretary of State's decision invalid (and thereby leaving the original decision in effect unless and until altered by another decision of the Secretary of State)?

Issue 2: The powers of an appeal tribunal to make a decision less favourable to a claimant than a supersession decision under appeal

When a claimant appeals against a decision refusing to accede to his application for supersession (or acceding to the application but not making a decision as favourable as the claimant wished), does an appeal tribunal have power to supersede the original decision on a ground which leads to a less favourable award than the superseded award?

Issue 3: The nature of the power to revise in Regulation 13C(3)

Is Regulation 13C(3) of the Social Security (Claims and Payments) Regulations 1987 (SI 1987 No 1968, as amended) a freestanding power to revise an award of disability living allowance made on a renewal claim?

5. In this decision, we first consider the statutory provisions concerning decisions of the Secretary of State generally, revision and supersession decisions specifically, and appeals to an appeal tribunal. We then go on to deal with the three issues identified above, and the application of our conclusions to the four individual cases. Finally, we summarise our conclusions on the main points of principle raised, including some which, for convenience, are dealt with only in our consideration of the individual cases.

6. For the sake of brevity, references in this decision to "the 1998 Act" or "the Act" are to the Social Security Act 1998, and references to "the 1999 Regulations" or "the Regulations" are to the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999 No 991). References to section numbers are (unless otherwise stated) references to sections of the Act, and references to regulation numbers are (unless otherwise stated) references to the Regulations.

Decisions by the Secretary of State

7. Section 8(1) of the 1998 Act provides that:

> "it shall be for the Secretary of State
> (a) to decide any claim for a relevant benefit;
> (b) ...;
> (c) ... to make any decision that falls to be made under or by virtue of a relevant enactment."

8. Although Regulation 28 of the 1999 Regulations requires (without identifying any consequence of non-compliance) that a person with a right of appeal against any decision shall be given written notice of the decision, neither the Act nor any regulation specifies any particular form in which decisions must be made - and a

decision (as opposed to notification of a decision) is not even required to be made in writing.

Revision and Supersession

9. The 1998 Act provides two mechanisms by which decisions may be altered by another decision of the Secretary of State: revision and supersession. Revision is dealt with in Section 9 and Regulation 3. Supersession is dealt with in Section 10 and Regulations 6 and 7.

10. The following features are noteworthy.

(1) The most important practical difference between the two mechanisms is that a revision generally takes effect from the date on which the original decision (i.e. the decision being revised) took effect (Section 9(3)), whereas a supersession generally takes effect only from some later date (Section 10(5) and Regulation 7), most usually the date on which the superseding decision is made.

(2) The circumstances in which a decision may be revised are therefore those where the legislature considered it appropriate that the decision be altered with full retrospective effect. These cases can be divided into two main groups, according to whether or not a specified ground for revision need be shown.

In the first category, no specific ground need be shown - the decision can be revised simply on the basis that it is considered to have been wrong as at the date when it was made. In practical terms, by far the most important case in this category is where, within a short period of notification of the decision, steps are taken (either by the Secretary of State on his own initiative or on application by the claimant) to obtain a revision (Regulation 3(1)). However, from May 2002 (after the dates relevant in most of the cases before us), there can be a revision at any time if a timeous appeal against a decision is pending (Regulation 3(4A)).

In the second group, a specific ground for revision must be shown. The primary grounds are those of "official error", and certain cases of ignorance of or mistake as to a material fact (referred to throughout this decision simply as "mistake of fact") (Regulation 3(5)). The only such ground that a claimant would wish to invoke in practice is that of official error (Regulation 3(5)(a)), because the other grounds only apply in circumstances where the revision would render the outcome less favourable to him than under the original decision.

(3) The grounds upon which a decision can be superseded are found in Regulation 6(2)-(4). As at the dates relevant to the cases we have considered, they included a relevant change of circumstances since the decision was made (Regulation 6(2)(a), which, since April 2003, has been amended to refer to a change since the date on which the decision had effect), error of law (except for decisions of appeal tribunals and Commissioners) and mistake of fact (subject to certain exceptions) (Regulation 6(2)(b)(i)).

(4) It was common ground between Mr Drabble and Miss Lieven - and in our judgment rightly so - that the decision of the Court of Appeal in *Wood v The Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (reported as R(DLA) 1/03) is authority for the propositions that:

> (a) there can be no supersession under Section 10 unless one of the grounds for supersession specified in Regulation 6 is actually found to exist, and
>
> (b) the ground which is found to exist must form the basis of the supersession in the sense that the original decision can only be altered in a way which follows from that ground.

We refer, in particular, to the judgment of Rix LJ (with whom Dyson LJ agreed) (at Paragraph 49):

> "'[S]uperseded' in Regulation 6 can only refer to an earlier decision in respect of which a subsequent Section 10 decision has been based on one of the Regulation 6(2) criteria. Unless one of those criteria has been established, and, I would suggest, forms the basis of the new superseding decision, a section 10 decision superseding an earlier decision can not even be made."

Therefore, for example, it would not be permissible to supersede a decision awarding disability living allowance on the ground that the claimant's condition had worsened, but then to make an award which was less favourable to the claimant than the original one. The establishment of a ground for supersession does not therefore necessarily put the claimant's entitlement at large in the sense of empowering the superseding decision maker to make whatever decision appears to him to be appropriate in the light of the claimant's current condition.

(5) It was also accepted by both Mr. Drabble and Miss Lieven - again in our judgment correctly - that it follows from the reasoning of Rix and Dyson LJJ in *Wood* in relation to supersession, that:

> (a) in those cases which require a ground for revision, the original decision cannot be revised unless a ground is actually found to be established and
>
> (b) the established ground must form the basis of the revised decision (in the same sense that it must do so in relation to supersession).

(6) When one examines more closely the grounds for revision and supersession, it is apparent that the question whether a particular case justifies revision, rather than supersession, may give rise to difficult issues of both fact and law, for three main reasons.

First, as noted in (2) and (3) above, mistake of fact is in some circumstances a ground for revision, and in others a ground for supersession. In this respect, as between a claimant and the Secretary of State, the position is skewed in favour of the latter in that a mistake of fact (not amounting to an official error) which resulted in the earlier decision being **less** favourable to the claimant than it would have been but for the mistake can never be

a ground for revision, but only for supersession. On the other hand, a mistake of fact which resulted in the earlier decision being **more** favourable to the claimant than it would have been but for the mistake is to be revised, rather than superseded, in certain circumstances (i.e. if either (a) it is not a disability decision or an incapacity benefit decision or (b) it is such a decision and (i) the mistake was as to a disability or incapacity determination and (ii) at the time the decision was made the claimant knew or could reasonably have been expected to know of the fact in question (Regulation 3(5)(b) and (c))).

Second, there is the existence of "official error" as a ground for revision. It is clear from the exclusion of certain errors of law in the definition of "official error" in Regulation 1(2) of the 1999 Regulations that the definition is capable of including some errors of law. Many cases in which the decision maker makes an error of fact will also be included, either because of the nature of the error or of other official actions or omissions which led to the error. Yet, as has been seen, error of law not amounting to an "official error" is a ground for supersession, and mistake of fact where there was no "official error" may (depending on the circumstances) be a ground for supersession and not revision. Therefore, the question whether revision or supersession is appropriate may turn on the potentially difficult question of whether a particular error of fact or law involved an "official error".

Third, mistake of fact which rendered the original decision more favourable than it should have been is (save in certain disability or incapacity cases) always a ground for revision, but change of circumstances is a ground for supersession only. If, therefore, facts have come to light which show that the claimant is not entitled to the rate of benefit which was awarded, the question whether revision or supersession is the appropriate mechanism for change will often depend on whether those facts existed at the date of the original decision, or whether they only arose (by way of a change of circumstances) after the date of the original decision. An incorrect finding as to the date when the new facts arose may result in the wrong mechanism being used.

The above points illustrate the point made by Rix LJ in *Wood* (at Paragraph 42): "There is a close affinity between superseded and revised decisions, since... both revision and supersession may be grounded on an error of law or mistake of fact."

(7) A decision of an appeal tribunal or a Commissioner cannot be revised. Such a decision can, however, be superseded on the ground of a change in circumstances or mistake of fact (Regulation 6(2)(a) and (c)).

(8) Revision and supersession can both be undertaken either "on an application made for the purpose" or by the Secretary of State "on his own initiative" (Sections 9(1) and 10(1)). The date from which a supersession takes effect may depend on which of those applies, because the primary rule is that a supersession takes effect "from the date on which it is made, or, where applicable, the date on which the application was made" (Section 10(5)).

(9) It is expressly provided that the Secretary of State "may" treat an application for revision as an application for supersession, and vice versa (Regulations 3(10) and 6(5)).

(10) It is expressly provided that, in general, a decision which can be revised cannot be superseded (Regulation 6(3)). Therefore, if the application is made within the one month period specified in Regulation 3(1) or the extension for special circumstances under Regulation 4, or a ground for revision applies, generally the appropriate decision is revision, not supersession. However, where the ground for changing the previous decision is a subsequent change of circumstances, only supersession, and not revision, can be appropriate, even where the claimant's application was made within the period provided by Regulations 3 and 4 (Regulation 3(9)(a)).

(11) It is expressly provided that, in making a decision under Section 9 and Section 10, "the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative" (Sections 9(2) and 10(2)).

The Jurisdiction and Powers of Appeal Tribunals

General

11. Section 12 of the 1998 Act provides:

> "(1) This section applies to any decision of the Secretary of State under Section 8 or 10 above (whether as originally made or as revised under Section 9 above) which
>
> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
> (b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act.
>
> (2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to an appeal tribunal....
>
> .....
>
> (8) In deciding an appeal under this section, an appeal tribunal
>
> (a) need not consider any issue that is not raised by the appeal; and
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."
>
> (9) The reference in subsection (1) above to a decision under Section 10 above is a reference to a decision superseding any such decision as is mentioned in paragraph (a) or (b) of subsection (1) of that section."

12. It is notable that Section 12(2) provides simply that in the case of decisions specified in Section 12(1) "the claimant... shall have a right to appeal to an appeal tribunal" and that the legislation does not expressly specify the powers - any powers - of the appeal tribunal in relation to the decision under appeal. There are provisions

limiting an appeal tribunal's powers (notably Section 12(8)(a) and (b)), but otherwise the legislation does not even expressly specify that an appeal tribunal may allow or disallow an appeal, or confirm or vary the decision under appeal. Therefore **all** the powers of an appeal tribunal - including even the most basic - must be implied. They must be derived from the fact that the statute gives a right of appeal, and from the nature of such an appeal in the context of the statutory scheme.

13. The following features of an appeal to an appeal tribunal are in our judgment clear.

14. First, the appeal is general, i.e. it is an appeal on fact and law. This was common ground between the parties to the appeals before us, and has been universally accepted since the introduction of the statutory scheme. Indeed, the appeal tribunal is designed to be a superior fact finding body, and is able to investigate the facts in greater depth than usually occurs before the decision maker. The composition of appeal tribunals (with one or two members in addition to the legally qualified chairman, where considered appropriate by the legislature) is designed to enable them most effectively to make the necessary findings of fact. Unlike the decision maker, appeal tribunals hear oral evidence where necessary. In the light of the fact that the initial decision is made by the Secretary of State (i.e. a person patently lacking in independence) and of the limited scope for the claimant to make representations to the Secretary of State, nothing less than such a superior fact finding body would be sufficient to comply with Article 6 of the European Convention on Human Rights ("the Convention"). We return to this point below.

15. Second, and as a consequence of the first feature to which we have referred, the appeal tribunal's jurisdiction is not limited to affirming or alternatively setting aside the decision under appeal. If, having made its own findings of fact, it considers the decision to be wrong, it has power to make the decision on the claim which it considers the Secretary of State ought to have made on the basis of the facts which it has found. In cases where the appeal tribunal makes a different decision from that made by the Secretary of State, the appeal tribunal's decision simply replaces that of the Secretary of State - and it is at least arguable that this is also the case where the appeal tribunal confirms the Secretary of State's decision and dismisses the appeal (see, for example, the decision of the Tribunal of Commissioners in R(I) 9/63).

16. The fact that even the most basic powers of an appeal tribunal have to be inferred from the nature of the appeal has two important consequences.

17. First, contrary to Miss Lieven's submission for the Secretary of State, in determining the powers of an appeal tribunal, it is in our judgment proper to consider the nature and operation of the system of adjudication and appeal in force before the 1998 legislation, as relevant to what can properly be regarded as inherent in or implied by the provision of a right of appeal in the 1998 Act.

18. Second, we find generally unpersuasive the emphasis placed by both Mr Drabble and Miss Lieven (albeit to different ends) on the fact that the 1998 legislation expressly gives particular powers only to the Secretary of State and not to appeal tribunals. We acknowledge that this has also been regarded as important by some

Commissioners in a number of individual decisions. However, as indicated above, no powers of decision whatsoever are expressly given to appeal tribunals. It is accepted by both Counsel - and, indeed, it is universally accepted - that appeal tribunals have some powers of decision, such as to substitute the proper decision on a claim in allowing an appeal against an initial decision on the claim. Since these powers must be found by a process of implication, in our view the absence of express statutory powers for an appeal tribunal in any particular instance can have little, if any, significance.

Appeal by way of rehearing

19. There is considerable authority that, prior to the 1998 legislation, an appeal was by way of complete rehearing, and as to what such a rehearing entailed in the context of benefits. Although immediately prior to the 1998 Act there was some specific provision relating to the powers of tribunals to determine questions first arising before them (namely Section 36 of the Social Security Administration Act 1992 ("the 1992 Act"), which is dealt with below), much of the authority pre-dates the introduction of Section 36 or its equivalent into the relevant legislation.

20. In R(F) 1/72, at a time when an appeal lay to the Commissioner on fact and law, the Commissioner said:

> "It is well-settled that a hearing before the Commissioner is a rehearing of the whole case. It is open to the Commissioner to deal with any points, and any questions of law, that may be put before him, always, of course, provided that the claimant is given a proper opportunity of meeting any fresh point that may be raised. Logically, I think the same must apply to a hearing before a local tribunal, but, again, always provided that the claimant is given a proper opportunity of meeting any fresh point that may be raised."

In that case, the insurance officer had submitted to the local tribunal that the decision under appeal should be altered to the claimant's disadvantage because of the effect of a provision which had mistakenly been overlooked when the decision was made.

21. Similarly, in R(P) 1/55, again at a time when appeals lay to the Commissioner on questions of fact as well as law, an insurance officer had reviewed an award of retirement pension and decided that the amount of the pension should be reduced to take account of the claimant's earnings, the overpayment being recoverable. A local tribunal decided that the overpayment was not recoverable. The insurance officer appealed to the Commissioner on the ground that, on the evidence, there was an argument that the claimant should not have been treated as retired at all, so that she was not entitled to any retirement pension. The Commissioner raised the issue as to whether he should regard the appeal as raising only the question as to whether the local tribunal had been right in what it decided, or whether he should make "[the] decision the local insurance officer should have given when he reviewed his prior decision". He continued:

> "It seems to me that the latter is the right view. The Commissioner cannot properly, I think, give a decision that an earlier decision ought to be reviewed in

> a particular way merely because the local insurance officer and the local tribunal have applied their minds only to particular questions, if he is satisfied that to review it either in the way decided by the local insurance officer or in the way decided by the local tribunal would be to review it in an incorrect way. The Commissioner must, I think, when the matter comes before him, give a decision which he believes to be the correct decision. If to do so involves considering questions not raised in the earlier stages of the appeal, the claimant must be afforded an opportunity of dealing with the fresh aspects which call for consideration, as has been done in this case, but after that has been done, the Commissioner must decide the case as he thinks right."

22. In the context of supplementary benefit, before the introduction of the equivalent of Section 36 of the 1992 Act, the principle adopted was that an appeal tribunal could deal with "matters within the purview of the original claim", even if they had not been considered previously (R(SB) 9/81, Paragraph 9). In R(SB) 9/81, the purview of the claim was held to extend to additions to the amount of weekly benefit which had not been mentioned in the original claim or in the letter of appeal. In R(SB) 1/82, to some extent explaining the decision in R(SB) 9/81, Mr Commissioner Monroe said, at Paragraph 10:

> "There is a well recognised distinction between an appeal in the strict sense and an appeal in the nature of a rehearing. On an appeal of the former kind a judgment can only be given if it can be said that it ought to have been given at the former hearing, while with a rehearing a judgment may be given that could have been given by the tribunal of first instance if it were considering the matter at the time of the rehearing (see Lord Davey in *Ponnamma v Arumogam* [1905] AC 383 at page 390). I have no doubt that appeals to an appeal tribunal are (like appeals under the Social Security Act 1975 to local tribunals and Commissioners (as to which see Decision R(F) 1/72 at Paragraph 9)) in the nature of rehearings to which the latter rule applies. I consider that Section 15(3)(c) of the Supplementary Benefits Act 1976 is to be interpreted in that sense."

That approach was specifically approved by Tribunals of Commissioners in R(FIS) 1/82 (in relation to the date as at which matters were to be considered) and R(SB) 42/83.

23. However, R(SB) 42/83 also identified limits on the powers of the appeal tribunal. The case concerned claims for single payments, which had under the legislation to be made separately from claims for weekly supplementary benefit and separately for each category of single payment claimed. The claimant claimed for four categories. On her appeal against the refusal of two categories, the appeal tribunal made an award for two categories which had not been included in the original claim. The Tribunal of Commissioners described that as a usurpation of the function of the benefit officer, and stressed that the appeal tribunal was an appellate body which (in the absence of any equivalent of Section 36 of the Social Security Administration Act 1992) had no original jurisdiction. It could only determine appeals from decisions made by benefit officers and, necessarily, a benefit officer could not have made a decision unless a proper claim had been made. Similarly, on

an appeal against a single payment decision, an appeal tribunal had no jurisdiction to make a decision increasing the amount of weekly benefit (R(SB) 14/82).

24. These supplementary benefit decisions on appeal were made under Section 15(3) of the Supplementary Benefits Act 1976 (reproduced in the family income supplement legislation), which provided:

> "(3) On an appeal under this section the Appeal Tribunal may
>
> (a) confirm the determination appealed against; or
> (b) substitute for any determination appealed against any determination which a benefit officer could have made."

However, as Mr Commissioner Monroe made clear in R(SB) 1/82, the approach he adopted was required by the nature of an appeal by way of a rehearing, as well as by any specific statutory wording. As a matter of principle, on such an appeal the tribunal may make any decision which the officer below could have made on the legal questions properly before that officer. That principle encompasses dealing with new questions so as to reach the right result on an appeal, within the limit that the appeal tribunal has no jurisdiction (in the absence of express legislation to that effect) to determine questions which fall outside the scope of that which the officer below could have done on the proper legal view of the issues before him, by way of a claim or an application or otherwise.

25. In our judgment, that approach to the nature of an appeal as a rehearing, which is how it was understood in the social security context before the 1998 Act changes, is to be applied to the current adjudication and appeal structure, subject only to express legislative limitations on its extent. Taking the simple case of an appeal against a decision on an initial claim, in our view the appeal tribunal has power to consider any issue and make any decision on the claim which the decision maker could have considered and made. The appeal tribunal in effect stands in the shoes of the decision maker for the purpose of making a decision on the claim. As to the nature of an appeal to a tribunal, we therefore agree with the position stated by Mr Commissioner Jacobs in Paragraphs 11 and 12 of CH/1229/2002.

26. Although it is not a position adopted by the Secretary of State in the cases before us, we note in passing that as recently as May 2001, the Secretary of State (represented then by Mr Drabble QC) was submitting, albeit in the different legislative context of compensation recovery, that the scope of the appeal was "dependent on the scope of the Secretary of State's power to include benefits in the certificate [of recoverable benefits]" (R(CR) 2/02, Paragraph 30). In that case, the Tribunal of Commissioners accepted that submission. Again, in CDLA/5196/2001, Mr Commissioner Rowland recorded the Secretary of State as submitting that "notwithstanding the fact that the Secretary of State had not given the correct decision or decisions, the tribunal were entitled to give whatever decisions should have been given by the Secretary of State" (Paragraph 14). We consider that the approach advocated by the Secretary of State in those cases is correct.

The Significance of the Absence of a Provision equivalent to Section 36 of the 1992 Act

27. We also agree with Mr Commissioner Jacobs in CH/1229/2002 that the absence in the 1998 Act of an equivalent to Section 36 of the Social Security Administration Act 1992 does not limit the extent of application of the approach set out above, for two reasons.

28. First, as indicated above, that approach was considered to be correct even before the introduction of a provision equivalent to Section 36.

29. Second, a provision equivalent to Section 36 is arguably unnecessary and indeed inappropriate in the new scheme. Section 36 provided as follows:

> "(1) Where a question which but for this section would fall to be determined by an adjudication officer first arises in the course of an appeal to a social security appeal tribunal, a disability appeal tribunal or a Commissioner, the tribunal, subject to subsection (2) below, or the Commissioner may, if they or he think fit, proceed to determine the question notwithstanding that it has not been considered by an adjudication officer.
>
> (2) A social security appeal tribunal may not determine a question by virtue of subsection (1) above if an appeal in relation to such a question would have lain to a disability appeal tribunal."

Section 36 therefore enabled an appeal tribunal to determine a "question" first arising in the course of an appeal, which would otherwise have fallen to be determined by an adjudication officer. As Mr Drabble pointed out in his submissions, under Section 20(1) of the 1992 Act there was to be submitted to an adjudication officer "any claim for a benefit" to which the section applied (Section 20(1)(a)), and the "questions" specified in Section 20(1)(b), (c) and (d). Section 20(1)(b) was very widely framed. It specified "any question arising in connection with a claim for or award of, such a benefit". Under Section 22(1), there was an appeal to a social security appeal tribunal against the decision of an adjudication officer on a "claim or question".

30. The former legislation therefore provided for appeals not only against outcome decisions as to entitlement to benefit, but also against determinations of any "question" which might arise in connection with a claim or award (e.g. a determination on a person's capacity for work, or whether he was living together with a woman as husband and wife). As we note below (see Paragraph 55(1)), although Section 8 of the 1998 Act does provide for appeals against "any decision that falls to be made under or by virtue of a relevant enactment", it substantially restricts the extent to which a claimant can appeal simply against determinations made as a preliminary to or in the course of arriving at outcome decisions, as opposed to the outcome decision itself. A provision equivalent to Section 36 may, for that reason, have been regarded as unnecessary and indeed inappropriate in the new scheme.

Section 12(8)(a) of the 1998 Act

31. We consider our conclusion as to the nature of an appeal to an appeal tribunal is reinforced by Section 12(8)(a) of the 1998 Act, which provides that "in deciding an appeal under this section, an appeal tribunal... need not consider any issue that is not raised by the appeal". It is implicit in this provision that an appeal tribunal is not limited to considering issues actually raised by the parties. A tribunal may, although is not necessarily obliged, to consider issues not raised by the parties.

32. Appeal tribunals are part of the adjudication system which is designed to ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled (as opposed to the benefits to which the parties may be contending that they are entitled). There is a legitimate public interest in ensuring such a result. The jurisdiction has thus been described as inquisitorial or investigatory (see, in particular, R(IS) 5/93 and the authorities cited in Paragraph 14 of that Commissioner's decision). Such a jurisdiction generally extended to include a duty on the tribunal to consider and determine questions which are necessary to ascertain the claimant's proper entitlement, whether or not they have been raised by the parties to an appeal (R(SB) 2/83). In our judgment, in the light of the above and the reasons given by Mr Commissioner Jacobs in Paragraphs 17 and 18 of decision CH/1229/2002, "raised by the appeal" in Section 12(8)(a) is to be interpreted as meaning actually raised at or before the hearing by at least one of the parties to the proceedings. Section 12(8)(a) therefore does not limit the overall jurisdiction of an appeal tribunal, but grants it a discretion as to the extent to which it exercises this inquisitorial role. That discretion must be exercised judicially. An appeal tribunal is under a duty to consider whether or not to exercise the discretion where the circumstances could warrant it and would err in law by failing to do so or by failing to give adequate reasons for its conclusion. However, it will not err in law if, following a proper judicial exercise of its discretion, it decides not to consider issues not raised by the parties to the appeal.

Section 12(8)(b) of the 1998 Act

33. However, it is clear that Section 12(8)(b) (prohibiting the taking into account of circumstances not obtaining at the time that the decision under appeal was made) does make an important inroad into what would otherwise be allowed to an appeal tribunal carrying out a rehearing. Some specific implications of this restriction are explored later in this decision.

Appeals in respect of Revision and Supersession Decisions

34. By Section 12(1) and (2) (set out in Paragraph 11 above), the decisions against which an appeal lies are "any decision... under Section 8 or 10... (whether as originally made or as revised under Section 9...)".

Supersession

35. So far as decisions under Section 10 (supersession) are concerned, Section 12(1) and (9) make a decision to supersede appealable. Further, it was held in *Wood* that, in

order to ensure compliance with Article 6 of the Convention, the reference in Section 12(9) to "a decision superseding" must be read as "a decision taken pursuant to the power to supersede", thus ensuring that there is also a right of appeal against decisions not to supersede. It is clear that an appeal against a decision to supersede or not to supersede is in both form and substance an appeal against the Section 10 decision itself, and not against the original decision which was the subject of the Section 10 decision.

36. As regards form, that follows simply from the words of Section 12(1) and (2), providing for an appeal against "any decision of the Secretary of State under Section ... 10". Under Regulation 31(1) (see Paragraph 38 below), the time limit for appealing therefore runs from the date of notification of the decision (or provision of a statement of reasons) under Section 10. (On that footing the reference to supersession in Regulation 31(2)(b) appears unnecessary, and possibly even inconsistent with Regulation 31(1). In our judgment, insofar as they are inconsistent, Regulation 31(1), rather than Regulation 31(2)(b), should be regarded as the effective provision governing the time within which an appeal against a supersession decision must be brought).

37. As regards substance, it follows from *Wood* that a claimant who appeals against an adverse supersession decision is entitled to submit on appeal that there was no available ground for supersession, or that that ground is not capable of forming the basis of the decision which was made. Similarly, following *Wood*, a claimant who appeals against a refusal to supersede in his favour must establish a ground for supersession.

Revision

38. So far as decisions under Section 9 (revision) are concerned, Section 12(1) provides a right of appeal, not against the decision under Section 9 as such, but only against the original decision as either revised or not revised. That is also the basis of Regulation 31 of the 1999 Regulations. Regulation 31(1) provides for a one month time limit, subject to limited extension under Regulation 32, for bringing an appeal. Regulation 31(2) provides:

> "Where the Secretary of State ...
>
> (a) revises, or following an application for a revision under Regulation 3(1) or (3) does not revise, a decision under ... Section 9, or
> (b) supersedes a decision under ... Section 10,
>
> the period of one month specified in paragraph (1) shall begin to run from the date of notification of the revision or supersession of the decision, or following an application for a revision under Regulation 3(1) or (3), the date the Secretary of State ... issues a notice that he ... is not revising the decision."

In form, therefore, an appeal against a decision under Section 9 is an appeal against the original decision (as either revised or not revised), not against the Section 9 decision itself.

39. However, it was accepted by both Mr. Drabble and Miss Lieven - again, in our judgment, correctly - that it follows from the reasoning of Rix and Dyson LJJ in *Wood* that, where the original decision has been revised adversely to the claimant, he is entitled to assert on appeal that no ground for revision existed. In other words, the claimant is not limited to arguing that the original decision as revised is wrong, but may argue that the original decision should remain effective as not having been properly revised. Whilst the question as to whether a claimant is entitled to appeal against a refusal to revise for official error (which is the only ground for revision in Regulation 3(5) which a claimant would in practice wish to assert) will be the subject of separate consideration in our decision in CIS/4/2003, it was also common ground between Mr Drabble and Miss Lieven that, if and to the extent that a claimant is able to appeal against a decision refusing to revise for official error, he cannot succeed in the appeal without establishing that the original decision arose from an official error.

40. It follows that, when one looks at the substance (as opposed to the form) of an appeal following a revision or a refusal to revise under Section 9, in a case where grounds for revision must be established, it is potentially misleading to describe the appeal as an appeal against the original decision as revised or not revised - because the claimant's appeal is not necessarily concerned simply with the merits of the original decision (as revised or not revised), but may be concerned with the prior questions of whether there was a ground for revision, and if so whether that ground is capable of leading to a different decision from the one which was originally made.

41. Having dealt with these various background matters, we now turn to the three issues identified by the parties and formulated above.

Issue 1: The general powers of an appeal tribunal on an appeal from a revision or supersession decision

Issue 1: Introduction

42. This issue concerns an appeal tribunal's powers, on an appeal to it following a decision of the Secretary of State which changes (to use a neutral word) or refuses to change the effect of a previous decision, to substitute the decision which the appeal tribunal considers the Secretary of State ought to have made, as opposed simply to declaring the Secretary of State's decision invalid (and thereby leaving the original decision in effect unless and until altered by another decision of the Secretary of State).

43. Previous decisions of Commissioners indicate that there are two interlinked sub-issues which, in practice, have given rise to problems, namely:

> (A) To what extent, if any, can an appeal tribunal hearing an appeal against a decision which has been revised (or not revised following a claimant's application for revision) under Section 9 make a decision under Section 10 to supersede (or not to supersede) the original decision, if it thinks that a decision under Section 10 is appropriate? Similarly, to what extent, if any, can an appeal tribunal hearing an appeal against a decision to supersede an original decision (or not to supersede following the claimant's application for a supersession)

under Section 10 make a decision under Section 9 to revise (or not to revise) the original decision, if it thinks that a decision under Section 9 is appropriate?

(B) On an appeal from a decision which (if valid) has the effect of superseding a previous award, to what extent, if any, can an appeal tribunal remedy defects in the decision, such as a failure to indicate that the power to supersede is intended to be exercised, a failure to refer to the original decision being superseded, a failure to specify a ground for supersession, or reliance on what the appeal tribunal finds to be the wrong ground for supersession? Similar points could arise in relation to a decision having the effect of revising a previous decision.

We shall refer to these two sub-issues as "Issue 1A" and "Issue 1B" respectively.

Issue 1A: The Parties' Submissions

The Secretary of State

44. The Secretary of State submitted that an appeal tribunal can amend defects in the decision under appeal provided that it does not alter what Miss Lieven referred to as the "legal nature" of the decision. As we understand the practical effect of this submission, it is that an appeal tribunal can substitute any decision for that of the Secretary of State (and therefore correct any error in the Secretary of State's decision) provided that the substituted decision does not purport to be made under a different statutory provision from the provision (or provisions) under which the Secretary of State acted. To take a simple example which was put to Miss Lieven in the course of argument, suppose that the Secretary of State makes a decision in the simple form, "The claimant is from [the date of this decision] not entitled to incapacity benefit". The Secretary of State's submission is that, even though the decision is silent as to the statutory power under which it was made, it must have been a purported supersession of the existing award under Section 10. On the claimant's appeal, the appeal tribunal would therefore (it is submitted) have jurisdiction to determine whether there was any available ground for supersession (either that apparently relied upon by the Secretary of State or another ground), and, if so, to make a decision in proper form identifying the decision to be superseded, the correct ground for supersession and (if necessary) changing the date from which the supersession had effect. If, however, the appeal tribunal's investigation of the facts led to the conclusion that the original awarding decision should have been revised (say, for official error or mistake of fact) rather than superseded, the appeal tribunal could not substitute a decision revising the original decision. Its power would be limited to declaring the Secretary of State's decision invalid, leaving it to the Secretary of State to revise the original decision if he were so minded.

45. In support, Miss Lieven made the following submissions.

(1) Supersession and revision are separate and distinct powers of revisiting a previous decision, but they are not and should not be treated as being interchangeable. They have different consequences for entitlement, and different appeal rights. In particular, in her submissions Miss Lieven stressed that there is no appeal against a

decision under Section 9, but only against the original decision as either revised or not revised; whereas, in the case of a decision to supersede under Section 10, the appeal is against the Section 10 decision itself.

(2) The Secretary of State is given the power to revise and/or supersede, a power not expressly given to an appeal tribunal. The appeal tribunal's express power is merely to decide appeals from decisions made by the Secretary of State.

(3) The Secretary of State is given the power to treat an application for supersession as an application for revision, and vice versa (Regulations 3(1) and 6(5)). Again, that is a power is not expressly given to an appeal tribunal.

(4) It follows from (1) to (3) above that if, for example, in the case of an appeal against a supersession decision under Section 10, the appeal tribunal were to purport to revise the original decision, it would in effect be changing a decision (namely the original decision) which was not under appeal to it, in purported exercise of a power (namely the power to revise) which is given only to the Secretary of State. Similarly, if, on an appeal against a decision which had been revised under Section 9, the appeal tribunal were to purport to supersede under Section 10, it would not be deciding the appeal against the original decision as revised, but exercising a power (namely the power to supersede) which is given only to the Secretary of State.

46. The Secretary of State's submission was therefore that the answer to the question in Issue 1A is that an appeal tribunal has no power to make a revision decision on an appeal from a supersession decision, or vice versa.

The Claimants

47. CPAG substantially agreed with the Secretary of State's approach to Issue 1A. CPAG was at one with the Secretary of State in submitting that an appeal tribunal cannot substitute a decision under Section 10 if the only decision (either express or implied) under appeal is the original decision as revised under Section 9, and similarly cannot revise the original decision if the only decision (express or implied) under appeal is a supersession decision under Section 10. However, CPAG's support of the Secretary of State's position was subject to two very important qualifications. First, CPAG contended that there was much wider scope for implied decisions, submitting that a decision given in the purported exercise of one power is to be taken as implying a decision refusing to use the alternative power. (This submission is dealt with further below: see Paragraphs 56-59). Second, CPAG's submissions under Issue 2, if correct, would substantially restrict the extent to which an appeal tribunal could properly make a decision less favourable to the claimant than the one under appeal.

48. The facts of Mr W's case raised only Issue 1B, and the submissions made on his behalf on that issue are dealt with below.

Issue 1A: Analysis and conclusions

49. In relation to the crucial Issue 1A, the Secretary of State and CPAG both submitted that an appeal tribunal has no power to make a revision decision on an

appeal from a supersession decision, or vice versa. Although during the course of the hearing we indicated that we had serious concerns about the case being put, we would only depart from common submissions of the parties (particularly when those parties were represented by Counsel so experienced in this field) after the most careful consideration. However, having given that consideration, we are unable to accept the submissions made to us.

50. The meaning of a statutory provision which is so clear that it admits only one possible construction cannot be altered or departed from by reference to the consequences, however inconvenient or anomalous, which would result from the application of that meaning. However, in our judgement the statutory provisions relevant to this issue fail by some margin to reach the degree of clarity which would bring that principle into play. In these circumstances, in ascertaining the legislature's intention, it is quite proper to have regard to potential consequences of possible alternative constructions, in the context of the statutory scheme as a whole. In the field of benefit decisions and appeals procedure, we consider it proper, in construing the relevant provisions, to assume that the legislature did not intend to create a scheme which would be likely to lead to impracticable or indeed absurd results in a significant number of cases. On the contrary, we proceed on the basis that the legislature intended the provisions relating to decisions and appeals (and in particular those relating to decisions changing the effect of a previous decision) to form at least a reasonably workable scheme. For the hearing, the parties provided us with a bundle of Parliamentary materials, comprising largely minutes of the relevant committees, most notably House of Commons Standing Committee B. In the event, we were not referred to any part of this bundle during the hearing, and it has not been necessary to rely upon these proceedings in Parliament in considering the true construction of the relevant words in the 1998 Act and 1999 Regulations. However, we note, without reliance but also without surprise, that generally the intent behind the 1998 scheme was expressed to be to introduce more streamlined and efficient procedures, and Section 10 was expressly introduced to simplify the mechanism for reviewing and, if necessary, changing benefit decisions.

51. In her skeleton argument, Miss Lieven submitted that the answer to Issue 1A for which the Secretary of State contended flowed from the statutory provisions "however uncomfortable the results may be". There can be no doubt that, if the submissions of the Secretary of State and CPAG are correct, results which at least border on the absurd could - and, in our experience, not uncommonly would - ensue.

52. We give two examples.

(1) The Secretary of State supersedes a decision awarding incapacity benefit on the ground of a relevant change of circumstances, namely that the claimant started working shortly after the date of the award, and removes entitlement from the date when the claimant started work. The claimant appeals, contending that what he was doing did not amount to "work", and that there was no change of circumstances because he had been doing it at the date of the Secretary of State's original decision, and furthermore the Secretary of State knew about it at the time. The appeal tribunal, after an oral hearing involving extensive investigation of the facts, decides (a) that what the claimant had been doing amounted to "work", (b) that there had been no

change of circumstances in that the claimant had been doing this work at the date of the original decision, and (c) that the Secretary of State had not been aware of the work. The appeal tribunal's findings would lead to the conclusion that the correct decision would have been one revising the original decision for mistake of fact, rather than superseding it on the ground of change of circumstances. The result of the parties' submissions to us would be that, despite its substantial acceptance of the Secretary of State's case, the appeal tribunal could only hold the Secretary of State's supersession decision to have been wrongly made, leaving it to the Secretary of State then to revise the original award. That would give rise to a fresh right of appeal, in which the claimant would be entitled to re-argue the issues as to whether he was working, and, if so, whether the Secretary of State knew about it - raising the possibility of a second appeal tribunal reaching different conclusions from the first. Indeed, it seems to us at least possible that, if the second appeal tribunal were to make findings which led it to conclude that the appropriate remedy was not revision but supersession, it would then have no alternative but to declare the revision invalid, with the result that the Secretary of State's supersession and revision decisions would each have been held invalid. Such a result would offend against the general principle of finality of judicial (including tribunal) decisions, subject only to any further appeal.

(2) The Secretary of State revises a decision awarding disability living allowance on the ground that the original decision maker was mistaken as to a material fact relating to the claimant's disability and that the claimant knew or could reasonably have been expected to know that fact and that it was relevant to the decision (Regulation 3(5)(c)). The revised decision is that the claimant was not entitled to benefit from the date of the original award. The claimant appeals, contending that (a) the Secretary of State was not mistaken as to a material fact, and, in any event, (b) he (the claimant) did not know and could not reasonably have been expected to know of it. The appeal tribunal finds that the Secretary of State was mistaken as to a material fact, but that the claimant did not know and could not reasonably have been expected to know of it, and therefore that the original decision should not have been revised, but rather superseded for mistake of fact (Regulation 6(2)(b)(i)). The result of the parties' submissions before us would be that the appeal tribunal could not substitute a supersession decision, but could merely declare the revision invalid. If the Secretary of State were then to make a fresh decision under Section 10 superseding the original decision, that fresh decision would take effect only from its date (Section 10(5), there being no provision to the contrary in Regulation 7). Moreover, the claimant would have a fresh right of appeal against the supersession decision, again involving the possibility of contradictory findings by the second appeal tribunal.

53. In our judgment, the parties are correct in submitting (as they do) that, when faced with an appeal following a decision under Section 9 or Section 10, an appeal tribunal must start by identifying the decision under appeal. The legislation is clear in providing that, in the case of a decision under Section 10, it is the Section 10 decision itself which is the subject of the appeal. In the case of a decision under Section 9, whatever the substance of the position may be, it is the original decision which is required to be treated as under appeal. The identification of the decision under appeal is vital because, in deciding the appeal, the appeal tribunal cannot take into account circumstances arising after the date of that decision (Section 12(8)(b)).

54. In the case of an appeal following a revision or refusal to revise where no ground for revision was required, the appeal is in both form and substance an appeal against the original decision. Furthermore, there could in practice be no question of an appeal tribunal needing to consider whether the original decision ought to have been superseded under Section 10, rather than revised: because any ground for supersession which was available on the basis of circumstances existing at the date of the original decision (e.g. mistake of fact or law) would by definition mean that the original decision was wrong and therefore ought to have been revised. References in the following paragraph to decisions under Section 9 are therefore restricted to cases in which a ground for revision was required to be established.

55. In our judgment, if an appeal tribunal decides that the Secretary of State's decision under Section 9 or Section 10 changing or refusing to change a previous decision was wrong then (subject to the restriction in Section 12(8)(b), if relevant) it has jurisdiction to make the revision or supersession decision which it considers the Secretary of State ought to have made, even if that means making a decision under Section 9 when the Secretary of State acted only under Section 10, and vice versa. In explaining our reasons for reaching this conclusion, we consider it neither necessary nor helpful to set out or comment extensively on the various approaches adopted in the past in decisions of individual Commissioners, but have preferred to approach the matter afresh. The reasons for our conclusion are as follows:

(1) Section 12(1)(a) provides that the appeal to an appeal tribunal is to be against decisions under Section 8 or Section 10 "made on a claim for, or an award of, a relevant benefit". In our view, this serves to emphasise that, in at least the great majority of cases, the appeal to an appeal tribunal is against what might be termed an "outcome decision", that is to say a decision which directly determines the claimant's entitlement to benefit, either on the initial claim or subsequently. In this respect we adopt the analysis of Mr Commissioner Jacobs in Paragraphs 24 and 25 of CIB/2338/2000:

> "24. Standing back from the details of the Social Security Act 1998 and the regulations made under it, there is a clear theme uniting most of the decisions that are appealable. This is that they are, to use the new jargon, 'outcome decisions'. This is not a term of art. It is merely a useful expression to refer to decisions that have, in crude terms, an impact on a claimant's pocket. In other words, an outcome decision is one that directly affects the money that the claimant receives or might receive in the future.
>
> 25. The determinations that are the building blocks of outcome decisions also, of course, affect the money that the claimant receives or might receive in the future. But they do not have this effect directly. They have this effect only when incorporated in an outcome decision. The claimant is able to appeal against the outcome decision and is able to challenge, as an issue arising on that appeal, the underlying determination."

(2) Taking first the position of an appeal against the initial decision on a claim, the Section 8 outcome decision under appeal will have been either to award or not to award benefit. As described above (Paragraphs 24-26), unless there is some express

provision to the contrary, the appeal tribunal's jurisdiction on the appeal is to make any decision which the Secretary of State could have made on the claim (although in doing so it need not consider any issues not raised by the appeal). That seems to us to follow simply from (a) the decision under appeal being generally an outcome decision deciding entitlement to benefit on the claim and (b) the appeal being a full appeal by way of rehearing on fact and law. In short, the appeal tribunal either upholds the Secretary of State's decision or holds it to have been wrong: but, if the latter, it goes on to make the decision on the claim which it considers the Secretary of State ought to have made. This may involve the appeal tribunal considering issues which have not been considered by the Secretary of State.

(3) Turning to the position on an appeal following a decision to revise (or not to revise), or to supersede (or not to supersede), that decision will either have changed or have left unchanged the claimant's entitlement to benefit. The reality is that the concern of the claimant (and indeed the Secretary of State) on such an appeal will be with whether the claimant's entitlement to benefit ought or ought not to be changed, not with the potentially much narrower question whether the Secretary of State was right to act under a particular section (Section 9 or Section 10). Parity of reasoning with the position on an appeal against the initial decision on a claim would suggest that, the appeal being again a full appeal by way of rehearing on fact and law, in providing in Section 12(2) that "the claimant shall have a right to appeal to an appeal tribunal" against Section 8 decisions which have been revised and against Section 10 decisions, Parliament intended that the appeal tribunal should have the power to decide the question of substance as whether the claimant's entitlement to benefit should be changed, and if so how. It would be illogical if the appeal tribunal's powers on an appeal against a decision changing (or not changing) the claimant's entitlement were in effect substantially more restricted in terms of making what it considers to be the correct outcome decision than is the case on an appeal against a decision on the initial claim. We do not consider that Parliament could have intended any such illogical distinction.

(4) That conclusion derives some support from the language of Section 12(1) itself. Appeals against (i) original decisions under Section 8, (ii) Section 8 decisions which have been revised and (iii) Section 10 decisions, are all dealt with in one breath; and all such decisions not falling within Schedule 3 are regarded as capable of being "made on a claim for, or an award of, a relevant benefit" (Section 12(1)(a)). The emphasis is on the outcome of the decision, not the narrow technical issue of the section under which the decision was made.

(5) It is in our judgment apparent from the scheme of Sections 9 and 10, and Regulations 3, 6 and 7, that the primary purpose of the distinction between revision and supersession is simply that revision encompasses cases in which it is thought appropriate that the original decision be changed with effect from its effective date, and supersession encompasses cases in which it is thought appropriate that the original decision be changed with effect from some later date (which, in the absence of provision to the contrary, is the date of the supersession decision). However, as indicated above (Paragraph 9(6)), there is what Rix LJ referred to in *Wood* as a "close affinity" between revision on a specified ground and supersession. Factors which we regard as particularly important are:

(a) Both in effect involve a change to a previous decision.

(b) The grounds of each are closely related, so that slight differences (as between the Secretary of State and an appeal tribunal on appeal) in either factual findings or interpretation of the meaning of Regulations 3 or 6 can lead to an appeal tribunal concluding that the Secretary of State chose the wrong option.

(c) The Secretary of State expressly has the power to treat an application for revision as an application for supersession, and vice versa.

(d) A co-ordinating mechanism between the two powers is provided by the rule in Regulation 6(3) that a decision which may be revised cannot be superseded.

There is in our judgment no sufficient indication in the statutory scheme that, in dividing the methods of changing a previous decision into two categories, with separate names, and in dealing with them in separate sections of the Act, the legislature intended to create a situation in which an appeal tribunal would be prevented on appeal from determining, on the basis of its findings, the question of substance as to whether the claimant's entitlement to benefit should be changed, and if so from what date. In our judgment, Parliament cannot have intended the scope of the appeal tribunal's powers to turn on fine legal niceties and complexities of the sort which the parties' submissions involve.

(6) Regulation 6(3) appears to us to be of particular importance in this respect. Its injunction that (with very limited exceptions) "a decision which may be revised under Regulation 3 may not be superseded under this regulation" appears to require an appeal tribunal hearing an appeal against a decision under Section 10 to decide (at any rate, if one of the parties raises the point) whether the superseded decision ought to have been revised, rather than superseded. However, the parties' submissions would involve the result that, if it decided that the original decision ought to have been revised, it could not itself revise, but could merely declare the supersession invalid. That would be, at least, very wasteful of time and money.

(7) The parties are of course right to point out that the appeal following a decision under Section 9 is in form an appeal against the original decision, not against the Section 9 decision itself; whereas an appeal against a Section 10 decision is an appeal against the Section 10 decision itself. We accept that Miss Lieven's submission on this point (see Paragraph 45(4) above) has substantial force. As we have indicated (Paragraph 53 above), we also accept that identification of the decision formally under appeal is important because it determines the date after which changes in circumstances cannot be taken into account. However, in our view, Miss Lieven's submission that the appeal tribunal's powers on the appeal are further limited in the way suggested gives too much force to form and too little to substance. At some points during the hearing, the arguments were reminiscent of the distinctions between ancient forms of action, when claims might fail merely because the wrong type of process was used. The substance of the matter is that both revision and supersession involve change to a previous outcome decision. Further, as we have described (Paragraphs 39-40 above), where grounds for revision must be shown, an appeal

against a decision which has been revised is at least some respects in substance an appeal against the decision to revise.

(8) For the reasons set out above, in our judgment an appeal tribunal's task on an appeal following either a Section 9 or a Section 10 decision is first to decide whether the Secretary of State was right to change (or not change) the claimant's entitlement to benefit in the way that he did. If it decides that the Secretary of State was wrong, its power is, subject to the express limitation in Section 12(8)(b), to make the decision which the Secretary of State ought to have made. That may involve making a decision under Section 9 when the Secretary of State acted under Section 10, or vice versa.

(9) It is in our judgment no objection that this may involve exercising a power which is given by the legislation to the Secretary of State, and which he has not exercised. As we noted above (Paragraph 12), no powers of decision at all are given expressly to appeal tribunals, leaving the extent of their powers to be inferred. If the appeal tribunal substitutes a decision under a statutory provision not invoked by the Secretary of State, it is not thereby usurping the Secretary of State's power. As explained above, it is in our judgment exercising its own power, derived from the nature of an appeal by way of rehearing, to determine on appeal whether the Secretary of State's decision changing the original award was correct, and to make the correct decision if it was not.

(10) In relation to an appeal in respect of a revised decision (which the tribunal considers ought to have been dealt with under the supersession provisions), neither can there be any objection to the tribunal using the supersession mechanism on the basis that an appeal is in form against the original decision as revised, and, at the time of making the original decision, the Secretary of State had no power to supersede it. In the light of the significance which should in our judgment be attached in this context to the fact that the appeal is in substance against the decision to revise or not to revise (see Paragraphs 39-40 above), the powers that are relevant are those which the Secretary of State had when considering whether to change the original decision, including his powers to supersede the decision.

(11) It was suggested by Miss Lieven that the intention displayed by the statutory scheme is that decisions should always first be made at the lowest level, i.e. that of the Secretary of State's decision maker. Thus, an appeal tribunal should not consider whether to revise or (as the case may be) supersede unless the Secretary of State has first done so and made a decision on the matter. We have already explained fully (in Paragraphs 27-30 above) why the absence from the 1998 legislation of an equivalent of Section 36 of the Social Security Administration Act 1992 has no effect on the general nature of an appeal tribunal's powers. The current statutory scheme also plainly displays the intention of granting an effective right of appeal against most decisions of the Secretary of State. The statutory scheme simply is not based upon every decision being made by the Secretary of State, subject only to an appeal by way of review (rather than rehearing). In our judgment, the submission of the Secretary of State's on this issue is unrealistic, particularly in the light of the close affinity between the concepts of revision and supersession. First, the matters which the Secretary of State has considered or ought to have considered in (say) revising or refusing to revise

may be closely intertwined with those relevant to supersession. Second, such a submission is wholly inconsistent with the Secretary of State's position in relation to Issue 2, where it is accepted that, if the Secretary of State has made a decision under Section 10, the appeal tribunal can substitute any other decision under Section 10, even if that involves superseding on a ground to which the Secretary of State gave no consideration and from a different date.

(12) In her skeleton argument Miss Lieven submitted that all that the appeal tribunal can do if it decides that a decision should have been made under Section 9 when an appeal against a decision under Section 10 is before it (or vice versa) is to "remit the matter to the Secretary of State for a fresh decision". However, no such power is expressly given to the tribunal. We accept that the Secretary of State of course has the power in any event to consider making a further decision. However, if the appeal tribunal's powers were in fact intended to be limited in the manner which the Secretary of State suggests, as part of the essential structure of the 1998 legislation, one might have expected some express reference to what the appeal tribunal should do in the event of its simply holding a supersession or revision to have been invalid.

(13) A further indication that the appeal tribunal's powers are not intended to be limited in the manner suggested is that the Secretary of State appears to have no power to make decisions in the alternative so as to cover the position if he is wrong in deciding that revision rather than supersession (or vice versa) is correct. In the second example given in Paragraph 52 above, relating to disability living allowance, if the appeal tribunal's powers really are limited in the way in which the parties suggest, the statutory provisions could have been expected to give the Secretary of State the power at least to make the decision in a form which would require the appeal tribunal, in the event of it making the findings which we have postulated, to hold that, although the Secretary of State had not validly revised for mistake of fact, he had validly superseded for mistake of fact.

(14) Further support for the construction we adopt arises from the terms of Section 17:

> "(1) Subject to the provisions of this Chapter, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulations under Section 11 above, any decision made in accordance with those regulations shall be final.
>
> (2) If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of... further such decisions...".

The effect of Section 17(2) is that, save as provided by regulations (and no relevant ones have been enacted), the findings of fact made by an appeal tribunal in the course of deciding that (say) a decision to revise was wrong are not binding on either the Secretary of State or the claimant in relation to a subsequent supersession decision by the Secretary of State, based on those findings. Had the appeal tribunal's powers on such an appeal been limited in the manner suggested by the parties, one might have

expected regulations to have been enacted providing for an appeal tribunal's findings on such an appeal to have some binding effect in such a situation. As it is, if the parties' submissions are right, one is left with the problems exposed by the examples given in Paragraph 52 above.

Issue 1A: Implied decisions

56. In circumstances where the Secretary of State's decision follows an application by the claimant, it might be possible to conclude that the Secretary of State has, *by implication*, made decisions under both powers (Section 9 and Section 10). For example, if the claimant applies for revision to obtain a more favourable rate of benefit, and the Secretary of State expressly makes a supersession decision awarding the more favourable rate only from the date of that decision, it may be possible to conclude that the Secretary of State has also refused to revise. Because of the rule in Regulation 6(3) that a decision may not be superseded when it may be revised, it could be argued that, in order to have found the power to supersede, the Secretary of State must have determined that the case was one where there should not be a revision, e.g. for official error.

57. This was the basis of Mr Drabble's submission that such decisions could be implied - and should readily be so - thereby opening up the jurisdiction of the tribunal on appeal in more cases than accepted by Miss Lieven for the Secretary of State. Mr Drabble submitted that if, on a claimant's application for supersession, the Secretary of State refused to supersede or made a decision superseding at the same rate, a decision not to revise should be implied, for the same reasons. He also submitted that if, on a claimant's application, the Secretary of State decided to revise the existing decision, a refusal to supersede should be implied. If, he said, a claimant in an application expressly asked the Secretary of State to consider all possible powers to change the existing decision in the claimant's favour, a decision to exercise the power of revision would imply a refusal to exercise the power of supersession. Why, he asked, should it not be the same where a claimant merely made a generic request for a change in entitlement because his condition had got worse? Mr Drabble did, however, accept that his logic could not apply in the same way where the Secretary of State acted on his own initiative (although he submitted that the exercise of the power of supersession would always imply a decision not to revise).

58. Miss Lieven submitted that there was a much more restricted scope for implying decisions. She accepted that there could be cases where, depending on the circumstances and in particular on the terms of any application by the claimant, a decision, say, not to revise could be implied in addition to an express decision to refuse to supersede. However, in general, she submitted that it was for the Secretary of State to determine the true nature of any application and to give a decision on that application. The appeal tribunal's jurisdiction would then be limited by the legal nature of the decision made by the Secretary of State.

59. These submissions raised potentially very difficult issues. Mr Drabble's submission, even in its most limited form based on the effect of Regulation 6(3), would avoid some particularly harsh consequences if the parties' general submissions were right. However, if appeal tribunals were required to implement the scheme as

either Mr Drabble or Miss Lieven submitted they should, that would involve detailed factual investigation of the background to applications and their administrative presentation to decision makers, and the drawing of subtle and technical distinctions. In our judgment, the 1998 legislation could not have been intended to involve consideration of such arid technicalities and complications. It seems to us a major advantage of the construction we have adopted in relation to Issue 1A that, except possibly in unusual cases, it avoids the need to resort to the often artificial device of implied decisions. By making the scope of an appeal tribunal's powers depend on the scope of the powers available to the Secretary of State when considering the decision under appeal, the appeal tribunal's task is considerably simplified: and it is able to concentrate on the central questions of substance with which the claimant and the Secretary of State are concerned.

Issue 1B: Introduction

60. Issue 1B concerns the following question. On an appeal from a decision which (if valid) has the effect of superseding a previous award, to what extent, if any, can an appeal tribunal remedy defects in the decision, such as a failure to indicate that the power to supersede is intended to be exercised, a failure to refer to the original decision being superseded, a failure to specify a ground for supersession, or reliance on what the appeal tribunal finds to be the wrong ground for supersession? Similar points could arise in relation to a decision having the effect of revising a previous decision.

61. In considering this issue, we shall assume for the sake of simplicity that there is no issue of switching between revision and supersession (or vice versa), which has been considered in Issue 1A.

62. In essence, our response to Issue 1B follows from our reasoning in relation to Issue 1A, since that raises essentially the same issue, but with the added complication there of the difference between revision and supersession.

63. The nature of the problems which have in practice arisen with "defective" decisions, and the range of views expressed by Commissioners on those problems, can be illustrated by reference to the following decisions of Commissioners.

64. In CSIB/51/2001, the claimant was awarded incapacity benefit from 3 April 1999, but was then assessed and failed to score sufficient points under the all work test. The matter was then referred to a decision maker in a document which Mr Commissioner May in his decision described as "seeking supersession", that supersession being sought on the footing that the all work test applied and that the claimant had scored less than 15 points. The form of the decision under appeal to the appeal tribunal, made on 4 October 1999, was that the claimant's claim for incapacity benefit was disallowed from 4 October 1999. The appeal tribunal allowed the appeal and found that the claimant was entitled to incapacity benefit from 4 October 1999, not on the basis that it considered the claimant to pass the all work test, but on the simple basis that the decision under appeal was invalid in that it (a) made no reference to supersession, (b) did not identify the decision to be superseded, and (c) did not state the ground for supersession. Mr Commissioner May allowed the Secretary of State's

appeal. He held that, having regard to the undisputed facts that (i) the case had been referred to a decision maker specifically to consider whether there should be a supersession and (ii) the claimant had had a previous incapacity benefit award and a medical report had been received for all work test purposes, it was sufficiently clear that the decision maker had superseded under Regulation 6(2)(g) of the 1999 Regulations. He said:

> "If mischief there be in this case it is that the printed form of the decision maker's decision does not make it clear that in respect where benefit is withdrawn a decision awarding incapacity benefit has been superseded, the basis of that supersession and the date of the decision which has been superseded. Notwithstanding that, supersession can I think be said to be implied standing the reference, the grounds for supersession under the regulation to which I referred being satisfied and the fact that the date from which benefit was disallowed is in conformity with Section 10(5) of the Social Security Act 1998."

The Commissioner went on to say that even if, which he did not accept, the decision of 4 October 1999 was "defective", he saw no reason why the appeal tribunal could not "conduct or perfect any supersession of the claimant's entitlement for themselves in the manner in which they could do so in respect of review as confirmed by the Tribunal of Commissioners in Paragraph 47(1) of [R(IS) 2/97]".

65. In CSIB/1268/2000 the facts were similar to those in CSIB/51/2001, but with two possibly significant differences. First, the operative decision previously awarding incapacity benefit (i.e. the decision requiring supersession) was that of a social security appeal tribunal, which had found the claimant to satisfy the all work test. It was therefore clear that there had been a previous assessment under the all work test. Second, the reference to the adjudication officer was described by the Commissioner as "a reference ... in which a decision on the all work test was said to be required on the basis of the claimant's score at part 4". The form of the decision under appeal was:

> "[The claimant] is not entitled to Incapacity Benefit from and including 20 October 1999. This is because he has been assessed under the All Work Test and has not attained the required Number of points. The total points were 6 (six). Therefore [the claimant] cannot be treated as incapable of work."

The claimant's appeal to the appeal tribunal failed. On further appeal, Mr Commissioner May reached the opposite conclusion to that which he had reached in CSIB/51/2001. The Secretary of State supported the claimant's appeal, submitting that the decision of 20 October 1999 was "fundamentally flawed, invalid and inept", on the ground that it did not purport to supersede the previous social security appeal tribunal's decision and there had been no reference to him to do so. The Commissioner accepted that submission, and declared the decision "inept and invalid". He said:

> "It is clear from the terms of the tribunal decision that notwithstanding the invalid nature of the decision maker's decision they considered that it was open

to them to carry out a supersession on their own behalf. However it was [the Secretary of State's representative's] submission that as the decision was defective in substance rather than in form it was not open for the tribunal to take that course. That position was consistent with the separate approaches I have taken in CSIB/51/01 where there was in effect a defect in form and CI/3810/2000 where the decision maker's decision was fundamentally flawed and invalid. That analysis is not inconsistent with what was said by the Tribunal of Commissioners in Paragraph 47(1) of the appendix to R(IS) 2/97 where the defect was one clearly of form. The mischief would have been avoided if a reference for a supersession had been made in light of a medical report as was done in CSIB/51/01."

66. In CSIB/1266/2000, the facts were accepted by the parties and by the Commissioner as being indistinguishable from those in CSIB/1268/2000. The appeal tribunal simply dismissed the claimant's appeal against the decision terminating incapacity benefit, rejecting the claimant's contention that the decision was flawed by reason of a lack of any reference to supersession. The Secretary of State's representative supported the claimant's appeal to the Commissioner. He submitted that CSIB/1268/2000 had been correctly decided. He submitted that, as there had been no purported supersession under Section 10, (a) the appeal tribunal had had no jurisdiction even to hear the appeal and (b) even if it did have jurisdiction, the appeal tribunal could not correct the decision because, there being no supersession, the decision was defective in substance rather than form, and if the appeal tribunal were to correct the decision that would amount to the appeal tribunal itself carrying out a supersession on its own initiative, which only the Secretary of State had power to do.

67. Mrs Commissioner Parker did not accept that submission. She held that the decision under appeal was "flawed" in making no mention of supersession or of any statutory grounds permitting supersession. However, she held that those defects were ones of form, not substance. In so holding she accepted a view expressed by the authors of the relevant note in the supplement to Thomson Sweet & Maxwell's Social Security Legislation (2001 edition) that "the substance of the decision... was that benefit was not payable and that, as matters taken into account by the Secretary of State amounted to clear grounds for supersession under Regulation 6(2)(g), the defect was really one only of form". She held that, that being so, (a) there was no doubt that the appeal tribunal had had jurisdiction to hear the appeal, because there had been a decision under Section 10 and (b) the appeal tribunal could "perfect the supersession process", and had erred in law in not doing so. The Commissioner set aside the appeal tribunal's decision as erroneous in law on the ground that it had not perfected the supersession by reformulating it in the necessary terms, and substituted a decision that "the decision of the Secretary of State is confirmed as a supersession, under Regulation 6(2)(g) of the [1999 Regulations], of a tribunal decision in or around 1997".

Issue 1B: The parties' submissions

The Secretary of State

68. The Secretary of State's contention was that the appeal tribunal could correct any error, whether of substance or form, in the decision maker's decision, provided that to do so did not amount to altering the "legal nature" of the decision. As we understand it, the effect of this submission is that, provided that the Secretary of State purported to make a supersession decision, the appeal tribunal could correct any error in that decision.

The Claimants

69. Although this issue bore primarily upon Mr W's case, as we understood the tenor of CPAG's submissions on Issue 1A, they were in substantial agreement with those of the Secretary of State.

70. On behalf of Mr W, it was contended that the appeal tribunal's power to correct defects in the Secretary of State's decision is much narrower than maintained by the Secretary of State. It was submitted that only "minor errors" could be corrected, and that, if the tribunal identifies anything more than a "minor error" in the Secretary of State's decision, it must allow the appeal and simply set the supersession decision aside as wrong. It is not clear how far this submission extended, but as we understand it none of the errors of the nature to which our formulation of Issue 1B specifically refers would be categorised as "minor" for the purpose of this submission.

71. On analysis of the submissions on behalf of Mr W, it seems that two reasons were in essence put forward for this stance, namely (1) that the power to supersede is that of the Secretary of State, not the appeal tribunal, and that if the power has not been properly exercised the appeal tribunal therefore has no option but simply to allow the appeal and set the Secretary of State's decision aside; and (2) as a matter of policy, claimants are entitled to have decisions made in proper form, and if appeal tribunals "correct" decisions in this way, that will only encourage sloppy decision making by decision makers.

Issue 1B: Analysis and Conclusions

72. We agree with the proposition implicit in the submissions of all parties that there may be some decisions made by the Secretary of State which have so little coherence or connection to legal powers that they do not amount to decisions under Section 10 at all. In the absence of specific facts, we do not consider it would be helpful here to seek to identify the characteristics which might lead to that conclusion in a particular case, but deal with the general principles below.

73. If, however, the Secretary of State's decision was made under Section 10 (as to which, see Paragraph 76 below), it follows from our reasoning in relation to Issue 1A that the appeal tribunal has jurisdiction, on appeal, to decide whether the outcome arrived at by that decision (i.e. either to change or not to change the original decision) was correct. This will or may involve deciding (a) whether one of the statutory

supersession grounds (whether the one relied upon by the decision maker or not) applied and (b) if so whether the original decision ought to be changed.

74. We therefore reject the submission made on behalf of Mr W that any shortcoming in a supersession decision (e.g. a failure to acknowledge that an existing decision needs to be superseded, a failure to state the ground for supersession, or reliance on what the appeal tribunal holds to be the wrong ground for supersession), other than a minor one, requires the appeal tribunal simply to hold the supersession to have been invalid. It is plainly desirable, in the interests of claimants and the appeal process, that decisions made on behalf of the Secretary of State should be properly and fully spelled out. However, a failure of the Secretary of State in this regard is of less significance than our conclusion that the intention displayed by the statutory scheme is that the appeal tribunal should on appeal have jurisdiction to determine whether the outcome arrived at by the Secretary of State was correct and, if it was incorrect, to make a correct decision.

75. That then raises the question of when a decision will be capable of being regarded as one made under Section 10 for this purpose. The facts of the above decisions, and of Mr W's case before us, show that (at any rate in incapacity benefit or credit cases) the Secretary of State's decision terminating entitlement commonly does not state that a previous decision is being superseded, or indeed even refer to a previous decision at all, or refer to Section 10, or even (beyond stating that the personal capability assessment has been found not to be satisfied) to the precise ground of supersession which is purportedly being invoked. Regardless of the conclusion we reach below, that is a highly unsatisfactory state of affairs. Commissioners have from the outset of the 1998 Act scheme expressed substantial concern that decisions have been made in disregard of the new statutory language and conditions, and that time and money is then wasted by appeal tribunals and Commissioners in attempting to unravel the consequences. Despite this, there is little evidence of any significant improvement, which we consider unfortunate. The fault may not always lie with decision makers themselves. For example, the fault in incapacity for work cases may lie more with those who design the printed forms to be used by decision makers.

76. In our judgment a decision should generally be regarded as having been made under Section 10, regardless of the form in which it may be expressed, if it has the effect of terminating an existing entitlement from the date of the decision (or from some later date than the effective date of the original decision). That is simply because there is no other general power which enables an existing entitlement to be terminated in that manner. In particular, where a decision is made, following a determination under the personal capability assessment, that there is no entitlement to incapacity benefit from the date of the decision, the only possible inference is that the decision maker intended to supersede the previous decision under Section 10. There is no other power which enables the Secretary of State to change a previous decision as from the date of the new one, and it would in our judgment be wholly unrealistic to infer that the second decision, however inadequately expressed, was made either wholly in ignorance of or without any reference to the power in Section 10. Similarly, a decision should generally be regarded as having been made under Section 9 if it changes the original decision with effect from the effective date of that decision.

77. We therefore agree with the result reached by Mrs Commissioner Parker in CSIB/1266/2000. CSIB/1268/2000 was, in our view, wrongly decided. Notwithstanding the form of the decision there under appeal to the appeal tribunal and the absence of evidence that there had been an express referral to a decision maker for supersession to be considered, it should have been held that the decision was one under Section 10 superseding whatever was the then operative decision awarding benefit, thus requiring the appeal tribunal to consider whether a ground for supersession had in fact been made out. Unless falling in the exceptional category referred to in Paragraph 72 above, the tribunal must deal with and decide the issues arising in the appeal before it.

78. However, we agree with Miss Lieven that it is misleading to describe our conclusion as affirming the proposition that the decision under appeal must simply be declared invalid if it is defective in substance, but not if it is defective only in form. Such a formulation is capable of being misleading, for two reasons.

79. First, the decision under appeal may be defective in what would generally be regarded as substantive respects without involving the consequence that it must simply be declared invalid. For example, if a decision terminating entitlement to benefit expressly does so on a factual basis, and therefore a ground, which the appeal tribunal on investigation of the facts finds to be wrong, that would generally be described as a defect of substance, not form. That would not, however, on the conclusion we have reached above, require the appeal tribunal simply to declare the decision invalid if its investigation of the facts showed that the Secretary of State had made out an alternative ground for supersession.

80. Second, as we pointed out in Paragraph 8 above, decisions of the Secretary of State are not required to be in any particular form. In our view, it follows that it may not be helpful to attempt to identify defects in form, for there is no yardstick by which to determine whether the form is defective or not.

81. Finally on this sub-issue, there is the question whether, where an appeal tribunal upholds the substance of the Secretary of State's decision, in the sense that it holds that the benefit was correctly altered from the date specified in the decision, it should in its decision notice seek to "perfect" or "recast" a decision which is incomplete in some respect, e.g. by expressly referring to supersession and Section 10, identifying the decision superseded, stating the ground for supersession, and so on. Will an appeal tribunal err in law if it does not do so but makes a decision simply confirming the Secretary of State's decision or dismissing the appeal?

82. In our judgment, in a decision notice the appeal tribunal should only be obliged to reformulate such a decision of the Secretary of State if either (i) the decision as expressed is wrong in some material respect (e.g. states an incorrect ground for supersession) or (ii) there is likely to be some particular practical benefit to the claimant or to the adjudication process in future in reformulating the decision. In the ordinary incapacity benefit case where entitlement has been terminated after a personal capability assessment, the decision as actually expressed is not inaccurate as far as it goes, and there would be little purpose in the tribunal setting aside the decision maker's decision and replacing it with a decision to the same effect from the

same date but more fully expressed. To hold that an appeal tribunal necessarily errs in law by not reformulating a decision which is not as complete as it might be would only be to encourage sterile appeals to tribunals and possibly further such appeals to Commissioners. In our judgment, an appeal tribunal would not err in law if in such a case its decision notice expressed its decision as being simply a dismissal of the appeal. (Of course, if a statement of reasons is requested, the appeal tribunal, in a case where it has not in its decision notice sought to reformulate a decision which is incomplete in some respect, may need to explain why it has not done so and what it considers the effect of the decision under appeal to have been).

Issue 2: The powers of an appeal tribunal to make a decision less favourable to a claimant than a supersession decision under appeal

Issue 2: Introduction

83. We have formulated this issue as follows. When a claimant appeals against a decision refusing to accede to his application for supersession (or acceding to the application but not making a decision as favourable as the claimant wished), does an appeal tribunal have power to supersede the original decision on a ground which leads to a less favourable award than the superseded award?

84. This issue in practice arises primarily in relation to disability living allowance. Decisions relating to disability living allowance are potentially more complex than those relating to other benefits (incapacity benefit, for example). First, there are two components of the allowance, and two rates of benefit for the mobility component and three rates of benefit for the care component. Second, incapacity benefit is generally awarded for an indefinite period, whereas disability living allowance may be and commonly is awarded for a fixed period. The award may be for a fixed period in respect of one component and for an indefinite period in respect of the other (although, if it is for a fixed period in respect of both components, the period must be the same). Third, provision is made for a person who has an award for a fixed period to apply, before the expiry of the period ("the renewal date"), for a renewed award, and for a decision on the renewal claim to be made before the renewal date, but to take effect from the renewal date. Fourth, it follows from the above that, whereas decisions superseding an award of incapacity benefit will in practice only be made by the Secretary of State on his own initiative, decisions superseding an award of disability living allowance may be made either after an application by the claimant for renewal or supersession, or in the absence of such an application.

Issue 2: The Parties' Submissions

CPAG

85. CPAG made the following background submissions in respect of this issue:

(1) CPAG submitted that the starting point should be that Issue 2 only arises where the claimant has made an application for an increased level of benefit, usually on the ground of a change of circumstances. If the Secretary of State has merely refused the application, he has not considered whether the claimant's condition has got better or

whether there is some other ground for superseding the original decision adversely to the claimant. Although the Secretary of State has power under Section 10(2) to consider matters not raised by the application, it can be assumed that he has not done so. Further, this power is expressly given to the Secretary of State, and it cannot be exercised by an appeal tribunal.

(2) It is only the claimant who has a right of appeal (from the Secretary of State's decision), and therefore it is the claimant's action, and the claimant's action only, in appealing which confers jurisdiction on the appeal tribunal. CPAG submitted that this provides the correct focus for the exercise of the appeal tribunal's powers, namely that its principal concern is whether the Secretary of State's decision is correct in the terms the Secretary of State has framed it or should be altered in a way which benefits the claimant. The claimant is not by his appeal seeking to rebut an argument that his condition has got better (or that there is some other ground for superseding adversely to him) as no such decision has been made against him by the Secretary of State. It was submitted that the tribunal's enabling or inquisitorial function has to be seen from this perspective: where required, it is to help **the claimant** in the task of establishing that the Secretary of State's decision is wrong in the sense of not giving the claimant what he is asking for. It was further submitted that the permissible legal inference for an appeal tribunal to draw from the fact that the Secretary of State is commonly not represented at hearings before tribunals is that the Secretary of State is satisfied with his decision and is not asking the appeal tribunal to consider any other issue.

(3) CPAG submitted that, for an appeal tribunal to supersede adversely to the claimant in such circumstances would run counter to the policy asserted by the Secretary of State that decisions should initially be made at the lowest possible level. Investigation of issues not raised by the appeal is time consuming and can lead to listing difficulties, particularly because an adjournment of the hearing may be necessary.

(4) In the light of the fact that a claimant has the right to withdraw his appeal at any time before the appeal tribunal's decision, it was submitted that there are difficulties as to the nature of the warning which natural justice and Article 6 of the Convention would require the appeal tribunal to give to the claimant where the tribunal is considering making an award that would leave the claimant worse off than the award made by the Secretary of State.

86. CPAG's submissions were that, in the light of that background:

(1) An appeal tribunal has no jurisdiction to supersede a decision adversely to the claimant where the Secretary of State has not done so because:

> (a) Section 12(8)(a) (providing that an appeal tribunal "need not consider any issue that is not raised by the appeal") should in its application to this context be construed as meaning "*shall* not consider any issue that is not raised by the appeal." It was submitted that "for the tribunal to enter into an investigation of entitlement in these circumstances, when no such investigation was deemed merited by the Secretary of State, could amount to the tribunal exercising an original decision making jurisdiction, which is precisely what the repeal of

Section 36 of the Social Security Administration Act 1992 was intended to prevent."

(b) Regulation 6(2) of the 1999 Regulations provides that a decision under Section 10 "may be made on the Secretary of State's own initiative or on an application made for the purpose on the basis that the decision to be superseded ....." - there then follow the cases and circumstances in which a decision may be superseded. If the Secretary of State refuses the claimant's application (which would obviously be an application for a supersession favourable to the claimant), or accedes to it but not to the full extent that the claimant wished, the tribunal would have no jurisdiction then to supersede unfavourably to the claimant as it would be purporting to exercise the Secretary of State's original jurisdiction to supersede "on the Secretary of State's own initiative."

(2) Alternatively, CPAG submitted that, if the appeal tribunal has jurisdiction to supersede in this manner, this Tribunal of Commissioners should "should issue strong guidance that such an exercise would normally be an inappropriate exercise of discretion". It was submitted by CPAG that its approach is not improperly diluting the traditional notion that an appeal tribunal stands in the shoes of the decision maker. It was submitted that "the tribunal does stand in the shoes of the decision maker, but it is the decision which is being appealed and the grounds of that challenge which it is concerned with."

The Secretary of State

87. The Secretary of State submitted (consistently with his stance on Issue 1), that the answer to Issue 2 is "yes", and that there is no such fetter on the exercise by the tribunal of its discretion to consider matters not raised by the appeal as is suggested by CPAG.

Issue 2: Analysis and conclusions

88. We will deal with CPAG's submissions (1)(a) and (2) together, as they raise similar issues. We reject those submissions, for the following reasons.

89. First, there is in our judgment no possible warrant for reading the words "need not" in Section 12(8)(a) as "shall not". "Need not" is clearly permissive, whereas "shall not" would have been mandatory. If Parliament had meant "shall not", it could easily have said so. We note that CPAG, in its first skeleton argument, qualified the proposition that "need not" means "shall not" by stating that that proposition applied "absent some glaring error in the papers which the Secretary of State has obviously missed and which clearly goes to the issue of entitlement." We do not see how either CPAG's primary proposition or that qualification of it can possibly be derived from the words of Section 12(8)(a).

90. Second, issues not raised by an appeal are in their nature quite likely to be issues as to whether the tribunal should make an award less favourable to the claimant than did the Secretary of State. In providing in Section 12(8)(a) that a tribunal need not consider issues not raised by the appeal (and therefore necessarily that it had the

power to do so), Parliament was implicitly providing that tribunals could consider whether to make a decision less favourable to the claimant than did the Secretary of State. As pointed out in Paragraph 32 above, appeal tribunals are part of the adjudication system designed to ensure that claimants receive neither more nor less than the amount of social security benefits to which they are properly entitled (as opposed to the benefits to which the parties may be contending that they are entitled). It would be wrong to issue guidance of the sort contended for by CPAG fettering the discretion of the tribunal to consider issues not raised by the appeal.

91. Third, in disability living allowance cases, the appeal tribunal's investigation of the facts necessary to decide the issue raised by the appeal may well indicate that even the award which the claimant has does not appear to be justified, and it would in our judgment be unsatisfactory if the appeal tribunal were not then able to go on to consider whether there is ground for supersession which would lead to a lower award. For example, a claimant's application to the Secretary of State for supersession of a disability living allowance award will generally be on the ground that his or her condition has deteriorated since the original award was made. In order to determine whether that is so, the appeal tribunal would have to examine the claimant's condition at the date of the decision under appeal. That might lead it to conclude that even the claimant's existing award does not appear justified. Among the possible reasons for such a conclusion are that the claimant's condition has improved or that the existing award was made under some mistake of fact (both of which are grounds for supersession). Appeal tribunals conduct, at a higher and more sophisticated level, a more intensive investigation of the facts than does the Secretary of State's decision maker; and it would be unsatisfactory if, in the above example, the appeal tribunal, having formed the view that the claimant's existing award does not appear justified, could not go on to consider whether it ought to be superseded. If it could not, and the Secretary of State were to make an unfavourable supersession decision, there would then be the likelihood of an appeal, with the result that a second appeal tribunal would have to investigate the facts again.

92. Fourth, Section 33 of the Social Security Administration Act 1992 contained specific provisions as to the extent to which an appeal tribunal needed to or could consider components of disability living allowance not under appeal:

> "(4) Where a person who has been awarded a disability living allowance consisting of one component alleges on an appeal that he is also entitled to the other component, the tribunal need not consider the question of his entitlement to the component which he has already been awarded or the rate of that component.
>
> (5) Where a person who has been awarded a disability living allowance consisting of both components alleges on an appeal that he is entitled to one component at a rate higher than that at which it has been awarded, the tribunal need not consider the question of his entitlement to the other component or the rate of that component.
>
> (6) The tribunal shall not consider

(a) a person's entitlement to a component which has been awarded for life; or
(b) the rate of the component so awarded; or
(c) the period for which a component has been so awarded, unless
(i) the appeal expressly raises that question; or
(ii) information is available to the tribunal which gives it reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue."

Section 33(4) and (5) had the same effect, in the specific situations for which they provided, as Section 12(8)(a) of the 1998 Act. Under the pre-1998 Act regime, appeal tribunals commonly did consider entitlement to the component not put in issue by the claimant in his appeal. Section 33(6) provided specific protection for life awards of a component about which no issue was expressly raised in the appeal. CPAG's submission is to the effect that, notwithstanding that Section 33(6) is not replicated in the 1998 Act regime, an appellant under the 1998 Act regime has a general protection somewhat more extensive than that provided for by Section 33(6) in relation to life awards only. In our view, express statutory provision would have been needed to achieve that result.

93. Fifth, the "strong" guidance which CPAG submits that we should give in relation to exercise of the tribunal's discretion in Section 12(8)(a) is that it would "normally" be inappropriate for the tribunal to consider superseding an award adversely to the claimant when the Secretary of State did not. However, any such guidance would in our judgment be so vague as to be of no assistance, since it would give no real indication as to when it would be appropriate for the tribunal to exercise its discretion to consider superseding adversely to the claimant when that was not in issue in the appeal. The discretion is one to be exercised judicially, taking into account all the circumstances of the particular case. We do not think it appropriate or helpful to attempt to formulate guidance as to the exercise of the discretion.

94. There must, however, be a conscious exercise of this discretion and (if a statement of reasons is requested) some explanation in the statement as to the reasons why it was exercised in the manner it was. In exercising the discretion, the appeal tribunal must of course have in mind, in particular, two factors. First, it must bear in mind the need to comply with Article 6 of the Convention and the rules of natural justice. This will involve, at the very least, ensuring that the claimant has had sufficient notice of the tribunal's intention to consider superseding adversely to him to enable him properly to prepare his case. The fact that the claimant is entitled to withdraw his appeal any time before the appeal tribunal's decision may also be material to what Article 6 and the rules of natural justice demand. Second, the appeal tribunal may consider it more appropriate to leave the question whether the original decision should be superseded adversely to the claimant to be decided subsequently by the Secretary of State. This might be so if, for example, deciding that question would involve factual issues which do not overlap those raised by the appeal, or if it would necessitate an adjournment of the hearing.

95. We now turn to CPAG's submission (1)(b). Miss Lieven submitted that this submission was wrong because, if the appeal tribunal were itself to supersede by making a less favourable award in a case where the Secretary of State had refused the claimant's application for supersession, that would not be a supersession on the Secretary of State's own initiative, but rather a supersession on the claimant's application. She submitted that the words "or on an application made for the purpose" in Regulation 6(2) refer to any situation in which it was the claimant's application, rather than the Secretary of State's initiative, which led to the Secretary of State considering the matter at all. However, we are of the view that it would not be correct to describe a supersession reducing a claimant's entitlement as being "on an application made for the purpose", when the claimant's purpose in making the application was to obtain a more favourable award.

96. In our judgment, however, the fact that the appeal tribunal's supersession decision would be regarded as one made "on the Secretary of State's own initiative" is not a ground for saying that the tribunal had no power to make it. As we indicated in relation to Issue 1 (see Paragraph 55(8) and (9) above), the appeal tribunal's function on appeal is in our judgment to make the supersession decision which it considers the Secretary of State ought to have made, and this may involve exercising powers only expressly given to the Secretary of State. If the appeal tribunal supersedes unfavourably to the claimant when the Secretary of State simply refused the claimant's application for supersession, the appeal tribunal is not usurping the Secretary of State's power to supersede. It is exercising its function of determining on appeal whether the Secretary of State's decision was correct, and of making the correct decision if it was not, effectively standing in the Secretary of State's shoes. The same applies to CPAG's objection that the appeal tribunal would be exercising the Secretary of State's power (implicit in the provision in Section 10(2) that the Secretary of State need not consider any issue not raised by the application or which did not cause him to act on his own initiative) to consider issues not raised by the application. In our judgment, for the reasons given more fully under Issue 1, it is implicit that an appeal tribunal has power to do so in order properly to decide the appeal.

97. Section 10(5) provides that, subject to provision to the contrary in regulations, "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." In our judgment, where the primary rule in Section 10(5) applies (i.e. is not varied by Regulation 7), in the situation where an appeal tribunal supersedes adversely to the claimant following a refusal by the Secretary of State of a claimant's application for a favourable supersession, the tribunal's supersession (being effectively the exercise by the tribunal of the Secretary of State's power to supersede "on his own initiative") would take effect from the date of the Secretary of State's decision under appeal. The appeal tribunal makes the decision, standing in the shoes of the Secretary of State and on the basis of facts down to the date of the Secretary of State's decision.

Issue 3: The nature of the power to revise in Regulation 13C(3)

Issue 3: Introduction

98. We have formulated this issue as follows. Is Regulation 13C(3) of the Social Security (Claims and Payments) Regulations 1987 ("the 1987 Regulations") (a) a freestanding power to revise an award of disability living allowance made on a renewal claim; or (b) a power which can only be exercised if one of the grounds for revision in Regulation 3 of the 1999 Regulations is also established?

99. Regulation 13C provides as follows:

> "(1) A person entitled to an award of disability living allowance may make a further claim for disability living allowance during the period of 6 months immediately before the existing award expires.
>
> (2) Where a person makes a claim in accordance with paragraph (1) the Secretary of State may
>
> (a) treat the claim as if made on the first day after the expiry of the existing award ("the renewal date"); and
> (b) award benefit accordingly, subject to the condition that the person satisfies the requirements for entitlement on the renewal date.
>
> (3) A decision pursuant to paragraph (2)(b) to award benefit may be revised under Section 9 of the Social Security Act 1998 if the requirements for entitlement are found not to have been satisfied on the renewal date."

Issue 3: The Parties' Submissions

100. Mr. Drabble submitted that Regulation 13C(3) is not a freestanding power to revise which can be exercised simply on the basis that the claimant did not on the renewal date satisfy the conditions of entitlement for the renewed award. He submitted that it also required one of the conditions for revision in Regulation 3 of the 1999 Regulations to be satisfied. He relied in this connection on the construction which was given to the then form of Regulation 17(4) of the 1987 Regulations in R(IS) 2/97. He pointed out that if it were a freestanding power it would appear to entitle the Secretary of State at any time (i.e. however long) after the renewal date to revise the award simply on the ground that that the revising decision maker does not consider that the conditions of entitlement for the award were satisfied on the renewal date. He submitted (and we agree with him) that this would have potentially far-reaching consequences for awards made on renewal.

101. Miss Lieven submitted that Regulation 13C(3) is simply a freestanding power to revise in the event that the conditions for entitlement are not satisfied on the renewal date.

Issue 3: Analysis and Conclusion

102. An award made before the renewal date is necessarily made on the basis of an assumption or prediction as to what the claimant's condition will be between the date of the decision and the renewal date. In our view, as a matter of common sense, the essential purpose of Regulation 13C(3) must be to enable the award made on renewal to be revised if, **contrary to the prediction or assumption of the decision maker who made the award**, the claimant's condition either improves or does not deteriorate further in the period between the making of the award and the renewal date. In our judgment its purpose was not to enable revision at any future time simply on the basis that it is considered that the decision maker's decision was wrong.

103. We must reject Mr. Drabble's submission, for two reasons. First, if it were correct, Regulation 13C(3) would not fulfil what in our judgment must be its essential purpose (and indeed it would appear to be deprived of any effect at all). Regulation 3(5)(c) of the 1999 Regulations has the effect that a decision awarding disability living allowance can only be revised for mistake of fact if at the time of the decision the claimant either knew or could reasonably have been expected to know of the fact in question. A claimant is obviously unlikely to know, at the time the renewal award is made, that his condition will improve or (as the case may be) will not deteriorate. Second, the construction given in R(IS) 2/97 to the then form of Regulation 17(4) of the 1987 Regulations does not in our judgment provide a helpful analogy. Regulation 17(1) provides that in general an award of benefit shall be for an indefinite period. The then form of Regulation 17(4) provided as follows:

> "In any case where benefit is awarded in respect of days subsequent to the date of claim the award shall be subject to the condition that the claimant satisfies the requirements for entitlement; and where those requirements are not satisfied the award shall be reviewed."

104. It was held in R(IS) 2/97 that this was not a freestanding power of review, and that the ordinary requirements for review had to be satisfied if an award were to be reviewed. However, we note that when, under the 1998 Act, review was replaced by revision and supersession the words "and where those requirements are not satisfied the award shall be reviewed" were simply removed from Regulation 17(4). They were not replaced by any reference to revision or supersession, presumably on the basis that any such reference would be unnecessary.

105. The position as regards the change made to Regulation 13C(3) when the 1998 Act changes were brought into force is different. In its old form, Regulation 13C(3) provided as follows:

> "An award under paragraph (2)(b) shall be reviewed by the adjudicating authority if the requirements for entitlement are found not to have been satisfied on the renewal date."

In this case, however, Regulation 13C(3) was not simply removed on the ground that it would be unnecessary, but was replaced with a specific reference to revision.

106. In our judgment, Regulation 13C(3) should be construed in the light of what must be its essential purpose. It should be construed as permitting revision on the ground of a particular type of mistake of fact by the decision maker, namely a prediction by the decision maker as to the claimant's likely circumstances at the renewal date which turns out to be wrong, for example because the claimant's condition improves when it was not expected to do so or because it does not deteriorate when it was expected to do so. Looked at another way, its purpose is substantially to permit revision on the ground of a change of circumstances between the date of the decision and the renewal date, despite the general prohibition in Regulation 3(9)(a) on revision in respect of a change of circumstances. That is the meaning to be attributed, in the context of Regulation 13C as a whole, to the words "are found not to have been satisfied" in Regulation 13C(3).

107. In our judgment, therefore, Regulation 13C(3) is a freestanding power to revise, but the power is not as wide as the Secretary of State contends, because, for the exercise of the power, it is not sufficient for the Secretary of State to show simply that the conditions of entitlement were not satisfied on the renewal date. Where, as will usually be the case, the issue is the condition of the claimant as at the renewal date, the Secretary of State must show that the claimant's condition has either improved between the date of decision and the renewal date to a greater extent than anticipated by the decision maker or has not deteriorated during that period to the extent anticipated by the decision maker.

Individual Cases

108. We now turn to the four individual appeals before us.

CIB/4751/2002

Decision

109. This is an appeal by the Claimant (Mr W) against a decision of the Liverpool Appeal Tribunal made on 20 September 2002. For the reasons set out below, we dismiss the appeal.

The Facts

110. The Claimant was awarded incapacity credits from 5 June 2000 by reason of his incapacity for work. Following completion by the Claimant of an IB 50 questionnaire and examination by a SEMA doctor, on 1 November 2001 an officer of the DWP completed forms referring the case to a decision maker for (a) a determination of the personal capability assessment and (b) (perhaps) supersession. However, because the relevant document (at page 49 in the case bundle) was not fully completed, it is far from clear whether it was seeking supersession. On 7 November 2001, a decision maker (a) determined that the Claimant scored no points under the personal capability assessment and (b) made a decision in the form "claim disallowed/disqualified from and including 7/11/01". The latter was done by ticking a box opposite that printed wording, and writing in the date. There was no more appropriate printed box on the form which could

have been ticked. The "evidence and justification for the decision" were stated as follows:

> "The personal capability assessment is applicable to [the Claimant] from 13 April 1995. There are no exceptional circumstances to treat him as exempt from the personal capability assessment.
>
> After consideration of all the evidence [the Claimant] has scored 0 points as follows:
>
> Therefore he is not capable of work from and including 7 November 2001 and not entitled to incapacity credits from that date."

111. On 22 November 2001, the Claimant appealed. On 11 January 2002 a decision maker reconsidered the decision of 7 November 2001, but decided not to change it. Among his reasons were that "as this is the first assessment since the Claimant became unfit for work the assessment will constitute a relevant change of circumstances to permit supersession of the decision". Regulation 6(2)(a) of the 1999 Regulations was relied upon.

112. The Secretary of State's initial submission in the appeal to the appeal tribunal purportedly set out the decision under appeal in terms which referred expressly to supersession, and which appeared to rely on Regulation 6(2)(g) of the 1999 Regulations.

113. On 20 September 2002, the tribunal dismissed the appeal. The Claimant's representative had argued that the decision of 7 November 2001 was not a purported supersession and was therefore inept and invalid, and that the tribunal should simply set it aside. First, the tribunal held, as stated on the decision notice, that there had been a valid supersession under Regulation 6(2)(g) because the fact of supersession was implicit in the decision of 7 November 2001 by virtue of the reference of the case to the decision maker: and any defect in that decision was one of form, not substance, which the tribunal was therefore entitled to correct. It relied upon the decision of Mrs. Commissioner Parker in CSIB/1266/00. Second, the tribunal decided that the claimant scored no points under the personal capability assessment.

The Parties' Submissions

114. The Claimant's representative, in his two detailed written submissions to us, relied upon the following primary arguments in support of the contention that the tribunal should have allowed the claimant's appeal and set the decision of 7 November 2001 aside as invalid.

(1) The Secretary of State had not discharged the burden of showing that there was a purported supersession under Section 10. It was contended that this was so for the following reasons:

(a) There was no referral to a decision maker to consider supersession.

(b) The decision maker did not refer to supersession.

(c) The decision maker did not state what law or regulation he was applying.

(d) The decision maker did not refer to the previous decision which was being superseded.

(e) The reference in the "evidence and justification for the decision" to the personal capability assessment being applicable from 13 April 1995 does not make sense.

(f) The Secretary of State has since vacillated as to what regulation the decision maker should have applied (i.e. whether it is Regulation 6(2)(a) or Regulation 6(2)(g)).

(g) There is no evidence that the decision maker first identified a relevant change of circumstances within Regulation 6(2)(a) and then decided whether the previous decision ought to be superseded.

(2) The tribunal cannot carry out a supersession when the Secretary of State has not.

(3) If there was a purported supersession under Section 10, it is defective in substance rather than in form, and so cannot be corrected by the tribunal. It is perhaps unclear from the written submissions precisely which of the defects in the decision identified in (1) above it is contended would, on their own, be sufficient to render the decision defective in substance. However, the principal ground relied upon is the failure of the decision to identify and rely upon a valid ground for supersession (which it is said should have been Regulation 6(2)(a) rather than Regulation 6(2)(g)).

115. The Claimant's representative submits, in the alternative, that the tribunal erred in law in the way in which it dealt with the activities of standing, sitting and rising from sitting.

116. The Secretary of State submits that the tribunal was right to dismiss the appeal, and that we should dismiss the Claimant's appeal. As modified by Miss Lieven at the hearing, the Secretary of State's reasoning, consistent with his stance on Issue 2, was that:

(1) The decision of 7 November 2001 was a supersession decision under Section 10 because it had the effect of terminating the existing award of incapacity credits from the date of the decision. There was no other power under which such a decision could have been made.

(2) The tribunal had power to correct such defects in the decision as there may have been.

(3) The tribunal was wrong to state that the ground for supersession was that in Regulation 6(2)(g), but since there was an available ground under Regulation 6(2)(a) the appeal should not be allowed on this ground.

117. It was further submitted that there was no error of law in the reasoning in respect of the activities comprised in the personal capability assessment.

Analysis and Conclusions

118. In our judgment, the Secretary of State is correct in submitting that the decision of 7 November 2001 was a decision under Section 10. It had the effect of terminating the previous award of incapacity credits from the date of the decision, and that could only have been done under Section 10 (see Paragraph 76 above).

119. The Secretary of State's decision could be said to be defective or at least incomplete in that it made no reference to supersession or to Section 10, it did not refer to the decision being superseded, it did not state the precise ground for supersession (although it did state that the Claimant had scored no points under the personal capability assessment), and the reference to the personal capability assessment being applicable to the Claimant from 12 April 1995 did not make sense. In our judgment, the Secretary of State is further correct in submitting that those defects did not require the tribunal simply to hold the decision invalid (see Paragraphs 81-82 above). It had power to correct the defects, in so far as correction was necessary. The tribunal said in its decision notice that "any amendment to the original decision regarding the fact of the supersession was a change in a matter of form rather than a matter of substance and the tribunal were therefore able to make any necessary amendment to the decision". The tribunal did not, however, purport actually to reformulate the Secretary of State's decision of 7 November 2001, but merely confirmed that decision. However, the outcome of that decision was not actually wrong in any significant respect (e.g. as to its effective date), and there would in our judgment have been no practical benefit to either the Claimant or to adjudication in the future in the tribunal's reformulating the decision in its own decision notice (see Paragraph 82 above). There is no error of law in the failure of the tribunal to reformulate the decision.

120. Nevertheless, the tribunal was required to give an adequate explanation in its statement of reasons of how it had reached its decision. There are two possible errors of law in the tribunal's reasoning on the issue whether the decision under appeal was simply invalid.

121. First, it stated that the test for determining whether a defect in the decision under appeal could be corrected by an appeal tribunal as being whether the decision was defective in substance or form. In our judgment, that is not a correct formulation of the test (see Paragraphs 78-80 above). However, as the tribunal was correct in holding that the decision was a supersession decision and that errors in it could be corrected, this error by the tribunal did not render its decision erroneous in law.

122. Second, it stated that the ground for supersession was that in Regulation 6(2)(g), whereas it is arguable that it should have been that in Regulation 6(2)(a) because the supersession followed the first personal capability assessment. Regulation 6(2) provides that a decision under Section 10 may be made on the basis that the decision to be superseded:

"(a) is one in respect of which

(i) there has been a relevant change of circumstances since the decision was made; or

(ii) it is anticipated that a relevant change of circumstances will occur.

.....

(g) is an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision) and where, since the decision was made, the Secretary of State has received medical evidence following an examination in accordance with Regulation 8 of the Social Security (Incapacity for Work)(General) Regulations 1995 from a doctor referred to in paragraph (1) of that regulation."

123. Regulation 7A defines "incapacity benefit decision" and "incapacity determination" as follows for the purposes of Regulation 6(2)(g):

"'incapacity benefit decision' means a decision to award a relevant benefit or relevant credit embodied in or necessary to which is a determination that a person is or is to be treated as incapable of work under Part XIIA of the Contributions and Benefits Act.

'incapacity determination' means a determination whether a person is incapable of work by applying the personal capability assessment in Regulation 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 or whether a person is to be treated as incapable of work in accordance with Regulation 10 (certain persons with a severe condition to be treated as incapable of work) or 27 (exceptional circumstances) of those Regulations."

124. Whether Regulation 6(2)(g) can be applicable on the first application of the personal capability assessment turns on whether the incapacity determination which leads to or is part of the superseding decision can itself qualify as the incapacity determination referred to in the words "where there has been an incapacity determination". The argument that it can is based on the provision that the incapacity determination can be "before or after the decision" (i.e. the decision being superseded). However, Miss Lieven's final submission to us, after the Secretary of State had been asked to give detailed consideration to this specific question, was to the contrary.

125. We consider that the better view is that the incapacity determination referred to cannot be the one which leads to or is part of the superseding decision, and therefore that Regulation 6(2)(g) was not applicable in the present case. It must be remembered that in an ordinary case an incapacity benefit claimant who is subject to the personal capability assessment (or such a person who qualifies for contribution credits for incapacity for work) will at the outset be entitled as the result of being treated as incapable of work under Regulation 28 of the 1995 Regulations. That deeming follows simply from the provision of medical evidence (usually statements from the claimant's GP) "until such time as [the claimant] has been assessed [under the personal capability assessment]". Where a decision awards a claimant incapacity benefit or credits on the basis of

Regulation 28, that is an "incapacity benefit decision", but there will not have been an "incapacity determination". The definition of "incapacity determination" does not cover a deeming under Regulation 28. The meaning of Regulation 6(2)(g) must be approached in that context. What entitles the Secretary of State to supersede under Regulation 6(2)(g) is the receipt by him of medical evidence following an examination. If that condition is to be met, the evidence must necessarily be received at a time when the condition of there having been an incapacity determination is also met. By definition, in the circumstances being considered, there will not have been an incapacity determination until **after** the medical evidence is received and the personal capability assessment is carried out.

126. However, we do not decide this question, for two reasons. First, it is unnecessary for us to do so because, if the tribunal was incorrect in saying that Regulation 6(2)(g), rather than Regulation 6(2)(a), was applicable, that does not in our judgment render its decision erroneous in law, as there was clearly an available ground for supersession under one or other of those provisions. In circumstances like those of the present case, the carrying out of a personal capability assessment is in itself a relevant change of circumstances, because it brings to an end the deeming of incapacity for work under Regulation 28. That would satisfy the terms of Regulation 6(2)(a) and entitle the Secretary of State to supersede the existing incapacity benefit decision if satisfied that the conditions of entitlement were not met. When such a change of circumstances is relied on, any superseding decision would take effect from the date of the decision under Section 10(5), as would a supersession under Regulation 6(2)(g). (It is our opinion that none of the provisions of Regulation 7(2)(c) would apply in relation to a supersession under Regulation 6(2)(a) following the first application of the personal capability assessment.) Secondly, although we had argument on behalf of the Secretary of State that Regulation 6(2)(g) was not applicable, we did not have the benefit of argument to the contrary on behalf of the Claimant, as his representative did not attend the oral hearing.

127. There remains the Claimant's alternative contention that the tribunal's reasoning was deficient in relation to the activities of standing, sitting and rising from sitting. The descriptors chosen by the Claimant in his IB 50 questionnaire were (by reference to the paragraph numbers in the Schedule to the Social Security (Incapacity for Work) Regulations 1995): (i) as regards sitting, 3(b) (15 points) or 3(c) (7 points); (ii) as regards standing, 4(f) (3 points); and (iii) (as regards rising from sitting), 5(c) (3 points). It follows that we need only consider whether there was an error of law in relation to sitting, because the points claimed in respect of standing and rising from sitting could not make any difference to the result. The complaint in relation to sitting is that the tribunal did not expressly say that it had in relation to this activity taken into account the fact that the Claimant had stood throughout the hearing (albeit apparenetly leaning against a high backed chair when doing so). However, the tribunal expressly noted that the Claimant had asked to stand up throughout the hearing, and it is in our judgment plain that the tribunal took this into account in reaching its conclusion in relation to sitting.

128. In our judgment, therefore, the tribunal's decision was not erroneous in law, and the tribunal was right simply to dismiss the Claimant's appeal.

CDLA/4753/2002

Decision

129. This is an appeal by the Claimant against a decision of the Colwyn Bay Appeal Tribunal made on 5 June 2002. For the reasons set out below that decision was in our judgment erroneous in law. We allow the appeal, set aside the tribunal's decision and remit the matter for redetermination by an differently constituted appeal tribunal which must comply with the directions set out in Paragraph 152 below. We draw the Secretary of State's attention to our direction in Paragraph 153 below.

The Facts

130. The Claimant is a woman now aged 60 who suffers from a number of complaints, including chronic low backache, cervical spondylosis and peripheral vascular disease.

131. On 25 January 1993, the Claimant was awarded the lowest rate of the care component of disability living allowance (on the basis of the main meal test) from 21 January 1993 for life.

132. On 17 October 1995, the Claimant, with a view to obtaining an award of the mobility component, applied for a review of that award on the ground of a change of circumstances.

133. In about 1996, on an appeal by the Claimant against the refusal by the adjudication officer to revise the award, an appeal tribunal reviewed and revised it, the revised decision being that the Claimant was entitled to (a) the higher rate of the mobility component from 17 October 1995 to 16 October 2000 and (b) the lowest rate of the care component for life (i.e. the award of the care component was left unchanged). There is no copy of that decision in the papers before us, but it can be inferred from the material which is in the papers that such a decision was made. (As CPAG helpfully pointed out in their submissions, the tribunal's record of proceedings records that a tribunal decision of 16 July 1996 was handed in at the hearing, presumably by the Claimant's representative, but that document does not appear to have been retained in the tribunal file).

134. On 21 July 2000, the Claimant submitted a completed renewal ("claiming again") claim pack. This asserted a level of disability which, if accepted, would have entitled the Claimant to the higher rate of the mobility and the highest rate of the care component. For example, the Claimant said that she could only walk 30 metres before the onset of severe discomfort, and that this would take 12 to 15 minutes. She expressly asserted that her condition had deteriorated since her last award.

135. On 3 August 2000, the Claimant's GP (Dr Pritchard) provided answers to standard form questions asked by the Benefits Agency. In answer to the question about the Claimant's walking ability before the onset of severe discomfort he ticked the option "50-100 metres", and indicated that this would be with a "normal gait" and at a "slow pace". He said that the Claimant could perform all the activities relating to

daily living set out on the form, although he qualified the answer relating to coping with hot pans by saying "yes but not heavy pans".

136. On 9 August 2000, the decision under appeal to the tribunal was made. The decision was made by filling in a standard form. On the page headed "details of decision" the section relating to mobility was completed so that it read "disallow 9/8/00" and then in the column headed "reason code" was entered "M50". The section relating to the care component was not completed at all.

137. The Secretary of State's submission to the tribunal described the decision as having been that the Claimant was not entitled to the mobility component from and including 9 August 2000 and was entitled to the lowest rate of the care component for help to make a main meal from and including 21 January 1993.

138. The Claimant appealed. Her appeal form stated: "I do not agree with the AO's decision dated 11 August 2000, and would like to appeal against that decision. I am virtually unable to walk."

139. On 22 February 2001, the hearing of the appeal was adjourned so that a report from an EMP could be obtained and so that all the papers relating to previous awards could be provided.

140. On 22 March 2001, the Claimant was examined by an Examining Medical Practitioner ("EMP") and a report was provided. The EMP gave the opinion that the claimant would be able to walk between 200 and 250 metres in 3 to 5 minutes with normal gait and balance, and that she could without help safely carry out all the everyday activities listed in the table on the standard form EMP report, save that help would be required using a "low cooker."

141. At the outset of the hearing before the tribunal, the chairman warned the Claimant and her representative that the lowest rate of the care component was also at risk. The representative stated that he did not need to discuss this further with the Claimant because he (the representative) had already warned her that this was a possibility.

142. The tribunal dismissed the Claimant's appeal. Its decision notice read simply as follows:

> "The Appeal is refused.
>
> [The Claimant] is not entitled to either component of disability living allowance with effect from 09/08/00.
>
> This is because she does not satisfy the statutory criteria of either component at any rate."

143. The tribunal therefore not only did not allow the Claimant's appeal against the removal of (and therefore refusal to extend the period of) the higher rate of the mobility component, but it also took away the award of the care component. The

tribunal did not in its statement of reasons make any reference to supersession or to the need for grounds for supersession to be established.

The Parties' Submissions

The Claimant

144. The Claimant submitted:

(1) The Claimant's application dated 21 July 2000, although in form an application for renewal ("claiming again"), could only be an application for supersession because the Claimant had an indefinite award of the lowest rate of the care component.

(2) The Secretary of State had no grounds for superseding the award of the mobility component:

(a) The decision of 9 August 2000, although it did not refer to supersession, was a decision under Section 10 because there was no other power enabling benefit to be terminated from the date of the decision.

(b) The only provision which could have entitled the Secretary of State to supersede as from the date of the decision was that in Regulation 6(2)(a)(i) (relevant change of circumstances).

(c) The onus of establishing a change of circumstances "is on the Secretary of State and he must be able to show that, on the evidence then available to him (here, solely the report of Dr Pritchard of 3 August 2000), the ground for changing the decision based on a relevant change of circumstances was in fact made out. The change **must** (following *Wood*) be such that the original award cannot stand."

(d) The information available to the Secretary of State at the time he made his supersession decision came nowhere near meeting this requirement. The only negative information which the Secretary of State had was Dr Pritchard's report. This did not establish that there had been a **change** of circumstances since the appeal tribunal's decision in 1996. At the very least, to establish this ground the Secretary of State would have needed to identify the basis for the previous appeal tribunal's award so that he could show that there had been a change.

(3) The tribunal erred in law in considering the care component when that was not an issue for the Secretary of State and the Claimant had not raised it as an issue in the appeal. CPAG relied here on the submissions which it made in relation to Issue 2.

(4) In the light of (2) and (3) above, the appeal tribunal which sat on 22 February 2001 should simply have held that the Secretary of State "had failed to make out the basis for the claimed for supersession on the information he had available at the time he made the decision. It therefore was wrong for that appeal tribunal to adjourn to

seek further evidence on this issue when such an adjournment had not been sought by the Secretary of State and he was content to base his case on Dr Pritchard's letter."

The Secretary of State

145. As modified by Miss Lieven at the hearing, the Secretary of State's submissions were as follows:

(1) CPAG's submission (1) was agreed.

(2) It was also agreed that the decision of 9 August 2000 was a supersession decision under Section 10. (In the Secretary of State's original written submission in this appeal, it was contended that that decision was "inept" and therefore invalid, and that the tribunal's only jurisdiction was so to declare. However, consistently with the Secretary of State's submissions on Issue 1B, that submission was withdrawn by Miss Lieven at the hearing.)

(3) The tribunal which sat on 5 June 2002 was required to consider, on the basis of all the information then before it, whether there was a ground to supersede the award made by the tribunal in 1996 in so far as relating to the mobility component, and if so whether it should be superseded.

(4) The tribunal was also entitled to consider the Claimant's entitlement to the care component, although it was not bound to do so as this was not an issue raised by the appeal.

(5) The tribunal's decision was erroneous in law because it did not consider whether there was an available ground for supersession.

(6) The Claimant's appeal should therefore be remitted to a new appeal tribunal.

Analysis and Conclusions

146. We agree with the parties that, since an award of disability living allowance is an award of one benefit, albeit consisting of two components, a purported application for renewal of a component which has been awarded for a fixed period must, where the other component has been awarded for an indefinite period, be treated as an application for supersession of the award as a whole (i.e. in respect of both components). Regulation 13C(1) of the Social Security (Claims and Payments) Regulations 1987, which provides that "a person entitled to an award of disability living allowance may make a further claim for disability living allowance during the period of six months immediately before the existing award expires", cannot in our judgment apply to this situation, because the existing "award" will not expire when the entitlement to the component which has been awarded for a fixed period ceases. That is in our view the case even where the two components were first awarded by separate decisions. The renewal claim pack submitted by the Claimant on 21 July 2000 was therefore necessarily an application for supersession. We would point out, however, that that would have been the case even if it had been possible for the Claimant to apply for renewal of her award of the mobility component. The claim

pack claimed substantial day and night care needs, and was therefore seeking an improved award of the care component as well as an extension of the award of the higher rate of the mobility component.

147. We further agree with the parties that the decision of 9 August 2000 was a decision superseding the appeal tribunal's 1996 decision under Section 10. The decision had the effect of terminating the Claimant's entitlement to the mobility component from the date of the decision, and there was no other general power under which that could have been effected (see our conclusions under Issue 1B).

148. The tribunal's decision was erroneous in law because it did not consider whether there were grounds on which to supersede the appeal tribunal's 1996 decision.

149. We comment as follows in relation to the Claimant's submission (2):

(a) The submission is in our judgment misconceived to the extent that (i) it concentrates solely on whether the Secretary of State was, on the material before him on 9 August 2000, justified in purporting to supersede the 1996 decision with effect from the date he did, and (ii) it assumes that if the appeal tribunal finds that the Secretary of State was not justified in doing so then his decision must simply be set aside. The question for the tribunal was whether, on the evidence before it, the Secretary of State had discharged the burden of establishing that there was a ground for supersession (whether the ground apparently relied upon by the decision maker or some other ground) and, if so, that the 1996 decision ought to be superseded. Section 12(8)(b), in providing that an appeal tribunal shall not take into account circumstances not obtaining at the time when the decision under appeal was made, plainly does not prevent an appeal tribunal taking into account evidence (e.g. an EMP report) coming into existence subsequently, provided that it is of relevance to circumstances down to the date of the decision under appeal.

(b) The potentially available grounds for supersession appear to have been those in Regulation 6(2)(a)(i) (change of circumstances) and 6(2)(c) (mistake of fact). Even if the supersession decision of 9 August 2000 was based on change of circumstances, the tribunal was not prevented from also considering mistake of fact.

150. As regards CPAG's submission (3), it is correct to say that neither the Claimant nor the Secretary of State had raised the Claimant's entitlement to the care component as an issue in the appeal. The tribunal was therefore not bound to consider the care component. However, for the reasons which we gave in relation to Issue 2, the tribunal was in our judgment entitled in its discretion to do so, provided of course that it gave the Claimant such warning of its intention to do so as was reasonably necessary in order to comply with the rules of natural justice. It did give such a warning. However, in our judgment the tribunal's decision was further erroneous in law in that it did not give any indication in the statement of reasons that it appreciated that under Section 12(8)(a) it had a discretion whether or not to consider removing the lowest rate of the care component.

151. As regards CPAG's submission (4), it cannot in our judgment be said that in deciding to adjourn the appeal tribunal which sat on 22 February 2001 exercised its discretion in a manner which no reasonable tribunal could have done. The report of Dr Pritchard provided evidence which gave some ground for thinking that either the Claimant's circumstances had improved since 1996 or the 1996 decision had been made under a mistake as to a material fact. We do not therefore have to decide whether, if we had been of the view that the decision of the appeal tribunal which sat on 22 February 2001 to adjourn for further evidence was one which no reasonable tribunal could have reached, that would have rendered the decision of the appeal tribunal which sat on 5 June 2002 erroneous in law.

152. We therefore set aside the tribunal's decision and remit the matter for determination by an entirely differently constituted appeal tribunal. We give the following directions to the new appeal tribunal:

(a) It must consider whether, taking into account only circumstances down to 9 August 2000, there were grounds to supersede the decision of the 1996 appeal tribunal, and if so whether it ought to be superseded and what the substituted award should be.

(b) A ground for supersession might of course lead either to an increase or a reduction in the award made or confirmed by the 1996 tribunal, depending on the precise nature of the ground for supersession. In practice, the available grounds will be either change of circumstances or mistake of fact.

(c) The new appeal tribunal must apply the provisions of Section 10(5) and Regulation 7 in deciding the date from which its decision takes effect. For this purpose a supersession favourable to the Claimant in respect of the care component is to be regarded as made on the Claimant's application dated 21 July 2000 and a supersession adverse to the Claimant in respect of either component should be regarded as having been made on 9 August 2000 on the Secretary of State's own initiative (see Paragraph 97 above).

(d) If the new appeal tribunal allows the Claimant's appeal and finds that there is no ground for supersession which leads to removal of the higher rate of the mobility component awarded by the 1996 appeal tribunal, it must consider whether to make an extended award of the higher rate of the mobility component. That would be pursuant to the Claimant's application for "renewal" made on 21 July 2000 which was implicitly refused by the decision of 9 August 2000. If in the appeal tribunal's view the Claimant's condition as at 9 August 2000 justified an extension of the award which was due to expire on 16 October 2000, that will in our judgment constitute a change of circumstances permitting the award to be superseded and an extended award (either for a fixed period or indefinitely) to be made. The change of circumstances would in our view lie in the fact that the original award was based upon the prediction that the Claimant's condition would have improved to the extent that he would no longer qualify for the benefit by the expiry date: but, in fact, contrary to that prediction, the award period had almost expired without the Claimant's condition having improving to that extent.

153. In connection with the rehearing we **direct** the Secretary of State within 28 days from the issue of this decision to file a further submission with the Appeals Service stating whether the Secretary of State wishes to contend before the new appeal tribunal that the Claimant's award of the lowest rate of the care component be superseded.

CDLA/4939/2002

Decision

154. This is an appeal by the Claimant against a decision of the Plymouth Appeal Tribunal made on 14 March 2002. For the reasons set out below that decision was in our judgment erroneous in law. We allow the appeal, set aside the tribunal's decision and remit the matter for redetermination by a differently constituted appeal tribunal. The new appeal tribunal must comply with the directions set out in Paragraph 164 below. We draw the Secretary of State's attention to our direction in Paragraph 165 below.

The Facts

155. The Claimant is a man now aged 43 who suffers from multiple sclerosis. By a decision made on 8 September 1993 ("the 1993 decision") he was awarded the lower rate of the mobility component and the middle rate of the care component of disability living allowance from 21 June 1993 for life.

156. On 12 July 2001, the Claimant completed a disability living allowance claim pack appropriate for an initial claim. That can only have been an application by the Claimant for supersession of his existing award on the ground of a relevant change of circumstances. However, it appears to have been doomed to failure on the face of the claim pack, in that the Claimant said that he could walk about 2 kilometres in about 2 hours before the onset of severe discomfort and that he did not claim any care needs at night.

157. On 5 October 2001, a decision was made, on the basis of the claim pack, superseding the 1993 decision but re-awarding the lower rate of the mobility component and the middle rate of the care component with effect from 5 October 2001. This was a "supersession at the same rate" which, in the light of the Court of Appeal decision in *Wood*, should have been simply a refusal to supersede.

158. The Claimant appealed. His letter gave no reasons for the appeal. It was contended by his representative before the tribunal that he was entitled to the higher rate of the mobility component and the highest rate of the care component. The Claimant appeared and gave evidence to the tribunal, which warned the Claimant and his representative that the tribunal could remove his existing award and adjourned the hearing for a short time so that the Claimant and his representative could consider whether they wished to continue with the appeal.

159. The tribunal's decision was that the Claimant was entitled to the lower rate of the mobility component from 5 October 2001 to 4 October 2006 but was not entitled

to any rate of the care component. The tribunal's decision therefore removed the Claimant's entitlement to the care component and turned the indefinite award of the lower rate of the mobility component into one for a fixed period. The decision in respect of the care component appears to have been based primarily on the Claimant's oral evidence at the hearing: the tribunal concluded by saying, "On his own evidence he did not satisfy the conditions for any rate of the care component."

The Parties' Submissions

160. It was submitted on behalf of the Claimant by CPAG that, for the reasons set out in its submissions under Issue 2 above, the tribunal had no jurisdiction to consider whether to supersede the 1993 award adversely to the Claimant when the Secretary of State had merely refused the Claimant's application for a more favourable award. In the alternative, it was submitted that in the exercise of the discretion inherent in Section 12(8)(a) the tribunal should have refrained from considering whether to supersede adversely to the Claimant.

161. The Secretary of State submitted that the appeal tribunal had the relevant jurisdiction to do what it did, but erred in law by giving inadequate reasons.

Analysis and Conclusions

162. For the reasons set out under Issue 2 above, we reject CPAG's first submission. The tribunal had jurisdiction to consider whether the 1993 decision ought to be superseded adversely to the Claimant.

163. However, it is clear that the tribunal's decision was erroneous in law in that (a) it did not in the statement of reasons consider whether there was a ground on which the 1993 decision could be superseded, and (b) it gave no reason for limiting the award of the lower rate of the mobility component to 5 years when it had previously been for an indefinite period. Moreover, the tribunal's decision was in our judgment further erroneous in law in that there is no indication in the statement of reasons that the tribunal appreciated that it had a discretion whether to consider an issue not raised by either of the parties to the appeal (i.e. whether the 1993 decision should be superseded adversely to the Claimant).

164. Unless the Claimant withdraws his appeal, the new appeal tribunal must consider whether there is a ground for superseding the 1993 decision which leads to a more favourable award for the Claimant than he had under that decision, and if not whether there is a ground for superseding that decision which leads to a less favourable award than he had under the 1993 decision. If the new appeal tribunal does supersede the 1993 decision, it must apply the provisions of Section 10(5) of the 1998 Act and Regulation 7 of the 1999 Regulations in order to determine the date from which its decision has effect.

165. In order to assist the new appeal tribunal to decide whether the 1993 decision ought to be superseded, we give the following direction in connection with the rehearing. We **direct** the Secretary of State, within 28 days of the issue of this decision, (i) to provide to the Appeals Service copies of the evidence (in so far as it is

available) which led to the making of the 1993 decision, and of that decision itself, and (ii) to file a further submission with the Appeals Service indicating whether he wishes to contend before the new appeal tribunal that the 1993 decision should be superseded adversely to the Claimant.

CDLA/5141/2002

Decision

166. This is an appeal by the Claimant against a decision of the Warrington Appeal Tribunal made on 10 September 2002. For the reasons set out below that decision was erroneous in law. We allow the appeal, set aside the tribunal's decision and remit the matter for redetermination by a differently constituted appeal tribunal in accordance with the directions given in Paragraph 184 below. We also draw the Secretary of State's attention to the direction in Paragraph 185 below.

The Facts

167. By the decision of an appeal tribunal made on 19 November 1999, the Claimant was awarded the higher rate of the mobility component and the lowest rate of the care component of disability living allowance from 1 December 1998 to 1 December 2001.

168. On 30 July 2001, the Claimant made a renewal claim, based on the effects of arthritis and carbon monoxide poisoning. In her claim pack, she stated (among other things) that she could not walk more than 30 yards before the onset of severe discomfort and could not cope with hot pans, chop vegetables or use taps.

169. On 13 September 2001, a decision was made re-awarding the higher rate of the mobility component (on the basis of virtual inability to walk) and the lowest rate of the care component (on the basis of inability to prepare a cooked main meal) from 2 December 2001 to 1 December 2003. That award was stated to be made on the basis of the claim pack alone.

170. On 31 October 2001, an enquiry reply slip was received by the DWP from the Claimant on which she stated as follows:

> "Many thanks for your letter and could you advise me as to the reason I have only been awarded this allowance for 2 years when my condition is diagnosed as being a permanent condition. I also enclose copies of recent scans which indicate that although I have now a wheelchair I am unable to use it myself unless someone pushes me as the damage to my shoulder is such that I cannot propel myself. I would be grateful if you could advise me of any further avenues that I may explore."

171. On 22 January 2002, a request was made by the DWP to Warrington Hospital for a medical report. On 30 January 2002, a report was provided by Dr Bentley, a consultant physician, who had last seen the Claimant in February 2001. His report was to the effect that the Claimant had no care needs. In answer to the question which of a list of activities the Claimant could do safely unaided by another person, he said

that the Claimant could do them all. In relation to a question as to what difficulty the Claimant might have with a list of specified activities relating to the cooking test, he wrote "none that I know of". In answer to the question as to the difficulties the Claimant experienced when walking, he wrote "patient feels gait abnormal - nil objective to support." He further advised that he had "not evaluated" the Claimant's walking ability, but that she could certainly walk more than 100 metres before the onset of severe discomfort. However, Dr Bentley enclosed that report with a covering letter which began: "I have not seen her for 11 months and I am not in a position to give an up to [date] evaluation of her." The letter concluded with the following:

> "From what I remember she came to the clinic on her own and she still manages a number of independent activities. I have answered your questions as far as I am able and she is no longer under on-going care at this hospital. If you feel that you need further clarification regarding her condition you may need an independent opinion from elsewhere."

172. On 12 February 2002, a decision maker purported to revise the decision of 13 September 2001, the revised decision being that the Claimant was not entitled to any rate of either component from 2 December 2001 (i.e. the renewal date). The reasons for the decision stated:

> "Further evidence received shows customer able to walk a useful distance with acceptable balance, speed and gait. No supervision needs considering level and type of disability. Safely mobile indoors and fully able to self-care including main meal."

173. The Claimant's appeal against that decision - or rather the decision of 13 September 2001, as purportedly revised by the decision of 12 February 2002 - was dismissed by the tribunal. The Claimant appeared and gave evidence at the hearing. In its statement of reasons, the tribunal said that the decision of 12 February 2002 could not have been a revision, because the Claimant had not asked for revision and the Secretary of State had taken no action leading to revision within a month after the decision of 13 September 2001. However, the tribunal held that the decision of 12 February 2002 was a supersession, albeit that it was not clear whether it was on the Claimant's application or on the Secretary of State's own initiative. The tribunal said that the issue for it was therefore whether a ground for supersession was established. The tribunal found that there was a ground for supersession, namely that the Secretary of State "had been ignorant of the lack of medical findings and ignorant of the medical diagnosis which did not support difficulties with mobility."

174. On 16 December 2002 (i.e. subsequent to the tribunal's decision), the Claimant was awarded the higher rate of the mobility component and the middle rate of the care component from that date pursuant to a fresh claim. An EMP report was obtained in connection with that claim. This appeal is therefore effectively concerned with the Claimant's entitlement in respect of, at most, the period from 2 December 2001 to 16 December 2002.

The Parties' Submissions

The Claimant

175. The Claimant submitted the following.

(1) There was no application for revision or supersession by the Claimant. The enquiry reply slip received on 31 October 2001 did not amount to such an application.

(2) The tribunal was wrong to treat the decision of 12 February 2002 as a supersession decision. It was a revision decision.

(3) Since the onus lay on the Secretary of State to show grounds for revising or superseding the decision of 13 September 2001, the question whether there were any such grounds must be judged by reference to the material before the Secretary of State at the time when he made the decision of 12 February 2002. That material came nowhere near establishing a case for either revision or supersession.

(4) In any event, the tribunal had no power to supersede when the Secretary of State had not made a decision under Section 10 but only under Section 9.

(5) If, contrary to the submission in (1), the enquiry reply slip is properly regarded as an application for a favourable revision or supersession, the Secretary of State should be treated as having also made a decision refusing to supersede, which would have entitled the tribunal to supersede in the Claimant's favour on the Claimant's application, but not to her detriment (because this would involve the tribunal exercising the Secretary of State's jurisdiction to supersede on his own initiative).

(6) Regulation 13C(3) of the Social Security (Claims and Payments) Regulations 1987 is not a freestanding power to revise. A case or ground for revision under Regulation 3 of the 1999 Regulations must be shown before the power is exercised.

(7) The tribunal should therefore simply have set aside the decision of 12 February 2002 as invalid. In view of (3) above, it should have done this on reading the papers and without hearing evidence from the Claimant.

The Secretary of State

176. The following submissions were made on behalf of the Secretary of State.

(1) It was permissible to treat the enquiry reply slip of 31 October 2001 as an application for supersession.

(2) The decision of 12 February 2002 was a revision, not a supersession.

(3) In any event, the tribunal's reasons for finding that the Claimant did not satisfy the conditions of entitlement to any rate of either component were inadequate.

(4) In the Secretary of State's written submission it was submitted that:

(a) The decision of 12 February 2002 was invalid because there were no grounds for revision under Regulation 3.

(b) The tribunal was not entitled to substitute a supersession decision for a revision decision.

(c) The tribunal should therefore simply have declared the decision of 12 February 2002 invalid.

(5) However, at the hearing, Miss Lieven submitted that Regulation 13C(3) of the Social Security (Claims and Payments) Regulations 1987 is a freestanding power to revise, in that a decision maker can revise an award made on renewal simply on the ground that he does not consider that the claimant satisfied the conditions of entitlement at the renewal date. In other words, a case or ground for revision within Regulation 3 does not have to be shown in the case of an award made before the renewal date on a renewal claim. The tribunal had power to substitute a revision under Regulation 13C(3) for the decision maker's purported revision under Regulation 3 for mistake of fact, because both types of revision are carried out under Section 9 of the Act - Regulation 13C(3) expressly says that the decision may be revised under Section 9. On this footing, therefore, the case should be remitted to a new tribunal for determination whether the Claimant satisfied the conditions of entitlement to any rate of either component of disability living allowance.

Analysis and Conclusions

177. The enquiry slip cannot have been an application for revision **under Regulation 3(1)**, because it was not sent within a month of the decision of 13 September 2001 and there was no application by the Claimant for an extension of time.

178. However, in our view, the enquiry reply slip was probably capable of being regarded as an application for revision and/or supersession of the decision of 13 September 2001. The Claimant was complaining about the substance of that decision, and in particular about the fact that it was for only 2 years, whereas her condition was permanent. However, in view of our conclusions below, it may not make any difference whether it was an application by the Claimant or not.

179. The decision of 12 February 2002 was a purported revision, and not a supersession, because (a) the box marked "revision" and not that marked "supersession" was ticked, (b) it was stated to be made under Regulation 3, and (c) it removed entitlement from the renewal date.

180. There was no evidence before the tribunal that a ground for revision was applicable:

(1) None of the grounds in Regulation 3 was applicable. The only ground which might have required consideration was Regulation 3(5)(c), but the Secretary of State had not sought to establish that the Claimant **knew or could reasonably have been expected to know** of some fact as to which he was mistaken at the time of making the decision of 13 September 2001.

(2) There was no evidence before the tribunal which justified revision of the decision of 13 September 2001 under Regulation 13C(3), as construed by us above under Issue 3 (see Paragraphs 106-107 above). In particular, there was no evidence of the Claimant's condition having unexpectedly improved between 13 September 2001 and 2 December 2001 (the renewal date).

181. The tribunal had jurisdiction to consider whether the decision of 13 September 2001 ought to be superseded under Section 10, whether favourably to the Claimant on her application or unfavourably to her on the Secretary of State's own initiative (see our conclusions under Issues 1 and 2 at Paragraphs 55 and 88-97 above).

182. The report of Dr Bentley raised at least an arguable case that the decision of 13 September 2001 had been made under a mistake as to the Claimant's walking ability and ability to prepare a cooked main meal, and therefore that the ground for supersession in Regulation 6(2)(b)(i) was satisfied. Although he had last seen the Claimant in February 2001 (i.e. some 7 months before the decision of 13 September 2001 and some 10 months before the renewal date), his report was on the face of it flatly inconsistent both with the award made by the appeal tribunal on 19 November 1999 and with the Claimant's renewal claim pack. We therefore reject the contention on behalf of the Claimant that the tribunal should, without hearing any evidence, simply have set aside the decision of 12 February 2002.

183. The tribunal's decision was erroneous in law in the following respects:

(1) It treated the decision made on 12 February 2002 as a supersession rather than a revision.

(2) In our judgment, the tribunal's reasoning was inadequate on the question whether the decision of 13 September 2001 was made under a mistake as to a material fact. That reasoning was contained in a single sentence, namely that "the tribunal agreed that the Secretary of State had been ignorant of the lack of medical findings and ignorant of the medical diagnosis which did not support difficulties with mobility." In our view, that reasoning, even when read in the light of the tribunal's detailed findings as to the Claimant's mobility and her care needs, was so unsatisfactorily brief and obscure that it amounted to an error in law.

(3) On the footing that the tribunal decided that the decision of 13 September 2001 had been superseded on the ground of mistake as to a material fact, rather than revised, the award should not have been removed with effect from the renewal date, but only from 12 February 2002. In the case of supersession on the ground of mistake of fact, there is no provision in Regulation 7 which varies the primary rule in Section 10(5) that supersession takes effect "as from the date on which it is made or, where applicable, the date on which the application is made." In accordance with Paragraph 97 above, our view is that, even when it follows an application by the claimant, a supersession unfavourable to the claimant is not made "on an application for the purpose" within the opening words of Regulation 6(2).

184. The case must be remitted to a new appeal tribunal. The Claimant's appeal form did not contend that the decision of 13 September 2001 was wrong, and

therefore the new appeal tribunal need not consider whether the decision maker was mistaken or ignorant as to some fact which would or might lead to a more favourable decision for the Claimant unless before the hearing the Claimant requests the tribunal to do so. The new appeal tribunal must determine whether the decision made on 13 September 2001 ought to be superseded adversely to the Claimant for mistake as to some material fact within Regulation 6(2)(b)(i). That mistake must be one which is capable of leading to a less favourable decision than the one made on 13 September 2001. If it concludes that the decision of 13 September 2001 ought to be superseded adversely to the Claimant, the supersession should take effect only from 12 February 2002.

185. The Claimant had an award (made by an appeal tribunal) of higher rate mobility and lowest rate care until 1 December 2001, and has an award of higher rate mobility and middle rate care from 16 December 2002. It would seem unlikely that, if those awards were both rightly made, the Claimant is not entitled to at least the higher rate of the mobility component and the lowest rate of the care component in respect of the period from 2 December 2001 to 15 December 2002. We therefore **direct** the Secretary of State, within 28 days after issue of this decision, to make a further submission in relation to the rehearing indicating whether he would in respect of that period support an award of disability living allowance, and, if so, what award.

Summary of Conclusions on Issues of Law

186. A decision can only be superseded under Section 10 if there is a ground for supersession and that ground forms the basis of the supersession decision in the sense that the original decision can only be altered in a way which follows from that ground (Paragraph 10(4) above).

187. Similarly, in a case where a ground for revision is necessary, a decision can only be revised under Section 9 if there is a ground for revision and that ground forms the basis of the revised decision in the sense that the original decision can only be revised in a way which follows from that ground (Paragraph 10(5)).

188. An appeal following a decision under Section 9 to revise or not to revise a decision is an appeal against the original decision (as revised or not revised). Accordingly, the appeal tribunal cannot on such an appeal take into account circumstances occurring after the date of the original decision (Paragraphs 38 and 53).

189. The time limit in Regulation 31 for appealing against a decision which has been revised, or not revised following a claimant's application for revision under Regulation 3(1) (application within 1 month) or (3), is calculated by reference to the decision to revise or not to revise (Paragraph 38).

190. Notwithstanding that an appeal following a decision to revise is an appeal against the original decision as revised, in a case where a ground for revision was necessary the claimant is entitled in such an appeal to argue that, taking into account only circumstances down to the effective date of the original decision, no ground for revision is established. Similarly, on a timeous appeal following a refusal of an application for revision on the ground of "official error", notwithstanding that the

appeal is against the original decision, the claimant must establish that the original decision arose from an official error (Paragraph 39-40).

191. On an appeal against a decision under Section 10 superseding or refusing to supersede an original decision, if it finds that the original decision ought to have been revised, the appeal tribunal has jurisdiction to make a decision under Section 9 revising the original decision. Similarly, on an appeal against an original decision which has been revised (or not revised) under Section 9, if, taking into account only circumstances down to the date of the original decision, it finds that the original decision ought to have been superseded rather than revised, the appeal tribunal has jurisdiction to make a decision under Section 10 superseding the original decision. The appeal tribunal is entitled (subject in particular to Section 12(8)(b) of the 1998 Act) to substitute the decision which it considers the Secretary of State should have made (Paragraph 55).

192. On an appeal against a decision which (if valid) changes the effect of a previous decision but which the appeal tribunal finds to contain defects (for example, failure to use the terms "revise" or "supersede", failure to indicate that a previous decision is being revised or superseded, failure to identify the previous decision being revised or superseded, failure to specify the ground for revision or supersession, or reliance on the wrong ground for revision or supersession):

(1) if the tribunal finds that the decision was made under Section 9 or 10 it has jurisdiction to make the decision which it considers that the Secretary of State should have made (thereby remedying any such defects in the decision, whether properly regarded as defects of form or substance), and therefore should not simply set such a decision aside as invalid (or "inept") (Paragraphs 73, 74 and 77-80):

(2) whilst there may be some such decisions which have so little coherence or connection to legal powers that they do not amount to decisions under Section 9 or Section 10 at all (Paragraph 72)

(a) a decision should generally be regarded as having been made under Section 9 if (however defectively expressed) it alters the original decision as from the effective date of that original decision, and

(b) a decision should generally be regarded as having been made under Section 10 if (however defectively expressed) it alters the original decision as from some date later than the effective date of that original decision (Paragraphs 75-76):

(3) the tribunal will not err in law if in its decision notice it does not set aside and reformulate the decision under appeal unless either (i) the decision as expressed is actually wrong in some material respect or (ii) there would be some benefit to the claimant or to the adjudication process in reformulating the decision (Paragraphs 81-82).

193. An issue is "raised by the appeal" for the purposes of Section 12(8)(a) of the 1998 Act if it has been raised by one of the parties at or before the appeal tribunal's decision (Paragraph 32).

194. An appeal tribunal is entitled to make a decision less favourable to the claimant than the decision under appeal. In particular, on an appeal against a refusal of a claimant's application for supersession of an award of disability living allowance (or against a supersession which was not as favourable as the claimant wished), an appeal tribunal is entitled to supersede (or revise) the original decision on a ground which leads to a decision less favourable to the claimant than the decision under appeal. However, unless the Secretary of State has in his submissions to the appeal tribunal raised the issue as to whether a less favourable decision should be made, the tribunal must consciously consider whether to exercise its discretion under Section 12(8)(a) of the 1998 Act to take into account issues not raised by the appeal. This is a discretion to be exercised judicially, taking into account all relevant circumstances. If a statement of reasons is given, then reasons for the exercise of the discretion should be set out. In addition, the appeal tribunal must be satisfied that there has been compliance with the requirements of Article 6 of the European Convention on Human Rights and of natural justice (Paragraphs 88-97 above).

195. Where a claimant applies for renewal or supersession in his favour of an award of disability living allowance but the Secretary of State supersedes the original decision adversely to the claimant, the supersession should be regarded as having been made on the Secretary of State's own initiative. In a case in which the primary rule in Section 10(5) applies (because there is no provision to the contrary in Regulation 7), the supersession will therefore take effect from the date of the Secretary of State's decision (Paragraph 95-97).

196. Similarly, where, on an appeal against a decision refusing a claimant's application for renewal or supersession of an award of disability living allowance (or against a decision on such an application which was not as favourable as the claimant wished), the appeal tribunal supersedes the original decision on a ground which leads to a decision less favourable to the claimant than the original decision, the supersession should be regarded for the purposes of Section 10(5) as having been made on the Secretary of State's own initiative at the date of the Secretary of State's decision under appeal (Paragraph 97).

197. An application for renewal of an award of disability living allowance which was for a fixed period in respect of one component and for an indefinite period in respect of the other component must be treated as an application for supersession of the awarding decision (Paragraph 146). For the purposes of such an application, there is a change of circumstances if it is considered that at the expiry of the fixed period the claimant will still qualify for an award of that component (Paragraph 152).

198. Regulation 13C(3) of the Social Security (Claims and Payments) Regulations 1987 (providing that an award of disability living allowance made on renewal can be revised if the claimant is found not to satisfy the conditions of entitlement on the renewal date) (a) is freestanding in the sense that it does not additionally require one of the grounds for revision in Regulation 3 to be established, but (b) in the usual case

where the issue concerns the condition of the claimant at the renewal date, it can be exercised only on the ground that the claimant's condition has either improved between the date of decision and the renewal date to a greater extent than anticipated by the decision maker or has not deteriorated during that period to the extent anticipated by the decision maker (Paragraphs 106-107).

His Honour Judge Gary Hickinbottom
Chief Commissioner

Mr Commissioner Mesher

Mr Commissioner Turnbull

21 January 2004