Bullchs 174

(Short)

CDLA/5196/2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the Darlington appeal tribunal dated 15 August 2001.

REASONS

2. I held an oral hearing of this appeal. The claimant was represented by Mr Philip Hanns of the Welfare Rights Team of the Social Services Department of Durham County Council and the Secretary of State was represented by Ms Deborah Haywood of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions. I am grateful to both advocates for their helpful submissions.

3. The appeal arises out a claim for disability living allowance, which was treated as made by the claimant on 23 March 2000. Having obtained a medical report from the claimant's general practitioner, the Secretary of State decided on 19 June 2000 that the claimant was entitled only to the lowest rate of the care component of disability living allowance. On 16 August 2000, the claimant asked for "the case to be looked at again". On 7 September 2000, the Secretary of State decided "to supersede but not to change" his earlier decision. On 4 October 2000, the claimant again asked for his case to be reconsidered. This time, the Secretary of State obtained a report from an examining medical practitioner who saw the claimant on 17 February 2001. On 6 March 2001, the Secretary of State decided to "revise" the decision of 7 September 2000 and to "disallow" disability living allowance altogether from 6 March 2001. On 12 March 2001 the claimant was given an explanation for the decision of 6 March 2001 and he asked for his case to be looked at yet again, saying that he would provide further evidence. However, he merely sent a letter dated 21 March 2001, stating that his circumstances had changed, and on 3 April 2001, the Secretary of State issued a decision refusing to revise the decision of 6 March 2001. The claimant appealed and provided a brief report from his general practitioner.

4. When the case came before the tribunal on 3 July 2001, the tribunal adjourned the hearing and asked the Secretary of State to provide an explanation of the original award of disability living allowance on 19 June 2000 and the grounds upon which it had been revoked on 6 March 2001. The Secretary of State duly made a further written submission on 11 July 2001. The only explanation forthcoming for the initial award was that "it was considered that [the claimant] required help for a significant portion of the day". As to the ground for revoking it, the explanation was:

> "He was examined by an EMP on 17/02/2001 and on 06/03/2001 the decision maker considered that there were grounds to review the existing award of the care component.
>
> "It was considered that there had been a relevant change of circumstances in that the clinical findings on the day of the examination indicated that [the

claimant] should be able to manage all his own personal care safely and unaided.

"As a result the decision maker decided to withdraw benefit from and including 06/03/2001."

5. The case came back before the tribunal on 15 August 2001. Mr Hanns made it plain that the claimant sought the lowest rate of the care component and the higher rate of the mobility component of disability living allowance. The tribunal therefore identified two issues: whether the original award of the care component had been correctly superseded so as to take away entitlement to the lowest rate of the care component and whether the award ought to have been superseded so as to make the higher rate of the mobility component payable.

6. In relation to the care component, the tribunal concluded that, although the claimant did have care needs, the evidence did not "establish that those were care needs which existed most of the time for a significant portion of the day". They also found that the claimant could prepare and cook a main meal for one. In relation to the mobility component, the tribunal were divided. The dissenting member accepted the claimant's evidence that he could walk only 20 to 30 yards before the onset of severe discomfort and would have accepted that he was virtually unable to walk but the majority preferred the examining medical practitioner's estimate that the claimant could walk 100 yards before the onset of severe discomfort and they concluded that he was not virtually unable to walk. The tribunal therefore dismissed the claimant's appeal. The claimant now appeals with the leave of a Commissioner.

7. The legislation governing decision-making and appeals is complex. The concepts of "revision" and "supersession" were introduced by the Social Security Act 1998. They replaced the single, and simpler, concept of "review" which had existed for half a century. I note that "review" was the term used in the submission made by the Secretary of State on 11 July 2001, fudging the distinction between revision and supersession. Section 8 of the 1998 Act provides for the Secretary of State to "decide any claim for a relevant benefit". Section 9(1) provides:

> "**9.**– (1) Subject to section 36(3) below, any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State –
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> (a) either within the prescribed period or in prescribed cases or circumstances; and
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> (b) either on an application made for the purpose or on his own initiative;
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> and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised."

Section 9(3) provides that, generally, a revision takes effect as from the date on which the original decision took (or was to take) effect. Section 10(1) provides:

> "**10.**– (1) Subject to subsection (3) and section 36(3) below, the following, namely –

(a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above; and

(b) ...

may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative."

Section 10(5) provides that, generally, a decision under section 10 takes effect as from the date on which it is made or, where applicable, the date on which the application was made, but regulations under section 10(6) may provide exceptions. It is impossible to discern from the primary legislation whether, in any particular case, revision or supersession is the more appropriate course of action. Section 12 permits an appeal against a decision under section 8 or section 10. It does not permit an appeal against a decision under section 9. Nor does it permit an appeal against a refusal to supersede so that, if a claimant applies for supersession but the Secretary of State is not satisfied that there should be any change in his entitlement, there must be a supersession "at the same rate" rather than a refusal to supersede (R(DLA) 6/02, CI/1547/01).

8. The Social Security and Child Support (Decisions and Appeals) Regulations 1999 make further provision. Regulation 3(1) prescribes a period for the purposes of section 9(1)(a), which is usually one month from the date of notification of a decision, but regulation 3(9)(a) specifically provides that paragraph (1) does not apply in respect of a relevant change of circumstances which occurred since the original decision was made. Regulation 3(5)(c) provides that a disability benefit decision may be revised under section 9 if it was made in ignorance of, or was based on a mistake as to, some material fact and the decision was more advantageous to the claimant than it would have been had the true facts been known and the claimant could reasonably have been expected to know the fact and to appreciate its relevance. Regulation 3(10) provides that an application for supersession may be treated as an application for revision. Regulation 6(2)(a)(i) provides that a decision may be superseded under section 10 where there has been a change of circumstances since the decision was made. Regulation 6(2)(a)(ii) provides that a decision may be superseded on the ground that it was erroneous in point of law, or it was made in ignorance of, or was based on a mistake as to, some material fact and it is too late for revision under regulation 3(1). Regulation 6(3) provides that a decision that may be revised may not be superseded and regulation 6(5) provides that an application for revision may be treated as an application for supersession. Regulation 7 makes complicated provision as to the dates from which some supersessions under regulation 6(2)(a) are to take effect, in place of the date laid down by section 10(5). Under regulation 31(2), the time for appealing against a decision which has been revised or, following an application under regulation 3(1), has not been revised runs from the date of notification of the decision to revise or the decision refusing to revise. Thus, where there has been a revision or refusal to revise, which cannot itself be the subject of an appeal, an appeal lies instead against the decision that has been, or has not been, revised.

9. It is small wonder that claimants are invited to apply for "reconsideration", which is a non-statutory term that may be taken to encompass both revision and supersession, rather than to try and work out whether revision or supersession would

be appropriate. The idea is that the Secretary of State will give whatever is the appropriate form of decision. However, the Secretary of State's decision-makers also find the legislation confusing and so do I. The main issue before me is about the consequences of the Secretary of State's decision-maker making a mistake as to the type of decision to be issued.

10. Mr Hanns' submission is that the Secretary of State's decision of 6 March 2001 purported to be a "revision", that the removal of the existing award required a "supersession" and that the tribunal were not entitled to cure the defect. Ms Haywood conceded that the Secretary of State should have superseded the existing award but submitted that the tribunal had cured the defect and had been entitled to do so.

11. I suspect that the decision of 6 March 2001 was given in terms of a revision because the application of 4 October 2000 which led to that decision was made within one month of the decision given on 7 September 2000. That application could therefore have been construed as an application for a revision within regulation 3(1). On the other hand, the claimant said that his condition had worsened. He did not say whether he considered that the worsening dated from before or after 7 September 2000. If the former, that was something that could be taken into account within a regulation 3(1) revision. If the latter, his application could not, by virtue of regulation 3(9)(a), be treated as an application for revision. It had to be treated as an application for supersession under regulation 6(2)(a)(i). The Secretary of State, however, took the view that there had been an improvement in the claimant's condition since 7 September 2000. As I held in CDLA/4217/01, where a claimant applies for an increase in benefit and the Secretary of State decides there should be a decrease, the Secretary of State's decision must be taken to have been made on his own initiative, rather than on the claimant's application, because otherwise section 10(5) has the effect that the decision is effective from an earlier date than it would have been if the claimant had not made his application. Accordingly, the Secretary of State's decision to remove entitlement had to be by way of a supersession of his own initiative under regulation 6(2)(a)(i). Such a decision would be effective from the day it was made. The Secretary of State was therefore entitled to make the decision he did on 6 March 2001 but it should have been by way of supersession, as Mr Hanns and Ms Haywood submit. However, as I also held in CDLA/4217/01, the claimant was entitled to a decision on his application of 4 October 2000 because otherwise he would be prejudiced in relation to the date from which a decision given on a successful appeal would be effective. On the Secretary of State's view of the case, the decision on the claimant's application should have been both a refusal to revise under regulation 3(1) and a supersession "at the same rate" under regulation 6(2). Thus there should have been three decisions in all: the refusal to revise and the supersession "at the same rate" on the claimant's application and the supersession on the Secretary of State's own initiative to remove the award.

12. Had the correct decisions been given on 6 March 2001, what would have been under appeal to the tribunal ? The decision of 3 April 2001 purported to be a refusal to revise under regulation 3(1) the decision of 6 March 2001. That was fine insofar as the decision of 6 March 2001 was a supersession decision and it meant that, by virtue of regulation 31(2), the appeal was against the decision of 6 March. But insofar as the decision of 6 March 2001 was a refusal to revise under regulation 3(1) the decision of 3 April 2001 had to be construed as a supersession "at the same rate". The appeal

could then be construed as being against the decision of 3 April 2000, but in all the circumstances, it would have been fairer (because the claimant plainly wished to appeal against a decision given before 3 April 2001) to accept it as being a late appeal against the decision of 7 September 2000, bearing in mind that the time for appealing ran only from 6 March 2001.

13. The overall effect would have been as follows. In relation to the care component, the tribunal would have been able to consider whether the award had properly been superseded on the Secretary of State's own initiative with effect from 6 March 2001. In relation to the mobility component, in respect of which the claimant could argue that either he had been virtually unable to walk before 7 September 2000 or else he had become virtually unable to walk at a later date due to a deterioration in his condition since then, the tribunal would have been able to consider both his arguments. If satisfied that the claimant had been unable to walk since 7 September at the latest, they could have allowed the appeal against the decision of 7 September 2000. If satisfied that the claimant had become virtually unable to walk from a later date, they could have allowed the appeal against the decision of 6 March 2001 to supersede the earlier decision "at the same rate".

14. Ms Haywood argues 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. That, she submits, is the nature of an appeal. Mr Hanns argues that the only appeal before the tribunal was against the "revision" on 6 March 2001, which was plainly misconceived as it purported to take account of a change of circumstances since the original decision was made. He submits that the tribunal's decision should simply be held to be erroneous in point of law and that the question of supersession should fall once more to be determined by the Secretary of State. He refers to R(DLA) 3/01 and CDLA/4485/00 in which Commissioners considered the "new" scheme of adjudication introduced by the 1998 Act. The former case does not really take the present argument further forward because it is concerned with the loss of the power of a tribunal to take account of changes of circumstances since the date of the decision under appeal. That is not in issue in the present case.

15. In CDLA/4485/00, Mr Commissioner Lloyd-Davies was concerned with an appeal arising from a decision of the Secretary of State purporting to supersede decisions of an adjudication officer that had already been set aside on appeal to a tribunal. He held that the Secretary of State should have considered superseding the decisions of the tribunal but that he himself could not do so. He said:

> "Any new supersession decision replacing that of the tribunal of 13 October 1999 would, in my judgment, be a matter first arising in the appeal: the tribunals established by the 1998 Act have no jurisdiction to deal with such matters (unlike their predecessors) and since my jurisdiction is limited to giving a decision which the tribunal could have given, I too cannot substitute any such decision."

Mr Hanns contrasted that approach with the approach taken in R(F) 1/72 where 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 tribunal that he had erred in law in framing the decision under appeal and had invited the tribunal to substitute a different decision that was even less favourable to the claimant. The tribunal had accepted that invitation and the Commissioner held that they had been entitled to do so. I do not consider that that degree of flexibility has been lost. Indeed, it has always been accepted that a supersession by the Secretary of State of a decision on one ground may be replaced by a tribunal by a supersession of the same decision on a different ground. It is important to note that section 12(8)(a) of the 1998 Act provides that a tribunal "need not consider any issue that is not raised by the appeal" and that implies that a tribunal *may* consider such an issue. I think that what troubled Mr Commissioner Lloyd-Davies was that in the case before him what was required was a wholly different supersession of a different decision. Accordingly, there were powerful reasons for not treating the supersession of the adjudication officer's decision as a supersession of the tribunal's decision.

16. The position in CSIB/1268/00, on which Mr Hanns also relied, was slightly different. There the adjudication officer's decision was not framed as a supersession at all, whereas a supersession of a tribunal's decision had been required. The date of the tribunal's decision was apparently unknown and so the tribunal's findings were probably also unknown which would have made supersession difficult, although not necessarily impossible. When the claimant appealed to a second tribunal, they recast the decision under appeal as a supersession. Mr Commissioner May QC accepted the Secretary of State's concession that they had not been entitled to do so. However, in CSIB/1266/00, Mrs Commissioner Parker declined to follow CSIB/1268/00 and held that a tribunal were entitled to correct what was merely, in her view, a defect of form. I prefer the latter approach.

17. Mr Hanns also referred me to CDLA/9/01, where Mr Commissioner Williams considered a case where the secretary of state's submission to the tribunal failed to show any grounds for supersession and the tribunal also failed to identify any grounds for supersession. The Commissioner said:

> "... the Secretary of State has the task of identifying either the circumstances that have changed ... or some other ground under regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, if he wishes to take a supersession decision. If challenged, the Secretary of State also has the task of deciding if he has done so. Under the Social Security Act 1998, the tribunal no longer has the powers that used to exist to deal with previously undecided issues as questions first arising on appeal or as references. If the matter has not been decided by the Secretary of State, then the matter must go back to him."

This passage appears to support Mr Hanns' argument. However, the Commissioner, having set aside the tribunal's decision, then went on to consider whether grounds of supersession had been shown and, not being so satisfied, he gave a decision restoring the original award of disability living allowance. As the Commissioner's power to correct an error in the Secretary of State's decision could be no greater than those of the tribunal, his reasons for his final decision imply that he considered that, in the circumstances of the case before him, the tribunal could have substituted for the decision under appeal a decision expressed as a supersession.

18. Mr Commissioner Williams appears to have resiled from that approach in CDLA/2733/02, although again his view is not entirely clear. In that case, he referred in paragraph 10 to an earlier decision of his, CDLA/3135/02, where the Secretary of State had made a supersession decision and the tribunal had found that the decision was made without grounds but purported to make a different supersession decision. He had accepted the Secretary of State's concession that the tribunal had had no jurisdiction to make that new decision. However, in paragraph 12, he did suggest that a tribunal had a power, although not a duty, to "correct" a decision of the Secretary of State, subject to the parties having a proper opportunity to deal with any new matters arising.

19. More importantly, for the purposes of the present case, he held in paragraph 11 that a tribunal hearing an appeal against a decision that has been revised cannot substitute a supersession decision effective from the date of the original revision. Mr Commissioner Jacobs has given a decision to the same effect in CCS/901/02. In CDLA/2033/01, I followed those decisions and held that a tribunal could not give a supersession decision when an appeal was brought following a refusal to revise an earlier decision and the refusal could not also be construed as a supersession. I do not resile from that approach, which was based on section 12(8)(b) of the 1998 Act which prohibits a tribunal from taking account of any change of circumstances since the decision under appeal. As the decision given on 1 March 2000 was a refusal to revise a decision given on 1 November 1999, the appeal brought following the refusal to review was against the decision of 1 November 1999 so that the tribunal could not issue a supersesion decision that could have been given on 1 March 2000 based on a change of circumstances since 1 November 1999. However, I may have been a little cautious in finding that the refusal to revise could not be construed as a supersession "at the same rate" as further evidence had been submitted between the date of the original decision and the refusal to supersede, although it was arguable that the further evidence did not really amount to a request for supersession on the ground of a change of circumstances. If the refusal to revise had been treated also as a supersession at the same rate, and if the appeal had been treated as being both against the original decision and the supersession, the tribunal would have had all options open to them. The loss of flexibility about which I complained in my decision would have been avoided.

20. In the present case, the arguments for treating the decision given by the Secretary of State on 6 March 2001 as being more than the "revision" it claimed to be are more compelling. Firstly, the reasons given for the decision were consistent with a supersession on the Secretary of State's own initiative rather than a revision. Secondly, the claimant's application for "reconsideration" should plainly have been treated both as an application for revision and as an application for supersession and

the Secretary of State in fact made the findings necessary for the disposal of both applications.

21. Thirdly, while Mr Commissioner Williams said in CDLA/9/01 that "[t]here is no doctrine of substance over form known to English law", it seems to me that the modern trend is towards principled pragmatism rather than pedantry. (The problem in CDLA/9/01 was that the Secretary of State argued that the tribunal had in substance made a supersession decision based on change of circumstances when Mr Commissioner Williams was not satisfied that that was what they had done, presumably because their findings did not reveal a change of circumstances. As I have already indicated, it appears that, had Mr Commissioner Williams been satisfied that they had found a change of circumstances, he would at that time have accepted the Secretary of State's submission.) I am at a loss to see why, when a claimant applies for "reconsideration" because he wants an increase in benefit and the Secretary of State decides that his benefit entitlement should be decreased and the claimant then appeals, the tribunal should have fewer powers than the Secretary of State had. I am at even more of a loss to understand why it should be the terms in which the Secretary of State's decision is issued that determines the limits of the tribunal's jurisdiction rather than what he actually decided, particularly as in some cases the terms of the decision may be required by the Secretary of State's findings of fact and it is partly against those findings that the claimant is appealing. For example, the date from which a change of circumstances takes place may determine whether a decision should be revised or superseded.

22. It seems to me that the key to all this is to recognise that, in most cases, the scope of an appeal to a tribunal is to be determined by the scope of the issues before the Secretary of State, rather by the scope of the Secretary of State's decision. This may require a tribunal to treat the Secretary of State as having implicitly made decisions in addition to those expressly made and it may entitle a tribunal to correct an error in the framing of a decision. Because the legislation is so complicated, it may also require the tribunal to treat an appeal as being two or more appeals against different decisions given on different dates. Although this may require a tribunal to deal with issues not expressly addressed by the Secretary of State, that is not outlawed by section 12(8)(a) of the 1998 Act and the issues will generally be ones that should have been dealt with by the Secretary of State. A tribunal has a discretion as to the extent to which it deals with new issues that are not raised by an appeal but these sorts of procedural issues are often directly raised by an appeal, albeit implicitly, and must be dealt with, although there will sometimes be cases where it is appropriate for the tribunal to leave new issues to be determined by the Secretary of State.

23. In the present case, the claimant had sought an increase in entitlement to disability living allowance, which should have been treated as being both an application for revision and an application for supersession of his award of the lowest rate of the care component. In his decision of 6 March 2001, the Secretary of State considered both the conditions of entitlement to the higher rate of the mobility component and all rates of the care component and decided that the claimant did not satisfy any of them and that the claimant's existing award should cease. He later claimed that the reason that the award should cease was that there had been a change of circumstances. He made a single decision as a "revision". The claimant had appealed. It seems to me that, in order properly to deal with the appeal, the tribunal

had to consider what decisions the Secretary of State could have given, and should have given, on his approach to the case and then decide what decisions they would substitute for them. I do not accept Mr Hanns' submission that the tribunal could do no more than decide that the revision was inappropriate and leave the Secretary of State to issue new decisions on the claimant's application and a new supersession decision on his own initiative. The Secretary of State had already purported to consider the relevant issues. His consideration of those issues may have been inadequate and he may have reached the wrong conclusions but the mere fact that the form of his decision was incorrect did not prevent the tribunal from themselves considering those issues and reaching their own conclusions on them. I understand the forensic necessity for claimants' representatives to argue before Commissioners that tribunals' powers are limited. It may lead to another opportunity for their clients to argue about the facts of their cases. However, it hardly seems desirable in the interests of claimants in general that a tribunal should be obliged to tell a claimant who has appealed in blissful ignorance of the procedural complexity of his or her case that they cannot consider whether he or she is entitled to benefit until the Secretary of State has issued another decision which they know full well will be adverse to the claimant again. I am satisfied that the tribunal in the present case were entitled to cure any defects in the Secretary of State's decision-making. The questions are whether they did so and whether they did so properly.

24. It seems to me that the tribunal did address the correct issues. In relation to the lowest rate of the care component, the tribunal decided that the issue for them was whether the original award had been correctly superseded. Thus, they implicitly treated the revision as the supersession it should have been. In relation to the mobility component, the tribunal decided that they had to consider the claimant's application for reconsideration. Therefore I must turn to Mr Hann's further arguments that the tribunal gave inadequate reasons for deciding both those issues against the claimant.

25. Mr Hanns argues that the decision in relation to the lowest rate of the care component is erroneous in point of law because, although the tribunal purported to accept the Secretary of State's argument that there had been a change of circumstances, neither the Secretary of State nor the tribunal had in fact identified any material change of circumstances that would have justified a supersession. It is true that neither the Secretary of State nor the tribunal explained the circumstances upon which the decision of 19 June 2000, awarding the lowest rate of the care component, and the decision of 7 September 2000, superseding that decision at the same rate, had been made and then identified circumstances that had changed. That was no doubt because the actual findings of the Secretary of State when making those decisions had not been recorded and all that was known was that he had decided that the claimant required attention in connection with his bodily functions for a significant portion of the day. However, the tribunal chairman recorded:

> "The principal cause of disablement according to [the claimant] (who impressed the tribunal as an honest and credible witness) is his osteoarthritis which he says causes him extreme discomfort on movement and also when sitting. He described his care needs as being in relation to dressing (particularly his socks), cleaning himself after a bowel movement (although he achieves this object by using the shower which he can for the most part use unaided) and also help when he chooses to have a bath because he has

difficulty in getting in and out of the bath unaided. He also describes some difficulty in getting up from a kneeling or prone position if he has to go down and pick something up.

"The tribunal on the basis of this evidence could not establish that those were care needs which existed most of the time for a significant portion of the day although [it is] conceded that they were legitimate care needs."

As pain caused by osteoarthritis does not usually lessen, although it may sometimes be relieved by medical intervention and in fact there was evidence that some of the claimant's disability was due to pain in his groin which was suspected to be due to a hernia, and as the care needs were more or less the same as those disclosed by the claimant in the claim form he submitted in April 2000, I am inclined to agree with Mr Hanns that the tribunal's finding that there had been a change of circumstances is unsatisfactory.

26. On the other hand, I agree with the tribunal that those care needs could not possibly be regarded as sufficient to satisfy the condition of section 72(1)(a)(i) of the Social Security Contributions and Benefits Act 1992 that attention be required for a significant portion of the day. Mr Hanns suggests that there had been merely a new expression of medical opinion, which he correctly submits would not be a change of circumstances, but that is not the basis of the tribunal's decision. The tribunal did not accept the examining medical practitioner's view that the claimant had no care needs at all. They accepted the claimant's evidence. In his claim form, he had estimated the length of time for which he need help each day as a matter of minutes and, on many days, very few minutes. The truth is that, on the claimant's own evidence, either there had been a change of circumstances or else the claimant ought never to have been awarded the care component of disability living allowance in the first place. In the latter event, the award would have fallen to be revised or superseded on the ground of error of law or ignorance of, or mistake as to, a material fact. Since the exact reasoning underlying the decisions of 19 June 2000 and 7 September 2000 is unknown, the proper grounds for supersession or revision could not be known for certain but there could be no doubt that either revision or supersession was required. The tribunal's decision that there had been a change of circumstances may have been unlikely to be correct but it was potentially the least unfavourable to the claimant, although in reality I do not suppose it would have made any difference which of the possible decisions had been made as all would have resulted in payment ceasing and there cannot have been any question of recovering any benefit that had already been paid to the claimant even if the decision implied that there had been an overpayment. The situation here was therefore similar to that considered in *Cooke v. Secretary of State for Social Security* (reported as R(DLA) 6/01). In these circumstances, I am not satisfied that the tribunal's decision is erroneous in point of law as regards the care component.

27. However, it would have been better if the tribunal had explained more clearly how they had reached their decision so that the claimant and Mr Hanns could have understood it properly. The tribunal's task in that regard would have been made easier had the Secretary of State actually considered the issues properly. It is not helpful to assert that there has been a change of circumstances but fail to explain the assertion. If a decision-maker wishes to argue that, on the current facts, an award is

manifestly inappropriate and there must either have been a change of circumstances or else a mistake of law or fact, but it is unclear which, and that he or she is prepared to accept the former as being more favourable to the claimant, he or she should spell that out. Then a claimant can understand that asserting that there has been no change of circumstances will not necessarily help his or her case unless he or she can also show that current care needs *could* properly be regarded as sufficient to satisfy the statutory criteria.

28. In respect of the mobility component, the tribunal did not specifically mention the possibility of revision rather than supersession and did not consider the date from which any supersession could be effective. They concentrated on the claimant's ability to walk at 7 March 2001. However, in the context of this particular case, that was not inappropriate, save that the date to which they meant to refer was 6 March 2001. It was not suggested by the claimant's evidence or by any of the other evidence that his ability to walk had improved. The claimant's case was that, if anything, there had been deterioration. Thus, if, as the majority of the tribunal found, he was not virtually unable to walk at the date of the Secretary of State's decision on 6 March 2001, it followed that he had never been virtually unable to walk for any significant length of time. In those circumstances no question of revision arose – although there had implicitly to be a refusal to revise – and the date from which a supersession would be effective was immaterial because the supersession would be "at the same rate" so far as the mobility component was concerned. Thus, in practical terms, the tribunal addressed the necessary issues.

29. Mr Hanns, however, criticises the reasoning of the majority. The tribunal noted that the claimant had consistently claimed to be able to walk only 20 to 30 yards without severe discomfort. The claimant's general practitioner in his report of 4 June 2000 and the examining medical practitioner had both suggested that the claimant could walk a hundred yards before the onset of severe discomfort. The tribunal took the view, as they were entitled to do, that if the claimant's estimate was accepted, he was virtually unable to walk but if the doctors' estimates were accepted he was not. In preferring the doctors' estimates, the majority noted the examining medical practitioner's clinical findings and also noted that, in a report of 29 June 2001, the claimant's general practitioner had indicated that he did not know the precise distance the claimant could walk without stopping although he appeared to walk as though in pain, that x-rays had suggested only "moderately severe osteoarthritis of the right hip" and that no steps had been taken by the claimant's general practitioner to refer him to a specialist orthopaedic surgeon with a view to further treatment of surgery.

30. Mr Hanns submits that the tribunal erred in taking account of the fact that the claimant had not been referred to a surgeon. I accept his submission that the fact that the claimant had not been referred to a surgeon did not necessarily mean that the claimant's evidence was not credible. Indeed, the Secretary of State appears to concede that, if that had been the only reason for rejecting the claimant's evidence it would have been insufficient. However, just as a tribunal may take account of the fact that a claimant *has* been referred to a consultant as being an indication of the seriousness with which a general practitioner regards the claimant's condition and therefore an indirect indication of the actual seriousness of the condition, so the fact that a claimant *has not* been referred to a consultant may be taken into account as being an indirect indication that the condition is not so serious. The tribunal included

among its members a doctor – who may or may not have been one of the majority but will in any event have been involved in the discussion of the case – and they were perfectly entitled to form a view as to the likelihood of the claimant not being referred to a consultant if his mobility was as limited as he estimated and to the likelihood of his general practitioner knowing that his mobility was that limited, as being one, among several, indications as to the true extent of the claimant's disability. Whether or not the majority of the tribunal were in fact right in their conclusion, I am satisfied that their decision on this issue is not erroneous in point of law.

31. As I am not satisfied that the tribunal's decision was in any respect erroneous in point of law, this appeal must be dismissed.

(signed) **MARK ROWLAND**
Commissioner
2 January 2003