Bulletin 178
[SHAC]

CDLA/5574/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Stoke-on-Trent appeal tribunal dated 22 August 2002 and **I refer the case to a differently constituted appeal tribunal for determination.**

2. **I direct the Secretary of State to make a written submission to the tribunal within one month of the date of this decision.** The submission should deal with the implication of the examining medical practitioner's report dated 9 April 2002 and should make clear the ground upon which it is said that the claimant ceased to be entitled to disability living allowance and the ground upon which it is said that any overpayment is recoverable, bearing in mind the terms of this decision and of CDLA/5803/1999. The submission should also state whether there has been any further claim for disability living allowance by the claimant since 26 April 2001 and, if so, the submission should state the outcome and have attached to it any medical evidence obtained in connection with that claim.

REASONS

3. The claimant had been awarded the higher rate of the mobility component and the lowest rate of the care component for an indefinite period from 18 July 2000. On 26 April 2001, the Secretary of State superseded the award and decided that the claimant was not entitled to disability living allowance at all from 22 February 2001. It appears that the original award was made in the light of support for the claimant's claim from his general practitioner who, in particular, said in response to a question asked by the Secretary of State that the claimant could "walk 50 metres or thereabouts". However, the claimant was said to have been observed on 22 February 2001 walking 387 yards at a normal pace and without any signs of discomfort. It was also said that he had been observed on 27 February 2000 demonstrating rather more ability to use his arms and hands than he had suggested in his claim form the previous year. He was interviewed on 3 April 2001 and it was following that interview that the supersession decision was made on 26 April 2001. On 14 May 2001, the Secretary of State decided that, in view of the supersession of the original award, £416.20 had been overpaid to the claimant and was recoverable from him. The claimant appealed and, sensibly, the appeal was taken as being against both the supersession and the recoverability decisions.

4. On 13 March 2002, the case came before a tribunal who adjourned, directing that a report from an examining medical practitioner be obtained and that the interviewing officer should attend the next hearing. A report, dated 9 April 2002 was duly obtained. The doctor expressed the view that the claimant would be able to walk 60 metres before the onset of severe discomfort and would not be able to peel or chop vegetables, use heavy pans or use a conventional oven. There is nothing to indicate that anyone in the Benefits Agency considered the significance of that report. Certainly no further written submission was made and the Benefits Agency did not trouble to send a presenting officer to make an oral submission. Nor did the Agency comply with the direction to arrange the attendance of the interviewing officer.

5. In the circumstances, the tribunal, quite reasonably, took the view that all disputes of fact should be resolved in the claimant's favour. Nonetheless, they decided that, on his own admissions, the claimant was not entitled to disability living allowance. They said that they considered that the decision of 26 April 2001 should have been a revision, rather than a

supersession, but they did not consider they should "back-date non-entitlement" further than the Secretary of State had done. However, they considered that the overpayment was due to the claimant misrepresenting the extent of his condition on his claim form and, on that ground, held the overpayment to be recoverable.

6. The claimant now appeals, with my leave, on two grounds. Firstly, it is said that the claimant and his representative were not given the opportunity of addressing the tribunal as to the recoverability of the overpayment. The claimant's representative says:

> "We were asked to leave the room whilst entitlement was considered. On re-entering the room the decision was waiting. There was no mention of the recoverability issue. I raised this and asked if we shouldn't discuss this issue. The chair took the decision back and without discussion with me or his colleagues wrote 'overpayment £416.10 recoverable'.

The claimant adds:

> "The recoverability issue had not been discussed prior to us being asked to leave the room, and my representative assumed that the tribunal had decided to consider the two issues (entitlement and recoverability) separately. That was also how it appeared to me."

In the second ground of appeal it is firstly argued that the tribunal were not entitled to decide that a revision would have been appropriate but then to determine the amount of the overpayment by reference to the supersession decision of the Secretary of State. Secondly, it is argued that the claimant's statements in his claim form were only opinions and that he did not make any misrepresentation.

7. The Secretary of State's response to the first ground is, as the claimant's representative observes in his reply, a little confused. On one hand, the Secretary of State's representative submits that the tribunal erred in failing to give the claimant the opportunity of addressing the tribunal on the new point raised by them as to whether there had been a misrepresentation. On the other hand, she submits that there is no evidence of a breach of the rules of natural justice and says:

> "in the absence of a statement from the chairman or tribunal members, I am unable to make a full submission on this point. In decision R(M) 1/89, a Tribunal of Commissioners held that a complaint about an alleged breach of natural justice should be considered if full and sufficient particulars are set out in the grounds of appeal. It is a matter for the Commissioner's judgement, given the nature of the extent of the allegation and the circumstances of the case, whether a full investigation of the allegation is required. Should the Commissioner require a statement from the tribunal or an investigation of the allegation, I respectfully request that he so directs."

8. I am somewhat surprised at this approach, partly because, when I granted leave to appeal, I said that it seemed to me that the claimant's evidence as to the conduct of the hearing was arguably supported by the way recoverability was dealt with in the statement of reasons, and partly because there is an obvious inconsistency in the submission. A failure to give the claimant an opportunity to address the tribunal on misrepresentation is itself a breach of the rules of natural justice and the Secretary of State's representative did not feel inhibited about supporting the appeal on that ground. Furthermore, there is nothing in R(M) 1/89 to justify the view that the Secretary of State cannot comment on an allegation as to the conduct of a

tribunal hearing unless there is a statement from the chairman or tribunal members. All that was decided in that case was that, where a full and adequately particularised allegation is made that the conduct of a hearing led to a breach of the rules of natural justice, it is necessary and correct to admit evidence as to what happened. In the present case, there was not only the written evidence of the claimant and his representative but also the record of proceedings and the statement of reasons, which, in my view, support the allegation that the issue of recoverability was not explored during the hearing. If the Benefits Agency had sent a presenting officer to the tribunal hearing, the Secretary of State would have been entitled to put in evidence from the presenting officer. A Commissioner will normally seek a statement from the chairman or members of a tribunal only if the other evidence is insufficient but raises an issue worthy of further investigation or if there is an allegation of personal misconduct that it would be unfair to find proved without the person concerned having had the opportunity of commenting. The present case does not fall into those categories. The Secretary of State is perfectly entitled to suggest that it is necessary to obtain comments from a chairman or members of a tribunal in a particular case where an allegation has been made about the conduct of a hearing, but should not assume that it is necessary in all such cases.

9. I see no reason to doubt the evidence of the claimant and his representative in this case. It seems to me to be unlikely that the chairman overlooked the fact that two separate decisions were under appeal. I consider it more probable that he merely forgot to write the conclusion on the recoverability issue on the decision notice until reminded by the claimant's representative and that he had expected the claimant's representative to deal with recoverability at the same time as entitlement – as would be normal – and did not realise that the representative had anything to say about recoverability if the question of entitlement was decided against the claimant. The representative should really have made it clear that he wished to address the tribunal on recoverability if he did not succeed on entitlement. However, as the Secretary of State concedes, it is clear that there was a breach of the rules of natural justice in the present case because the idea that the overpayment might be recoverable on the basis of misrepresentation rather than failure to disclose was not one that had been advanced by the Secretary of State to the tribunal and was therefore one upon which the tribunal were obliged to give the claimant a specific opportunity to comment. I accept the evidence of the claimant and his representative that no such opportunity was given. That evidence is supported by the lack of any indication in the statement of reasons that the claimant's representative had made a submission on the point and by the lack of any reference to the issue in the record of proceedings.

10. The Secretary of State has made no observation on the first part of the claimant's second ground of appeal. What the statement of reasons actually says is:

> "The Tribunal did not accept that [the claimant's] condition had improved between the date of the original award and the supersession decision. The evidence indicated that he had a gradually deteriorating condition. The Tribunal therefore found that the Appellant had misrepresented the extent of his condition in his claim form and the award had been made when some medical support came from the general practitioner. The original decision was made in ignorance of material facts. This should therefore technically be a revision decision rather than a supersession decision. However, as the Decision Maker had made a supersession decision effective from 22nd February 2001 the Tribunal did not feel it appropriate to back-date non-entitlement to before that date."

11. Ignorance by the Secretary of State of a material fact is not necessarily a ground for revision rather than supersession. In deciding that a revision would have been more

appropriate than a supersession, the tribunal presumably had in mind regulation 3(5)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, but that applies only where "at the time the decision was made the claimant or payee knew or could reasonably have been expected to know of the fact in question and that it was relevant to the decision". Otherwise, supersession under regulation 6(2)(b) is appropriate where a decision has been made in ignorance of a material fact. As the claimant's representative points out, the distinction between revision and supersession is important because it determines the date from which the decision is effective and therefore determines the amount of overpayment there may have been. Furthermore, the ground of revision or supersession is likely to have a bearing on the ground upon which an overpayment is recoverable. Thus, in the present case, if the ground of supersession was change of circumstances, as the Secretary of State had decided, the natural ground upon which to seek to recover the overpayment was a failure to disclose that change of circumstances. If, however, the ground of revision or supersession was ignorance of, or mistake as to, a material fact, it was possible to seek recovery of the overpayment on the ground that the ignorance or mistake had been induced by a misrepresentation in the claimant's claim form. The Secretary of State's view that there had been a change of circumstances was, in effect, a concession made by him in the claimant's favour, limiting the amount of the potential overpayment. If the tribunal were not minded to go behind the concession as to the amount of the overpayment, they were obliged to accept the linked concession that supersession was more appropriate than revision, which in turn required them to make a finding in respect of recoverability that was consistent with the grounds of supersession. I agree with the claimant's representative that, in trying to be merciful on the issue of recoverability but not on the issue of entitlement, the tribunal reached an inconsistent decision.

12. This seems to me to be the reason why they fell into further error in not identifying plainly the misrepresentation that, in their view, caused the overpayment. When I granted leave to appeal, I drew attention to CDLA/5803/99, in which Mr Commissioner Jacobs pointed out that it was "notoriously difficult to judge time and distance" and even more difficult to state with any certainty how far one can walk "before you feel severe discomfort", so that a claimant's answers to the questions posed by the mobility section of a disability living allowance claim pack "can usually only fairly be interpreted as statements of the claimant's honest opinion", rather than true representations of fact. The Secretary of State concedes that the tribunal in the present case did not make any finding as to whether the claimant's statements represented his honest opinion. In CDLA/5803/99, Mr Commissioner Jacobs also pointed out that the award in that case, like the award in the present case, might well have been based upon the claimant's general practitioner's estimate of his walking ability rather than on the claimant's own estimate. The general practitioner's evidence is relevant both to the question whether the claimant's estimate was accurate or reasonable and to the question of causation.

13. Both parties ask that the case be referred to another tribunal. Had the parties addressed me more fully on the facts of the case, I might have been prepared to substitute my own decision for that of the tribunal. As it is, I accede to the submissions and give the directions set out in paragraph 2 above.

(Signed) **MARK ROWLAND**
Commissioner
1 July 2003