DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is disallowed. The decision of the Rochdale appeal tribunal dated 4 September 2000 is not erroneous in point of law, and therefore stands.

2. This is an apparently simple case, which has been running for a very long time and which has got overlaid with some awful procedural and technical tangles. I am afraid that I have contributed more than my fair share to that process. Although the object has been to examine every argument which could possibly help the claimant, my eventual conclusion has had to be against him.

3. The essential chain of events was as follows. The claimant's son Michael made a claim for disability living allowance (DLA) for the period from 17 August 1998. On 25 September 1998 the claimant made a claim for invalid care allowance (ICA), apparently for the period from 14 September 1998. That was in accordance with the instructions given on information leaflets and documents issued with ICA claim forms, which told claimants to make ICA claims at the same time as or as soon after a DLA claim as possible. ICA is payable to people who are substantially engaged in caring for a severely disabled person (for whom attendance allowance, constant attendance allowance or at least the middle rate of the care component of DLA is payable: Social Security Contributions and Benefits Act 1992, section 70(2)). On 28 September 1998 a letter was sent to the claimant notifying him of the decision that he was not entitled to ICA from 14 September 1998, on the ground that Michael did not receive a qualifying benefit. That was the case at the time, because of course the investigations into Michael's DLA claim had hardly started.

4. For some reason, the claimant was sent another letter on 8 October 1998 informing him that his claim for ICA had been unsuccessful. This letter including the following paragraphs under the heading "WHAT TO DO NOW":

> "IF THE PERSON YOU ARE LOOKING AFTER HAS CLAIMED AN ATTENDANCE ALLOWANCE OR DISABILITY LIVING ALLOWANCE
> Wait until they are told the result of their claim. If they are awarded either Attendance Allowance or the MIDDLE or HIGHER rate CARE COMPONENT of Disability Living Allowance then you should claim ICA again. Do so as soon as they are told the result of their claim or you could lose benefit.
>
> REMEMBER
> To get ICA either Attendance Allowance or the middle or higher rate CARE COMPONENT of Disability Living Allowance must be payable to the person you look after.
> Although this claim has been unsuccessful you can claim ICA again if they are awarded one of these benefits in the future. The fact that you have claimed now may protect your entitlement to backdated ICA in any future successful claim you make."

There may have been similar information in the letter of 28 September 1998, as only the first page is copied in the papers.

5. Regulation 6 of the Social Security (Claims and Payments) Regulations 1987 had been amended from 7 April 1997 to include the following:

> "(21) Where a person has claimed invalid care allowance and that claim ("the original claim") has been refused, and a further claim is made in the circumstances specified in paragraph (22), that further claim shall be treated as made--
> (a) on the date of the original claim; or
> (b) on the first day in respect of which the qualifying benefit was payable in respect of the disabled person,
> whichever is the later.
> (22) The circumstances referred to in paragraph (21) are that--
> (a) the original claim was refused on the ground that the disabled person was not a severely disabled person within the meaning of section 70(2) of the Contributions and Benefits Act;
> (b) at the date of the original claim the disabled person had made a claim for a qualifying benefit, and that claim had not been determined;
> (c) after the original claim had been determined, the claim for the qualifying benefit was determined in the disabled person's favour; and
> (d) the further claim for invalid care allowance was made within three months of the date that the claim for the qualifying benefit was determined."

"Qualifying benefit" covers any benefit specified in section 70(2).

6. On 16 February 1999 Michael was sent a letter informing him that it had been decided that he was entitled to the middle rate of the care component of DLA from 17 August 1998 to 16 August 2000. The two pages (out of three) of that letter copied in the papers say nothing about the possibility of anyone who looks after the disabled person being able to claim ICA.

7. On 12 November 1999 the claimant submitted an ICA claim form on which he stated that he wished to claim from 17 August 1998. The decision on this claim was given on 7 December 1999 and it appears from the document at page 76 that it was probably notified to the claimant on 8 or 9 December 1999. The claimant was awarded ICA from and including 16 August 1999. The claim was disallowed for the period from 17 August 1998 to 11 August 1999 on the ground that all the days in that period fell more than three months before the date of claim and that the absolute limit for claiming ICA was three months (Claims and Payments Regulations, regulation 19(2) and (3)). The claim was disallowed for the period from 12 August 1999 to 15 August 1999 on the ground that ICA benefit weeks start on Mondays.

8. In a letter to the ICA Unit dated 25 February 2000 (following a telephone conversation on 23 February 2000), the claimant asked for his ICA to be backdated to 17 August 1998. He explained that he had put the September and October 1998 letters away and had then mislaid them, and also described the exceptionally difficult circumstances resulting from the serious

medical problems of his two sons through 1998 and 1999. At the time that Michael was notified of his entitlement to DLA, the claimant thought that he was not entitled to ICA because he had been turned down before. He was eventually advised to claim again by staff at the JobCentre.

9. A deputy section manager at the ICA Unit replied in a letter dated 13 March 2000 that the claim could not be backdated any further and no documents dating from before 12 November 1999 had been found which could possibly have been treated as a claim for ICA. On 13 April 2000 the claimant lodged an appeal, also making a claim for an ex gratia payment. He identified the letter telling him about the decision appealed against as that of 13 March 2000. When the documents were sent to the Appeals Service by the ICA Unit the date of notification of the decision under appeal was given as 13 March 2000, so that the appeal was treated as in time. However, the decision which was set out in the written submission was that given on 7 December 1999, described as notified on 13 March 2000.

10. The appeal tribunal of 4 September 2000 dismissed the appeal. It considered the claim made on 12 November 1999 and correctly decided that the legislation did not allow the backdating of the claim so as to produce entitlement to ICA any earlier than 16 August 1999. The ICA claim of 12 November 1999 was made more than three months after the notification of the award of DLA, so that the special rule in regulation 6(21) and (22) of the Claims and Payments Regulations could not apply.

11. The claimant now appeals against that decision with my leave. When granting leave, I suggested that an issue which deserved consideration was whether the appeal tribunal should have looked at an implied request to revise the decision of 28 September 1998 on the ground of official error, especially in the light of an earlier decision of mine in appeal CG/1479/1999. However, I also warned the claimant that I had not formed any opinion that his appeal was likely to succeed.

12. The Secretary of State's written submission did not support the appeal. Both the Secretary of State and the claimant requested an oral hearing. I granted that request and the hearing took place on 4 October 2002 at Bury County Court, after an earlier adjournment requested by the claimant's new representative at Oldham Citizens Advice Bureau. At the oral hearing the claimant was represented by Ms A Marshall of Oldham CAB. The Secretary of State was represented by Mr Huw James, solicitor, instructed by the Office of the Solicitor to the Department for Work and Pensions. I am grateful to both representatives for their careful submissions and their attempts to deal with the difficult procedural issues which came up in argument. I directed further written submissions, which resulted in a further submission dated 22 November 2002 on behalf of the Secretary of State and a reply dated 18 December 2002 from Mr Richard Soothill of Oldham CAB. Finally, the Secretary of State's representative submitted an addendum dated 6 January 2003, which I did not refer to the claimant's representative as it resiled from a point against the claimant.

13. I can start with what is agreed. First, it is agreed that on the claim received on 12 November 1999, looked at as a claim, the claimant has received all that the law allows. Second, it is I think agreed that if the claim form received on 12 November 1999 is interpreted as also

including an implied application to supersede the decision of 28 September 1998, the claimant could gain nothing from that exercise. I have no doubt that the claim form, since it raised the question of entitlement to ICA from 17 August 1998, is to be interpreted as including such an application (R(SB) 9/84, paragraph 17(iii) and CG/1479/1999). However, for the reasons given in paragraphs 9 and 10 of my direction dated 9 October 2002, the claimant could not show that the decision of 28 September 1998 had been given in ignorance of or under a mistake of material fact. Even if the claimant could have shown that ground, or error of law or a subsequent relevant change of circumstances, regulation 7 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 in conjunction with section 10 of the Social Security Act 1998 would prevent any superseding decision having effect any earlier than 12 November 1999. I need not repeat the detailed reasoning here. A similar result would follow if the claimant's letter of 25 February 2000 were treated as a separate application to supersede the decision of 28 September 1998.

14. Therefore, the only possible route to success in law for the claimant lies in treating the claim form received on 12 November 1999 as also including an implied application to revise the decision of 28 September 1998. Again, I have no difficulty in treating it as including such an application. And on that basis, I am satisfied that the appeal received on 13 April 2000 was in time. The simplest analysis is that the letter of 25 February 2000 was an application to supersede the decision of 7 December 1999 and its implied refusal to revise the decision of 28 September 1998 (the potential ground being error of law). The letter of 13 March 2000 then constituted a refusal to supersede the decision of 7 December 1999, and the appeal against that decision was in time. There might be some technical difficulties over whether the appeal tribunal was empowered to consider the question of revision of the decision of 28 September 1998 for official error, although a Commissioner has very recently decided that an appeal tribunal deciding an appeal against a disallowance of a claim for a past period should deal with the implied request to revise an earlier decision (CIS/2642/2002). However, I do not need to go into all that as I have decided that a case of official error cannot be made out.

15. As at 12 November 1999 (and 25 February 2000) "official error" was defined in regulation 1(3) of the Decisions and Appeals Regulations as an:

> "error made by an officer of the Department of Social Security ... or the Department for Education and Employment acting as such which no person outside any of those Departments caused or to which no person outside any of those Departments materially contributed."

There has subsequently been an amendment to the definition.

16. In the submission of 18 January 2002 the representative of the Secretary of State relied on paragraph 26 of the decision of the Tribunal of Commissioners in R(I) 5/02. It was stated there that decisions made by adjudication officers under the pre-Social Security Act 1998 regime could not be revised for official error. It is not entirely clear whether the Tribunal put that on the basis that adjudication officers when making decisions were not officers of the Department acting as such or on the basis that section 8 of the Social Security Act 1998 only

allows decisions of the Secretary of State to be revised. I would be very reluctant to accept either basis. Adjudication officers could only be appointed from among civil servants employed by the then Department of Social Security. Although they did not act on behalf of the Secretary of State when making decisions, it seems to me that they did not cease to be officers of the Department acting as such when doing so. Nor do I see why a provision parallel to the one relevant in R(I) 5/02 (paragraph 4(1) of Schedule 12 to the Social Security Act 1998 (Commencement No 8, and Savings and Consequential and Transitional Provisions Order 1999, providing that decisions of adjudication officers and others made before (for industrial injuries benefits) 5 July 1999 are to be treated as decisions of the Secretary of State) should not allow the revision of decisions of adjudication officers if a ground under section 9 is made out. In the addendum dated 6 January 2002 the Secretary of State's representative resiled from the reliance on paragraph 26 of R(I) 5/02 and submitted that the statement made there was per incuriam. Whether or not the statement should be followed will have to be decided conclusively in some other case. For the moment I certainly do not wish to rely on it to decide the present case against the claimant.

17. The stumbling-block in the claimant's case is over whether the adjudication officer's decision of 28 September 1998 can be said to have arisen from official error under regulation 3(5)(a) of the Decisions and Appeals Regulations. In CG/1479/1999 I held that there was no rational point in making an immediate decision disallowing a claim for ICA on the ground that the disabled person was not receiving DLA, rather than delaying until the outcome of the DLA claim was known and the ICA claim became capable of determination. I said that the balance of legitimate advantages and disadvantages for the claimant and for the Benefits Agency was overwhelmingly against empowering the adjudication officer to decide the ICA claim when it was not capable of proper determination (because the fundamental question of DLA entitlement had not been decided). I therefore decided that the adjudication officer's adverse ICA decision could be reviewed on the ground that it was erroneous in point of law and a decision in favour of the claimant substituted on the first ICA claim. Ms Marshall submitted that exactly the same reasoning applies to the adjudication officer's decision of 28 September 1998 in the present case or, if adjudication officers were not officers of the Department acting as such, to the Secretary of State's decision to submit the case to an adjudication officer for decision. She submitted that on either basis the decision arose from official error.

18. I regret that I cannot accept that submission. In CG/1479/1999 I was considering an adjudication officer making a decision before the amendments to the Claims and Payments Regulations, and in particular the introduction of paragraphs (21) and (22) of regulation 6, came into operation on 7 April 1997 (the arrangement of the paragraphs has later been altered, but the substance of the new rules remains in place). As the legislation stood at the date of the adjudication officer's decision in CG/1479/1999, the disadvantages to which an ICA claimant was exposed by an immediate adverse decision being made were stark. However, the new rules introduced a significant improvement for those claimants who did follow the advice to claim ICA at about the same time as DLA was claimed. It was a part of those rules that the initial claim for ICA should have been disallowed on the ground that the disabled person was not in receipt of DLA. But, if a further claim for ICA is made within three months of the notice of the result of the DLA claim, ICA entitlement can start from whatever would have been the proper

date under the initial claim. Of course, arguments could be made against such a system as over-complicated or unfair or as putting too great a burden on claimants in requiring them to take action to safeguard their rights. However, I do not see how it can be denied that that system is within the range of reasonable and rational responses to the problem of coordinating decision-making on ICA and DLA when, in their nature, DLA claims may require lengthy investigation before they are decided. In those circumstances, it cannot be concluded that there is no rational point in an immediate adverse ICA decision being made. There is a rational point in the context of the provisions approved by Parliament for further claims. Thus the reasoning on which the conclusion in CG/1479/1999 was based does not work in the present case.

19. I regret also that in my decision in CG/1479/1999 I did not make it sufficiently clear how much depended on the date of the relevant decision, before the changes on 7 April 1997. This case has given the opportunity to clarify the limits of that decision, but that will be no consolation to the claimant.

20. No other possible error by the adjudication officer or the Secretary of State in relation to the decision of 28 September 1998 has been suggested. My conclusion has to be that the decision of 28 September 1998 cannot be found to have arisen from official error and so cannot be revised under regulation 3(5)(a) of the Decisions and Appeals Regulations. No other ground of revision applies and I have already decided that the claimant cannot gain from any implied application for supersession. The appeal tribunal's decision on the claim of 12 November 1999, looked at as a claim, could not be faulted in law. As it could not have helped the claimant if the appeal tribunal had expressly considered any of the additional points about revision and supersession, the appeal against the appeal tribunal's decision must be dismissed.

21. I note that from 10 April 2000, if not before, the claimant has been mentioning the possibility of an ex gratia payment being made for the period from 17 August 1998 to 15 August 1999. The making of an ex gratia or extra-statutory payment is not within the powers of an appeal tribunal or a Commissioner, but I do not know whether or not any formal reply has been given to the claimant's request. It seems to me that the post-April 1997 system relies on an ICA claimant remembering the instructions given when an initial claim is disallowed and taking the right action when DLA is awarded to the disabled person being looked after. In those circumstances, it might be thought to be an element of good administration for a reminder to be included in the information sent out with notice of the DLA decision. I do not know whether that is or was standard practice or was done in the present case. I note also that the letter sent to the claimant on 8 October 1998 did not specify the time-limit for making a further ICA claim. The claimant's representatives at Oldham CAB will be able to advise on any further steps which the claimant can take about an extra-statutory payment.

(Signed) J Mesher
Commissioner

Date: 10 February 2003