[2013] AACR 29

(BMcD v Department for Social Development (DLA) [2011] NICom 175)

His Honour Judge J A H Martin QC, Chief Commissioner **C12/10-11(DLA)(T)**
Kenneth Mullan, Commissioner
J P Powell, Deputy Commissioner
25 May 2011

Supersession – defects in decisions of the Department – factors which an appeal tribunal should consider

The claimant was awarded the middle rate care component and highest rate mobility component of disability living allowance (DLA) from and including 27 April 2004 by virtue of a decision dated 29 June 2004. On 2 December 2005 a decision-maker superseded the decision of 29 June 2005 on the grounds that the claimant had failed to submit herself to a medical examination. Notwithstanding that the claimant's entitlement to DLA had ended by virtue of the decision of 2 December 2005, a further decision superseding the decision of 29 June 2004 was made on 22 December 2005, the effect of which was to remove entitlement to DLA from and including 22 December 2005. The claimant appealed against this decision. Recognising that the decision of 22 December 2005 was incorrect, the Department then made a series of decisions trying to rectify the errors. On 25 May 2007 an oral hearing was adjourned for the Department to prepare a written submission to explain the decision-maker's decision of 2 December 2005, to clarify the decision under appeal and the date from which DLA was disallowed. The Department prepared a further submission and asked the tribunal to rectify the errors made in the decision-making process. The substantive appeal tribunal hearing took place on 12 November 2007 in which the tribunal treated the appeal as an appeal against the decision of 2 December 2005. The tribunal disallowed the appeal. Following an unsuccessful setting aside application and refusal of leave to appeal, the claimant applied to the Commissioner for leave to appeal. On 19 February 2010 the Chief Commissioner granted leave to appeal and directed that the appeal should be dealt with by a Tribunal of Commissioners in accordance with Article 16(7) of the Social Security (Northern Ireland) Order 1998.

Held, allowing the appeal, that:

1. the conclusions reached by a Tribunal of Commissioners in Great Britain in R(IB) 2/04 were correct and that decision properly represented and reflected the law in Northern Ireland. Therefore a tribunal considering defective decisions had the jurisdiction to remedy the defects in those decisions (paragraph 48);

2. it was important to note that a tribunal had an inquisitorial role and correcting defects in the Department's decision-making was part of that role. However the tribunal's power to remedy defects in the decision-making process required to be exercised judiciously to ensure that the perception of the independence of the appeal tribunal was not damaged (paragraphs 49 to 52);

3. there were several factors to be considered when hearing and determining an appeal where the remedying of a defect in a Departmental decision was an issue (paragraph 53). The suggested factors included:

- whether the requirement to consider remedial action has been raised by the Department, or has arisen through the appeal tribunal's own consideration of the issues arising in the appeal;
- the likely impact of the exercise of the discretion on the issues arising in the appeal;
- the likely impact of the exercise of the discretion on the outcome of the appeal;
- the extent to which the appellant understands the likely impact of the exercise of the discretion;
- whether the appellant is represented;
- whether there is a requirement to adjourn the appeal to enable the appellant to be advised of developments, give further consideration to what has occurred or to seek representation, if required.

The Commissioners remitted the case for redetermination by a differently constituted tribunal.

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. The decision of the appeal tribunal dated 12 November 2007 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on us by Article 15(8) of the Social Security (Northern Ireland) Order 1998 (SI 1998/1506), we set aside the decision appealed against.

2. For further reasons set out below, we are unable to exercise the power conferred on us by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which we have not had access, and there may be further findings of fact which require to be made. Further we do not consider it expedient to make such findings at this stage of the proceedings. Accordingly, we refer the case to a differently constituted appeal tribunal for redetermination. In referring the case to a differently constituted appeal tribunal for redetermination, we direct that the appeal tribunal takes into account the guidance set out below.

3. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to disability living allowance (DLA) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

4. The decision-making process giving rise to the appeal is complicated and requires to be set out in some detail.

5. The appellant claimed DLA from 27 April 2004. Having obtained a factual report, dated 21 June 2004, from the appellant's general practitioner (GP), a decision-maker, on 29 June 2004, awarded the middle rate of the care component and the higher rate of the mobility component of DLA from and including 27 April 2004. On 18 August 2005 the appellant was examined by a medical officer of the Department in connection with the personal capability assessment on her claim for incapacity benefit (IB).

6. On 2 December 2005 a decision-maker purported to supersede the decision dated 29 June 2004 on the grounds "*…. that after information supplied to the decision-maker in relation to a failed personal capability assessment for incapacity benefit following a medical examination held on 18/08/05 that the MSS department had arranged three separate doctor's visits that the customer cancelled offering no reasonable excuse.*" and disallowed DLA from 2 December 2005.

7. Notwithstanding that entitlement to DLA had ended by virtue of the decision-maker's decision dated 2 December 2005, on 22 December 2005 the appellant was examined in connection with her DLA by an examining medical practitioner (EMP). Mr Toner, for Decision Making Services (DMS), submits that this examination was probably carried out following a request from the applicant to have the decision dated 2 December 2005 reconsidered.

8. Notwithstanding that the decision-maker's decision dated 26 June 2004 had already been superseded on 2 December 2005, the decision-maker, on 22 December 2005, again purported to

supersede the decision dated 26 June 2004 on the grounds of ignorance of a material fact, namely "*…. the true extent of (the claimant's) disability and her resulting care and mobility needs … .*" and decided that the appellant was not entitled to DLA from 22 December 2005.

9. On 11 January 2006 the appellant requested that the decision-maker's decision dated 22 December 2005 be reconsidered. On 14 February 2006 the decision dated 22 December 2005 was reconsidered but not changed. The appeal against the decision dated 22 December 2005 was received in the Department on 22 February 2006.

10. On 29 June 2006 a decision-maker revised the decisions dated 22 December 2005 and 14 February 2006 on the grounds of official error in that the decision dated 14 February 2006 did not revise the decision dated 22 December 2005 which was itself erroneous as it did not properly identify grounds. Notwithstanding that the decision dated 2 December 2005 was extant, the decision-maker went on to supersede the decision dated 29 June 2004 on the grounds of relevant change of circumstances, namely a reduction of the appellant's (care and mobility) needs and disallowed DLA from 22 December 2005.

11. On 19 September 2007 a decision-maker revised the decision dated 22 December 2005 on the grounds of official error, namely that the period in question had already been adjudicated upon on 2 December 2005 and there was no legislative basis for making that decision. The decision-maker also decided that decisions made on 14 February 2006, 20 June 2006 (there is no record of such a decision) and 29 June 2006 had no effect and that the decision dated 2 December 2005 was correct.

12. A letter of appeal had been received in the Department on 22 February 2006. There were several postponements and adjournments of the appeal. One adjourned oral hearing took place on 25 May 2007. The appellant was present and was represented by Alderman N. The record of proceedings (ROPs) for the adjourned oral hearing indicate that discussions centred on the decision-making process giving rise to the appeal. The appeal was adjourned in order that:

> "The Department should seek advice from its Decision Making Services section and must provide a full written submission to explain the Decision Maker's decision dated 2/12/2005; to clarify the decision under appeal and the date from which the Department submits the appellant's award of Disability Living Allowance was disallowed and to clarify the decision dated 29/6/2006."

13. The further submission was prepared by the Department on 18 September 2007. In that further submission, the appeals writer requests that the appeal tribunal rectify errors in the decision-making process.

14. The substantive appeal tribunal hearing took place on 12 November 2007. The appeal tribunal disallowed the appeal and made its own substituted decision. That decision was to the effect that the appellant did not satisfy the conditions of entitlement to the care or mobility components of DLA from and including 2 December 2005. The appeal tribunal found that grounds existed on 2 December 2005 to supersede the decision dated 29 June 2004, namely that there was a relevant change of circumstances in that there was a reduction in the "… appellant's care and mobility needs".

15. Following an unsuccessful set aside application, an application for leave to appeal to the Social Security Commissioner was refused on 24 October 2008.

Proceedings before the Social Security Commissioners

16. A further application for leave to appeal to the Social Security Commissioner was received in the Office of the Social Security Commissioners and Child Support Commissioners (OSSC) on 27 November 2008. For the purposes of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999 (SI 1999/225), as amended, the application for leave to appeal was late. On 26 March 2009, however, the application was accepted for special reasons by the Chief Social Security Commissioner. Also on 26 March 2009 observations were sought from DMS and these were received on 24 April 2009. DMS opposed the application. There then followed an exchange of correspondence, observations and observations in reply between the appellant and DMS.

17. Leave to appeal was granted by the Social Security Commissioner on 19 February 2010 on the basis that "… an arguable issue arises in relation to whether the appeal tribunal was correct to exercise its discretion to rectify defects in the decision-making process".

18. Also on 19 February 2010, the Chief Social Security Commissioner directed, in accordance with Article 16(7) of the Social Security (Northern Ireland) Order 1998, that the appeal be dealt with by a Tribunal of Commissioners.

19. There then followed correspondence from OSSC with the appellant on the question of representation at the oral hearing of the appeal. The Citizens Advice Bureau, through Ms Kyne, then came on record as representative for the appellant.

20. An oral hearing of the appeal took place on 24 February 2011. At the oral hearing, the appellant was represented by Ms Louise Kyne from the Citizens Advice Bureau, and the Department was represented by Mr Seamus Toner of the DMS section. Gratitude is extended to both representatives for their detailed and constructive observations, comments and suggestions in relation to this most difficult and convoluted matter.

Submissions of the parties

21. In the application for leave to appeal to the Social Security Commissioner, the appellant submitted that the decision of the appeal tribunal was in error of law on the basis that:

> (i) the legally qualified panel member (LQPM) did not accept a diagnosis of chronic obstructive pulmonary disease from a professor at the Royal Victoria Hospital;
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> (ii) the LQPM did not accept factual evidence concerning physical disability;
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> (iii) the appeal tribunal "… disregarded facts concerning errors in law (*by an officer of the Department)* when DLA was stopped";
>
> (iv) the LQPM refused leave to appeal on an application that was in time and did not sign the decision.

22. In initial observations on the application for leave to appeal, Mr Toner for DMS submitted that:

"… while the tribunal accepted the appeal against the decision-maker's decision dated 2 December 2005, the appeal itself had been made against the decision-maker's decision dated 22 December 2005 and was made on 22 February 2006. While the appeal may have been made timeously against the decision dated 22 December 2005 it falls outside the one month time limit in regulation 31(1) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 in respect of the decision-maker's decision dated 2 December 2005.

I submit that because there had been an ongoing reconsideration process throughout the period following the decision-maker's decision dated 2 December 2005, to the decision-maker's decision dated 22 December 2005, to the appeal made on 22 February 2006, that the appeal can be accepted as an appeal made in time against the decision-maker's decision dated 2 December 2005 – regulation 31(2) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999."

23. Thereafter, Mr Toner opposed the application on each of the grounds cited by the appellant. In relation to ground (iii), he submitted that:

"It was noted by a tribunal of Commissioner in Great Britain, at paragraph 73 of reported decision R(IB) 2/04, in discussing an appeal tribunal's powers with respect to supersession decisions –

> *'… 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.'*

Commenting on the above extract in paragraph 69 of unreported decision C16/08-09(DLA (…), the Commissioner held –

> '*This means that the appeal tribunal, subject to the other guidance given by the Tribunal of Commissioners on the exercise and limits of the authority, has the power to remedy any defect in the decision under appeal, and make any decision which the decision-maker should have made.'*

In the reasons for decision, the tribunal explained why the decision dated 2 December 2005 was the decision under appeal and why subsequent decisions to that decision were invalid. The tribunal also found that on 2 December 2005 grounds under regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (relevant change of circumstances) applied to supersede the decision dated 29 June 2004 which awarded disability living allowance. Finally, and applying Article 11(5) of the Social Security (NI) Order 1998, the tribunal found that 2 December 2005, the date of the decision, to be the effective date of the supersession.

I submit that the tribunal exercised its power to remedy the defects in the decision under appeal and made the decision the decision-maker should have made."

24. Further correspondence was received from the appellant in reply to the written observations from DMS which included reference to errors which had been made by the adjudication officer and contradictory statements made by the decision-maker.

25. DMS was requested to provide further observations in reply to the written correspondence from the appellant, and in reply to the following specific direction:

> "To what extent is an appeal tribunal, when exercising a jurisdiction to remedy any defect in a decision under appeal, under the principles set out in R(IB) 2/04, obliged to indicate that it is so exercising that jurisdiction and why?"

26. In reply to this direction, Mr Toner submitted that:

> "… in reported decision R(IB) 2/04 the tribunal of Commissioners in Great Britain (in paragraphs 81 and 82) appear to have remained silent on the steps a tribunal has to take to alert a claimant that it will be considering the appeal as against a decision that it has substituted as the decision the decision-maker may have made. Dealing with the issue of the nature of appeals as rehearings, the tribunal of Commissioners quoted with approval in paragraph 20 the following extract from a Great Britain Commissioner's reported decision R(F) 1/72 –
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> > '*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 points that may be raised. Logically I think the same must apply to a hearing before a local tribunal, but, again <u>always</u> <u>provided that the claimant is given a proper opportunity of meeting any fresh point that may be raised</u>.*' (my underlining)
>
> The tribunal's decision shows that (the claimant) attended the hearing along with her representative. Also present was an officer presenting the appeal on behalf of the Department.
>
> The record of proceedings shows that it was raised by the presenting officer that the award of benefit was superseded and disallowed on 2 December 2005, that subsequent decisions made since that decision were incorrect and that the decision made on 19 September 2007 should have revised the decision dated 2 December 2005 and the incorrect decisions leaving the decision made on 2 December 2005 as revised on 19 September 2007 as the decision under appeal.
>
> I submit that (the claimant), while maybe not conversant with the technicalities of 'supersession', would in this instance have been sufficiently aware of the case that had been made against her."

The record of proceedings

27. The ROPs for the appeal tribunal hearing indicates that the appellant was present at the substantive hearing and was again represented by Alderman N. The appeal tribunal had before it numerous pieces of documentation including the further submission prepared as a result of the direction issued after the adjourned oral hearing on 25 May 2007. The ROPs also indicate that

while the appellant had received the further submission from the Department, dated 18 September 2007, she had not given a copy to her representative. The representative was provided with a copy at the oral hearing. The ROPs also record that there were discussions about the decision-making process giving rise to the appeal.

The appeal tribunal's reasons

28. The appeal tribunal produced a very detailed statement of reasons (SORs) in respect of its decisions for both the care and mobility components of DLA. In respect of the decision-making process giving rise to the appeal, the appeal tribunal stated:

> "The decision under appeal is the supersession decision dated 2 December 2005. The Tribunal finds that the decision dated 22 December 2005, described as a supersession decision, was invalid because the appellant's award of Disability Living Allowance (DLA) had previously terminated as a result of the supersession decision of 2 December 2005 and therefore there could not be a subsequent supersession decision on the grounds of a relevant change of circumstances. It follows that the subsequent decisions dated 14 February 2006 and 29 June 2006 are also invalid as they did not correct this error. The revision decision dated 19 September 2007 revised these decisions on the grounds of official error. The tribunal finds that grounds existed on 2 December 2005 to supersede the Decision Maker's decision of 29 June 2004, which had made an indefinite award of high rate mobility and middle rate care for day supervision, under Regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999. This is because there was evidence of a relevant change of circumstances since that 2004 decision was made. The 2003 Court of Appeal decision in Wood v Secretary of State for Work and Pensions is authority that a decision may be superseded where one or more of the conditions in regulation 6(2) of the Social Security and Child Support (Decisions and Appeals) Regulations are satisfied and the outcome is changed. The change of circumstances was that the appellant's mobility and care needs had reduced."

29. The appeal tribunal then outlined the evidential basis on which it had found that there had been a relevant change of circumstances. It then stated that:

> "The burden of proof is on the party seeking supersession, in this case the Department, to show that an existing award should be changed. The submitted Commissioner's decision C5/00-01(DLA) is authority that information obtained in connection with one benefit can be relevant to the entitlement to another benefit. The Tribunal finds that the clinical findings and observations in the EMO's Incapacity for work medical report plus the appellant's description of a typical day recorded therein indicated a reduction in the appellant's mobility and care needs because it showed that she was no longer virtually unable to walk and no longer satisfied the conditions of entitlement to the middle rate of the care component of DLA. Accordingly the Tribunal finds that there were grounds to supersede on the basis of a relevant change of circumstances, as opposed to alleged failure to attend medical examinations as originally stated in the Decision Maker's decision of 2 December 2005. We accept the Presenting Officer's submission that the revision decision dated 19 September 2007 should have revised the 2 December 2005 decision and stated this ground of supersession. The Tribunal accepts the Department's submission that it was not possible to ascertain the date of the change of circumstances and therefore in accordance with Article 11(5) of the Social Security (Northern Ireland)

Order 1998 the effective date of supersession is the date on which the Decision Maker's decision was made."

The relevant legal background

30. A Tribunal of Commissioners in Great Britain, in R(IB) 2/04, undertook an extensive analysis of the legislative provisions relating to decision-making and appeals. In Great Britain these provisions are the Social Security Act 1998 and the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), both as amended. In Northern Ireland these provisions are the Social Security (Northern Ireland) Order 1998 and the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 (SI 1999/162), both as amended. To all intents and purposes, the legislative provisions with respect to decision-making and appeals in Great Britain and Northern Ireland are identical.

31. At paragraph 60, the Tribunal of Commissioners introduced "Issue 1B", as follows:

"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."

32. Following a review of existing case law on the issue, the Tribunal of Commissioners concluded, at paragraphs 72 to 82:

"*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.)"

The exercise of the power to remedy defects

33. As is pointed out by Mr Toner from DMS, the decision in R(IB) 2/04 is "… silent on the steps a tribunal has to take to alert a claimant that it will be considering the appeal as against a decision that it has substituted as the decision the decision-maker may have made". Mr Toner refers to the analysis undertaken by the Tribunal of Commissioners, at an earlier part of their decision, on the nature of appeals as rehearings. In reviewing earlier case law on this issue, the Tribunal stated, at paragraph 20:

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

34. The review of the case law on appeals as rehearings also included an approval, at paragraph 25, of the decision in Great Britain of Commissioner Jacobs in CH/1229/2002. The Tribunal of Commissioners stated that:

> "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."

35. Paragraphs 11 and 12 of Mr Commissioner Jacobs' decision, which concerned housing benefit, were as follows:

> "11. *The nature of an appeal*. An appeal to a tribunal under the social security legislation has always been regarded as an appeal by way of a rehearing: *R(F) 1/72, paragraph 9* and *R(SB) 1/82, paragraph 10.* The same reasoning now applies to appeal tribunals under the Social Security Act 1998. This does not mean that the appeal tribunal must actually consider afresh every issue that the decision-maker acting for the local authority considered. The issues actually considered will probably be fewer. In practice, they will be those raised either by the parties or by the appeal tribunal on its own initiative. The issues raised by the local authority will be apparent from the terms of the decision and be set out in the submission to the tribunal. The issues raised by the claimant will be apparent from the letter of appeal and related submissions. The issues raised by the appeal tribunal will be those that appear to merit consideration on the information before it. However, this does not affect the principle that all the issues that were before the decision-maker on the claim are potentially open to consideration by the appeal tribunal in the light of the evidence and submissions presented to the tribunal.

12. *Authority*. My conclusion on the scope of the tribunal's jurisdiction is also supported by authority. Local tribunals and social security appeal tribunals were given jurisdiction to deal with questions first arising in the course of the appeal. It was conferred by section 70A of the National Insurance Act 1965, which was inserted by section 84(6) of, and Schedule 21 to, the Social Security Act 1973. The provision was then consolidated, first as section 102 of the Social Security Act 1975 and then as section 36 of the Social Security Administration Act 1992. When the power was introduced, it did not at first apply to means tested benefits. It was later extended to them. There is no present equivalent to that power. So, the position now is as it was before the power applied.

> 12.1 Before the introduction of the power, Commissioners decided that a tribunal had jurisdiction to consider issues that had no formed part of the decision under appeal. In *R(U) 2/54, paragraph 8*, this was applied to different bases of disqualification that arose under the same legislative provision. In *R(F) 1/72, paragraphs 8 and 9*, it was applied to errors identified by the decision-maker that, if corrected, would be to the claimant's disadvantage. The error related to a provision different from that on which the decision had been based.
>
> 12.2 Before the power was extended to means tested benefits, the Commissioners decided that a tribunal had jurisdiction to consider any issues that were within the purview of the original claim: *R(SB) 9/81, paragraph 9*. In that case, the issues had not been considered by the decision-maker and were not mentioned in the claimant's letter of appeal to the tribunal. Nonetheless, the Commissioner held that the tribunal had a discretion to consider them."

36. At paragraph 32 of R(IB) 2/04, the Tribunal of Commissioners stated that:

"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."

Was the decision of the appeal tribunal in error of law?

37. The ROPs for the appeal tribunal hearing runs to six A4 pages, and from this it is clear that the appeal tribunal addressed the difficult issues arising in the appeal in a careful and thorough manner. Equally, the appeal tribunal has provided a detailed, analytical SORs for its decision. Notwithstanding the care taken, did the appeal tribunal go wrong in law and, if so, where?

How defective was the decision dated 2 December 2005?

38. We start our analysis by considering the submission made by Ms Kyne that the decision of the department, dated 2 December 2005, fell into the category of decision, described by the Tribunal of Commissioners in R(IB) 2/04, at paragraph 72 of their decision, as having "…so little coherence or connection to legal powers that they do not amount to decisions under section 10 at all". The reference to section 10 is to section 10 of the Social Security Act 1998, which has an equivalence in Article 11 of the Social Security (Northern Ireland) Order 1998, both of which provisions relate to supersessions. The Tribunal of Commissioners confirmed, however, that the reasoning applied equally to revisions.

39. What paragraph 72 is stating is that there may be certain decision-making actions of the Department which lead to "decisions" which are so incoherent or defective as not to amount to decisions at all. Mr Toner, while conceding that the decision-making action taken on 2 December 2005 was not of the highest standard, submitted that that action was capable of remedy, under the power identified by the Tribunal of Commissioners in R(IB) 2/04, and did not fall into the residual incoherent or defective category.

40. We are of the view that the decision-makers of the Department endeavour to ensure that decision-making action in connection with social security benefit entitlement is as accurate and precise as possible. Precision is necessary both in the proper application of the substantive rules of entitlement and the correct application of the decision-making rules. The latter includes the proper categorisation of decisions within the decision-making structure. Decision-making action has to be taken in the context of detailed and complex rules of entitlement and an intricate decision-making scheme.

41. We also recognise that, despite the commitment to decision-making accuracy, there will be occasions when the decision-making action falls so far short of accuracy and precision that it cannot be said that the proper outcome in terms of establishment or alteration of benefit entitlement has been achieved. That is the category of case alluded to in paragraph 72 of R(IB) 2/04. In these exceptional cases, appeal tribunals and Social Security Commissioners may determine that it will be impossible to remedy the defects or render coherent that which was incoherent – see, by way of example, the decision of Commissioner Mullan in *WC-v-Department for Social Development (DLA)* ([2010] NICom 86, C19/10-11(DLA)).

42. In the instant case, we agree with Mr Toner that the decision-making action taken on 2 December 2005 was problematic. A copy of the outcome of that decision-making action is attached to the original appeal submission as Tab No 9. Tab No 9 is a Departmental template document utilised to record Departmental decisions. The decision-making action is described in Tab No 9 as a "supersession". In one section of the form, the "supersession" is stated to be on the basis of a "relevant change of circumstances". Elsewhere a "disallowance" is stated to be on the basis that there has been a "failure to establish conditions satisfied".

43. In a narrative section of the "decision" the following is recorded:

> "SUPERSEDED AND DISALLOWED Having considered all the available evidence I am satisfied that there are grounds to supersede the decision dated 29/06/04. I am satisfied that after information supplied to the decision-maker in relation to a failed personal capability assessment for incapacity benefit following a medical examination held on 18/08/05 that the MSS department had arranged 3 separate doctor's visits that the customer cancelled offering no reasonable excuse. I have therefore disallowed the customer's claim as there has been a failure to establish the conditions. I am therefore superseding the decision dated 29/06/04 and disallowing DLA from 02/12/05."

44. As was noted above, the appellant had claimed DLA from 27 April 2004 and had been awarded the middle rate of the care component and the higher rate of the mobility component of that benefit from and including 27 April 2004. The only way in which the decision dated 27 April 2004 could be changed would be for it to be revised or superseded under Articles 10 or 11 of the Social Security (Northern Ireland) Order 1998, as amended. The "decision" at Tab No. 9 falls between two stools and reads, alternatively, as if the decision-maker was making a decision on a new or renewal claim or was superseding the decision dated 27 April 2004. If the decision-maker was superseding, then a relevant ground for supersession would have to be established under Article 11 of the Social Security (Northern Ireland) Order 1998 and regulations 6 and 7 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended.

45. We are of the view that the decision-maker's intent, in taking decision-making action on 2 December 2005 was to alter the decision dated 27 April 2004. The error in the conclusion of the decision-making action taken on 2 December 2005 is that no proper legal or evidential basis for the alteration of the decision dated 27 April 2004 was specified or explained. That did not, however, render the decision so incoherent as to not to amount to a decision at all. The decision-making action undertaken on 2 December 2005 while imperfect was, in our view, capable of remedy, if a subsequent decision- maker or appeal body had the power to take remedial action. The issues of the extent to which a decision-maker or appeal body has such a power, and the ambits of that power are what we now consider.

How do decision-makers remedy defects in the decision-making process?

46. There is a legal provision for a Departmental decision-maker to remedy defects in an earlier decision of a decision-maker. Under Article 10 of the 1998 Order, any decision of the Department may be revised by the Department, within a prescribed period, either on an application made for the purpose or on the Department's own initiative. Further provision for the revision of decisions is made under regulation 3 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended. Regulation 3(1) means that the Department can simply change its mind about a decision if it commences action to do so within the relevant time period or where the claimant applies to the Department for a change of mind, again subject to specific time limits. Regulation 3(5) includes the power to revise on the basis that the original decision arose from an official error. Accordingly, where a defect in the initial decision-making process is identified by a subsequent decision-maker or by the claimant, that defect might be remedied by the revision of the initial decision. An alternative, but, we accept, a less likely method of remedying defects in an initial decision is that it could

subsequently be superseded under Article 11 of the 1998 Order and regulation 6 of the 1999 Regulations.

47. The clear advantage to appellants where there is internal remedial decision-making action undertaken in the Department, is that appeal rights to an appeal tribunal are accorded to the appellant.

The scope of an appeal tribunal's power to remedy defects in a Department's decision

48. There is no doubt that the decision of the Tribunal of Commissioners in Great Britain in R(IB) 2/04 is clear authority for the proposition that where an appeal tribunal identifies defects in a decision which purports to change the effect of a previous decision (eg 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), the appeal tribunal has the jurisdiction to remedy those defects and make the decision which the Department ought to have made. We approve of that decision and conclude that it properly represents and reflects the law in Northern Ireland.

49. We also accept that the appeal tribunal's jurisdiction to remedy defects in a Departmental decision and make the decision which the Department ought to have made is part of its inquisitorial role. As was noted by the Tribunal of Commissioners in Great Britain in R(IB) 2/04, at paragraph 32 of their decision, the inquisitorial role includes "… a duty on the tribunal to consider and determine questions which are necessary to ascertain the claimant's proper entitlement …". The appeal tribunal has a discretion as to the extent to which it exercises its inquisitorial role, which discretion is one which must be exercised judicially, and that includes a duty "… to consider whether or not to exercise the discretion where the circumstances could warrant it …" and the appeal tribunal "… would err in law by failing to do so or by failing to give adequate reasons for its conclusion".

50. Analysis of the inquisitorial role often includes a conclusion that the appeal tribunal "stands in the shoes" of the decision-maker, and is permitted, accordingly, to make any decision which the decision-maker could have made. Indeed, such language appeared in paragraph 25 of R(IB) 2/04. It is essential to be aware, however, of the perception which the public might have of such a possibility. In this regard, it is important to note that by making an appeal the appellant is indicating dissatisfaction with the decision of the Department, and a wish to have that decision reviewed by someone, or a body, who is entirely separate from the Department. Throughout the appeal process, there is an ongoing, significant and, in our view, correct emphasis on the autonomy of the appeal tribunal as a judicial body which will take an independent view of the issues which the appellant wishes to raise. The appellant's perception of the independence of the appeal tribunal might be altered on receipt of further information that the appeal tribunal is in a position to put in order problems with the Department's decision. The appellant might wonder why any decision of the Department, which has been found to be defective by a body charged with its review, is not simply ignored or struck out by that body. In the instant case, for example, in the application for leave to appeal to the Social Security Commissioner, the appellant was anxious to submit that the appeal tribunal had ignored errors in the decision-making process. Rather than underline independence the remedying of defects might give the impression that the appeal tribunal is there to do the Department's job for it. That possibility takes on a greater significance in oral appeals where the appellant is present but a Departmental presenting officer is not, or in oral appeals where the Department is represented and requests that the appeal

tribunal remedies defects to the disadvantage of the appellant. In such situations issues of basic fairness, impartiality and "equality of arms" may arise and, when they do, will be of the utmost importance.

51. It is equally important to note, however, that the exercise of the judicial discretion to make inquiry beyond the apparent confines of the case and, by so doing, to remedy defects in the decision-making process and make the decision which the Department ought to have made, may operate to the appellant's advantage. To use the language of paragraph 32 of R(IB) 2/04, ascertaining the "claimant's true entitlement" might involve a conclusion that the Department's determination of that entitlement was incorrect, and involved an error in the decision-making process.

The exercise of an appeal tribunal's power to remedy defects in a Department's decision

52. It seems to us, therefore, that the exercise of the appeal tribunal's power to remedy defects in the decision-making process, as part of the exercise of the discretion to utilise its inquisitorial role, requires an element of caution, principally in order to ensure that the perception of the independence of the appeal tribunal is not damaged. Caution is also required to ensure that the appellant is aware of the effect that the exercise of the power to remedy defects may have on the issues arising in the appeal. In turn, the appellant, armed with additional information on what the appeal tribunal has the power to do, may take appropriate action, including in some instances, withdrawing the appeal.

53. Although this list is not exhaustive, the factors which an appeal tribunal should consider, when hearing and determining an appeal where the remedying of a defect in a Departmental decision is or becomes a live issue, are:

- whether the requirement to consider remedial action has been raised by the Department, or has arisen through the appeal tribunal's own consideration of the issues arising in the appeal;
- the likely impact of the exercise of the discretion on the issues arising in the appeal;
- the likely impact of the exercise of the discretion on the outcome of the appeal;
- The extent to which the appellant understands the likely impact of the exercise of the discretion;
- whether the appellant is represented;
- whether there is a requirement to adjourn the appeal to enable the appellant to be advised of developments, give further consideration to what has occurred or to seek representation, if required.

54. We would note that we are not putting forward, as a general principle, that there is a requirement for an appeal tribunal to adjourn an appeal tribunal hearing on each occasion on which the issue of the potential exercise of the discretion to remedy defects in the decision-making process is raised. Much will turn on the individual circumstances of the case. If the remedial action had the potential to operate to the potential advantage of the appellant, then it is unlikely that an adjournment would be required. Similarly, and even in a case where remedial

action might operate to the appellant's disadvantage, where the appellant is represented by a representative who has a clear understanding of all of the issues, then an adjournment or postponement might not be necessary.

The application of those principles in the instant case

55. In the instant case, the problems with the decision-making process giving rise to the appeal were recognised at an early stage. The original appeal submission was prepared on 13 April 2006. On 24 July 2006 a new submission had been made available for the appeal tribunal having been prepared to give "clarification of the decisions which had been made". The oral hearing of the appeal was adjourned on 25 May 2007. The ROPs for the adjourned oral hearing indicate that discussions centred on the decision-making process giving rise to the appeal. The ROPs record the appellant's representative as stating that "Department made mess of this". As was noted above, the appeal was adjourned in order that:

> "The Department should seek advice from its Decision Making Services section and must provide a full written submission to explain the Decision Maker's decision dated 2/12/2005; to clarify the decision under appeal and the date from which the Department submits the appellant's award of Disability Living Allowance was disallowed and to clarify the decision dated 29/6/2006."

56. The further submission was prepared by the Department on 18 September 2007. In that further submission, the appeals writer requests that the appeal tribunal rectify errors in the decision-making process.

57. At the substantive oral hearing of the appeal, there was a further discussion of the decision-making process giving rise to the appeal. In written observations, forwarded in response to a specific question on the issue of the appeal tribunal's exercise of its power to remedy defects in the decision dated 2 December 2005, Mr Toner, as was noted above, submitted that:

> "The tribunal's decision shows that (the claimant) attended the hearing along with her representative. Also present was an officer presenting the appeal on behalf of the Department.
>
> The record of proceedings shows that it was raised by the presenting officer that the award of benefit was superseded and disallowed on 2 December 2005, that subsequent decisions made since that decision were incorrect and that the decision made on 19 September 2007 should have revised the decision dated 2 December 2005 and the incorrect decisions leaving the decision made on 2 December 2005 as revised on 19 September 2007 as the decision under appeal.
>
> I submit that (the claimant), while maybe not conversant with the technicalities of 'supersession', would in this instance have been sufficiently aware of the case that had been made against her."

58. We agree that the appellant and her representative were aware, from an early stage in the appeal tribunal proceedings that it was the Department's submission that the decision-making process giving rise to the appeal was problematic, and that the appeal tribunal was asked to consider exercising a discretion to remedy the defects in the decision-making process, and make the decision which the appeal tribunal ought to have made. We conclude, therefore, that the

decision of the appeal tribunal could not be said to be in error of law on the basis that the appellant, and/or her representative were not aware of the powers of the appeal tribunal with respect to the decision-making process.

59. What concerns us is the effect which the submission which the Department had made in respect of the errors in the decision-making process had on the ***issues*** arising in the appeal. As was noted above, the error in the decision dated 2 December 2005 is that no proper legal or evidential basis for the alteration of the decision dated 27 April 2004 was specified or explained. By way of further submission dated 18 September 2007 the Department was submitting that the decision dated 2 December 2005 was defective. Further, the Department requested that the appeal tribunal rectify the errors in that decision and make the decision that the Department should have made. The requested decision was that the decision-maker, on 2 December 2005, had grounds to supersede the decision dated 29 June 2004 on the basis that there had been a relevant change of circumstances since 29 June 2004. The submitted change of circumstances was that there had been an improvement in the appellant's functional ability, as evidenced by the contents of the medical report of the examination conducted by a medical officer of the Department on 18 August 2005 in connection with the appellant's ongoing entitlement to IB.

60. The principal difficulty is that the appeal tribunal did not put to the appellant that, by the date of the appeal tribunal hearing, the Department's submission was that there had been a relevant change of circumstances, involving an improvement in functional ability, and sought her comments on that specific issue. Further, the evidence-gathering process and, more particularly, the gathering of oral evidence was not directed towards the issue of whether there had been a change in her circumstances or an improvement in her functional ability. Indeed, the evidence-gathering process from the appellant, and the assessment of the appellant's own evidence, is more redolent of evidence-gathering and assessment in respect of the rules of entitlement rather than in connection with grounds to supersede. In supersession cases, the sequence is to determine whether there is evidence to satisfy the ground for supersession – in this case a relevant change of circumstances – ***and then, if so***, whether there is evidence to support benefit entitlement.

61. In our view, it is entirely possible that had the appellant been asked to comment on the assertion that there had been a relevant change of circumstances, involving an improvement in functional ability, and that evidence in support of that change and improvement was to be found in the report of the examination conducted by the medical officer of the Department in connection with her entitlement to IB, she might have made a specific submission to counter that assertion. For example, she might have given greater emphasis to the further evidence given in brief terms by her representative that her entitlement to IB was reinstated in March 2006, fairly shortly after it had been removed. She may, for example, having been made aware of the significance of the first report of the examination in connection with her entitlement to IB, have sought to adduce the evidence in connection with the reinstatement of her IB, before the appeal tribunal.

62. We are of the view that there is not much more that the appeal tribunal could have done in connection with the manner in which it addressed the difficult issues which arose in this appeal. Unfortunately the little which could have been done, and which was not done, was of significance. The request to remedy the defects in the decision dated 2 December 2005 had an effect on the issues arising in the appeal. In turn, this had the potential to alter the balance of the evidence giving and gathering, and the eventual assessment of that evidence. In our view, this was a case in which the appeal tribunal should have paused and indicated to the appellant, and her representative, the variance in the decision which the Department was seeking, the effect of

that variance on the issues arising in the appeal, the evidence which the Department was adducing in support of that variance. In turn, the appeal tribunal could have invited comment from the appellant on the altered issues which arose, and allowed her to give evidence in connection with those issues. Given the complexity of the issues which arose in the appeal, it was not enough to rely on the ability of the appellant, or her representative to understand them.

63. Accordingly, and with some regret given the appeal tribunal's careful and judicious management of the other aspects of the appeal, and its circumspectly prepared SORs, we find that the decision of the appeal tribunal is in error of law and set that decision aside.

The report of the examination conducted by the EMP on 20 December 2005

64. In the case summary prepared for the oral hearing of the appeal, Ms Kyne submitted that:

> "… it is arguable that by treating the decision appealed against as being the decision of the 02/12/05 the Tribunal cannot take into account circumstances arising after the date of that decision, which would rule out the Tribunal being able to consider the medical examination and subsequent EMP report dated 20/12/05."

65. In C2/10-11(IB), Commissioner Mullan stated the following, at paragraphs 22 to 31:

> "22. Article 13(8)(b) of the Social Security (NI) Order 1998 provides –
>
> '(8) In deciding an appeal under this Article, an appeal tribunal –
>
> (a) …
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'
>
> 23. Article 13(8)(b) exhorts appeal tribunals to concentrate on the decision under appeal, and, more particularly, the date of the decision under appeal. The applicability of Article 13(8)(b) has to be considered, however, in the context of the social security appellate structure. It is inevitable that the appeal tribunal hearing will take place at a date later to the date of the decision under appeal. In the majority of cases, the date of the appeal tribunal hearing will be at least some months after the date of the decision under appeal and, in some rare instances, may take place at a date some years after the date of the decision under appeal.
>
> 24. It is equally often the case that the appellant, or any representative whom the appellant might have and, in rare instances, the Department, as the other party to the proceedings, may also have, between the date of the decision under appeal and the date of the appeal tribunal hearing, sought to adduce further evidence considered to be relevant to the issues arising in the appeal. Moreover, the appeal tribunal itself has the legislative power, under regulation 51(4) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, to adjourn an appeal tribunal of its own motion for the purpose, for example, of production of additional evidence.

25. In oral hearings, where the appellant is in attendance, the appeal tribunal will also usually hear the oral evidence of the appellant given, therefore, at a time which post-dates the decision under appeal.

26. In short, therefore, an appeal tribunal may find that there is before it evidence which post-dates the decision under appeal. The question arises, therefore, as to how the appeal tribunal should deal with such evidence in light of the rule set out in Article 13(8)(b) of the Social Security (NI) Order 1998.

27. In *R(DLA) 2/01*, Commissioner Jacobs considered how disability appeal tribunals (as they then were) should consider evidence which post-dated the decision under appeal, in light of a then extant rule in section 33(7) of the Social Security Administration Act 1992. Section 33(7) provided that a disability appeal tribunal should '… not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

28. In *R(DLA) 2/01*, the date of the decision under appeal was 15 September 1998. The appeal tribunal hearing took place on 18 February 1999, when the appeal tribunal had before it oral evidence from the appellant that he had had a serious operation in January 1999, and also had before it a letter from the appellant's GP, dated 3 November 1998. The statement of reasons for the appeal tribunal's decision recorded, in two separate places, that 'we hear' the case on the basis of the evidence which was before the adjudication officer on 15 September 1998.

29. At paragraph 9 of the decision, Commissioner Jacobs noted that:

> ' … In the case of a claim for a Disability Living Allowance, the jurisdiction [of an Appeal Tribunal] is limited to the inclusive period from the date of claim to the date of the decision under appeal. The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. However it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time it is not admissible.'

30. In relation to the case before him, Commissioner Jacobs found that the appeal tribunal appeared wrongly to have limited itself to the evidence which was before the adjudication officer. In relation to the evidence which post-dated the decision under appeal, and which was before the appeal tribunal, Commissioner Jacobs noted, at paragraph 11:

> 'The claimant told the tribunal that his disablement at the time of the hearing was the same as that at the date of the adjudication officer's decision. The tribunal's statement records that the claimant had had a serious operation on 8 January 1999 and was now recovering. Although the statement does not say this in so many words, the implication is that although the claimant was recovering from his operation, he was nevertheless worse than he had been at the date of the

> adjudication officer's decision. That may have been correct. However, that did not mean that by appropriate questioning the tribunal could not have obtained relevant evidence from the claimant as to his condition at the relevant time, perhaps by comparison with his condition at the date of the hearing. The tribunal was not entitled to reject the claimant's oral evidence on the ground that it was not before the adjudication officer. The same point applies with greater force to the claimant's evidence in his letter of appeal to the tribunal which was written about two weeks after the adjudication officer's decision. This evidence was also covered by the tribunal's blanket rejection.'

31. In *R(DLA) 3/01*, Commissioner Jacobs considered the effect of section 12(8)(b) of the Social Security Act 1998, the equivalent in Great Britain to Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998, in light of his comments in *R(DLA) 2/01*. At paragraph 58 he stated:

> 'Section 12(8)(b) limits an appeal tribunal's jurisdiction by preventing it taking into account a fresh circumstance. It is only concerned with evidence in this respect: evidence is not admissible unless it relates to circumstances obtaining at the date of the decision under appeal. I stand by the statement of law that I set out in [*R(DLA) 2/01*] para.9 … In relating later evidence to the time of the decision, the claimant's evidence is admissible, although it will, like all evidence, have to be weighed by the appeal tribunal.'"

66. The decisions of the Commissioner in Great Britain in R(DLA) 2/01 and R(DLA) 3/01 were considered and approved by Commissioner Brown in C24/03-04(DLA) at paragraphs 6 to 8 of her decision.

67. In paragraph 43 Commissioner Mullan cited the following extract from paragraph 9 of the decision of Commissioner Jacobs in R(DLA) 2/01:

> "… If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time it is not admissible."

and in paragraph 44, and in the circumstances of that case, he found that:

> "…, I cannot see, from the statement of reasons for the appeal tribunal's decision that the appeal tribunal has endeavoured to make findings concerning the relation of the evidence which post-dated the decision under appeal to the period under its consideration – that is the period up to the date of the decision under appeal."

68. In the instant case, in the SORs for the appeal tribunal's decisions with respect to both the care and the mobility components of DLA, reference is made to the report of the examination conducted by the EMP on 20 December 2005. The appeal tribunal noted that:

> "The EMP's report was obtained about 2½ weeks after the Decision Maker's decision. There is no evidence that the appellant's condition had changed in those 2½ weeks and therefore the EMP's report is an indication of the appellant's condition at the time of the Decision Maker's decision."

69. In our view, the appeal tribunal has made clear findings concerning the relation of the evidence which post-dated the decision under appeal to the period under its consideration – that is the period up to the date of the decision under appeal. Accordingly, it could not be said that in accordance with the principles set out in R(DLA) 2/01 and R(DLA) 3/01, as approved in C24/03-04(DLA), the decision of the appeal tribunal is in error of law on this cited ground.

The reformulation of the decision

70. In the case summary prepared for the oral hearing of the appeal, Ms Kyne submitted that:

> "… if it is accepted that the Tribunal had the power to remedy the grounds and replace it with the grounds requested by the department, the Tribunal should have reformulated the decision in the decision notice, it is submitted that the Tribunal did not thoroughly explain that it was reformulating the decision of 02/12/05. In the decision notice it states:
>
> > 'Appeal disallowed. The appellant does not satisfy the conditions of entitlement to the care component of DLA from an including 02/12/05. Grounds existed on 2/12/05 to supersede the decision dated 29/06/2004. There was a relevant change of circumstances in that there was a reduction in the Appellant's care and mobility needs.'
>
> (The decision notice in respect of the Mobility Component is identical save for reference to the mobility component.)
>
> It is submitted that the Tribunal's decision notice does not provide a sufficient explanation to convey that there was a reformulation of the decision of 02/12/05 so that it was now treated as the effective date for the appeal purposes and its grounds were replaced by the grounds given on faulty supersession decision of 22/12/05."

71. In R(IB) 2/04, the Tribunal of Commissioners in Great Britain stated the following, at paragraph 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 … . 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.)"

72. In the instant case, the decision notices for the appeal tribunal's decisions with respect to both the care and mobility components give a detailed and comprehensive explanation of the basis that the disallowance was arrived at. While the decision notices do not specify that the appeal tribunal has remedied defects in the original decision dated 2 December 2005, the

combination of the very complete SORs and the decision notices should have made it clear to the appellant and her representative what the appeal tribunal has done and why. Accordingly, we cannot agree that the decision of the appeal tribunal is in error of law on the basis of this ground.

The use of the evidence in the report of the examination conducted by the medical officer of the Department on 18 August 2005

73. It is clear that the appeal tribunal placed a great deal of reliance on the evidence contained in the report of the examination conducted by the medical officer of the Department on 18 August 2005. Ms Kyne took issue with the appeal tribunal's consideration of this evidence both as a ground for supersession and in light of the fact that the evidence was obtained in connection with the appellant's ongoing entitlement to IB, a benefit which was not at issue in the present appeal.

74. In the Great Britain decision in CDLA/5803/1999, Commissioner Jacobs stated the following, at paragraph 25:

> "The adjudication officer was entitled to make use of evidence obtained for the purposes of another benefit. However, care has to be taken to ensure that the evidence is properly comparable."

75. This is, in our view and succinct an accurate summary of the approach to be taken by adjudicating authorities when considering cross-benefit evidence. There is no reason why such evidence should not be considered but it is essential to be sure that what is being compared is truly similar and that evidence, and particularly medical evidence, directed towards the criteria relating to one benefit is indeed relevant in relation to the criteria relating to another benefit. In the instant case, the appeal tribunal considered a wide range of evidence which was before it, including but certainly not limited to the evidence in the report of the examination conducted by the medical officer of the Department on 18 August 2005. The other evidence considered by the appeal tribunal included the report of the examination conducted by the EMP on 20 December 2005 (which, as we noted above, was considered in the proper circumstances), evidence from the appellant's GP and the appellant's own evidence. The assessment of that evidence was both in the context of identifying a relevant ground for supersession and in the context of entitlement to DLA. In our view, therefore, it could not be said that the decision of the appeal tribunal was in error of law on this cited ground.

The appellant's appeal rights

76. During the course of the oral hearing of the appeal we questioned whether the appellant had ever exercised a right of appeal against the decision dated 2 December 2005. We were satisfied, on the basis of the responses from both Ms Kyne and Mr Toner, that the appeal made on 26 February 2006 could be accepted as an appeal against the decision dated 2 December 2005.

Disposal

77. The decision of the appeal tribunal dated 12 November 2007 is in error of law. Pursuant to the powers conferred on us by Article 15(8) of the Social Security (Northern Ireland) Order 1998, we set aside the decision appealed against. We refer the case to a differently constituted appeal tribunal for re-determination and direct that:

(i) the DMS Unit of the Department is to prepare a new submission for the oral appeal tribunal hearing by the differently constituted appeal tribunal. The new submission is to set out the legal and evidential background to the decision-making action undertaken by the Department between 2 December 2005 and 19 September 2007 and is to include specific submissions on what the Department considers to be the legal effect of that decision-making action;

(ii) the new submission is to be made available to the appellant and her representative in advance of the further oral hearing of the appeal in order to give the appellant, and her representative the opportunity to address and, if necessary, respond to the issues which have been raised;

(iii) the appeal tribunal is to redetermine the appeal in light of the further submissions which are to be made and in accordance with the principles set out above.

78. We have been informed that the appellant has not made any further claim to DLA since the dates of the decision-making action undertaken by the Department in 2006 and 2007. We also understand that the appellant has become disillusioned by the protracted nature of the decision-making and appeal proceedings which have taken place. The appellant has been well served by her representative, Ms Kyne, in the proceedings before the Social Security Commissioners. Ms Kyne has indicated that she will continue to support and represent the appellant in the further proceedings before the appeal tribunal. Given that commitment, we urge the appellant to attend the further oral hearing of the appeal to give evidence in connection with the benefit issues which are of importance to her.