DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Paula Gray

DECISION

This appeal by the Secretary of State succeeds.

Permission to appeal having been given by me on 15 June 2015 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the two decisions of the First-tier Tribunal sitting at Derby and made on 30 October 2014 under reference SC 034/13/04670 and SC 034/13/04671. I refer these matters to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

DIRECTIONS

1. These directions may be amended or supplemented by those of a District Tribunal Judge at the listing stage.
2. The case will be listed before a differently constituted panel as an oral hearing. The new panel will make its own findings and decision on all relevant matters, noting the reasons that the matter has been remitted.
3. The parties should send to the HMCTS First-tier Tribunal office as soon as possible any further relevant written evidence, if there is any. If they cannot send that evidence promptly the parties will need to contact that office to let them know that further evidence is expected. This is not to suggest that any further evidence is required or expected. To be of relevance evidence must relate to the position as it was at the dates of the decisions under appeal, even if it came into existence after that date.

REASONS

1. This is an appeal by the Secretary of State and I will refer to the respondent as the claimant.
2. There were two appeals before the tribunal, and two essential issues; the first was as to the claimant's entitlement to DLA, the second whether or not there was a recoverable overpayment of the DLA which had been paid under an award.

3. Recoverability, on the case as put by the Secretary of State, depended upon whether the time had come during the period of the award, which took effect from early 2002, when the claimant no longer satisfied the conditions of entitlement, and if so whether she should have informed the Secretary of State of that.
4. Those were the issues for the first tribunal, which I will refer to as the FTT or the tribunal in this decision, and they will remain the issues for the fresh tribunal.

The FTT decision

5. The FTT decided, in short, that there had been no entitlement to DLA from 2002, but that there was no recoverable overpayment. That was because the claimant had not misrepresented or failed to disclose any material matter; the 2001/2002 decision had been based on a mistake of fact; the award from 2002 should not have been made, but that mistake could not be laid at the door of the claimant, and her condition had not improved over the period so as to place an onus on her to notify the Secretary of State of any changes.

The legal and evidential background

8. This is taken largely from the helpful account in the full statement of the District Tribunal Judge. The award effective from the renewal date in early 2002 was made in late 2001 under the power which allows such an award to be 'renewed' prospectively. The award, which had originally been one of the higher rate of the mobility component only, became on renewal in addition one of the lowest rate of the care component based on satisfaction of the main meal criteria.
9. The essence of the tribunal's finding of facts was that the claimant had an underlying problem in her lumbar spine which gave her some, but not extensive limitations on her mobility and functioning; at no relevant time had she been either virtually unable to walk or unable to plan, prepare and make a main meal in accordance with the statutory considerations.
10. There was DVD evidence from about the date of the decision which, like the Secretary of State, the FTT found highly persuasive as to the probable state of affairs at that date. Modest levels of prescribed analgesia supported the finding of only limited difficulties. The appellant's account of very significant pain and functional difficulties was found not to be credible.
11. The approach of the Secretary of State was that proper entitlement was reflected in the award of the higher rate mobility and lowest rate care which was in place at least from 17/1/2000, and most recently confirmed in a decision made 1/10/2001, the prospective award in relation to entitlement from the renewal date 17/1/2002. That award was indefinite. The decision under appeal, the 2013 Secretary of State's supersession decision, was justified on the basis that from 30 April 2009 there had been significant improvement in the claimant's condition following a series of epidural pain relief injections. That change of circumstances supported the supersession decision in

relation to both components of the existing award, and gave rise to the overpayment decision in respect of the period 6/5/2009 to 7/5/2013, in the sum of £14,770 .95 which was recoverable; the claimant, it was said, should have reported the fact that her condition had improved.

12. It was in relation to this aspect that the view of the majority of the FTT and the Secretary of State parted company. The issue upon which they differed was, according to the DT J in the statement of reasons, "whether or not the proper course was to supersede as and from 2009 or whether to reach further back."

The FTT majority approach

13. At paragraph 10 of the statement of reasons the finding is set out that the claimant's condition had not since 2001 justified the award in payment, and that the renewal decision of October 2001 (effective from a date early in 2002) had been taken by the Secretary of State as a result of the mistake of fact. A further finding was that there had not been any significant improvement in the claimant's condition as a result of the series of injections relied upon by the Secretary of State; there was no significant difference between her functional abilities in 2001/2 and those which existed at the date of the 2013 decision under appeal. Her observations in the interview under caution (IUC) as to the impact of the spinal injections being "brilliant" was simply an exaggerated way of expressing herself.
14. The statement of reasons analyses what evidence had been presented to the Secretary of State in the DLA renewal form in relation to the 2001 indefinite award.
15. The award of the lowest rate of the care component based upon the main meal test could not, the FTT found, have been based upon the claimant's account in that renewal claim form. The account, they said "fell well short" of stating that she was unable to do that "within the usual test we apply".
16. The evidence from the claim form was discussed. The observation was made that the claimant had said she could not lift hot saucepans, and that she would be unable to bend to the oven. The statement makes the legally correct observation that she would not have had to do this to be able to cook a main meal for one person, given the strict terms of that legal test.
17. As to mobility the statement reads [13] "as regards her walking in 2001 we found that she was able to make progress on foot without severe discomfort over a considerable distance and with reasonable balance and gait. This was the position she had maintained was the case in late 2001."
18. Accordingly the entitlement decision was revised, and the overpayment found to be irrecoverable.

The minority

19. The statement of reasons clearly sets out the minority view in accordance with *Secretary Of State for Work and Pensions-v-SS (DLA)[2010] UKUT 384 (AAC)reported ref [2011] AACR 24 [10].*

The appeal to the Upper Tribunal

20. I granted permission to appeal, accepting that the various points made in the Secretary of State's application for permission to appeal were arguable and further commenting

> The judge may not have explained sufficiently the view taken by the majority that Mrs B's condition had not improved to the extent that there was an obligation upon her to disclose that change given the combination of her evidence of at least some improvement in her condition in the interview under caution (IUC) and her plea of guilty to an offence under section 112 (1A) and (2) Social Security Administration Act 1992 of failure to disclose a change of circumstances which she knew would affect her entitlement to DLA, namely an improvement in her capabilities. Although I do not consider the majority view as to her use of the word "brilliant" in the wider context of the IUC irrational of itself, in conjunction with the criminal conviction it may be so. That point seems to me arguable and it is further arguable that the approach taken by the majority to the relevance or evidential weight accorded to the criminal conviction is not sufficiently explained.
>
> It seems to me at best unclear as to whether the majority, in their view that the Secretary of State could not have made the award that he did of either component of DLA in October 2001, considered only the renewal claim pack of August that year or whether they looked at the evidence overall as they should have done, bringing into account the prior information before the Secretary of State in the claim pack completed in November 1999. On the totality of the evidence it could be argued that to come to the view that there could be no true entitlement in October 2001 was irrational.

21. On the basis of the way in which the grounds of appeal were worded, there was a question as to whether I was dealing with both appeals or only with the appeal in which the Secretary of State did not succeed at the FTT. Although it is an apparently strange position to consider a party appealing a decision that was made in their favour, the issue needed to be addressed because I was of the view that, given that the appeals had been linked below, both appeals would preferably be "at large" were I to remit the matter for rehearing, as it would be fair for a fresh tribunal to consider all the matters including those in which the Secretary of State had succeeded previously. The Secretary of State confirmed that he was content for me to consider both cases.

The respective positions of the parties

22. The Secretary of State relied upon the original grounds of appeal. In summary that they were that in relation to the overpayment decision the FTT had failed to explain in sufficient detail why the Secretary of State's contention that there had been a relevant change in circumstances had been rejected. The finding that the course of injections the claimant received did not bring about a significant improvement in her condition was, given her evidence in the IUC arguably irrational and at least inadequately reasoned.
23. As to the entitlement decision, issue was taken as to the finding that the original award back in 2001 must have resulted from a mistake of fact. The conclusion the tribunal drew from the evidence available to the decision maker was different to that drawn by the decision maker, but that of itself is not necessarily indicative of a mistake of fact.

24. I offered the claimant the opportunity to make further representations or comment, but nothing has been forthcoming although a considerable time has been made available to her.
25. Neither party requested an oral hearing and I was of the view that eh matter could be fairly determined without one.

My analysis

26. The Secretary of State's argument that the FTT was simply substituting their own view for that of the 2001 decision maker has merit. That is not permissible is a matter of law; the process of revising a decision for mistake of fact requires more than the FTT coming to a different conclusion on the basis of the available evidence; the conclusion to which the decision maker came must have been one to which no reasonable decision maker could have come. The tribunal had not justified the finding that the original award in 2001 was the result of a mistake of fact.
27. In the light of that material error it is unnecessary for me to decide whether the finding as to a lack of improvement in the claimant's condition following the spinal injections was irrational in view of the other evidence. It seems to me appropriate that I forbear to rule in relation to that as such a ruling may prejudice the rehearing. I say simply that the finding was not adequately explained in light of the totality of the evidence.
28. I explain my analysis below.

Revision on the basis of mistake of fact

29. A tribunal can act to revise under section 9 Social Security Act 1998 (SSA) where the Secretary of State has acted to supersede under section 10 *(R(IS) 2/04).*
30. In general the difference between a decision which is revised and one which has superseded is the effective date. A decision made under a mistake may be revised back to its inception, whereas a supersession will take effect from the date of a supervening event, whether that is a change of circumstances, the report of such a change, or the supersession decision itself. (section 10 (5) SSA)
31. The importance of the date is that issues concerning overpayment may be affected, the period of overpayment potentially increasing with a revision, although that was not the position here.
32. Under regulation 3 (5) (c) and (d) Social Security (Decisions and Appeals) Regulations 1999 where a decision is revised as being made in ignorance of or under a mistake of fact in addition to establishing the mistake it must be shown that the claimant knew, or could reasonably have been expected at the time the decision to be revised was made to know of that fact and that it was relevant to the decision to make the award. *(JA-SSWP [2014] UKUT 44 (AAC)* Upper Tribunal Judge Rowland [14]).

The practical difficulties of revision

33. The problem the FTT gave itself is well set out by Deputy Upper Tribunal Judge Paines in *NA v SSWP (DLA) [2014] UKUT 40 (AAC)*:

[25] The distinction between a difference of opinion and a mistake or ignorance of fact is an elusive one.

[32]A decision-maker or tribunal dealing with a supersession decision must be able to say that the facts are different from how the previous decision-maker assessed them, and to exclude the possibility that the previous decision-maker took the same view of the facts but regarded them as falling on the other side of the line between entitlement and non-entitlement.

[33] This should not be too difficult where the decision-maker or tribunal has a record of the previous decision-maker's findings of fact. It will be possible to compare the previous findings with the new findings. The position is more difficult where no record of the previous findings is available. In that situation the decision-maker or tribunal will have to consider whether the facts as they now appear are ones on the basis of which no reasonable decision-maker could have made the award that was made on the previous occasion. If that is the position, the decision-maker or tribunal can assume that either the previous decision-maker assessed the facts wrongly or they have changed. That is because it is improbable that the previous decision-maker reached an irrational decision, making it more probable that the facts were mis-understood or have changed.

34. Here there was no document that set out the factual findings in 2001. A multi-page decision is in the bundle, in the form of various boxes to be ticked which give the essence of the outcome, but not the reasons; a box on page 97, the final page of that decision, which is headed "Reasons for Decision" said simply " She is able to self care by day and night. She can be safely left by day and night." That, rather than findings in respect of the decision which was made, is justification for not awarding the care component at above the lowest rate. Critical, then, is the evidence which was before the 2001 decision maker.

The evidence before the 2001 decision maker

35. I observed in granting permission to appeal that it may not have been the renewal claim pack in isolation which informed the decision maker's 2001 renewal award; there was earlier evidence from claim packs in 1997/8, and these were in the bundle before the FTT. It is fair to say that they do not really change the position regarding mobility, however the fact that similar matters were repeated in the renewal claim, with the inevitable attendant representation that the functional limitations set out are enduring, may reinforce the perceived evidential value of the claims made.
36. Claims in relation to mobility whilst legally a distinct component from care, may yet inform a decision on care needs. This is because in general somebody with very significantly impaired mobility is likely to be more in need of assistance in respect of certain aspects of daily living than those who are agile, and that may feed in to the credibility of claims made in respect of a need for attention with the bodily functions used in maintaining appropriate personal care.
37. As to care, the older claim form referred to problems with personal care and in preparing a meal. It was similar to the 2001 form, but not

identical, stating that turning on taps was difficult, as well as using the oven and the grill. The later form referred to problems undoing bottles, but not to taps. The reference to the grill was omitted. Arguably the older documents added something to the picture in relation to care.

38. The FTT made no reference to the earlier documents in their analysis. That was a mistake, although of itself not fatal to the decision.

The 2001 renewal claim pack

39. As to mobility, significant difficulties were asserted in relation to the claimant's ability to walk out of doors; she answered "1 yard" to the question *"Tell us roughly how far you can walk before you feel severe discomfort…..for example, before you need to stop and rest",* but this seems to have been overlooked by the FTT. As I have quoted above the statement of reasons says that "as regards her walking in 2001 we found that she was able to make progress on foot without severe discomfort over a considerable distance and with reasonable balance and gait. **This was the position she had maintained was the case in late 2001."**(My emphasis).
40. Arguably the care difficulties set out involved the claim that the appellant was unable to prepare a main meal, albeit that certain facts asserted would not be determinative of an award given the nuances of the legal test. The claim, in general, refers to her having significant functional difficulties in the sort of tasks that are involved in preparing food (undoing bottles etc) in cooking and in washing up. Overall she could be said to be presenting herself as someone who had difficulties in preparing a meal, whereas the FTT found that in fact at that time and subsequently she was quite able to do so.

Analysing the FTT findings

41. There is dissonance between the DVD evidence which the FTT found compelling and which was the foundation of the facts they found as to the very limited effect of the appellant's problems on her mobility and general function, and the statements she made in the renewal claim pack of 2001. There is an absence of explanation as to how the majority has reconciled that.
42. Although not said to have formed part of the reasoning I have considered an argument as to the difference between a representation of fact and a statement of opinion, but it is hard to see how it could apply here, where what is being said in the claim pack is that the claimant was in severe discomfort from the moment that she started to walk. This is not analogous to a claim that someone can walk, say, only 50 yards, a statement which they have based upon being able to walk from and to a particular point which is in fact a rather greater distance than that.
43. Further, something which is at face value merely an expression of opinion is, if that opinion is not honestly held, a misrepresentation of fact; the dishonest element means that the statement becomes a lie,

which is self-evidently a misrepresentation of fact. These are subtle points, but ones with which the tribunal needs to engage.

44. Judge Rowland deals with what might constitute a representation in *JA-v-SSWP* cited above. At paragraph 27 he makes the observation

"Inaccurate statements of fact are generally misrepresentations, even if honest (which they may not have been here)."

45. He refers to an illustrative example in that case, citing details from the claim form completed some years earlier, and referring to more recent surveillance evidence which revealed a different picture, and he quoted the tribunal's account of that evidence in the statement of reasons. The passage that he refers to concludes "in the video evidence the appellant's movements appeared to be fluid and pain-free. She was not using a stick. She was not limping." Further detail followed. He said at paragraph 30

"if that was also the position in June 2010, I find it very difficult to see how the answers on the claim form could be said not to include a number of misrepresentations, even if, for instance, that is that she said she could not walk without severe discomfort was based on an innocent misunderstanding of the meaning of "severe discomfort".

The adequacy of the reasoning of the majority view

46. There were a number of aspects of the IUC which required explanation given the conclusions to which the FTT had come. The issue was not only that which surrounded the use of the term "brilliant" in connection with the effect of the spinal injection upon the claimed pain and her subsequently improved function; there were occasions in which she had answered questions about possible improvement in function, and there was the interplay between the interview and the plea of guilty at the Magistrates Court to offences in connection to the failure to disclose apparently on this very issue. This was ignored, save for the statement as to the tribunal not being bound by the criminal conviction because its investigations do not wholly replicate it; that is insufficient where, at least on the face of it, they do. An explanation as to why negligible or no weight was given to the criminal conviction was, in the circumstances, imperative.

The decision to revise

47. There are problems with this of itself and in the explanation.
48. Although the FTT is entitled as a matter of law to revise the existing supersession decision of the Secretary of State *(R(IB)2/04 [55])*, section 12 (8) (a) SSA, the statutory provision that they need not consider a matter not raised by the appeal, means that reasons need to be given for the exercise of the discretion to do so: *(R(IB)2/04 [94]*.
49. As the tribunal's approach would lead to there being no recoverable overpayment consideration should have been given to the possibility of an adjournment to allow representations on the issue, clearly fundamental to the Secretary of State's case, to be made. It may be that the tribunal did consider the point, but there is no reference to

that in the statement of reasons; as a discretionary decision it, also, required some explanation as to how the discretion was exercised.

Mistake of fact?

50. The approach indicated by the statement of reasons as to whether the decision was based upon a mistake of fact was flawed.
51. The tribunal approached the question of whether or not misrepresentations of fact had been made as to the care award, which was in respect of satisfaction of the main meal test, looking only at the representations made on the part of the form which dealt with that question and using the highly technical criteria for that award in their judgement as to whether or not certain facts were material. For example it was said that because case law shows that it is not necessary to bend to an oven to cook a main meal because such a meal can be cooked on the hob, the representation that the claimant was unable to bend to use the cooker was not a misrepresentation. The FTT might have meant that it was not a material misrepresentation; I use the term misrepresentation in the light of the finding of fact by this FTT that the claimant could in fact bend, given her activities on the DVD, at paragraph 8 where she was said to be able to "bend for items … amounting to quite a heavy load" and their finding that her abilities at that time were the same as her abilities at the date of the renewal form. I use the term because it seems to me that it must flow from their findings; in their terms that must have been a misrepresentation of fact, although they classified it otherwise, or perhaps felt that it was immaterial, given the constraints of the main meal test.
52. For a representation of fact to be material it does not have to be critical to the legal basis upon which a particular level of award is made. It must be something which is likely to have influenced the making of an award at that level. Accordingly the claim that the appellant could not bend to an oven, whilst of itself not sufficient to satisfy the main meal test given that the meal can be cooked on the hob and therefore without bending, may be put into the balance by the decision maker in relation to the question whether by reason of a combination of significant problems somebody might, overall, be categorised as a person who could not cook a meal for themselves.
53. Absence of evidence can of itself lead to the representations in the claim pack overall being seen as a misrepresentation of the position. For example to talk in terms of walking difficulties without mentioning, in answer to certain questions, significant walking which is accomplished, is in effect to suppress material facts, which is a misrepresentation of the reality of the situation.
54. So far as the fresh tribunal is concerned, of course, they are not governed by the findings of the earlier FTT, and must make findings of fact of their own on the evidence that they accept and reject, and they should not take my use of the word misrepresentation as anything more than my way of explaining the flaw in the logic of the first FTT's reasoning.

55. I would add one further matter concerning the revision decision of the FTT. I mentioned above that in addition to establishing the mistake of fact, the tribunal, in order to permit the revision, must find that the claimant knew or could reasonably have been expected at the time the decision to be revised was made to know of that fact and that it was relevant to the decision to make the award: regulation 3 (5) (c) and (d) Social Security (Decisions and Appeals) Regulations 1999.
56. The statement of reasons does not deal directly with this, and although the findings of the tribunal as to the claim and functional abilities at the date of the revision suggest it, once more the finding that she had made no misrepresentations requires explanation in that context.
57. The provision must be borne in mind by the fresh tribunal should they decide to tread the same path towards revision as the previous FTT.

Remitting the two linked appeals

58. The FTT found that the renewal award should not have been made in 2001. They revised the decision back to that date substituting the award made for a decision that there was no entitlement to either component.
59. Technically the Secretary of State's entitlement decision was upheld; that decision had been that there was no entitlement, although from a later date. In the decision notice issued on the day of the hearing the tribunal expressed their decision to be to the disadvantage of the claimant and in statistical terms the Secretary of State was the winner rather than the loser; however the result was also to the Secretary of State's disadvantage in that it fatally undermined the overpayment decision.
60. The grounds of appeal, was not quite making that point, criticised the basis of the decision. At my invitation the Secretary of State agreed to my considering that decision also. He therefore appeals a winning decision. That counterintuitive possibility is within the terms of section 11 Tribunals, Courts and Enforcement Act 2007 which governs the right of appeal to the Upper Tribunal. The relevant parts read as follows:

> 11-(1) for the purposes of subsection (2) the reference to a right of appeal is to a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-Tier Tribunal other than an excluded decision.
>
> (2) any party to a case has a right of appeal, subject to subsection 8
>
> (8) the Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

61. I mention the qualifying provision, subsection (8) for completeness; it is not material.
62. The position is really not so unusual; consider the situation in which an appeal is allowed in part, but the litigant wishes to succeed fully, and so, where legal grounds permit, seeks to appeal. This is not quite that situation, but is similar.

63. I have considered basic fairness in relation to what I propose to do, and in all regards it seems to me to be more fair to the claimant to remit both decisions, and there are grounds to do so, rather than remitting the decision of the Secretary of State which was set aside by the FTT, and leaving the one upon which he apparently succeeded in place.
64. If I were to remit only that one decision it would not actually tie the hands of the fresh FTT. That is because the findings of the previous FTT in the entitlement appeal, even where they were not disturbed by the Upper Tribunal, would not bind the fresh FTT considering the related overpayment appeal. The fresh tribunal would still have to consider the question of entitlement in order to provide the foundation for any findings that they might make in relation to the overpayment question. Technically it is unnecessary for both appeals to be before the fresh FTT.
65. The possibility that a fresh FTT might decide the overpayment issue on findings which were wholly different to those in the first FTT's entitlement decision, with both decisions then existing at the same time is not unknown, and it is less than satisfactory.
66. Further, the Secretary of State could, although there is absolutely no indication that he would, use the decision that no entitlement existed from the initial award in 2002 to found a further overpayment decision for the period 2002 to 2009 in addition to the current decision which deals with the approximate period 2009 to 2012. To remit the entitlement decision is therefore in some sense to protect the claimant, although there seems little if any likelihood that she would be disadvantaged in that way, the Secretary of State maintaining before me his position that the evidence pointed to earlier entitlement followed by an improvement in condition such that the claimant should have notified the Department.
67. Both decisions will therefore be before the fresh tribunal for their consideration.

Upper Tribunal Judge Gray

(Signed on the original on 9 May 2015)