IN THE UPPER TRIBUNAL **Case No.** CDLA/3773/2014
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The administrator of the claimant's estate appeared in person.

The Secretary of State was represented by Mr Jeremy Heath, solicitor.

Decision: This appeal is allowed in part. The decision of the First-tier Tribunal dated 4 March 2014 is set aside and there is substituted a decision superseding the decision of the Secretary of State dated 17 June 2009 on the ground that it was made in ignorance of the material facts that no payments of disability living allowance were made to the claimant after 2 December 2008 and that the claimant's deputy had not been aware until 2 April 2008 that her care home fees were being funded by a primary care trust from 30 July 2007. The claimant was overpaid disability living allowance amounting to £1,150.70 from 29 August 2007 to 2 December 2008 and the overpayment from 2 April 2008 to 2 December 2008, amounting to £620.60, is recoverable from her estate.

REASONS FOR DECISION

1. This is an appeal, brought by the administrator of the estate of the late claimant with permission granted by the First-tier Tribunal, against a decision of the First-tier Tribunal dated 4 March 2014 allowing in part an appeal brought by the administrator after a decision of the Secretary of State dated 17 May 2012 and deciding that the claimant had been overpaid disability living allowance from 3 October 2007 to 2 December 2008 and that that overpayment was recoverable from her estate.

The facts and procedural history

2. The claimant suffered from pre-senile dementia as a result of Alzheimer's disease and also from other conditions, including epilepsy. As she was incapable of managing her own affairs, a deputy (originally a receiver but I will use the term "deputy") had been appointed by the Court of Protection to manage them for her. A new deputy was appointed in September 2009. The claimant had long been entitled to both the middle rate of the care component and the lower rate of the mobility component of disability living allowance but payment of the care component had ceased from 31 May 2000 following her admission on 30 April 2000 to the care home where she lived until her death on 9 October 2009. Because the claimant had not been assessed as requiring "Continuing NHS Healthcare" but could not afford to meet all of the fees for her accommodation, the local authority contributed to the fees – possibly paying them all from April 2007. However, on 3 October 2007, the local NHS primary care trust wrote to the claimant at the care home, saying –

> "Your need for health care has recently been assessed by an NHS Registered Nurse, and it has been found that at this time you are eligible to receive Continuing NHS Healthcare. This means the NHS will be responsible for paying your nursing home placement fees from 30/07/07."

The implication was that the local authority's liability ceased on 29 July 2007.

3. No-one told the Department for Work and Pensions in 2007 about the apparent change in funding and it found out only on 24 March 2009. The Department's computer records an entry made on that date –

> "508 TO MU73 RE CUST NHS FUND U3T4CB".

It appears from the record of proceedings before the First-tier Tribunal that a "508" is a form for recording information received by telephone and that "MU73" is the office of the Department in Blackpool that administers disability living allowance.

4. The information appears to have led to the immediate suspension of payments and to the primary care trust being contacted on 8 May 2009 so that it could confirm the funding. On 3 June 2009, the Secretary of State made a decision set out in a letter addressed to the claimant's deputy to the effect that the claimant – presumably in fact the deputy or someone else on her behalf – had contacted the Department on 24 March 2009 about a change of circumstances and that from 29 August 2007 she was entitled to the lower rate of the mobility component and the middle rate of the care component of disability living allowance. What presumably was also decided was that the mobility component had ceased to be payable to the claimant from 29 August 2007. The Secretary of State told the First-tier Tribunal that that would have appeared on the second page of the letter of which only the first page was before the First-tier Tribunal and is before me. In any case, it can clearly be inferred from the making of the subsequent decision to the effect that there had been an overpayment that the decision of 3 June 2009 terminated payability. There was probably also a reference at the end of the letter to regulation 12A of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890), as amended, paragraphs (1) and (2) of which then provided –

> "12A.—(1) Subject to regulation 12B (exemption), it shall be a condition for the receipt of a disability living allowance which is attributable to entitlement to the mobility component for any period in respect of any person that during that period he is not maintained free of charge while undergoing medical or other treatment as an in-patient—
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> (a) in a hospital or similar institution under the NHS Act of 1977, the NHS Act of 1978 or the NHS Act of 1990; or
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> (b) in a hospital or other similar institution maintained or administered by the Defence Council.
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> (2) For the purposes of paragraph (1)(a) a person shall only be regarded as not being maintained free of charge in a hospital or similar institution during any period when his accommodation and services are provided under section 65 of the NHS Act of 1977, section 58 of, or paragraph 14 of Schedule 7A to, the NHS Act of 1978 or paragraph 14 of Schedule 2 to the NHS Act of 1990."

The decision probably also said that the care component was not payable from 29 August 2007 by virtue of regulation 8, rather than regulation as had previously been

the case, but nothing turns on that. It is to be noted that regulation 12A(1) – like regulation 8 and, although the phraseology is different, regulation 9 – is concerned with "a condition for the receipt" of the benefit, rather than a condition of entitlement, so that, when it applies, the benefit ceases to be payable but the claimant retains what is generally known as an underlying entitlement. Thus the language of entitlement used on the first page of the decision letter was appropriate. 29 August 2007 was presumably taken as the date from which payments of the mobility component should have ceased because the mobility component remained payable for the first 28 days after the new funding regime took effect (see regulation 12B(1)(a) of the 1991 Regulations) and that regime was regarded as taking effect on 1 August 2007 either because that was when the fees were next due or because it was the beginning of a complete week in respect of which the benefit was paid.

5. That decision led to a further decision being generated by a computer on 17 June 2009 to the effect that there had been an overpayment of disability living allowance to the claimant amounting to £1,434.70 in respect of the period from 29 August 2007 to 24 March 2009 as a result of the deputy not having disclosed the material fact that "in a care home [the claimant] became funded by the National Health Service" and that therefore that amount was recoverable from the claimant. The decision referred to section 71 of the Social Security Administration Act 1991, subsections (1) to (3) of which provide –

> **71.**—(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure–
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> (a) a payment has been made in respect of a benefit to which this section applies; or
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> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
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> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.
>
> (2) Where any such determination as is referred to in subsection (1) above is made, the person making the determination shall [in the case of the Secretary of State or [the First- tier Tribunal], and may in the case of [the Upper Tribunal] or a court] –
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> (a) determine whether any, and if so what, amount is recoverable under that subsection by the Secretary of State, and
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> (b) specify the period during which that amount was paid to the person concerned.]
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> (3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.
>
> (4) ….
>
> (5) *repealed.*
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> (5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) or under regulations under subsection (4) unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under section 9 or superseded under section 10 of the Social Security Act 1998.
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> …"

Also on 17 June 2009, the Department wrote to the deputy requesting payment. However, again, only the first page of the two-page letter is included in the

documents before me and so it is not clear whether the full terms of the decision were sent to the deputy or whether the deputy was informed of the claimant's right of appeal.

6. There does not appear to have been a reply from the deputy and nothing further happened until 2010, after the claimant's death, when the Department discovered that probate had been taken out and the administrator of the claimant's estate became involved. At this time, the Department was seeking only £1,283.73 but this reduction in the amount sought appears to have been due only to innumeracy. That apparent innumeracy is consistent with the Department's apparent inability at that time to explain fully to the administrator exactly what it had decided and why. I need not set out the twists and turns of the lengthy correspondence. Suffice it to say that, on 17 May 2012, the Department wrote to the administrator, saying –

> "Further to the request for the decision about an overpayment issued on 17 June 2009 to be looked at again.
>
> We have looked at the facts and evidence we used to make our decision and looked at the points raised. As a result, we have not changed our original decision.
>
> …
>
> You may have a right of appeal depending on the time between you receiving and querying the decision.
>
> If you want to appeal …"

7. The administrator promptly lodged a notice of appeal, which was received on 25 May 2012. The case was referred to the First-tier Tribunal. The Secretary of State initially submitted that the decision of 17 May 2012 was not "a formal reconsideration" and that therefore the appeal was out of time because more than 13 months had elapsed since the previous decision of 17 June 2009. However, in a supplementary submission, it was stated that a late application for "reconsideration" had been accepted and that the decision of 17 May 2012 was therefore a refusal to revise and the appeal was in time. The Secretary of State was accordingly directed to provide a full submission on the appeal. This led him to seek further information from the administrator and from the care home, which resulted in some shifting of positions on both sides and explains the delay in the proceedings before the First-tier Tribunal.

8. The administrator raised a number of arguments as to whether there had been any overpayment at all, which I will consider below as far as is still necessary. In the alternative, he argued that the overpayment was in fact less than the £1,434.70 claimed, partly because the claimant's bank account, managed by the deputy, showed receipt of only £1,219.10 disability living allowance in the relevant period and partly because the Department's earlier claims for £1,283.73 showed (he argued) that it had already clawed back £150.97. He also argued that the claimant had been let down by the deputies.

9. The Secretary of State submitted that, because the claimant was not notified until 3 October 2007 that the NHS was funding her accommodation, there was an overpayment only from that date. What he presumably meant was that, although there was an overpayment from 29 August 2007, it was recoverable only in respect of the period from 3 October 2007.

10. The First-tier Tribunal found that there had been an overpayment, but only during the period from 3 October 2007 to 2 December 2008, and also found the overpayment to be recoverable since it arose from the deputy's failure to disclose a material fact. It left the Secretary of State to calculate the amount of the overpayment on that basis.

11. The administrator's first application for permission to appeal, in which he referred for the first time to the Court of Appeal's decision in *Secretary of State for Work and Pensions v Slavin* [2011] EWCA Civ 1515; [2012] AACR 30, was treated as a request for a statement of reasons.

12. The statement of reasons shows that the First-tier Tribunal's determination of the period of the overpayment was made because it accepted literally the Secretary of State's concession and because the claimant's bank accounts showed receipt of payments of disability living allowance only up to 2 December 2008. It said –

> "Thereafter, giros were issued. Mr Pavey, the Presenting Officer for the DWP, conceded that there was no evidence as to why the method of payment changed and no evidence as to who or where the giros were sent."

13. The statement then refers to the Primary Care Trust's letter of 3 October 2007 and continues –

> "12. This means that [the claimant] was assessed as requiring nursing care in a nursing home, hence why the NHS was taking over the funding from the Local Authority.
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> It is my understanding that nursing homes employ some health care professionals who regularly provide services on the premises to those accommodated there. If this is the case, the 2011 Court of Appeal Judgement in *Secretary of State for Work and Pensions v Slavin* is clear that payability of the mobility component of DLA is removed under Regulation 12A."

14. A different judge of the First-tier Tribunal granted permission to appeal on the administrator's second application, on the ground that the relevance, if any, of the Court of Appeal's decision in *Secretary of State for Work and Pensions v Slavin* required clarification.

15. The claimant's appeal to the Upper Tribunal was essentially on the ground that *Slavin* illustrated the fact that care home residents should be treated as in-patients for the purposes of regulation 12A only if the care home employed qualified health care professionals and that, in his submission, the care home in this case did not do so.

16. The Secretary of State, however, submitted that it was unnecessary to consider *Slavin* as the First-tier Tribunal had had no jurisdiction to consider the administrator's appeal because the appeal to it was made too late, and that therefore the Upper Tribunal should simply substitute a decision to that effect. His argument was essentially that an appeal may not be brought against a decision more than 13 months after it is made (see rule 23 of, and Schedule 1 to, the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) as then in force). Time is extended where the decision is revised under section 9 of the Social Security Act 1998 (see section 9(5)) and in some circumstances where there is a refusal to revise the decision (see Schedule 1 to the 2008 Rules). Here, the decision of 17 May 2012 was a refusal to revise and the only possibly relevant circumstance in which time is extended is where there has been an application for revision made under regulation 3(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991). However, by virtue of regulation 4(3)(b), it is not permissible to make an application for revision under that provision more than 13 months after the date of the decision being challenged and, submitted the Secretary of State, any application in this case was made after that period had elapsed. Moreover, he submitted that there was nothing in the letter of 17 May 2012 to suggest that time for applying for a revision had been extended or that the question of revision was considered under regulation 3(1) rather than under some other paragraph of that regulation. In the alternative, he submitted that the decision had "so little coherence or connection to legal powers" that it did not amount to a decision at all (see R(IB) 2/04 at paragraph 72). The administrator submitted that it was too late to raise such points. When the case came before her, Upper Tribunal Judge Perez raised the question whether the decision of 17 May 2012 should be treated as a refusal to supersede the decision of 17 June 2009 under section 10 of the 1998 Act and regulation 6(2)(b) of the 1999 Regulations – *i.e.*, on the ground of error of law or error of fact – and directed that further written submissions be made.

17. The Secretary of State resisted the idea of supersession, submitting that the writer of the letter of 17 May 2012 had clearly had revision in mind, rather than supersession. In the alternative, he submitted that supersession would not assist the claimant because the decision to be superseded would have been the decision of 3 June 2009, governing the claimant's entitlement, and that any supersession based on *Slavin* would not have had effect before the claimant's death because it would have had to be made under regulation 6(2)(b) of the 1999 Regulations on the ground of error of law so that, he submitted, section 27 of the 1998 Act and regulation 7(6) of the 1999 Regulations would have applied. Understandably, the administrator did not engage in detail with these procedural submissions, but he expanded on his argument as to the effect of *Slavin*, which I will consider below.

18. Judge Perez then directed that there be an oral hearing, indicating her current view, which was to the effect that a letter dated 11 November 2011 from the claimant was capable of being regarded as an application for supersession, that supersession of the decision of 3 June 2009 could not have been effective in respect of a period before the claimant's death, either due to the effect of section 27 (the relevance of which she doubted) or due to the effect of section 10(5) (which I will consider below), but that it was arguable that the First-tier Tribunal had erred in law in failing to consider whether the recoverability decision (made on 17 June 2009) could be superseded on the ground that the care home where the claimant resided employed

staff with qualifications such that it was a "hospital or similar institution" for the purposes of regulation 12A(1) of the 1991 Regulations and that the decision had therefore been based on a mistake of fact. She drew attention to CIS/3605/2005, in which Mr Commissioner Levenson said –

> "12. … Section 71(5A) imposes a restriction on the circumstances in which a recoverability decision can be made. It does not authorise a recoverability decision or recovery. Section 71(1) limits recoverability to those payments which would not have been made but for the misrepresentation of failure to disclose. This means that, in the circumstances which arose in the present case, the tribunal was quite right (and, indeed, obliged) to find that the Secretary of State was entitled to recover a lesser amount than that which the uncorrected entitlement decision indicated might be recoverable."

19. In the event, Judge Perez was unavailable and the hearing took place before me. Mr Heath appeared for the Secretary of State and resiled from some of the submissions made in writing on the Secretary of State's behalf. In particular, he conceded that section 27 of the 1998 Act was of no relevance because *Slavin* was consistent with previous case law and the more obvious ground of supersession under regulation 6(2)(b) of the 1999 Regulations in this case would be error of fact rather than error of law. However, he submitted that, not only would any supersession of the decision of 3 June 2009 have been ineffective in this case due to the effect of section 10(5) of the 1998, so too would such a supersession of the decision of 17 June 2009. I was not persuaded by that argument but gave him the opportunity that he requested to make a further written submission. The administrator produced evidence in support of his contention that claimant was not "undergoing … treatment as an in-patient … in a hospital or similar institution". I was not persuaded by his argument either, but, since I was giving Mr Heath time to make further submissions I explained my reservations and allowed both parties to make further written submissions on this issue too. Finally, I asked for a further submission from the Secretary of State as to the amount of any overpayment that might be recoverable, to which the administrator would be able to reply.

20. I have received a 39 page submission from Mr Heath, to which are attached 19 pages of annexes and 8 pages of chronology, which together range over issues beyond those in respect of which further submissions were requested. I have received a considerably briefer and more narrowly focused submission from the administrator, dealing primarily with the second of the three main issues.

Jurisdiction

21. I agree with most of what was said in the pre-hearing written submissions made on behalf of the Secretary of State. In particular, I accept that the decision of 17 May 2012 was written with only revision, as opposed to supersession, in mind and that, insofar as that decision was a refusal to revise the decisions of 3 June 2009 and 17 June 2009, the appeal received on 25 May 2012 was out of time because there is no right of appeal against a refusal to revise a decision and the decision of 17 May 2012 did not have the effect of extending the time for appealing against the earlier decisions under section 9(5) of the 1998 Act or rule 23 of, and Schedule 1 to, the 2008 Rules. (I do have one slight reservation about the latter point because, while it is clear that the decision of 17 May 2012 did not itself include any decision to extend

time for applying for a revision under regulation 3(1) of the 1999 Regulations, there seems to have been such a decision at some time and, while such an application for revision may be made only within 13 months of the date of the decision being challenged and there is no letter from the administrator within that period in the documents before me, it is possible that there were earlier communications from him and that one of those was taken as an application for revision. However, for the purposes of this appeal, I will assume in the Secretary of State's favour that that is not so and that the writer of the supplementary submission to the First-tier Tribunal overlooked the time limit in regulation 4(3)(b).)

22. Where I part company with the writer of the submissions to the Upper Tribunal is in his assumption that, because the Secretary of State had in mind only revision, the appeal could not proceed on the basis that the decision of 17 May 2012 was not only a refusal to revise but was also a refusal to supersede. It is expressly provided in regulation 6(5) that an application for revision may be treated as an application for supersession. Therefore, although regulation 6(3) of the 1999 Regulations precludes a supersession where the decision in question may be revised, if the Secretary of State refuses to revise a decision following a challenge to the decision by a claimant, he should go on and consider whether to supersede it. Doing so would have made no difference to the Secretary of State's decision in the present case because he would have refused to supersede the earlier decisions as he was not satisfied that they were based on any error of fact or of law. However, the claimant was entitled to appeal against a refusal to supersede and so to invite the First-tier Tribunal to take a different view of the case. Consistently with this approach, a Tribunal of Commissioners made it clear in R(IB) 2/04 that the fact that the Secretary of State has made a decision only in terms of revision does not preclude a tribunal, when acting on an appeal following that decision, from making a decision in terms of supersession (see, in particular, paragraph 55(8) to (10)). (Whether a tribunal may substitute a decision in respect of which, had the Secretary of State made it on revision, there would have been no right of appeal may still be controversial, but that issue does not arise here.)

23. The appeal received on 25 May 2012 was well within the one-month time limit under the 2008 Rules for appealing against a decision on 17 May 2012 that was a refusal to supersede earlier decisions. Mr Heath argues (at paragraphs 2(6)(iv) and (7) and 8(3)(h) of his post-hearing submission) that there is still a jurisdictional problem because the "application for reconsideration" was made more than 13 months after the decisions being challenged, but that argument is misconceived because the time limit in regulation 4(3)(b) of the 1999 Regulations applies only to applications for revision under regulation 3(1) and not to other applications for revision or to applications for supersession in respect of which there are no time limits.

24. However, although there are no time limits for applications for supersession, the effect of delaying an application may be to deprive a supersession of any practical effect in respect of the period before it was made because section 10(5) and (6) of the 1998 Act provides –

> "(5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.
> (6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may be prescribed."

Thus in the present case, there being no material regulation made under subsection (6), any application made by the administrator after the claimant's death for supersession of the decision of 3 June 2009 as to the payability of disability living allowance to the claimant could not have been successful because it could not have taken effect for any period during her lifetime. So, although the First-tier Tribunal had jurisdiction to consider the administrator's appeal against the decision of 17 May 2012 insofar as it could be treated as a refusal to supersede the decision of 3 June 2009, it could not give a decision in his favour. On this issue, I agree with Mr Heath.

25. I also agree with Mr Heath that a decision as to the recoverability of an overpayment under section 71 of the 1992 Act may be superseded under section 10 of the 1998 Act. The question then arises as to how, if at all, section 10(5) applies to such a supersession. At the hearing, I understood him to submit that, because the period of the overpayment ran during the claimant's lifetime and the application for supersession was after her death, section 10(5) meant that a decision could not be given in the claimant's favour. That prompted me to ask how, if he were right, any recoverability decision could ever in practice be superseded because all such decisions are necessarily concerned with overpayments during periods in the past. I suggested that a superseded recoverability decision "takes effect" indefinitely from the date of the supersession rather than during the period of the overpayment. Whether I misunderstood Mr Heath at the hearing or whether he has since changed his position, I am not sure but, in any event, he now submits (at paragraph 8(5)(d) of his post-hearing submission) that, even if the effective date for a supersession decision of an overpayment recoverability decision is no earlier than the date of the application for supersession, once the superseding decision takes effect it still defines the Secretary of State's right to recover the overpayment under section 71 of the 1992 Act "for past, present and future". I agree, at least in respect of the present and the future.

26. Thus, although the decision of 3 June 2009 could not have been superseded in the claimant's favour on 17 May 2012, the decision of 17 June 2009 could have been. It is not material that the decision of 3 June 2009 could not be superseded because findings of fact made in the decision of 3 June 2009 were not conclusive for the purposes of any later decision, including a decision as to the amount of benefit payable during the material period for the purposes of calculating the amount of an overpayment (see *Secretary of State for Work and Pensions v AM (IS)* [2010] UKUT 428 (AAC) at [42] to [52]) or, at any rate, the amount that is recoverable (see CIS/3605/2005 at [12], set out in paragraph 18, although I might not have analysed the decision-making in quite the way the Commissioner did in that case). This makes pragmatic sense because, while administrative convenience may require that claimants should not be able to pursue payments where they have delayed taking steps to obtain them, it is much harder to justify the Secretary of State *continuing* to take action to recover a sum allegedly overpaid in the face of evidence that the claimant was in fact eligible for the payment. Of course, delay in applying for supersession may give rise to evidential difficulties, but the application of common

sense in the drawing of inferences where there is no clear evidence should prevent any unfairness to the Secretary of State, bearing in mind that ultimately the burden of proof or, as Baroness Hale of Richmond put it in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372; R1/04 (SF), "the burden of collective ignorance" generally lies on the person who has made the late application for supersession because it is that person who asserts that the grounds for supersession are made out. In any case, for reasons that will appear below, I am satisfied that the decision of 3 June 2009 was correct and I would not supersede it even if I could.

The amount of the overpayment

27. For the purposes of this decision, I will take the amount of the overpayment to be the amount paid to the claimant that ought not to have been paid to her on a true understanding of the facts, irrespective of the fact that for other purposes the decision of 3 June 2009 must stand. In other words, I take the approach taken in *Secretary of State for Work and Pensions v AM (IS)*.

28. The administrator argues that there was no overpayment at all because the claimant was not "undergoing … treatment as an in-patient … in a hospital or similar institution" for the purposes of regulation 12A of the 1991 Regulations. In my direction following the hearing, I said –

> "5. It appears to be common ground that the First-tier Tribunal erred in law in failing to decide whether [the claimant] was in fact receiving treatment from, or under the supervision of, doctors or qualified nurses. If she was not, she was not overpaid and so there is nothing to recover.
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> 6. However, I have some difficulty in seeing how this factual issue could be decided in the Appellant's favour on the evidence available in the Upper Tribunal's file. The documents provided to me by [the administrator] at the end of the hearing tend, if anything, to reinforce my view.
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> 7. It is quite clear from *Slavin* and the earlier cases mentioned by the Court of Appeal that a person is "undergoing medical or other treatment as an in-patient … in a hospital or similar institution" while receiving nursing care in a care home, save (see R(DLA) 2/06) where the nursing is merely incidental or ancillary to the provision of accommodation. In *Slavin*, the home was clearly regarded as a residential care home rather than a nursing home (which had been a statutory distinction under the Registered Homes Act 1984 until that Act was replaced by part 1 of the Care Standards Act 2000 in 2002) and it subsequently transpired that the NHS provided only 20% of the funding (see the Upper Tribunal's final decision, *AS v Secretary of State for Work and Pensions (DLA)* [2012] UKUT 466 (AAC)).
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> 8. Here, the home is described as a "nursing home". I suspect that under the 1984 Act it was registered as both a residential care home and a nursing home. It appears from the documents that I was shown by [the administrator] that [the claimant] was admitted to a different residential care home in 1998 and moved to the […] Nursing Home in 2000. It is not in dispute that funding was by the local authority until 2007, which is consistent with her having been assessed as requiring residential care rather than nursing care or, in post-2002 language, personal care rather than nursing care. However, it is quite clear from the letter dated 3 October 2007 (doc 89), that [the claimant] was assessed as requiring nursing care from 30 July 2007.

> 9. [The administrator] argues that there is no evidence that [the claimant] received care that amounted to "medical or other treatment" in this case. However, it currently seems to me that that can be inferred from the evidence as to the funding. It seems to me to be inconceivable that a primary care trust would pay the whole of the fees of a nursing home other than on the basis that it could and would provide nursing care that amounts to "treatment". The registration authority (now the Care Quality Commission) would specify the categories of person who could be admitted to the home and the staff necessary to provide appropriate care for such people and the primary care trust would not pay the fees of a person who was not in appropriately registered accommodation.
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> 10. The SWP FACE overall assessment form and review form provided to me by [the administrator] (which I accept were both completed in 2009) suggest that the […] Nursing Home was indeed staffed so that there was always at least one nurse on duty, who (I suggest it is to be inferred in the absence of other evidence) exercised a sufficiently close or extensive degree of supervision over non-qualified staff that their care was to be regarded as nursing care. After all, even in an ordinary hospital, there are members of staff on wards who are not qualified nurses.
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> 11. The documents provided by [the administrator] do not appear to me to be sufficient to show that in fact [the claimant] did *not* receive nursing care at any time since 2007. Apart from SWP FACE and DACS forms, they consisted of [the claimant's] general practitioner's medical records. Nursing or other care records, including their own periodic care plans, would, or should, have been kept by the Nursing Home and would not be included in the medical records held by her general practitioner.
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> 12. Mr Heath drew my attention to the fact that a letter dated 9 October 2013 (doc 82-83) written by the accountant of the company that owned the Nursing Home suggests that the local authority, rather than the primary care trust, paid the nursing home fees until March 2009. In the light of the other evidence in the case, that currently seems to me simply to have been a mistake (unless there was an arrangement between the two public authorities under which the primary care trust reimbursed the local authority and so still bore the cost). However, it is open to either party to provide further evidence from the local authority or the primary care trust to show that the local authority was in fact bearing the cost of the fees until March 2009."

I have not materially altered those views. No further evidence relating to the funding has materialised, although the administrator made Freedom of Information requests to the local authority and to the primary care trust and its successor which presumably have not revealed anything helpful.

29. In his post-hearing submission, the administrator argues that the assessment mentioned in the primary care trust's letter of 3 October 2007 was not in fact carried out. In support of this he raises several arguments. First, he points out that there is no mention of the assessment in the claimant's medical notes and it is argued that it is inconceivable that an assessment would not have involved the claimant's general practitioner and, indeed, also her deputy. Secondly, he refers to the letter in the file dated 9 October 2013 (doc 82-3) from the care home's accountant stating that the local authority continued to pay the fees until March 2009 and that it was only from April 2009 that the Primary Care Trust took over which, he submits, is consistent with

the Primary Care Trust having to comply with the NHS Continuing Healthcare (Responsibilities) Directions 2007 and would be inconsistent with the Primary Care Trust having decided to pay the claimant's fees from 30 July 2007. Thirdly, there is produced a copy of a fax from an out-of-hours medical service to the claimant's general practitioner sent on or around 25 September 2007, answering "? Yes", when asked whether "[T]his patient's death is expected within 14 days and the issue of a death certificate will present no problems." This, it is submitted, reinforces the argument that the claimant's general practitioner and the care home would both have been aware of, and required to attend, an assessment by an NHS nurse. Fourthly, it is argued that the evidence shows that the claimant should have been assessed as requiring NHS-funded nursing care or registered nursing care contribution since before 2004 and it is pointed out that the fees paid to the care home did not in fact change materially from 2006 until her death, reinforcing the argument that the nature of her care did not change.

30. I am not entirely convinced that the Secretary of State is right to concede that the First-tier Tribunal erred in law in failing adequately to consider whether the claimant was "undergoing … treatment as an in-patient … in a hospital or similar institution" because it is arguable that, given the way the issue was put before it, it was entitled to infer that the claimant was receiving sufficient "treatment" from the fact that the primary care trust had apparently accepted responsibility for the fees and that that is what the First-tier Tribunal did, even though, having subsequently been referred to *Slavin*, the judge was not entirely certain about the point. It is also arguable that the lack of further reasoning is immaterial given the probability that the reason for the decision was the almost total lack of evidence capable of displacing that natural inference.

31. In any event, having considered the slightly more extensive evidence before me, I am satisfied that the First-tier Tribunal reached the right conclusion and so it does not matter whether it erred in law in its approach.

32. I find it very difficult to envisage the NHS ever agreeing to pay the fees of a care home that was not one that was registered by the Care Quality Commission on the basis that it was properly staffed so as to be able to provide nursing or other medical services for residents that would amount to "treatment … in a hospital or similar institution" for the purposes of regulation 12A of the 1991 Regulations. It is not necessary to review here the legislation that has that effect; that has been done comprehensively in *Slavin* and the cases to which the Court of Appeal. I also find it difficult to envisage the NHS ever agreeing to pay the fees of a care home under the provisions mentioned in regulation 12A(2) and their successors without it accepting that the relevant person has a "primary health need" for nursing or other medical services, although I accept that assessments may sometimes not be altogether satisfactory and there may occasionally not be a proper assessment at all (as in R(DLA) 2/06). In modern NHS terminology, as the administrator submits, regulation 12A bites where a claimant is assessed as requiring "Continuing NHS Healthcare", but not where only "NHS-funded nursing care" or a "registered nursing care contribution" is required.

33. In relation to the administrator's original ground of appeal and the issue identified by Judge Perez, the documents produced by the administrator at the

hearing before me show beyond doubt that in this case the care home did have a matron and other nurses on its staff and therefore was capable of providing nursing care. Thus, this case is distinguishable from *Slavin*. Given that it is not in dispute that the claimant required at least some nursing care, the inference to be drawn is that such care was provided in the care home. That is sufficient for social security purposes; it is not for the social security authorities to investigate the adequacy of the care. Nor would the lack of a satisfactory assessment be by itself material to the question whether regulation 12A applied to the claimant. The source and nature of the funding is important, because it determines whether or not the claimant is being "maintained free of charge" for the purposes of regulation 12A(2), but it does not matter for social security purposes that the decision to fund might have been procedurally defective.

34. As to whether there had been an assessment of the claimant's need for nursing care in this case, I can see no reason why the primary care trust should have said in its letter of 3 October 2007 that there had been an assessment if that was not true. I do not consider that it is significant that the assessment is not mentioned in the general practitioner's medical notes. It may be that, given the state of the claimant's health at the time as indicated in the fax from the out-of-hours medical service produced by the administrator, the assessing nurse felt able to make an assessment without involving the general practitioner or it may be that, since the question of funding was not of direct clinical relevance, information concerning the assessment did not find its way into the notes that have been produced to me even though the general practitioner was aware of it. It is unnecessary for me to speculate. The administrator does not claim that the claimant did not require nursing care – or indeed that she did not require nursing care to the extent that would justify a finding that she had a "primary health need" – and it was for the primary care trust to arrange the assessment and decide whether or not it should meet the whole of the fees.

35. I accept that the letter from the care home's accountant dated 9 October 2013 appears inconsistent with the letter from the primary care trust, because it suggests that the local authority rather than the primary care trust continued to take responsibility for the payments until April 2009 (just after the Department was informed of the change of funding) and it also suggests that there was no significant change in the amount of the fees paid. I do not consider that either of these matters suggests that there was no assessment of the claimant's nursing needs at all, but they do raise the questions whether the assessment was actually for Continuing NHS Healthcare and whether the primary care trust did in fact take responsibility for the payment of the fees. However, the letter from the accountant was written in 2013 to the Department for Work and Pensions and is itself inconsistent with letters dated 27 March 2008 and 23 April 2008 from the care home to the claimant's deputy, which clearly state that the claimant's fees were fully funded by the primary care trust from 30 July 2007 and refer to the letter from the primary care trust dated 3 October 2007. The 2013 letter is also inconsistent with what the Department was plainly told in 2009. I prefer the contemporaneous evidence from which it is to be inferred that the primary care trust did actually make the payments promised in its letter; whether it did so directly or through the local authority does not matter.

36. In preferring the contemporaneous evidence, I take into account the fact that there is nothing before me from either of the public authorities involved that undermines the clear statement in the letter from the primary care trust dated 3 October 2007, despite the Department having apparently sought information from the primary care trust in 2009 and the administrator having much more recently sought information from both the local authority and the successor of the primary care trust. The relevant enquiries having been made, it is the claimant (who brings the application for supersession and who seeks to go behind the letter of 3 October 2007) who must "bear the burden of the collective ignorance" as to whether there was any mistake in the letter or whether there was either any subsequent failure to act on the assessment or change of mind about it. (If, in the future, further evidence were to be obtained, consideration could be given by the Secretary of State as to whether my decision should be superseded.)

37. I need not speculate as to how the inconsistency between the primary care trust's letter of 3 October 2007 and the accountant's letter of 9 October 2013 might have arisen but I observe that the 2008 letters from the care home were written following the realisation that, although the claimant's fees had been met by the primary care trust since 30 July 2007, the standing order for her previous contribution to the fees – paid monthly and not four-weekly as stated in one of the letters, continued in force until it was cancelled after the payment made on 25 March 2008, in consequence of which a refund of £3,691.13 was paid by the care home to the claimant through her deputy. It seems therefore that the records may not have been up-dated correctly in 2007 or 2008 in accordance with the care home's understanding of the position and, although the refund was paid, may still have been incorrect when the accountant looked back at them five years later. (I am also a bit sceptical about the suggestion in the accountant's letter that the local authority was paying the whole of the fees from April to July 2007. The letter from the care home dated 27 March 2008 does not help resolve the issue. On one hand, it refers to a letter from the deputy dated 3 May 2007 about the fees, which might support the accountant's suggestion, but on the other hand the credit balance in the account does not seem consistent with the claimant having ceased to be liable for any fees as early as April 2007. Happily, nothing in the present case turns on that issue and so I need not consider it further.)

38. I do not accept that the fact that the fees apparently did not increase is sufficient to show that the primary care trust did not in fact decide, on the basis of an assessment, that it ought to meet all the fees. Apart from any doubt there might be about the accuracy of the accountant's evidence as to the amount of the fees, the amount charged was a matter for the care home and no doubt reflected what the primary care trust was prepared to pay.

39. I have already suggested that the administrator's third point, the relevance of the fax, is capable of supporting the case against him because it might suggest a relatively summary assessment of the claimant's needs was sufficient to show her need for nursing care. As to his fourth point, it is simply irrelevant to the claimant's entitlement to disability living allowance whether she should have been assessed as requiring nursing care before 30 July 2007. The fact is that she was not assessed as requiring "Continuing NHS Healthcare" before then, so regulation 12A did not bite. Any assessment that she required only "NHS-funded nursing care" or "registered

nursing care contribution" would not have affected her entitlement to benefit, for reasons explained in R(IS) 2/06 and *Slavin*. (In fact, the evidence does not entirely exclude the possibility that she had been assessed by the primary care trust as requiring such a degree of nursing care, but I will assume that she had not.)

40. Accordingly, I am satisfied that regulation 12A of the 1999 Regulations did apply in this case and that the decision of 3 June 2009 was in fact correct. However, it does not follow that the decision of 17 June 2009 was also correct.

41. As to the period of the overpayment, the Secretary of State originally found it was from 29 August 2007 to 24 March 2009. The First-tier Tribunal reduced this to the period from 3 October 2007 to 2 December 2008. As I have indicated, it erred in deciding that the overpayment began only on 3 October 2007, rather than finding that that was the beginning of the period in respect of which it was recoverable. Although that error was immaterial to the outcome, I will correct it for clarity. The finding that no benefit was paid after 2 December 2008 might be criticised, at least on procedural grounds, but it has not been challenged and so I will adopt it. It requires that the decision of 17 June 2009 be superseded on the ground that it was based on ignorance of the material fact that benefit due after 2 December 2008 was not paid.

42. I am therefore satisfied that the claimant was overpaid the lower rate of the mobility component of disability living allowance from 29 August 2007 to 2 December 2008. That amounts to 32 weeks at £17.10 pw up to 8 April 2008 (£547.20) and 34 weeks at £17.75 pw thereafter (£603.50), totalling £1,150.70.

How much of the overpayment is recoverable?

43. The Secretary of State was right to concede before the First-tier Tribunal that there can be no failure to disclose a material fact for the purpose of section 71 of the 1992 Act if the person who would normally be expected to disclose it is unaware of it and that, in the absence of evidence that anyone was made aware of the primary care trust's decision to pay the claimant's fees until it sent its letter on 3 October 2007, the overpayment made before that date in this case could not be recoverable. However, quite apart from the point that the material date would have been the date of receipt of that letter rather than the date it was sent, there are further issues in this case that were not addressed in that concession or by the First-tier Tribunal.

44. It is important that the claimant was incapable of managing her own affairs and that a deputy had been appointed by the Court of Protection. I do not know the precise terms of the appointment but it is plain that he managed the claimant's bank account into which social security benefits, including disability living allowance, were paid and, more importantly, that he was the person with whom the Department communicated on benefit matters. Thus, he was clearly a "person by whom … sums by way of benefit are receivable" for the purpose of regulation 32(1A) and (1B) of the Social Security (Claims and Payments) Regulations 1987/1968, as amended, which imposes a duty on such persons to provide information to the Secretary of State if the Secretary of State has required them to do so or if they might otherwise reasonably be expected to know that the information might affect the payment of benefit. The deputy was there to act in place of the claimant and so the claimant herself was not expected to make disclosure and the question in the present case is whether there

was any failure *by the deputy* to comply with regulation 32 such as would amount to a failure to disclose a material fact for the purposes of section 71(1) of the 1992 Act. If so, the overpayment is recoverable from the claimant (see R(IS) 5/03) or, here, the claimant's estate.

45. I do not consider that CA/1014/1999 and CSDLA/1282/2001, relied on by Mr Heath for the proposition that a person with a power of attorney has a power to disclose but not a duty to do so, in fact support that general proposition. In the former case, there was another person who was an appointee under regulation 33 who was the person by whom benefit was "receivable" and, in the latter case, it was similarly found that the benefit was not "receivable" by the attorney in that role or at all. Thus the cases are authority only for the proposition that regulation 32 does not apply to a person with a power of attorney who is not the person by whom benefit is "receivable". It is to be noted that regulation 33(1)(c) expressly precludes the appointment of an appointee in a case where a deputy has been appointed by the Court of Protection with a power to receive benefit on behalf of the claimant, so it can be inferred that such a deputy will always be a person by whom benefit payments are "receivable".

46. So, the first question that arises in the present case is when the deputy became aware that the primary care trust had decided to pay the claimant's care home fees. The letter dated 3 October 2007 was addressed to the claimant rather than to the deputy and, although a copy was provided to the care home among others, the deputy was not among those listed as recipients of copies and it appears that the primary care trust did not send one to him. Whether that was because it had failed to ascertain that there was a deputy or whether there was simply an administrative error, I do not know. I have not been asked to presume that there was some other communication between the primary care trust and the deputy. Ordinarily, I would presume that a letter of the nature of the one sent to the claimant on 3 October 2007 had been forwarded to the deputy by the care home or a member of her family but, if it had been sent in this case, I would have expected the care home to have known and it appears not to have done so. In the letter from the care home to the deputy dated 27 March 2008, it said –

> "You are correct and have been overpaying the four weekly standing orders. We have also been informed that as from as from 30th July 2007 [the claimant's] fees became fully funded by […] Primary Care Trust and this was confirmed on 3rd October 2007 by a letter."

47. Mr Heath concedes that there is no clear evidence that the deputy was aware that the primary care trust had undertaken to meet the fees until he received that letter, which I will assume was before 2 April 2008 when the next complete week of payment of benefit began, and he submits that I should find that that was indeed when he first discovered that fact. I am satisfied that there is no warrant for deeming the deputy to have received the letter of 3 October 2007 when the claimant did. Although such a deeming would not cause any real injustice in the present case, such an approach would tend to undermine the purpose of the limitations in section 71(1) in other cases where a deputy might have spent on behalf of a claimant benefit received in the claimant's account in the reasonable belief that the claimant was entitled to it. I also accept Mr Heath's concessions and, accordingly, I am satisfied that the first week in respect of which disability living allowance was paid after the

deputy became aware that the primary care trust was funding the claimant's fees was the week beginning 2 April 2008. Until then, the deputy could not be expected to disclose that fact to the Department. When making the decision on 17 June 2009, the Secretary of State was plainly unaware of the deputy's initial ignorance of the primary care trust's funding decision.

48. The second question that arises is whether the deputy was thereafter under any duty under regulation 32 of the 1987 Regulations to report the fact that the claimant's fees had become fully funded by the primary care trust. In my judgement he was, for two reasons. First, it is to be inferred that, as the person to whom benefit was paid, he had received a standard information and instruction leaflet. The version in the papers before me requires the Department to be told if "you change your address" or "go into hospital or residential accommodation" or "the local council start paying for you to live in residential care" or "the local council stop paying for you to live in residential care". There is nothing about NHS funding. Perhaps there should be, if the form has not been amended already. However, it seems to me that the deputy could have been expected to infer from the fact that the primary care trust was paying the fees that the local authority had stopped doing so. That was one of the matters that had to be reported. Secondly and in any event, a solicitor acting as a deputy for a person resident in a care home is, in my judgement, to be presumed to know the relevant law – or at least to be able to find out what it is – and therefore to realise the implications of NHS funding and so can be expected to report such a change of circumstances. The overpayment from 2 April 2008 to 2 December 2008 (amounting to £620.60) is therefore recoverable from the claimant's estate.

49. I have not overlooked the point that, in a case like the present, an overpayment may be recoverable from the deputy as well as the person whose affairs he or she manages and that it was said in R(IS) 5/03 that recoverability decisions should generally be made in respect of all those who might be liable. However, if the Secretary of State in fact makes a decision in respect of only one person, the First-tier Tribunal does not necessarily err in law in not considering whether another might also be liable, particularly in a case where it can readily be seen why the Secretary of State might have decided to pursue recovery against only the one person (see *ED v Secretary of State for Work and Pensions* [2009] UKUT 161 (AAC) to which Mr Heath refers in his eight annex). Here, all the overpaid benefit was accumulated in the claimant's account from which the only relevant payments made were in respect of the deputies' fees, any dispute about which fell to be determined by a relevant court. In these circumstances, it is easy to see why the Secretary of State might consider that fairness as well as administrative convenience suggested that the overpayment should be recovered from the estate rather than from either of the deputies.

50. The administrator has complained that the deputy originally managing the claimant's affairs was appointed to a judicial post overseas at the end of October 2008 and that it was not until September 2009 that his successor was appointed. However, this is not relevant to the present case. Even if there was a lacuna – a judicial appointment overseas is not always full-time so the first deputy may not have been absent the whole time – and even if that lacuna contributed to the period of the overpayment and a failure promptly to challenge at least the second of the decisions of June 2009, it has not in the long run resulted in any loss of financial benefit to the

claimant or to her estate. To the extent that the overpayment is recoverable, the claimant's estate will be put back into the position in which it would have been had the correct amount of benefit, *i.e.* nil, been paid in the first place. To the extent that the overpayment is not recoverable, the claimant's estate will have obtained a windfall. The administrator may legitimately complain that the absence of a deputy for a significant period resulted in money not being spent for the claimant's benefit while she was alive, but that is not relevant to the present case and I make no finding on the issue.

Conclusion

51. Accordingly, I am satisfied that the First-tier Tribunal did have jurisdiction to hear the administrator's appeal but, in addition to making the minor technical error as to the period of the overpayment, the First-tier Tribunal erred in law in failing adequately to consider whether the claimant's deputy had failed to disclose a material fact and so erred in its decision as to the amount of the overpayment that was recoverable from the claimant's estate. I give the decision set out above, which reduces the amount of the overpayment that is recoverable.

Mark Rowland
26 September 2016