DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant’s appeal is allowed. The decision of the Sutton appeal tribunal dated 7 July 2000 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute the decision which the appeal tribunal should have given on the appeal against the decision dated 3 February 2000 (Social Security Act 1998, section 14(8)(a)(i)). My decision is that the adjudication officer’s decision dated 24 July 1992 is superseded on the ground that it was erroneous in point of law and with effect from 21 April 1994 is superseded by the decision that the claimant is entitled to the middle rate of the care component of disability living allowance and to the lower rate of the mobility component for an indefinite period.

2. On 24 July 1992 an adjudication officer awarded the claimant the lowest rate of the care component of disability living allowance ("DLA") and the lower rate of the mobility component from and including 9 June 1992 for life. She is registered blind. On 8 October 1999 she applied for a review in relation to the care component on the grounds that the decision was erroneous in law as a result of the decisions in the Mallinson and Halliday/Paivy cases and that there had been a relevant change of circumstances. She was asking for the middle rate of the care component. A decision was made that the existing decision should not be changed. Since under paragraph 3(1) of Schedule 16 to the Social Security Act 1998 (Commencement No 11, and Savings and Consequential and Transitional Provisions) Order 1999 ("Schedule 16") the application for review was treated from 18 October 1999 as an application for supersession within section 10 of the Social Security Act 1998, that decision must have been a refusal to supersede.

3. The claimant appealed. The appeal tribunal found that, on applying the principles of Mallinson and Pairey/Halliday in the House of Lords, the claimant satisfied the conditions for the middle rate of the care component, since she needed frequent attention throughout the day in connection with her bodily functions. It did not differentiate clearly in its findings between the current position and that as at 1992 or 1994, and there was some evidence of deterioration of the claimant’s sight over that time. However, it seems to me that the fairest reading of the decision, given that the appeal tribunal was in no doubt that a ground of review had been made out and did not identify any particular change in circumstances, is that the appeal tribunal found that the claimant had satisfied the conditions for the middle rate of the care component from 9 June 1992.

4. However, the appeal tribunal restricted entitlement to the additional benefit to the period from 7 September 1999, applying regulation 59(1) of the Social Security (Adjudication) Regulations 1986. It took the view that regulation 57(3) did not permit the backdating of the award to the date of Mallinson (21 April 1994), as had been submitted by the claimant’s representative, and that regulation 58 did not apply in the light of section 60(2) of the Social Security Administration Act 1992.
5. The claimant now appeals against the appeal tribunal's decision with my leave. The appeal is supported by the Secretary of State in the submission dated 21 September 2001. I agree that the appeal tribunal went wrong in law in applying regulation 59(1) of the Adjudication Regulations.

6. It seems to me that the effect of paragraph 3(6) of Schedule 16 is that, in the case of an application for review which is treated as an application for supercession which is decided to the advantage of a claimant, the old rules for review on the date of effect are to be applied. But I do not have to decide whether or not the Secretary of State is right that the claimant can use whichever of the old or the new rules is more favourable, as the result of both in the present case is the same.

7. Using the Adjudication Regulations, the case fell squarely within regulation 58, which provided that in a case where section 69(1) of the Social Security Administration Act 1992 applied the revised decision on review took effect from the date of the "relevant determination". Section 69(1) did apply because Mallinson was a relevant determination (finding an adjudication officer's view of the law wrong) in consequence of which an earlier decision (the date of 24 July 1992) would otherwise have been revised on review on the ground of error of law. Where regulation 58 applied, the operation of the one-month limit in regulation 59 was excluded (regulation 59(3)(a)). Regulation 57(3) on its face would allow the revised decision on review to take effect from 9 June 1992, because the adjudication officer's decision of 24 July 1992 misconstrued the conditions of entitlement to the middle rate of the care component in section 72 of the Social Security Contributions and Benefits Act 1992. But that must be subject to section 69 of the Social Security Administration Act 1992 and regulation 58. Section 69(2) of the Social Security Administration Act 1992 did not short-circuit the whole process by rendering a decision revealed to be in error of law by a subsequent decision of a court or a Commissioner in another case not subject to review for error of law at all, as the appeal tribunal seems to have thought.

8. Therefore, the appeal tribunal erred in law in not applying regulation 58 of the Adjudication Regulations. As noted by the Secretary of State, regulation 7(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 has the same effect as regulation 58. The appeal tribunal's decision must be set aside as erroneous in point of law.

9. The Secretary of State has submitted that I should substitute the decision that the claimant is entitled to the middle rate of the care component from 21 April 1994. I agree that I am able to do that on the facts found by the appeal tribunal, as explained in paragraph 3 above. The Secretary of State does not dispute that the claimant satisfied the conditions of entitlement to the middle rate of the care component and that the adjudication officer's decision of 24 July 1992 falls to be superseded on the ground that it was erroneous in point of law. Accordingly, the superseding decision can take effect from 21 April 1994, but no earlier.
10. My decision to that effect is set out in paragraph 1 above.

(Signed) J. Mesher
Commissioner

Date: 4 October 2001