IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

File no: CIB/2215/2009

Appellant: C.H.

Respondent: Secretary of State for Work and Pensions

DECISION OF THE UPPER TRIBUNAL

JUDGE MESHER

ON APPEAL FROM:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: 227/09/00250

Tribunal Venue: Middlesbrough

Date of tribunal hearing: 14 May 2009

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Middlesbrough First-tier Tribunal dated 14 May 2009 involved an error on a point of law and is set aside. The case is remitted to a tribunal within the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the directions given in paragraphs 10 to 14 below and further procedural directions to be given by a district tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

REASONS FOR DECISION

1. The tribunal of 14 May 2009 was concerned with the decision dated 24 October 2008, removing the claimant's entitlement to incapacity benefit on supersession following receipt of the report of an examination by an approved disability analyst (ADA) on 18 September 2008. She had been entitled to incapacity benefit since 22 December 2006. On 12 April 2007 she had been examined by an approved doctor (Dr Masud Anwar), following whose report the personal capability assessment (PCA) was applied to her, resulting in a score of four points for mental health descriptors only and a decision that on supersession she was not entitled to incapacity benefit from 16 May 2007. Her appeal against that decision was successful. An appeal tribunal of 3 August 2007 found that she qualified for 10 points on mental health descriptors, enough to pass the PCA. The examination of 18 September 2008 was carried out by Ms Patricia Pearson, who described herself as a registered nurse.

2. There is no copy of the actual decision of 24 October 2008 in the papers, but the Secretary of State's written submission to the tribunal set it out as a supersession of the decision awarding incapacity benefit from 22 December 2006 on the ground of receipt of medical evidence following an examination by an approved doctor. There was reliance on regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. As in force until the day before 30 October 2008, regulation 6(2)(g) allowed supersession where the Secretary of State had:

> "received medical evidence following an examination in accordance with regulation 8 of the Social Security (Incapacity for Work) (General) Regulations 1995 from a doctor referred to in paragraph (1) of the regulation;"

With effect from 30 October 2008 an amendment replaced "doctor" by "health care professional" (defined in section 39(2) of the Social Security Act 1998 with effect from 3 July 2007 as meaning a registered medical practitioner, a registered nurse, an occupational therapist or physiotherapist registered with certain regulatory bodies, or a member of certain other regulated professions prescribed by the Secretary of State. Following an amendment with effect from 3 July 2007, regulation 8(1) of the Incapacity for Work Regulations has allowed claimants to be called by or on behalf of a health care professional (HCP) approved by the Secretary of State to attend for a medical examination.

3. The claimant's appeal against the decision of 24 October 2008 reiterated her problems and said that she did not think that the examining doctor had fully understood them. Her representative, Mr Derek Redfearn of Stockton & District Advice & Information Service, put forward written submissions that she qualified for 11 additional mental health descriptors, supported by a medical report dated 13 November 2008 from the claimant's GP, Dr Hall, on a questionnaire sent by Mr Redfearn. It was also submitted that if the claimant was found not to satisfy the PCA it should be asked what sort of work she could be asked reliably and punctually to do and any possible risk to her health assessed (in effect relying on regulation 27 of the Incapacity for Work Regulations).

4. The claimant attended the hearing on 14 May 2009 with her husband and Mr Redfearn. The tribunal disallowed her appeal and confirmed the decision under appeal, although it accepted additional mental health descriptors bringing the total of points to seven. The statement of reasons listed the medical evidence considered as made up of Dr Hall's reports and what it called the EMP report of 12 April 2007 from Dr Anwar. However, later in the statement, when referring to what the claimant was recorded as having told the EMP, it is obvious that it was Ms Pearson's report that was being looked at. The "evidence of the EMP" was preferred to that of Dr Hall where there was a conflict between them because "the EMP had taken a detailed description of a typical day of the appellant, which gave the tribunal a clearer insight into the mental health problems of the appellant than did her General Practitioner's report". On regulation 27, the tribunal concluded that, because the claimant's depression and anxiety were only mild, there was not really a "substantial" risk to anyone's health from her being found capable of work.

5. Mr Redfearn applied on the claimant's behalf for permission to appeal, on the grounds that the tribunal gave inadequate reasons for not accepting Dr Hall's evidence, and did not explain why, if it preferred the EMP's report, it awarded additional points. Dr Hall had been the claimant's GP for 20 years, saw her regularly and was well aware of the effects of her mental health condition. When granting permission to appeal I said that the grounds were arguable and asked whether the tribunal should have taken into account that the ADA of 18 September 2008 was a registered nurse and not a doctor.

6. The Secretary of State's fully reasoned submission of 25 November 2009 did not support the appeal. It was submitted that once any HCP had been trained to a standard to allow him or her to undertake examinations for the PCA, a report should not be treated as having a lesser value solely because it had been completed by a nurse rather than a doctor. The medically qualified panel member on a tribunal was well placed to assess the medical evidence. It was submitted that the tribunal had been entitled to reach the conclusions of fact it did, including on regulation 27, and had given adequate reasons. In his reply dated 21 December 2009 Mr Redfearn relied on his original grounds and raised the further point that it was questionable whether the supersession was correct.

7. For the reasons given in my decision in CIB/2230/2009 (a copy of which is to be issued to the claimant and Mr Redfearn with the present decision), following and applying the central reasoning in CSIB/340/2009, the tribunal went wrong in law in confirming a supersession decision grounded on regulation 6(2)(g) of the Decisions and Appeals

Regulations. That ground of supersession could not be made out on 24 October 2008 by receipt of medical evidence following an examination from a HCP who was not a doctor. The tribunal did not explore any other potential ground of supersession such as relevant change of circumstances. That on its own requires the setting aside of the tribunal's decision.

8. I therefore do not need to express a concluded opinion on the other points put forward on the appeal. However, it does seem to me that, even if the Secretary of State's representative is right in the view set out in the previous paragraph about the intrinsic weight of a report from a nurse, rather than a doctor, a tribunal ought to acknowledge the correct professional status of the person who has produced the report in question. In the present case, the tribunal referred throughout its statement of reasons to an EMP's report when the report was not from a medical practitioner. That would be a factor pointing against there having been a proper weighing of conflicting evidence, although not necessarily on its own sufficient to justify setting aside a decision. In the present case, the strongest argument for the absence of a proper weighing of the evidence is that only one plus point of the ADA's opinion (the taking of a description of a typical day) and one minus point of the GP's opinion (apparently the absence of such a description) was put in the scales, and not any minus points for the ADA (eg that her opinion was from a snapshot view on a first meeting, which might be particularly significant for mental health problems) or plus points for the GP (eg his long and detailed knowledge of the claimant, with unusually detailed reports).

9. For the reason given above, the decision of the tribunal of 14 May 2009 is set aside. The claimant's appeal against the Secretary of State's decision of 24 October 2008 is remitted to a First-tier Tribunal for reconsideration in accordance with the following directions.

Directions to the new tribunal

10. No-one who was a member of the tribunal of 14 May 2009 is to be a member of the new tribunal that reconsiders the claimant's appeal. There must be a complete rehearing of the appeal on the evidence produced and submissions made to the new tribunal, which will not be bound in any way by any findings made or conclusions expressed by the tribunal of 14 May 2009.

11. The Secretary of State is to produce a new written submission on the case on the basis that the ground of supersession in regulation 6(2)(g) and having regard to paragraph 11 of CIB/2230/2009, within a time to be fixed by a district tribunal judge in further directions. Those directions will also deal with whether the claimant's representative is to be required to produce a written submission in reply before the rehearing.

12. If, as appears likely, the potential ground of supersession put forward is relevant change of circumstances, the receipt of the report of the ADA of 18 September 2008 cannot in itself be a relevant change, but may constitute evidence of a relevant change in the claimant's condition and/or her ability to cope with it. That will probably involve the tribunal in considering whether that report, and other evidence, shows a real change from the circumstances as they were as at 16 May 2007 in the light of the findings of the appeal tribunal of 3 August 2007 or merely a difference of opinion about the assessment of those matters. In carrying out that comparative exercise, the new tribunal is to apply the approach

set out in paragraph 11 of CIB/2230/2009, subject to its own evaluation of any submissions to the contrary.

13. If the tribunal concludes that the Secretary of State has proved that a ground of supersession exists with effect from 24 October 2008 and that the claimant is not incapable of work under the PCA, it must go on to consider the potential application of regulation 27 of the Incapacity for Work Regulations.

14. The evaluation of all the evidence, including the weight to be given to the comparative expertise and professional standing especially as to the identification of mental health problems of Ms Pearson, will be entirely a matter for the judgment of the members of the new tribunal. The decision on the facts in this case is still open.

[redacted]

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 8 March 2010