DECISION OF SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal, brought with leave of the district chairman, succeeds. I find an error of law in the decision of the Glasgow appeal tribunal (the tribunal) sitting on 16 October 2002.

2. Using my powers under s.14(8)(a)(ii) of the Social Security Act 1998, I set aside the tribunal's decision and substitute my own in its place to the following effect:-

> **"The claimant remains entitled to National Insurance (Incapacity) Credits (credits) from and including 7 August 2001, on an award made by a decision maker (DM) dated 22 August 2001 that she has deemed incapacity for work under regulation 28 of the Social Security (Incapacity for Work)(General) Regulations 1995 (the regulations); this is because, although a ground for supersession of that decision arises under regulation 6(2)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the 1999 regulations) as there has been carried out a personal capability assessment (PCA) for the first time, the Secretary of State has not discharged the onus of proof in demonstrating that the conditions of entitlement to credits were no longer met."**

Background

3. The claimant's date of birth is 29 April 1981. On her claim for credits from 7 August 2001, her general practitioner (GP) on 2 October 2001 advised that she had a depressive illness, that she remains depressed and that no immediate change is foreseen. Presumably there was an earlier MED 4 to the same effect and the DM's decision of 22 August 2001 was a decision applying regulation 28 of the regulations.

4. On her questionnaire dated 24 October 2001, the claimant completed the box in which she was asked to give information about any mental health problems. She did not claim that any physical descriptors applied but relied solely on the fact that she had had depression since the termination of a pregnancy in August 2001.

5. She was seen by a doctor on behalf of the Department (the medical adviser) on 9 January 2002. The medical report form (the report) records that the interview and examination started at 11.50 am, ended at noon and that the report was completed at 12.20.

6. The medical adviser describes the claimant's functional ability, breaking it down into headings such as "social" and "typical day" and then applies the mental health assessment. However, at the close of the report the medical adviser concludes that there is:-

> "No evidence of clinical depression."

7. Founding on the medical adviser's opinion, a DM on 10 February 2002 superseded the earlier decision of 22 August 2001 awarding credits. This was stated to be because the Secretary of State had received medical evidence following an examination by an approved doctor since that decision was given and that the appellant had been awarded no points.

The tribunal decision

8. The tribunal was undoubtedly disadvantaged. At an earlier hearing the claimant was unable to be present but her representative (Mr Steven Craig, a welfare rights officer with the Queen's Cross Housing Association Limited, who has been her representative throughout) advised that the appellant's family had experienced recent difficulties. However, she was again not present at the tribunal hearing in issue and, on this occasion, it does not appear that the representative was able to explain the appellant's absence. The tribunal decided to proceed and no objection was taken either then or subsequently to this course of action. The representative pointed to the GP's evidence of depressive illness and argued that in the context of this mental health assessment, the medical adviser's examination which, on its face, only lasted ten minutes was insufficient to satisfy the onus of proof lying on the DM.

9. The tribunal confirmed the DM's decision under appeal. Its reasons were these:-

> "... The only evidence produced by the Appellant was to state that after her termination she became depressed which manifested itself in her not being able to eat or sleep. She received medication from her doctor to assist. She states that some days she could be okay and other days she would not have motivation. The Tribunal accepted the EMP's Report. No additional evidence was placed into evidence to show why the Appellant was entitled to any points."

Appeal to the Commissioner

10. There have been various written submissions on behalf of the parties, further amplified at an oral hearing which was requested by Mr Craig and directed by me, and which oral hearing took place on 5 February 2004. As noted, the claimant was represented by Mr Craig and the Secretary of State was represented by Mr Crilley, Solicitor, of the Office of the Solicitor to the Advocate General. I am indebted to them both for the constructive nature of the debate.

11. Mr Crilley adhered to the Secretary of State's written submission that the tribunal's decision was not erroneous in law. I shall deal with the content of the submissions made by the parties, as crystallized at the oral hearing, in the course of my own decision; I conclude there was an error of law and explain why I substitute my own decision as that which I consider the tribunal ought to have made.

My conclusion and reasons

Standards set by R(A) 1/72

12. That case is authority for the proposition that a tribunal need not be over-elaborate but that the claimant should be able to discern the reasons why their evidence has failed to satisfy. Mr Craig accepts the point made by Mr Crilley that what is a sufficient standard of reasoning varies according to the particular circumstances and relevant factors involved; however, he submits that, given that the burden of proof lies on the Secretary of State and that both the claimant and the GP produced evidence of the appellant's depression and that the examination was significantly brief, the tribunal erred in failing to deal properly with the arguments made at its hearing in these respects.

13. Mr Crilley suggests that the tribunal impliedly answered the submission. It stated plainly that it accepted the EMP's report. No other *criticism* of the latter had been advanced to it other than the supposed inadequacy of the length of time taken for the examination; therefore, by relying expressly on the report, by implication the tribunal rejected the validity of the only objection made to it.

14. I fully accept that a statement of reasons assumes an informed reader. However, a tribunal has a duty to assess all of the evidence and consider any submissions made, reach a reasoned view of which it prefers and why, and briefly to explain to the appellant the process by which it has analysed the evidence and argument in the way that it has when applying the statutory tests.

15. The reference by Mr Craig at the tribunal to the examination only lasting ten minutes was made in the specific context of evidence which supported the appellant and of the burden of proof which lay on the Secretary of State. He was arguing that in the individual circumstances of the appellant's case, including an examination which lasted only ten minutes, the relevant onus was not discharged. I am at a loss to understand a contention that the tribunal gave a sufficient explanation of why it rejected that submission. The tribunal had a medical member and such an explanation could have been provided. The tribunal does not even mention the point let alone state any views on it. I find the reasoning inadequate both on this and also (in the tribunal's adoption of the medical adviser's report without comment) in other respects too; I refer to the latter below when justifying why I consider it appropriate to make my own decision. I therefore set the tribunal decision aside for error of law.

Reliability of evidence

16. Mr Craig does not suggest that any examination lasting only ten minutes automatically means that the onus of proof has not been discharged. However, he submits that it is relevant that this is a mental health case. With physical descriptors, preparation by the medical adviser beforehand can be very useful as a claimant usually describes his problems in detail on the questionnaire; but the opportunity for the claimant to give information about any mental health problems is more limited. This leaves the initial exploration of all issues and their answers to the interview, where it is necessary for the medical adviser to establish rapport, take a history, and make judgements in applying the mental health assessment. It would appear to be manifestly the case that ten minutes is insufficient for such a task, outwith exceptional circumstances.

17. In CSIB/450/03, the Deputy Commissioner said:-

> "...I consider it is clear that the claimant was entitled to raise the issue of whether or not the medical examiner's report made in 15 minutes was an adequate basis to justify a review".

18. In response, Mr Crilley relies on the written submission of the Secretary of State:-

> "...that there is not set timings for the examination because it depends on individual circumstances; the most important requirement is that the doctor collects sufficient evidence to justify the advice provided for the decision maker."

19. Mr Crilley founds particularly on the following passage from CIB/0908/2003 in which Mr Commissioner Jacobs said:-

"The duration of the medical examination

> 7. Although the point is not raised on appeal to the Commissioner, there was a complaint against the medical adviser on the ground that the interview and examination lasted only 17 minutes. So what? The length of an interview and examination is not relevant in itself. The issue is whether it is properly conducted. If in a particular case it can be done properly in 17 minutes, why should the doctor spend longer on it? There is nothing in this case to suggest that the interview and examination were not properly conducted. The tribunal was entitled to reply on the report as the basis for its decision."

20. In both the cases relied on by the respective parties, the passages are *obiter*. In CSIB/450/03, the error of law was that the tribunal had breached the rules of natural justice in not allowing the representative to develop his submission that 15 minutes was inadequate. Furthermore, it apparent from the content of the quotation from CIB/0908/2003, that Mr Commissioner Jacobs's comments were also *obiter*.

21. But Mr Commissioner Jacobs is clearly right when he says: "the issue is whether it is properly conducted". However, with respect, I consider he uses uncharacteristically imprecise language in stating that, "[t]he length of an interview and examination is not relevant in itself". It is not determinative, but surely it may be relevant as an indicator that the examination was not properly conducted. What if an interview and examination is recorded as lasting 1 minute? Could this not legitimately suggest, even to a lay person, that there may have been an inadequate consideration of all pertinent matters?

22. Mr Crilley is correct to point out that one is not simply looking at the time taken for the interview and examination, but also that for completion of the report; it is at this stage, probably, that some of the judgement is exercised as to which descriptors apply. Furthermore, he submits that the medical adviser would have spent time preparing for the examination, and was therefore in a position to focus on the relevant issues. However, the scope for such prior preparation is more limited in mental health cases; I take Mr Craig's point on that.

23. I do question moreover, how an adequate history sufficient to answer the necessary relevant points could routinely be taken in ten minutes. That has not been my experience when sitting on tribunals in such cases as the medical member has been eliciting the necessary information from the appellant. But I would need medical input before I felt safe in drawing an inference in the present case that ten minutes could not be long enough for the medical adviser to collect sufficient evidence.

24. However, whatever was the timing of the examination and then for the subsequent completion of the report, I must conclude, contrary to the Secretary of State's submission, that the report does not contain enough detail on which to base a full mental health assessment; the Secretary of State does not therefore discharge the onus, to show that regulation 28 no longer applies because the appellant has failed the PCA, by reliance on it.

My criticisms of the report

25. The medical adviser states baldly:-

> "No evidence of clinical depression".

25. There was such evidence. There was a diagnosis from the appellant's GP to that effect and the appellant own statement on the questionnaire. What, of course, the medical adviser means is that she saw no signs or symptoms of clinical depression. That must lie in her evaluation of the appellant's presentation and the history taken. I note that in the medical adviser's pen picture the appellant is described as "not anxious and agitated". This does not on the face of it refute the GP's diagnosis of depression and the report is insufficiently thorough to provide a basis on which one can safely rely.

27. A major difficulty is that parts of the report are not legible. Mr Crilley was unable to assist today nor was Mr Craig. One has to query if the decision maker or the tribunal could decipher all the answers.

28. I am unable from the information we could read to accept the submission of the Secretary of State that the medical adviser in all instances:-

> ".....has provided evidence for the appropriateness of the mental health descriptors based on clinical assessment and observations following an interview that recorded the claimant's descriptions of every day activities."

29. Descriptor 15(e) reads:-

> "Mental condition prevents him from undertaking leisure activities previously enjoyed."

We were not able to work out the answer to this. However, nothing seems to be recorded in the general description of the appellant's functional ability about how she was before, and how she is now; therefore, it is not apparent how this was answered without a direct question which, in written submissions to tribunals, DMs always warn is an unreliable way of obtaining information as it invariably produces false results. There are other examples where the information cannot be gleaned from the general history taken, so that it has to be assumed that direct questions were asked.

30. Descriptor 17(c) provides:-

> "Avoids carrying out routine activities because he is convinced they will prove too tiring or stressful".

The medical adviser's answer to justify "no" is (I think, because it is hard to read), "claims to do little". This appears to me to be circular.

31. The answer to descriptor 17(e) is illegible.

32. Descriptor 17(f) states:-

> "Is scared or anxious that work would bring back or worsen his illness."

The medical adviser's comment is that "no evidence (I cannot read the next word) of mental health condition preventing her seeking employment". The difficulty here is the medical adviser's inconsistent approach. On the one hand she concludes there is no mental health condition but then applies the mental health test. What should have been done is for the medical adviser to give a reasoned opinion why there is no mental health disablement, perhaps justifying that by reference to the mental health descriptors but not applying the

mental health assessment in terms. Presumably what the medical adviser meant in the answer to box 17 (f) (although still irritatingly referred to as CPf) is that the claimant was not scared or anxious etc. However, on its face, the answer does not fit the question. The medical adviser is not, of course, the decision maker; however, invariably in mental health cases the decision maker relies exclusively on the advice from the medical adviser.

33. Descriptor 16(c) reads:-

> "Is frequently distressed at some time of the day due to fluctuation of mood."

And descriptor 18(b) reads:-

> "Gets upset by ordinary events and it results in disruptive behavioural problems".

The answer given to the first is, "no distress or agitation at interview" and to the second, "no disruptive or suicidal behaviour". Yet in her questionnaire the appellant wrote that she:-

> "...just cracked up I started smashing things up I couldn't talk to anybody I wouldn't go out I cried constant... I wasn't sleeping, eating I was just staring at the walls. Some days I could be OK and the rest I just won't move at all."

With medication, the claimant's condition may well have altered. The history taken by the medical adviser notes that "sleep has improved on medication". But why is there no specific conclusion that all prior problems have resolved on medication?

34. Descriptor 18(d) reads:-

> "Gets irritated by things that would not have bothered him before he became ill".

In the history taken at interview with the medical adviser it is noted:-

> "Temper – says can go (is the word 'potty'?). Argues with brothers, sister".

The medical adviser's comment is that the descriptor is inapplicable, "no evidence of pathological irritability".

35. I am at somewhat of a loss to understand how 18(d) can be satisfactorily considered without any direct comparison with how the appellant was previously. I note that the claimant attended the interview with her mother. It does seem to me surprising that in these kinds of cases the opportunity is not taken, outwith the claimant's presence, also to speak to someone who knows her well. This appears to be standard practice in medical reports submitted by consultant psychiatrists when an issue of a person's mental health arises.

36. I regret that the above reservations make me unable to accept the overall accuracy of the medical adviser's report to a degree such that I can conclude that it is sufficiently reliable in the circumstances of this case to demonstrate that the Secretary of State has discharged the onus of proof to show that regulation 28 no longer applies.

Summary

37. Having set aside the tribunal decision for error of law because of inadequate reasons, I make my own decision as set out above in paragraph 2. I refer to the ground for supersession as arising under regulation 6(2)(a) of the 1999 regulations; this is because of the approach taken by a Tribunal of Commissioners to when regulation 6(2)(g) can be used, set out in paragraph 125 of conjoined cases CIB/4751/2002, CDLA/4753/2002, CDLA/4939/2002 and CDLA/5141/2002.

(Signed)
L T PARKER
Commissioner
Date: 10 February 2004