THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSIB/598/04

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

Appellant: *Respondent:*

Tribunal: *Tribunal Case No:*

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of the Glasgow appeal tribunal (the tribunal) held on 5 May 2004 is not in error of law. The decision therefore stands.

The issues

2. The main issue results from the decision of the Court of Appeal in *Howker v Secretary of State for Work and Pensions* [2002] EWA Civ 1623 (R(IB)3/03) (*Howker*). If a decision maker on behalf of the Secretary of State (DM) applies the personal capability assessment (PCA) under the Social Security (Incapacity for Work) (General) Regulations 1995 (SI No 311) (the 1995 regulations), as amended by the Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996 (SI No 3207) (the 1996 regulations), does this infect the whole process so that any award of benefit or credits cannot be validly terminated, even by a tribunal on appeal applying the original version of the Schedule?

3. Subsidiary issues are, firstly, whether the tribunal paid adequate regard to an earlier medical assessment following which the appellant was determined to satisfy the PCA and, secondly, the tribunal's adequacy of reasons with respect to its finding that the appellant was a "highly unpersuasive witness".

Statutory provisions

4. Section 171C of the Social Security Contributions and Benefits Act 1992 (s.171C) states, so far as relevant, as follows:

> "**171C.**—(1) Where the own occupation test is not applicable, or has ceased to apply, in the case of a person, the question whether the person is capable or incapable of work shall be determined in accordance with a personal capability assessment.
>
> (2) Provision shall be made by regulations–
>
> (a) defining a personal capability assessment by reference to the extent to which
> a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed;
>
> (b) as to the manner of assessing whether a person is, in accordance with a personal capability assessment, incapable of work."

Initially, the test for incapacity for work, once the own occupation test was no longer applicable, was called the all work test (AWT). Substitution of the new term, "personal capability assessment", in s.171C was effected from 3 April 2000 by section 61 of the Welfare Reform and Pensions Act 1999.

5. The main regulations governing incapacity for work are the 1995 regulations. As amended by the Social Security (Incapacity for Work) Miscellaneous Amendments Regulations 1999 (SI 1999/3109) (the 1999 regulations) the term, "all work test", was replaced, wherever it appeared in the 1995 regulations, by "personal capability assessment".

6. Regulations 24 and 25 (insofar as pertinent) of the 1995 regulations, as amended, read:

> "**24.** For the purposes of section 171C(2)(a) of the Contributions and Benefits Act the personal capability assessment is an assessment of the extent to which a person who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in the Schedule, or is incapable by reason of such disease or bodily or mental disablement of performing those activities.
>
> **25.**—(1) For the purposes of section 171C(2)(b) of the Contributions and Benefits Act a person is incapable of work in accordance with the personal capability assessment when one or more of the descriptors in Part I or Part II apply to him if, by adding the points listed in column (3) of the Schedule against the descriptor, he obtains a total score of at least—
>
> (a) 15 points in respect of descriptors specified in Part I; or
> (b) 10 points in respect of descriptors specified in Part II; or
> (c) 15 points in respect of descriptors specified in Parts I and II.
>
> ...

7. The relevant descriptors in the Schedule are these:

> "...

3. Sitting in an upright chair with a back, but no arms.	3(a) Cannot sit comfortably	15
	(b) Cannot sit comfortably for more than 10 minutes without having to move from the chair because the degree of discomfort makes it impossible to continue sitting	15
	(c) Cannot sit comfortably for more than 30 minutes without having to move from the chair because the degree of discomfort makes it impossible to continue sitting	7
	(d) Cannot sit comfortably for more than 1 hour without having to move from the chair because the degree of discomfort makes it impossible to continue sitting.	3
	(e) Cannot sit comfortably for	0

	more than 2 hours without having to move from the chair because the degree of discomfort makes it impossible to continue sitting.	0
	(f) No problem with sitting.	
...		
		15
6. Bending and Kneeling		
	6(a) Cannot bend to touch his knees and straighten up again.	15
	(b) Cannot either, bend or kneel, or bend and kneel as if to pick up a piece of paper from the floor and straighten up again.	3
	(c) Sometimes cannot either, bend or kneel, or bend and kneel as if to pick up a piece of paper from the floor and straighten up again.	0
	(d) No problem with bending or kneeling.	

..."

Background

8. The appellant had been in receipt of national insurance credits from April 2002. The PCA was first applied to him following a medical report on 30 August 2002 by a medical adviser (MA1) and he then satisfied the PCA. Preceding the examination by MA1, the appellant completed an incapacity for work questionnaire (the first IB50) on 26 June 2002. On the first IB50, among other matters, he was told this:

> "**Sitting in a chair**
>
> **We need to know if you have any difficulties sitting comfortably in a chair.**
> By *sitting comfortably* we mean without having to move from the chair because the degree of discomfort makes it impossible to continue sitting.
> By *chair* we mean an upright chair with a back, but no arms.
> **Please tick the first statement that applies to you. Tick one box only.**"

The appellant ticked the box which read, "I cannot sit comfortably for more than 30 minutes, without having to move from the chair".

9. The following was the instruction on the first IB50 with respect to the activity of bending and kneeling:

> "**Bending or kneeling**
>
> **We need to know if you have any difficulties bending or kneeling.**
> We mean bending or kneeling from a standing position not from sitting.
> By *bending or kneeling* we mean you can do the activity either by bending or by kneeling or by a combination of both.
> Please tick the first statement that applies to you. **Tick one box only**.

The appellant ticked the box, "I cannot bend to touch my knees and straighten up again".

10. To both activities and on the same page, the appellant was afforded the following opportunity:

> "**More information**
>
> Please use the space below to tell us anything else you think we may need to know about the difficulties you have, sitting in a chair, getting up from a chair and bending or kneeling. In particular you should tell us about any pain or tiredness you feel while doing or after doing these sorts of things. Also tell us if it varies from day-to-day."

The appellant amplified the problems he had both with sitting in a chair and in relation to bending or kneeling.

11. MA1 observed that, during the examination, the appellant sat over on his left buttock and moved around on the chair from time to time, that on occasions he held on for support when rising from sitting and that he required to squat to pick up clothing from the floor; he walked with a right-sided limp, he had low back and buttock spasm on the right and only 85% full range of movement of the lumbar spine. It was MA1's opinion that:

> "Physiotherapy and on-going therapy could lead to significant improvement of back pain in 6 months time."

(The appellant was at that time on brufen).

12. On 19 May 2003, the appellant completed another questionnaire (the second IB50). The second IB50 was in exactly the same printed format as had been the first IB50. However, the appellant now ticked the boxes, "I cannot sit comfortably for more than one hour, without having to move from the chair" and, "I cannot either bend or kneel, or bend and kneel as if to pick up a piece of paper from the floor and straighten up again"; he gave no amplification with respect to the activity of bending or kneeling, but in relation to sitting specifically described his problems in terms of sitting "for up to an hour", whereas in the first IB50 he had expressly detailed his difficulties "after 30-40 mins sitting". He also stated on the second questionnaire that he had attended physiotherapy until two months earlier when he developed ulcers because of his medication. He therefore had ceased brufen and was now taking only paracetamol.

13. Following an undated report from the general practitioner (GP), which made no reference to any back problem, the appellant was examined by a further medical adviser (MA2) on 22 July 2003. MA2 observed that the appellant:

"Sat comfortably 15 min
Rose by not holding on
Bent to pick bag from floor".

The relevant features of MA2's clinical examination were recorded as follows:

"No lumbar deformity
Tender (R) side L. spine
Flexion to mid shin
Fully squatted
No muscle wasting".

MA2 then concluded:

"Exam not consistent with choice of descriptor."

14. It was the opinion of MA2 that no relevant descriptors were satisfied. On 30 July 2003 a DM superseded the earlier decision which had awarded credits; regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the decisions regulations) was utilised to do so because, from and including 30 July 2003, on application of the PCA the points given were nil.

The tribunal hearing and decision

15. An appeal against the DM's adverse decision was made to a tribunal. At that stage, the first IB50 and the report of MA1 were not in the papers. At the first hearing on 4 February 2004, the appellant was represented by a local welfare rights officer (the representative) but not then by Mr Orr. On the appellant's behalf, the representative said that the appellant "claims no improvement" and therefore requested that the previous papers be included; there was accordingly an adjournment on that basis.

16. Those previous papers were therefore before the tribunal on 5 May 2004. There was also a letter dated 18 March 2004 from the appellant's GP in which he said that he had been asked:

"... to provide evidence in support of [the appellant's] condition but since his assessment I have only seen him once with the condition that he mentioned and I referred him for further physiotherapy.

Consequently I personally am not in the position to say one way or another whether he is fit and I would be very pleased if someone could assess him again."

17. At the tribunal hearing the appellant was now represented by Mr Christopher Orr. He first put the argument that amendments made by the 1996 regulations to the activities of "sitting in an upright chair with a back, but no arms" (activity 3) and "bending and kneeling", (activity 6) were invalid under the reasoning in *Howker*; officials of the Department of Work and Pensions had wrongly told the Social Security Advisory Committee when the amendments proposed by the 1996 regulations were submitted to them that all of them were "neutral", which was not the case with respect to *inter alia* the amendments to activities 3 and 6, so that such amendments were accordingly invalid and this then rendered the DM's purported application of the PCA likewise invalid. After a brief recess to consider this

argument, the tribunal proceeded to take evidence from the appellant and, following further deliberations, refused his appeal.

18. The tribunal noted the burden was upon the Secretary of State to show that there were grounds for supersession of the awarding decision and gave a very detailed statement of reasons for its own decision. In part, its statement read:

> "This appeal first came before a tribunal on 04.02.04 when it was adjourned with a direction to the Secretary of State to file the papers relating to the previous Personal Capability Assessment (PCA). The direction was complied with on 05/04/04.
> ...
>
> ... we have concluded that the amendments relevant in this appeal, namely those made in the descriptors relating to sitting and bending and kneeling were *ultra vires* under the reasoning in *Howker* ... In the event we have concluded on the evidence that [the claimant] would have scored no points under the descriptors in both their original and amended forms for the reasons explained below.
>
> ...
>
> The argument put forward on behalf of the appellant in this case is not well developed, however it seems to us that [the appellant's] representative could be making one or more of three possible arguments as follows:
>
> A The effect of the invalidity of the amendments is such as to render ineffective in law the whole of that part of the regulations which relates to the Personal Capability Assessment (PCA). This is in our judgment plainly wrong. Disapplying the amendments (as was explicitly acknowledged in the lead judgment in *Howker*) has the effect of restoring the original text. This leaves a clear legal basis for applying the PCA (or All Work Test (AWT)). This was the course taken by the Court of Appeal in *Howker* and Commissioner Jacobs.
>
> B The fact that the process of evidence gathering and the process of reasoning which lead to the decision in the present case were both founded on an erroneous view of the law has the effect that no valid decision has been made. Again we disagree. There is a clear difference between on the one hand an erroneous decision and on the other a purported decision which is in reality no decision at all. In the former case there is amply authority for the proposition that the tribunal has a power and a duty to correct the decision. In the latter it does not. In our judgment the decision under appeal before us clearly falls in the former category. The terms of the decision are clearly expressed, as is the process of reasoning which lead to it. We have no hesitation in concluding that our duty is to make the decision, which the decision maker should have made ...
>
> C The process of evidence gathering and decision making was carried out on incorrect legal assumptions, at least in relation to the activities of sitting and bending and kneeling. This means that the wrong questions were asked in the IB50, the medical advisor addressed his mind to the wrong questions, and in turn the decision maker asked the wrong questions and

had before him evidence which was inadequate. There is in our view some merit in this much more modest challenge. We accept that the wrong questions were asked and that this impaired both the gathering of evidence and the decision making process. However we have had the opportunity to correct these deficiencies by taking evidence ourselves and applying what is our *[sic]* judgment the correct law. In particular, we have taken the view that on the facts of the present case there is more than enough appropriate evidence from the examining doctor to enable us to decide whether point scoring descriptors under the original wording of the regulations were satisfied. We concede that there may be cases where this might not be so.

[The claimant] who was born on 26/10/54 claimed National Insurance Credits from 03/04/02 and an award was made on 18/04/02. [The claimant] was examined for the purposes of the PCA on 30/08/02 and on the basis of the medical advisor's report a decision maker did not interfere with the award. The medical advisor found point scoring descriptors satisfied under the headings of sitting, rising from sitting, bending and kneeling, standing, and using stairs. The disabling condition was identified as 'low back pain radiating down back of right thigh'.

[The claimant] completed a further form IB50 on 19/05/03 indicating problems under the headings of sitting, rising from sitting, bending and kneeling, and using stairs ... His General Practitioner in an undated report ... referred to breathing problems investigated and treated in April 2003 but made no further comment. In particular no reference was made to low back or leg pain. The same Doctor wrote a further short report dated 18/03/04, but again was unable to comment in detail, though he mentioned a referral for further physiotherapy.

He was seen again by a medical advisor 22/07/03 ...There were no objective findings relating to back and leg pain, and full range of movement was found in the upper body as well as full power in the upper limbs. [The claimant] was noted to sit comfortably for 15 minutes, to rise without holding on, to pick a bag from the floor, and to move freely during the assessment including taking off a heavy leather coat. It seems improbable that the sitting did occupy the full 15 minutes of the examination; we take from the note that no discomfort in sitting was observed. The medical advisor expressed the opinion that no point scoring descriptors were satisfied and this was accepted by the decision maker.

...

For the reasons listed below we have concluded that the most reliable evidence before us as to the degree of disability is the report of the medical advisor. We accepted and on the basis of it concluded that at the date of decision under appeal [the claimant] did not satisfy any point scoring descriptor. We come to this conclusion for the following reasons:

1. [The claimant] was in our view a highly unpersuasive witness. His oral evidence was at times inconsistent with itself (for example as to the variability of the back condition) and inconsistent with the account given in form IB50. Although [the claimant] says he has become worse our impression was that his oral evidence today was tailored to the

circumstances in which he found himself, whereas the IB50 was completed in a more neutral spirit.

2. In both the IB50 and in oral evidence [the claimant] has described a very high level of disability arising from back pain. This is inconsistent in our view with the facts that he has not been referred for specialist investigation, and no strenuous pain killing measures have been attempted. We acknowledge his peptic ulcer would have been a contra indication for some stronger painkillers, but it would not have been for all. While he might have been taken off anti inflammatory drugs we find it improbable that someone suffering from such a severe degree of pain described would have been maintained on a low daily dose of a very low level pain killer, namely paracetamol. Even when coupled with the use of the tens machine.

3. The severe degree of disability described is inconsistent with [the claimant's] evidence today of a substantial amount of regular walking, particular when there is another person in the household able to shop.

4. [The claimant's] GP has completed two reports. In the first he makes no reference at all to back pain. In the second apart from the oblique reference to a referral to physiotherapy he gives no impression that he is conscious of a significant back pain problem. Had [the claimant's] disabilities been anything like he claims we would have expected a clear reference to this from his own GP, who does not appear to be unsympathetic to him. We find it inconceivable that reports of that kind would have been prepared in a case where there was a significant disabling degree of back pain.

5. The report of the medical advisor indicates no objective sign of a significant back condition and, most importantly, no limitation of function.

6. In [the claimant's] oral evidence today, notwithstanding that we have found it exaggerated, he has clearly stated that his difficulties with certain of the descriptors relied on would be minimal. For example, he stated that he would bend over to get something off the floor although he could not kneel to do so. Although he later sought to qualify this evidence, it was initially given without any qualification or reservation.

For these reasons, to the extent that [the claimant's] case is in conflict with the findings of the medical advisor, we reject it. We find that at the date of the decision [the claimant's] score was zero points whether one applies the original or the amended version of the regulations. There was thus in our view ample evidence to conclude that supersession was justified under Regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the decisions regulations). This conclusion is in no way undermined by the fact that the IB50, the report of the medical advisor, and the decision all applied in relation to two activities the incorrect amended form of the regulations."

Appeal to the Commissioner

19. Mr Orr appealed on the appellant's behalf. He argues that, because the DM applied a personal capability assessment (PCA) in a version which the tribunal decided was invalid, then there had been no application of the PCA as required by the legislation and, accordingly, no valid termination of credits. He further argues that the tribunal failed to have regard to the previous medical examination and that the reasoning in respect of credibility is inadequate.

20. The Secretary of State supports only the second ground: the DM, on behalf of the Secretary of State, submits:

> "... that the tribunal have failed to explain what account they had taken of that evidence vis a vis the 2nd PCA and the claimant's contention that his condition had not improved. I therefore submit that the tribunal erred in law by failing to give sufficient reasons for their decision."

21. Leave to appeal was granted by the District Chairman who had chaired the tribunal hearing.

The oral hearing

22. The case came before me for an oral hearing on 16 December 2004. The appellant remains represented by Mr Christopher Orr, a welfare rights officer with the Glasgow City Council. The Secretary of State was represented by Mr Jonathan Brodie, Advocate, instructed by Miss Parker, Solicitor, of the Office of the Solicitor to the Advocate General. Both of them retained the stance taken in their respective written submissions. I refer to their arguments where necessary in the course of my own conclusions.

My conclusion and reasons

A valid application of the Personal Capability Assessment

23. Mr Orr argues that the legislative provisions for incapacity require an application of the wholly statutory PCA; the DM carried out a PCA which had no correct statutory basis and therefore could make no valid supersession based on such.

24. Mr Orr accepts as right the approach set out in paragraph 24 by a Tribunal of Commissioners in R(IB)2/04 when the Tribunal said:

> "As a matter of principle, on such an appeal the tribunal may make any decision which the officer below could have made on the legal questions properly before that officer. That principle encompasses dealing with new questions so as to reach the right result on an appeal, within the limit that the appeal tribunal has no jurisdiction (in the absence of express legislation to that effect) to determine questions which fall outside the scope of that which the officer below could have done on the proper legal view of the issues before him, by way of a claim or an application or otherwise."

25. However, Mr Orr submits that the present case falls within the exception to the above set out in paragraph 72 of R(IB)2/04:

> "We agree with the proposition implicit in the submissions of all parties that there may be some decisions made by the Secretary of State which have so little coherence or connection to legal powers that they do not amount to decisions under section 10 at all. In the absence of specific facts, we do not consider it would be helpful here to seek to identify the characteristics which might lead to that conclusion in a particular case, but deal with the general principles below."

26. Mr Orr submits that s.171C is mandatory:

> "... the question whether the person is capable or incapable of work shall be determined in accordance with a personal capability assessment."

He contends that that was not done in the present case because there was no compliance with the correct legislative terms of the test and therefore the application of the PCA was only a purported one; thus, the subsequent supersession had no connection to the necessary legal powers.

27. In response, Mr Brodie points out that the effect of *Howker* is that, with respect to any of the 1996 regulations which are now held to be invalid because it is subsequently judged that the Secretary of State's officials misled the Social Security Advisory Committee and that this was a significant enough breach of the statutory procedure to invalidate the particular amendment, then the 1995 regulations must be read as if the 1996 changes had never been made.

28. However, Mr Brodie submits, *Howker* does not have the effect that, where a DM applies the PCA in its form if the 1996 regulations operated, the application of a valid PCA is thereby undermined. Section 171C provides the statutory basis for the application of the PCA. That is expanded by regulations 25 and 26 of the 1995 regulations. It was the 1999 regulations which substituted the term "personal capability assessment" for that of "all work test". The statutory basis for the application of the PCA in order to determine whether or not a person is incapable of work, remains largely unchanged by the 1996 regulations, except to the extent that it hinges on satisfaction of descriptors listed in the Schedule.

29. Some of those descriptors were altered by the 1996 regulations. Following *Howker*, an adjudicating authority has to decide whether the effect of a particular 1996 amendment was potentially adverse to claimants and, if so, whether the Social Security Advisory Committee was thereby misled. Two activities defined in the Schedule (activity 3 and activity 14) have already been held by Commissioners to be applicable only in their original 1995 form. Presumably the DM in the present case applied activities 3 and 6 as changed by the 1996 amending regulations. The tribunal held, as it was entitled to do, that the DM was wrong so to do. In each case, the tribunal has to carry out a legal reasoning process, and determining whether or not a particular amendment can be categorised as "neutral" is not an easy one: but the situation is analogous to that where a particular decision maker omits consideration of a relevant activity entirely or misunderstands how a Commissioner or a Court has or might interpret that activity.

30. However, argues Mr Brodie, as was said by the Tribunal of Commissioners at paragraph 25 of R(IB)2/04:

> "The appeal tribunal in effect stands in the shoes of the decision maker for the purpose of making a decision on the claim."

Applying the regulations in a way which, in part, is not confirmed by the tribunal, is not a case where a decision maker acts entirely without authority and makes a decision which is not within his remit. It was the DM's function to apply the PCA to the circumstances of the appellant's case and he did so; that the tribunal decided that the DM acted erroneously in law in respect to how he applied it, is nevertheless a decision capable of correction by the tribunal in the usual way.

31. I accept Mr Brodie's arguments on this point in full. As was said at paragraph 32 by the Tribunal of Commissioners:

> "Appeal tribunals are part of the adjudication system which is designed to ensure that claimants receive neither more nor less than the amount of social security benefit to which they are properly entitled (as opposed to the benefits to which the parties may be contending that they are entitled). There is a legitimate public interest in ensuring such a result."

What the tribunal quintessentially did in the present appeal was to determine questions fully within "the scope of that which the officer below could have done on the proper legal view of the issues before him" (see my paragraph 24 above).

32. In particular, I am unable to accept Mr Orr's submission that, because the PCA assessment is a creature of statute, any deviation from that statutory basis means that there is no connection whatsoever to legal powers: with the result that no decision, whether under s.10 of the Social Security Act 1998 or otherwise, arises. *Howker* did not strike down either the whole PCA assessment as set out in the amended 1995 regulations nor even all of the purported changes made by the 1996 regulations. In effect, the Court of Appeal left the question of when the original text remained the valid version to be decided on a case by case basis. I therefore agree with the Secretary of State that there is no error of law in the tribunal's approach to the effect of *Howker*. On the contrary, I commend the tribunal for its analysis.

The effect of a previous satisfaction of the personal capability assessment

33. Although a ground for supersession automatically arises under regulation 6(2)(g) of the decisions regulations in the present circumstances, this does not mean that carrying out an adverse supersession is then similarly automatic. It is for the Secretary of State to show, on a balance of probabilities that, as from the supersession date, the appellant no longer satisfies the PCA. The totality of the evidence, including prior medical assessments, will be relevant on that issue. This reasoning is implicit in the decision of Mr Commissioner Bano in CIB/0884/2003, cited by the Secretary of State and with which I agree.

34. However, as was said at paragraph 10 of that case by the Commissioner, "the weight to be attached to earlier assessments is entirely a question of fact for the tribunal". There, the claimant's representative asked for all the previous AWT assessments to be made available to a tribunal hearing the case, yet it was not clear from the decision later made that the deciding tribunal either had or gave consideration to those earlier assessments. Moreover, the Commissioner regarded as apparent from the evidence that "...on any view, the claimant's condition was essentially stable." This meant that:

> "...[t]he earlier reports were themselves based on clinical findings which, in the circumstances of this case, were almost certainly relevant in considering the correctness of the report which the claimant challenged, and on which the supersession decision was based."

35. Mr Brodie appeared to be referring to the earlier questionnaire rather than to the prior medical examination when submitting to me that the tribunal erred in failing to state what view it took of it. He said that when there is a line of evidence which suggests a worse condition than set out in a previous questionnaire, this should be specifically addressed by a tribunal, which should state what view it took of the conflict and why.

36. I am totally unable to see any "line of evidence", whether in the claimant's questionnaires or in the medical examinations or both, which suggests a worse or at least an unchanged condition so that such therefore requires to be specifically addressed. In the present case, the tribunal had the previous papers and referred to them. While perfect reasons might have included an explanation of how the tribunal considered the contrast between the earlier satisfaction of the PCA and the later failure thereof, the statement of the tribunal assumes an informed reader (particularly where, as here, the claimant is represented by a highly competent representative); as was said by Mr Commissioner Jacobs at paragraph 16 of CIB/4423/03:

> "Adequacy can only be judged in the context of the evidence and submissions as a whole. In that context in this case, the reasons given by the chairman were adequate."

37. The two questionnaires most certainly did not show a condition in which there was no significant change. To identical instructions, the claimant's responses indicated an improving situation. MA1 specifically advised that the appellant could have a significant improvement with "physiotherapy and on-going therapy". Even if the appellant's anti-inflammatories had been replaced with pain killers at the time of completion of the second IB 50, he had attended physiotherapy and he ticked boxes which showed an improvement.

38. The clinical findings and observations of MA2 were markedly different from those of MA1; both the completion of the second IB 50 and the examination by MA2 were much closer in time to the adverse decision under appeal (30 July 2003) than was the hearing on February 2004 by a tribunal at which it was asserted that the appellant had not improved.

39. When one adds to this background the gist of the information from the GP, to which the tribunal alluded in full, I am unable to accept that there was any *contemporaneous* line of evidence indicating worsening or even lack of improvement, so that, in context, I do not agree that the tribunal erred in doing other than refer to the previous papers. Having regard to the fullness and clarity of the tribunal's findings and reasons about why the appellant failed the PCA as from the relevant date, the tribunal was not required to compare and contrast the two medical assessments, still less the questionnaires, as a matter of law.

Credibility

40. The tribunal's opinion of the appellant, as "a highly unpersuasive witness", to a degree informed its weighing of the medical evidence. To the same degree therefore, I consider that the Secretary of State's support for the second ground of the appeal, but not the third, is somewhat inconsistent. However, I agree with the Secretary of State that the tribunal did not err in law in its assessment of the appellant's credibility.

41. Mr Orr argues that reference to inconsistencies in the account given by the appellant of the effect of his condition in the second IB 50 when compared to problems as described at the oral hearing, is a fundamentally flawed analysis of the evidence by the tribunal; this is because the appellant was asked the wrong questions on the questionnaire, so that there was no relevant link with the later testimony

42. I do not accept that argument in the circumstances of the present case. The tribunal refers to inconsistency between the oral evidence and the *account* given on the second IB 50. This does not simply encompass the ticking of "*descriptor*" boxes but also includes the amplification, given on an open basis, by the claimant in the "*more information*" boxes. It is in this latter respect where, in my view, the tribunal considered there were inconsistencies. Furthermore, whatever the test, the appellant ticked descriptors in the second questionnaire with respect to sitting and bending or kneeling which both showed a lesser level of disability than in those he ticked for the respective activities in the first IB 50 and also differed from his narration at the hearing.

43. Moreover, many other reasons were given in explanation of why the tribunal doubted the claimant's credibility. There was more than sufficient in the rest of the tribunal's reasoning to make its assessment rational and sufficiently explained, even if one left out of the reckoning any reliance on inconsistency between the appellant's oral evidence and the second questionnaire. I am unable to accept that a tribunal's analysis is rendered erroneous, because it does not point out in a formulaic way that, even if it is wrong in one of the factors on which it relies, nevertheless the remaining ones justify why it did not judge the claimant's evidence to be credible and reliable. If, in fact, the other points (about which complaint has not, and could not, be made) are sufficient to support the evaluation, then a tribunal's overall reasoning is not erroneous in law. Even if I agreed with Mr Orr's view, which I do not, I consider that for me to set aside the tribunal's decision on that ground, only to substitute a decision to the same effect, seems an empty process; but that would be my reaction, as I could not disturb the analysis made by the tribunal unless satisfied that it is clearly wrong, which is most certainly not the case.

Conclusion

44. For the above reasons, I find no error of law in the tribunal's decision. As set out in my paragraph 1, the tribunal's decision therefore stands.

(signed)
L T PARKER
Commissioner
Date: 22 December 2004