DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant the claimant leave to appeal and I allow his appeal against the decision of the Darlington appeal tribunal dated 7 June 2001. I set aside that decision and I refer the case to a differently constituted tribunal for determination. **I direct the Secretary of State** to make, within one month of the date of this decision, a short submission to the tribunal, informing them of any "incapacity determination" made either before or after 7 July 2000 and providing the tribunal with any medical evidence relied upon in such a determination, if it is still in existence.

REASONS

2. I held an oral hearing of this case. The claimant was represented by Mr Scott McInally of the Welfare Rights Service of the Social Services Department of Durham County Council and the Secretary of State was represented by Ms Deborah Haywood of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions. I am grateful to both advocates for their helpful submissions.

3. The claimant had been in receipt of incapacity benefit since 12 February 1999. On 23 June 2000, he was examined for the purposes of a personal capability assessment. On the basis of the medical advisor's findings, the Secretary of State decided on 7 July 2000 that the claimant did not score sufficient points to satisfy a personal capability assessment and was no longer entitled to incapacity benefit from the date of the decision. The claimant appealed.

4. The principal argument advanced by Mr McInally before the tribunal was that regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, upon which the Secretary of State had relied to justify a supersession of the existing award of incapacity benefit, was *ultra vires*. The tribunal rejected that argument and also rejected further submissions to the effect that the tribunal should declare the decision under appeal a nullity because it did not specifically state that it was a supersession and to the effect that the claimant should have been awarded more points on the assessment. The claimant now applies for leave to appeal, repeating the argument as to the *vires* of regulation 6(2) and also submitting that the tribunal erred in law in failing to give adequate reasons for rejecting the claimant's other arguments. He also raises a technical argument arising out of the tribunal's refusal of leave, but that does not advance his case for reasons I gave in CIS/4772/00. As the first point raises a question of law that requires consideration, I grant leave to appeal. Both parties have given their consent to my treating the application as the appeal.

5. Section 10(1) and (3) of the Social Security Act 1998 provides:

> "**10.**– (1) Subject to subsection (3) and section 36(3) below, the following, namely –

(a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above; and

(b) ...

may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.

(2) ...

(3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.

..."

So far as is material, regulation 6(1) and (2) of the 1999 Regulations provides:

"**6**–(1) Subject to the following provisions of this regulation, for the purposes of section 10, the cases and circumstances in which a decision may be superseded under that section are set out in paragraphs (2) to (4).

(2) A decision under section 10 may be made on the Secretary of State's .... own initiative or on an application made for the purpose on the basis that the decision to be superseded –

(a) is one in respect of which –

(i) there has been a relevant change of circumstances since the decision was made; or

(ii) ....;

....

(g) is an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision) and where, since the decision was made, the Secretary of State has 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 that regulation; and

...."

The word "and" at the end of regulation 6(2)(g) is superfluous, for reasons I gave in CIB/4051/01.

6. It is convenient first to take Mr McInally's point that the decision under appeal was not a supersession. It was described in the submission to the tribunal as being a supersession but I accept that the terms of the decision itself do not refer to supersession. The Secretary of State simply decided:

"[The claimant] is not entitled to Incapacity Benefit from and including 7/7/00. This is because he does not meet the incapacity threshold under the personal capability assessment."

The failure to refer to supersession in the decision was common practice. It was apparently adopted in the name of "simplification". It may be arguable that it is permissible to inform a claimant only of the "outcome" of a decision, given that a claimant has the right to ask for an explanation of a decision, but I do not see how that could justify the Secretary of State's decision-maker not actually making a decision in

the correct terms. The Secretary of State's decision was therefore flawed and it is necessary to consider the consequences.

7. Mr McInally very properly drew the tribunal's attention to R(IS) 2/97 where a Tribunal of Commissioners said that a decision should not be held invalid solely on the basis that the adjudication officer had purported to revise a decision under the wrong statutory provision without any further consideration of whether, among other things, the conditions requiring a review of the claimant's entitlement had in fact arisen. However, he submitted that that was no longer appropriate following the coming into force of the 1998 Act. In my view, as the tribunal agreed with the Secretary of State's view that the claimant had not scored a sufficient number of points on the personal capability assessment, they were entitled to consider what the proper legal consequences of that were, even though the Secretary of State had apparently not done so at the time the decision under appeal was made. Section 12(8)(a) of the 1998 Act does not prohibit a tribunal from considering issues that were not considered by the Secretary of State, even if they are not clearly raised by the appeal.

8. Mr McInally contended that perfecting defects in the Secretary of State's decision suggests a lack of objective impartiality, particularly as claimants must comply with quite strict procedural rules when appealing. The submission to the tribunal referred to *Findlay v. United Kingdom* [1997] 24 EHRR 221, where the European Court of Human Rights said that a tribunal "must also be impartial from an objective viewpoint". I do not accept that giving the correct decision suggests that a tribunal is not acting impartially. Quite the reverse: it is not the function of the tribunal to take only points that favour the claimant. It is in the nature of an appeal that the appellate body should correct errors in the decision under appeal. Both parties must comply with procedural rules – so that, for instance, a tribunal cannot make a decision in terms of a supersession under regulation 6(2)(g) if the new medical evidence was not received by the Secretary of State following a medical examination – but just as a tribunal's consideration of an appeal is not limited to the grounds advanced by a claimant, so they are not constrained by the terms in which a Secretary of State's decision is framed. If they were, that could operate to the detriment of many claimants even though it might help some others. I do not accept that the approach taken in R(IS) 2/97 has ceased to be a good one or that what is in reality a supersession cannot be treated as such by a tribunal and, if the conditions are satisfied, be replaced by a decision properly worded as a supersession.

9. I turn to the question of the validity of regulation 6(2)(g). Mr McInally's argument is that regulation 6(2)(g) requires supersession of an award of incapacity benefit on mere receipt of medical evidence so that a claimant must lose his benefit whatever the score suggested by the medical evidence and can never succeed on an appeal. If regulation 6(2)(g) had that effect, there might be grounds for concern, but that is plainly not the effect of the legislation. Firstly, regulation 6(1) provides that a decision *may* be superseded in the circumstances outlined in paragraph (2) and not that it *must* be superseded, and the need to avoid injustice may dictate the way the discretion should be exercised (see *Regina v. National Insurance Commissioner, ex parte Department of Health and Social Security* (reported as an appendix to R(S) 1/79) and CIS/6249/99). Secondly, it is possible to supersede a decision but "at the same rate" (R(DLA) 6/02) – or even at a higher rate – so that even if supersession

were required in every case where a claimant attend a medical examination, that would not necessarily work to the disadvantage of the claimant. There is nothing whatsoever in regulation 6 to suggest that a claimant should lose entitlement to benefit when medical evidence received by the Secretary of State following a medical examination suggests that a claimant scores a sufficient number of points on a personal capability assessment to be found incapable of work. Furthermore, the Secretary of State is not bound by the medical evidence he receives from the medical advisor. There are, admittedly rare, cases where he gives a claimant a different score on a personal capability assessment from that suggested by the medical advisor but, more importantly, it follows from the fact that the Secretary of State is not bound by that evidence that a tribunal also is not bound by it and is entitled to prefer evidence given by, or on behalf of, a claimant. Therefore, regulation 6(2)(g) does not operate in the fashion suggested by Mr McInally.

10. As an alternative argument, Mr McInally argued that regulation 6(2)(g) operates unfairly because it provides a claimant with less protection than regulation 6(2)(a)(i), the predecessor of which was considered in some detail in CIB/3899/97. Supersession under regulation 6(2)(a)(i) would be justified only if there were a real change in a claimant's medical condition, whereas, Mr McInally submitted, regulation 6(2)(g) permits the Secretary of State to act arbitrarily and terminate an award when the claimant's condition has not actually changed. I do not accept that regulation 6(2)(g) does entitle the Secretary of State to act arbitrarily. Firstly, he can only supersede a decision under regulation 6(2)(g) so as to terminate an award upon receipt of medical evidence suggesting that the claimant does not score a sufficient number of points on the assessment, and the medical advisor can be presumed to exercise professional judgement. Secondly, although the Secretary of State is not bound by previous decisions, he ought to be able to justify giving an apparently inconsistent decision if challenged. Earlier decisions are not irrelevant (see R(S) 1/55, CIB/1972/00, CIB/3667/00 and CIB/3179/00) and, where a claimant has asserted that his or her condition has not changed since a previous assessment, a tribunal should make it plain why a different decision has been given (see R(M) 1/96). Thirdly, a claimant is provided with protection by regulation 6(2)(g) because the Secretary of State is, in effect, prevented from superseding an award without first arranging a medical examination, unless he can demonstrate grounds for supersession under regulation 6(2)(a)(i) or some other part of regulation 6(2).

11. I am therefore not persuaded that regulation 6(2)(g) is either irrational or unfair. It plainly falls within the scope of the power to make regulations conferred by section 10(3) of the 1998 Act. Accordingly, I reject Mr McInally's submission that regulation 6(2)(g) is *ultra vires*.

12. However, I am far from certain that regulation 6(2)(g) was the provision under which supersession was appropriate in the present case. Regulation 7A defines the terms used in regulation 6(2)(g):

> " "incapacity benefit decision" means a decision to award a relevant benefit or relevant credit embodied in or necessary to which is a determination that a person is or is to be treated as incapable of work under Part XIIA of the Contributions and Benefits Act,

> "incapacity determination" means a determination whether a person is incapable of work by applying the personal capability assessment in regulation 24 of the Social Security (Incapacity for Work) (General) Regulations 1995 or whether a person is to be treated as incapable of work in accordance with a severe condition to be treated as incapable of work) or regulation 27 (exceptional circumstances) of those Regulations".

Although regulation 6(2)(g) envisages that the "incapacity determination" may have been either "before or after" the "incapacity benefit decision" and provides only that the receipt of the "medical evidence following an examination" should have been "since the decision was made", it is unclear whether it also envisages that receipt of the medical evidence should have been since the incapacity determination was made.

13. Not every incapacity determination is made following an examination. For instance, a determination that a claimant is to be treated as incapable of work in accordance with regulation 10 may be made following receipt of advice given by a medical adviser who has merely read written medical evidence. Nor is every incapacity benefit decision based on an incapacity benefit determination. An initial award of incapacity benefit is usually based on the application of regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995. Regulation 28 provides that, generally, a person who is submitting medical certificates is to be treated as incapable of work in accordance with the personal capability assessment until such time as he or she is assessed. Thus, where regulation 28 is applied and then, following a medical examination, it is decided that the claimant does not score sufficient points under the personal capability assessment, there will have been an "incapacity benefit decision" followed by a medical examination, followed by the receipt of medical evidence by the Secretary of State followed by an "incapacity determination" immediately followed by a supersession.

14. On a literal reading of regulation 6(2)(g), all the conditions are satisfied in such a case by the time the supersession is to be made. However, it is at least arguable that the more natural reading of the regulation is that the "incapacity determination" mentioned in the provision should have been before the medical examination that gives rise to the evidence justifying the "incapacity determination" adverse to the claimant that leads to the supersession. I take that view partly because of the order in which the conditions are placed in the statutory provision but partly also because the provision seems to be geared towards replacing one decision based on an "incapacity determination" with another. An explanation for allowing that the "incapacity determination" mentioned in the regulation may have been made *after* the "incapacity benefit decision" is that when an initial incapacity benefit decision is based on regulation 28 and then an examination is carried out and it is decided that the claimant does satisfy the personal capability assessment, it may not be necessary to supersede the award of benefit, even though it could be superseded "at the same rate".

15. If the second interpretation of regulation 6(2)(g) is correct, then it is unclear whether or not that provision could have any application to the present case. That is because the Secretary of State's submission to the tribunal does not record whether or not there had been any "incapacity determination" before the medical examination carried out on 23 June 2000 and there is no other evidence before me one way or the other.

16. However, it is not necessary for me to reach a firm conclusion as to the meaning of regulation 6(2)(g) because it is perfectly clear that regulation 6(2)(a)(i) applies if regulation 6(2)(g) does not. The only reason that there might not have been an "incapacity determination" before 23 June 2000 is that regulation 28 was applied. In those circumstances, the mere carrying out of the personal capability assessment was a change of circumstances justifying a supersession under regulation 6(2)(a)(i), because it meant that regulation 28 was no longer applicable. As "assessed" in regulation 28 refers to the assessment by the Secretary of State in the light of the evidence produced by the medical examination, as opposed to the carrying out of the examination, and as the resulting supersession should have been made at the same time, the supersession would have been effective from the date it was made (as is the case under regulation 6(2)(g)), even if the exception from regulation 7(2)(c)(iii) would not have applied. (There is no evidence justifying the application of regulation 7(2)(c)(ii).)

17. Accordingly, I am satisfied that, if the tribunal properly concluded that the claimant did not score a sufficient number of points under the personal capability assessment at the time of the Secretary of State's decision, they were entitled to remedy the Secretary of State's word his decision in terms of supersession and they were entitled to decide that the claimant was not entitled to incapacity benefit from that date.

18. Mr McInally's remaining arguments are as to the adequacy of the tribunal's reasoning. The standard of a tribunal's reasoning on a point of pure law is not a separate ground of appeal; the only question is whether or not they reached the right conclusion. However, Mr McInally is entitled to challenge the tribunal's reasoning on the other issues before them. .The Secretary of State had awarded 8 points in respect of the activity of hearing and 3 in respect of the activity of walking. The points awarded in respect of hearing were not in issue. The claimant claimed more points in respect of walking, or, alternatively, walking on stairs, and also points in respect of reaching and lifting and carrying. He gave evidence in support of those contentions. Mr McInally drew the tribunal's attention to the fact that the medical examination lasted on 25 minutes as against the 30 apparently recommended and he suggested that it was therefore inadequate and that the claimant's evidence should be preferred to that of the medical advisor. The tribunal said:

> "[The claimant] did not produce any medical evidence to challenge the Examining Medical Officer's (EMO) report. His GP's report (documents 22-24) was of little help other than to confirm the diagnosis. It is not essential for the success of an appeal that medical evidence be produced to challenge the EMO's report but, nevertheless, it does assist an Appellant if he is able to produce such evidence.
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> "[The claimant's] evidence, if accepted by the tribunal, amounts to a contradiction of the EMO's report. Having carefully considered this report, the Tribunal were satisfied that the clinical findings supported the report's opinions and to that extent, therefore, the report could not be regarded as unsafe or unsound. This does not mean that the Tribunal automatically preferred the report to that of the Appellant's evidence; the report is only one

factor (albeit an important one) taken into account by the Tribunal in reaching its decision.

"The tribunal, therefore, carefully considered all [the claimant's] evidence and compared it with the EMO's report, but having done so formed the opinion, on the balance of probabilities, that [the claimant] had under-estimated his physical abilities with regard to the physical descriptors in issue and to that extent, therefore, his evidence could not, on a balance of probabilities, be regarded as credible."

19. Mr McInally submits that the tribunal completely failed to deal with his argument that the medical examination was inadequate. Although it is true that the tribunal did not deal with the argument, I do not find this a compelling point in isolation. Insofar as Mr McInally's argument before the tribunal was based on the examination having been 5 minutes shorter than recommended, his argument seems to me manifestly to have been a bad one. Not many descriptors were in issue and the examining medical officer's report was far more detailed than many I have seen. On the other hand, it is arguable that Mr McNally's submission to the tribunal implied a more general argument that any examination lasting only half an hour or so would not be all that thorough. A challenge to the examining medical practitioner's clinical findings may be said also to have been implicit in the challenge to his conclusions. If the clinical findings themselves were in issue, it does not seem to me to be entirely logical to reject such challenges on the simple basis that the conclusions were supported by those findings. That, I think, is at the root of Mr McInally's final point, which is that the tribunal have not really explained why they thought the claimant had exaggerated the seriousness of his condition or, as the tribunal put it, "under-estimated his physical abilities".

20. It may well be the case that the tribunal considered that the examination was quite long enough for the recording of the type of clinical findings recorded in this case and that, in their experience, it was unlikely that such findings would have been recorded inaccurately. However, they did not say so. Ms Haywood pointed out that the tribunal had suggested to the claimant in the course of the hearing that his evidence to the tribunal was different from what he had said to the examining medical officer (actually, in his incapacity questionnaire), implying that he was exaggerating in his evidence to the tribunal. The claimant had replied that his earlier statement must have been referring to a good day. It may well be that the tribunal rejected that explanation but they did not say so. Furthermore, even what the claimant had said in his questionnaire would, if accepted as accurate, have enabled him to score the necessary number of points to enable him to be found to be incapable of work.

21. But the most serious difficulty I find with the tribunal's reasoning is that it is not clear to me that the examining medical officer's clinical findings *necessarily* support his conclusions. That is not a criticism of him. His reasoning is extensive and I am quite prepared to accept that the conclusions are consistent with the findings. However, before the tribunal, there were direct challenges to the finding as to the distance the claimant could walk and as to the finding that, although the claimant satisfied the descriptor "cannot raise one arm above head as if to reach for something but can with the other", he did not satisfy the descriptor "cannot raise one arm to head as if to put on a hat but can with the other". Unless there is something not apparent to

me of significance in the clinical findings, those conclusions both seem to me to involve an element of judgement going beyond those findings. The tribunal themselves appear to have accepted that the conclusions went a little further than the clinical findings. The tribunal may have taken the view that the claimant's evidence was unreliable, because there were some inconsistencies in it, and they may have been content to rely on the examining medical officer's judgement because he had actually examined the claimant and his reasoning suggested that he had approached the case with an open mind. However, they did not say so.

22. With some hesitation, I accept that the tribunal's reasoning was inadequate. In the circumstances of this case, where the difference between the examining medical practitioner's conclusions and what the claimant needed to show in order to be entitled to incapacity benefit was very small, the tribunal had to do more than merely, in effect, state their conclusion. Some short statement was required as to why they did not accept any of the claimant's evidence where it differed from the examining medical officer's conclusions or, which may come to the same thing, as to why they considered the examining medical officer's reasoning to be compelling.

23. I refer this case to another tribunal for determination because the parties have not had the opportunity of making detailed submissions to me on the facts and because the claimant will wish to give oral evidence.

(signed) **MARK ROWLAND**
Commissioner
7 January 2003