DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The Secretary of State's appeal to the Commissioner is allowed. The decision of the Durham appeal tribunal dated 21 October 2003 is erroneous in point of law, for the reasons given below, and I set it aside. The case is referred to a differently constituted appeal tribunal for determination in accordance with the directions given in paragraph 15 below (Social Security Act 1998, section 14(8)(b)).

2. The claimant was, by a decision dated 20 December 2000, awarded incapacity benefit from and including 15 December 2000. On 1 November 2001 he was examined by an examining medical practitioner (EMP), who found problems with the physical activities of walking, continence and remaining conscious without seizures sufficient to score more than 15 points. A copy has apparently not been retained of whatever decision or determination might have been made as a result. On 12 September 2002 the claimant signed an IB50 questionnaire. He was not requested to send a Med 4 statement. He was examined by another EMP on 19 February 2003. That EMP only ticked one point-scoring descriptor, for standing. A decision maker then made the following decision on 24 February 2003:

> "This decision is given in respect of [the claimant] for Incapacity Benefit.
> The test of incapacity for work in respect of him is the personal capability assessment.
> He has been assessed under the personal capability assessment and has not attained the required number of points.
> The total points were 3.
> Therefore [the claimant] is capable of work and cannot be treated as incapable of work from and including 24/2/03.
> I have superseded the decision of the decision maker dated 20/12/00 awarding Incapacity Benefit because the Secretary of State has received medical evidence following an examination by an approved doctor since the decision was given.
> As a result [the claimant] is not entitled to Incapacity Benefit from and including 24/2/03."

3. The claimant appealed. The hearing took place on 21 October 2003 after an earlier postponement. The claimant attended with his representative, Mr Stephen Guy of Durham Welfare Rights Unit. There was no presenting officer on behalf of the Secretary of State. Mr Guy submitted that there must have been a decision given after the EMP examination of 1 November 2001 superseding the decision of 20 December 2000. Therefore, the decision in November 2001 had not been addressed. The appeal tribunal allowed the appeal. Its conclusion on Mr Guy's submission was as follows:

> "5. On balance the Tribunal agree the previous award made on 20 December 2000 must have been superseded and that following a further medical examination on 19 February 2003 the Decision-Maker could not go back and supersede the decision of 20 December 2000.

6. The Tribunal also considered that the Decision-Maker who received the medical examination report dated 19 February 2003 should at least have considered whether what it contained was just a different doctor's opinion or whether it showed [the claimant's] condition had improved (ie a change of circumstances) or whether he had in fact never suffered from some of the conditions thought to have been diagnosed by the doctor on 1 November 2001 (ie a mistake of fact in the earlier decision). The evidence given by [the claimant] about his condition does vary slightly between each examination but some of his complaints are very similar on the second occasion - they are just given a different assessment.

7. The submission does not address these points at all.

8. By seeking to supersede an earlier decision which has already been superseded the Tribunal find that the decision of 24 February 2003 is invalid and in the light of the inadequacies in the submission this Tribunal does not consider it can correct the error."

4. The Secretary of State for Work and Pensions now appeals against that decision with the leave of a district chairman. I granted the Secretary of State's request for an oral hearing of the appeal. The hearing took place at Darlington County Court on 10 August 2004, together with the hearing in CIB/420/2004, where very similar issues were raised. The claimant did not attend, but was represented by Mr Guy. The Secretary of State was represented by Miss Margaret Anderson of counsel. I am grateful to both representatives for helpful submissions.

5. There was considerable discussion of whether, when a claimant passes the PCA on its first application, following a period of deemed incapacity for work under regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995 (the 1995 Regulations), a superseding decision either should or could be given. I explain below why I have not needed to decide that question. But Miss Anderson's submission was that, whatever the answer on that issue, there was no doubt about the power of the decision maker on 24 February 2003 to carry out a supersession on the ground set out in regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999:

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

Miss Anderson submitted first that there had not been any decision actually made after the application of the PCA to the claimant following the medical examination on 1 November

2001, merely a determination as to incapacity for work. Therefore, she argued, the only decision that could be superseded was that of 20 December 2000. Only actual "outcome" decisions could be superseded, not decisions which should have been given, but were not. Her second submission was that, even if there had been a decision rather than a determination following the examination of 1 November 2001, that made no difference to the existence or otherwise of the ground of supersession under regulation 6(2)(g). Thus, if the decision maker of 24 February 2003 should have superseded that decision and not the decision of 20 December 2000, that was a defect which could have been corrected by the appeal tribunal under the approach set out by the Tribunal of Commissioners in CIB/4751/2002 and others.

6. Mr Guy submitted that the evidence was that a decision was made after the examination of 1 November 2001. He pointed to the letter written to him on 15 October 2003 by the social security office dealing with the claimant's incapacity benefit. The letter said that the medical report of 1 November 2001, which Mr Guy had requested, was enclosed and was being sent to the Appeals Service, but "we cannot trace the decision made for this medical and therefore cannot enclose it". He submitted that the letter assumed that a decision would have been made, and that, as a superseding decision should have been made, it should be concluded that one had been made. It was then, he said, fundamental that the right decision, the currently operative decision, should be superseded, so that the appeal tribunal did not err in law in concluding that it could not correct the defect. Mr Guy specifically requested that, if I were minded to hold that the appeal tribunal had the power to remedy the defect of the decision maker superseding the wrong decision, I should defer making a decision until after the Court of Session had decided the appeal against Commissioner's decision CSIB/1266/2000 (*Docherty*), expected to be heard early in 2005.

7. I tend to think, on the evidence before me, that there was not a superseding decision made after receipt of the report of the medical examination of 1 November 2001. The papers for the other appeal heard with the present case contained, attached to the Secretary of State's submission to the Commissioner, a copy of the printed documents used by officers when the medical examination in that case on 6 September 2001 indicated that the claimant passed the PCA on its first application. It is proper for me to look at those documents as evidence of standard practice at the time relevant in the present case. The first four pages are a general worksheet for the PCA, including the scoresheet for points under the PCA. The fifth page, section 6 of the worksheet, is headed "Determination on Incapacity". It has tick boxes for "not for disallowance" and "Disallowed" and for "Meets incapacity threshold" and "Does not meet incapacity threshold". There is a further tick box labelled "Decision on line in RP303". Then there is a large space labelled "Use this box to record your determination on incapacity for work and your decision on the entitlement to the benefit or advantage". In CIB/420/2004, the boxes for "Not for disallowance" and "Meets incapacity threshold" were ticked, along with the box for "Decision on line in RP303". The documents also included a standard form letter, apparently to be filled in manually, for use when a claimant passed the PCA on the first application. This letter gave the information that the claimant had met the threshold of incapacity under the PCA and stated "This means that your award of benefit or credits will continue". It was then explained that the claimant did not have to send any more medical certificates and information was given about what future changes would need to be notified.

8. It seems to me that those printed documents draw a clear distinction between determinations on incapacity for work and decisions on entitlement. As the same worksheet is to be used for cases where the PCA is passed and cases where it is failed on the first application, which would lead to a disallowance, the reference in the letter of 15 October 2003 to Mr Guy to "the decision" was most likely to be to those general documents, without any necessary assumption that a decision on entitlement had been made. The documents also show a clear intention that a decision on entitlement would not be made following the passing of the PCA and that there would merely be a determination on incapacity. The standard form letter in particular indicates that. But there is a slight element of doubt introduced by the box "Decision on line in RP303". Miss Anderson had no information as to what that means and there was no-one from the Department for Work and Pensions to give any explanation.

9. I therefore do not wish to decide the case against the claimant on the definite basis that there was no supersession decision given after the receipt of the medical examination of 1 November 2001, although I suspect strongly that that was so. And it could be argued that, on the slighter evidence which it had, the appeal tribunal was entitled to conclude that there had been such a superseding decision given. Instead, I examine what the position would be if there had been a supersession decision given after the receipt of the report of the medical examination of 1 November 2001. That would then have been the current operative decision on 24 February 2003, so that on that basis the decision maker on that date superseded the wrong decision.

10. However, the ground of supersession under regulation 6(2)(g) of the Decisions and Appeals Regulations is quite different in nature from the more "traditional" grounds of supersession in, say, regulation 6(2)(a) to (c). It is no part of the conditions under regulation 6(2)(g) that the decision to be superseded was wrong or flawed in any way when it was made or that there should be any comparison of later circumstances with those obtaining at the time that the decision to be superseded was made. The ground is made out simply by evidence of the receipt of medical evidence following an examination for incapacity for work purposes by an approved doctor. The decision to be superseded must be an "incapacity benefit decision". The definition of such a decision in regulation 7A of the Decisions and Appeals Regulations is:

> "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;"

That definition is met both by an initial decision awarding incapacity benefit on deemed incapacity for work under regulation 28 of the 1995 Regulations, because a determination that the claimant was to be treated as incapable of work was necessary to it, and by an assumed supersession decision on passing the PCA on its first application, because a determination that the claimant was actually incapable of work would be necessary to it. There must, in accordance with regulation 6(2)(g), have been an "incapacity determination" (also defined in regulation 7A) before the decision maker of 24 February 2003 came to consider whether there was a ground of supersession. Whether or not there was a supersession decision following the receipt of the

report of the medical examination of 1 November 2001, there was undoubtedly a determination that the claimant was incapable of work on the application of the PCA, which was an "incapacity determination".

11. Thus it would make no difference whatsoever to the question of whether the ground of supersession under regulation 6(2)(g) of the Decisions and Appeals Regulations was made out whether it was the decision of 20 December 2000 or the assumed decision made after receipt of the report of the medical examination of 1 November 2001 that was being superseded. I have no doubt that, if the circumstances were as assumed, the assumed defect in the decision of 24 February 2003 could have been remedied by the appeal tribunal of 21 October 2003. The decision was a long way from being so incoherent or unconnected to any legal power as not to be a decision at all (CIB/4751/2002 and others, paragraphs 72 and 192), or, to use alternative language (see CIB/2836/2002, paragraph 18), fundamentally flawed. The appeal tribunal should not have declared the decision of 24 February 2003 invalid and the matters mentioned in paragraph 6 of its statement of reasons were irrelevant to regulation 6(2)(g). It should therefore have gone on to give a proper decision on whether the Secretary of State had shown that a ground of supersession existed and, if so, whether he had shown that the superseding decision should be adverse to the claimant through failing the PCA (the burden of proof being on the Secretary of State on both issues: R(I) 1/71 and CIB/4751/2002 and others, paragraphs 19 to 26). That would ideally have involved the appeal tribunal in deciding whether or not a supersession decision was actually made following receipt of the report of the medical examination of 1 November 2001. However, in my judgment the appeal could have quite properly have decided on the basis that whatever the answer to that question, and whatever decision was to be superseded, a ground of supersession under regulation 6(2)(g) had been shown.

12. I therefore do not need to decide the question of whether, under the Social Security Act 1998 adjudication structure, there ought to be a supersession decision on a claimant passing the PCA on its first application or whether, as is apparently the Department's practice, there is merely a determination of incapacity without a supersession. A decision on that question should be made in a case in which the answer matters, if such a case does indeed exist.

13. I reject Mr Guy's submission that I should defer my decision to wait for the decision of the Court of Session in *Docherty*. The Tribunal of Commissioners in CIB/4751/2002 and others knew of the pending appeal in *Docherty*, although it was not clear when the case would be heard by the Court of Session or what the precise grounds of challenge were. It was decided not to defer the Tribunal of Commissioners' decision (although this was not expressed in the decision), because the appeal from CSIB/1266/2000 in *Docherty* concerned only one particular part of the much wider range of problems which were being considered from a wider perspective in the five appeals which were heard together by the Tribunal. CSIB/1266/2000 concerned the question of whether an appeal tribunal could, in Mrs Commissioner Parker's phrase, "reformulate" a decision which made no mention of supersession or of any statutory grounds for supersession in terms of the clearly existing ground under regulation 6(2)(g) of the Decisions and Appeals. That is not in issue in the present case. The decision under appeal clearly identified the ground under regulation 6(2)(g) although the provision itself was not cited

in the decision. If there was an error in the decision under appeal it was one which was immaterial to the exercise of the power of supersession. I consider that I should follow and apply the approach adopted in CIB/4751/2002 without waiting for the Court of Session in *Docherty*.

14. For the reasons given above, I set aside the appeal tribunal's decision as erroneous in point of law. Miss Anderson submitted that I should consider substituting a decision on the claimant's appeal against the decision of 24 February 2003, but I have no doubt that it is right to refer that appeal to a new appeal tribunal for rehearing on the merits. Accordingly, I refer that appeal to a differently constituted appeal tribunal for determination in accordance with the directions below.

15. There must be a complete rehearing of the appeal on the evidence presented and submissions made to the new appeal tribunal, which will not be bound by any findings made or conclusions expressed by the appeal tribunal of 21 October 2003. The new appeal tribunal will have no difficulty in concluding that a ground of supersession under regulation 6(2)(g) has been shown by the Secretary of State, but should identify the current operative decision to be superseded or, if for some reason it is unable to do so, proceed on the alternative bases described at the end of paragraph 11 above. Once a ground of supersession has been shown, the new appeal tribunal must then go on to decide whether the Secretary of State had proved that the claimant was not incapable of work, by reason of not scoring enough points on the PCA. For that purpose evidence in the form of the previous EMP report following which the claimant passed the PCA may be relevant in addition to the EMP report of 19 February 2003 in forming a full picture of the claimant's condition as at 24 February 2003. I need give no directions of law about the meaning of any of the particular descriptors within the PCA. The evaluation of all the evidence will be entirely a matter for the judgment of the members of the new appeal tribunal. The decision on the facts in this case is still open.

(Signed) J Mesher
Commissioner

Date: 18 August 2004