DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Ipswich appeal tribunal dated 13 November 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 paragraphs 21 and 22 below (Social Security Act 1998, section 14(8)(b)).

2. This appeal, made with my leave, was supported by the representative of the Secretary of State in the submission dated 13 April 2004, but with the suggestion that the Commissioner should substitute a decision more favourable to the claimant only in terms of its effective date. In reply, the claimant made a number of comments and requested an oral hearing before the Commissioner, as she said that she had not had a choice to attend the appeal tribunal hearing. I directed a further submission from the Secretary of State to deal with some legal difficulties. The further submission dated 1 July 2004 resiled from what had been submitted earlier about the date from which the superseding decision could take effect and took the legal issues a good way further forward. However, I was not satisfied that the position put forward there was internally consistent and therefore directed an oral hearing. The claimant attended on 13 September 2004, accompanied by her mother. The Secretary of State was represented by Mr James Maurici of counsel, instructed by the Solicitor to the Department for Work and Pensions, who very helpfully produced a written submission on which his oral submissions were based. I am grateful to the claimant and to Mr Maurici for their assistance.

The background

3. The claimant had been accepted as incapable of work from 15 July 2002. The certified incapacity then was Crohn's disease. Her claim for incapacity benefit was disallowed, because she did not satisfy the contribution conditions, but she was apparently awarded contribution credits. She did not send in any statements from her GP after the one covering the period to 17 August 2002. The claimant does not remember being instructed that she had to do that and says that she did not receive the one reminder that the local office says was sent. As it turns out, I do not need to reach conclusions on those points. On 9 May 2003, following the completion of an IB50 questionnaire and an examination by an examining medical practitioner (EMP) on 30 April 2003, a decision was given that the claimant was not entitled to contribution credits from and including 18 August 2002. The decision as signed (a printed form with individual details written in) was as follows:

> "[The claimant] is not entitled to National Insurance Credits from and including 18/8/02.*
> He/She cannot be treated as incapable of work from and including 18/8/02 because none of the exempt conditions apply.
> He/She is not entitled to National Insurance Credits because he/she has been assessed under the Personal Capability Assessment and has not attained the required number of points.

The total number of points is 6.
He/She is not incapable of work and cannot be treated as incapable of work because there are no exceptional circumstances.
Therefore [the claimant] cannot be treated as incapable of work.

* med evid expired 17/8/02."

4. The claimant appealed. On the Appeals Service enquiry form she requested a "paper hearing". An appeal tribunal sitting in Ipswich on 13 November 2003 disallowed the appeal and confirmed the decision of 9 May 2003 after a paper hearing. That would have meant that no notice of the hearing would have been sent to the claimant or to the Secretary of State. The statement of reasons said that the appeal tribunal's decision was that the claimant was not to be treated as incapable of work from 18 August 2002. On the points scored under the PCA, the EMP's report was preferred to the claimant's replies on the IB50 questionnaire and to the descriptors raised in her letter of appeal, as the claimant was not available to answer questions about those descriptors.

The appeal to the Commissioner

5. The claimant now appeals with my leave. When granting leave to appeal I said this:

> "The decision under appeal, made on 9 May 2003, purported to find the claimant not incapable of work and not entitled to contribution credits from 18 August 2002. The appeal tribunal confirmed that decision and in its statement of reasons expressly confirmed the date of effect. There was no explanation by the Secretary of State or the appeal tribunal of how a decision given on 9 May 2003, which presumably had to be made under the power of supersession or possibly revision, could take effect from any date earlier than 9 May 2003. As this appeared to be the first actual application of the personal capability assessment to the claimant, would the proper ground of supersession have been relevant change of circumstances (in the carrying out of the assessment) rather than the ground under regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (see paragraphs 122 to 127 of the Tribunal of Commissioners' decision in CIB/4751/2002 and others)?"

6. In the submission of 13 April 2004, the representative of the Secretary of State submitted that the appeal tribunal had erred in law by apparently accepting that it was the receiving of the EMP's report which justified supersession (under regulation 6(2)(g)), as had been put forward in the Secretary of State's written submission to the appeal tribunal. It was submitted that on the first application of the PCA the proper ground of supersession was relevant change of circumstances, in the actual carrying out of the PCA and the ending of deemed incapacity for work under regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995 (the 1995 Regulations). On that basis, the change of circumstances would have occurred on 9 May 2003, so the Secretary of State's representative suggested that I should substitute a supersession decision that the claimant was not incapable of work and not entitled to contribution credits from 9 May 2003. As already noted, the submission of 1 July 2004 on behalf of the Secretary of State took a different view and submitted that, if the claimant

failed the PCA, the superseding decision to take away entitlement to credits could take effect from 18 August 2002. It was because of the difficulties of that submission that I directed the oral hearing.

Did the appeal tribunal err in law?

7. Mr Maurici submitted that the appeal tribunal did not err in law in a way that justified setting its decision aside by apparently relying on regulation 6(2)(g) of the Decisions and Appeals Regulations, because there was an alternative ground available in regulation 6(2)(a)(i) (relevant change of circumstances). He also submitted that there was no error of law justifying the setting aside of the decision in the appeal tribunal's failure to explain why it made its decision effective from 18 August 2002, because that was the only possible date from which, once the appeal tribunal had confirmed the claimant's failure of the PCA, it could take effect. But finally he submitted that the appeal tribunal had erred in law when it noted that the claimant had raised some new descriptors, compared to her IB50 questionnaire, in her letter of appeal and said that without the ability to question her it was unable to establish whether those new descriptors could be satisfied, but gave no reasons for not adjourning for an oral hearing to take place.

8. I think that I might just be prepared to accept that last submission. But, contrary to Mr Maurici's second submission above, I conclude that the appeal tribunal did err in law, not only in failing to explain the effective date of its decision (having also failed to remedy the defect in the Secretary of State's decision of not identifying any ground of supersession on which the existing decision could be altered), but also in adopting 18 August 2002 as the effective date. For the reasons explained below, on the facts as found by the appeal tribunal, the effective date of a superseding decision based on regulation 6(2)(a)(i) of the Decisions and Appeals Regulations should in this case have been 9 May 2003. For that reason, I set aside the appeal tribunal's decision as erroneous in point of law.

9. Mr Maurici submitted that the case should be referred to a new appeal tribunal for rehearing. The claimant was agreeable to such an outcome. She had been under a misapprehension when she originally opted for an paper hearing, as she understood that an oral hearing could not be arranged close enough to her home for her to want to travel, in view of the effects of her condition. Now she has moved and would be able to attend an oral hearing at the nearest tribunal venue. But before I can give directions to the new appeal tribunal, I must try to sort out the legal position on the effective date of superseding decisions in cases like the present.

Deemed incapacity for work, the PCA and supersession

10. I shall not set out all the relevant legislation. The essential background is that section 171C(1) of the Social Security Contributions and Benefits Act 1992 provides that, except in the limited cases in which the own occupation test applies, "the question whether the person is capable or incapable of work shall be determined in accordance with a personal capability assessment". There are a number of circumstances in which a person can be treated as incapable of work (eg under regulation 10 or regulation 27 of the 1995 Regulations). The relevant circumstances in the present case are prescribed in regulation 28 of the 1995 Regulations, under which a person shall, if certain conditions are met, be treated as incapable of work in accordance

with the PCA until such time as she has been assessed under the PCA or is to be treated as capable of work by reason of failure to provide information or attend a medical examination. The main condition, apart from not having been found, subject to exceptions, capable of work in the previous six months, is that the person provides evidence of incapacity for work in accordance with the Social Security (Medical Evidence) Regulations 1976. In other words, the person must provide either doctor's statements on the prescribed form or some other sufficient evidence of incapacity for work.

11. Thus, when the claimant in the present case did not send in doctor's statements after 17 August 2002, one of the necessary conditions for her to be treated as incapable of work under regulation 28 ceased to exist, whether or not a reminder was sent. It is rightly accepted by the Secretary of State that a retrospective medical statement may satisfy the condition in regulation 28 for a past period, provided that it is received by the right time, but no such statements were produced in the present case before the decision of 9 May 2003 was made. In the context of claims for incapacity benefit where at the outset a necessary condition for the operation of regulation 28 (not having been found capable of work in the previous six months) did not exist, Commissioners have held in decisions CIB/1031/2000 and CIB/3106/2003 that the claim could not be disallowed on that ground alone. A judgment would have to be made on whether or not the claimant actually satisfied the PCA as at the date of claim and down to the date of the decision. Depending on the circumstances, that could be by reference to existing evidence, such as a recent EMP examination that had led to the PCA being failed and the removal of entitlement by supersession, or might need the obtaining of new evidence before a PCA could be carried out by a decision maker. The decisions assumed (and, indeed, positively stated in paragraph 6 of CIB/3106/2003) that, if a new PCA were carried out by a decision maker, which the claimant passed, the claim would be allowed from the outset, not merely from the date of the decision. I agree with those decisions and consider that the principles stated apply equally to a case where regulation 28 did apply at the beginning of a claim or period, but a necessary condition for its operation ceases to exist.

12. How does that affect the operation of the powers of supersession? The author of the Secretary of State's submission of 1 July 2004 (Mrs Gratrex) took the view that, in the circumstances of the present case, a decision could not be made that the claimant was not incapable of work merely because the conditions of regulation 28 ceased to be satisfied (paragraph 4). There would have to be a PCA. But she also said in paragraph 7 that it was not possible for a claimant to satisfy the PCA for any period before the assessment was carried out by a decision maker (paragraph 7). That led her into complicated submissions about what sorts of determinations could be made for the period between the end of the period of satisfaction of regulation 28 and the carrying out of a PCA, depending on the result of the PCA and also on whether the case was one where incapacity benefit had been awarded or was a credits-only case.

13. At the oral hearing, Mr Maurici expressly resiled from the propositions in paragraphs 4 and 7 of Mrs Gratrex's submission (see paragraphs 26 and 38 of his written submission). He submitted that, once a claimant ceased to meet the conditions for being treated as incapable of work under regulation 28, in the absence of the carrying out of a PCA she would have to be regarded as capable of work. The failure to provide medical statements was therefore a relevant

change of circumstances which gave grounds for supersession.

14. However, he went on to submit, applying CIB/3106/2003, that the Secretary of State had to arrange a PCA and in a case where the claimant had never come within regulation 28 or at some point fell outside it "is required in arranging the PCA to look at any prior period where reg 28 was not in play in order `to determine whether the claimant is actually incapable of work in accordance with the assessment' in that period" (paragraph 35 of his written submission). Mr Maurici submitted that, if the PCA was favourable to the claimant, it would relate back to any period in which the claimant was not already treated as incapable of work by virtue of regulation 28. If the PCA was not favourable to the claimant, there would be one supersession decision taking effect from the day after the last day covered by regulation 28 (through the provision of medical evidence in the present case), based first on the change of circumstances in medical evidence ceasing to be provided and second on the change of circumstances in the PCA actually being applied.

15. Mr Maurici submitted that supersession on the first change of circumstances could properly take effect from the day after regulation 28 ceased to apply, in accordance with regulation 7(2)(c)(iii) of the Decisions and Appeals Regulations. That was because, at the point that supersession for the first change of circumstances was applied, there had not been an incapacity determination as defined in regulation 7A, so that regulation 7(2)(c)(ii) did not apply to make the effective date the date of the superseding decision unless the claimant should have realised that the change of circumstances should have been notified. Mr Maurici very properly recorded a question mark against that last proposition. But he submitted that the Secretary of State's actual supersession decision in the present case did follow a chronological order in first identifying the ceasing of the provision of medical evidence and then the failure of the PCA (although I note that there was no express reference at all to powers of supersession or to the carrying out of a supersession).

16. I am indebted to Mr Maurici for taking the analysis considerably further forward. I agree with him that, contrary to paragraph 7 of Mrs Gratrex's submission, the result of a PCA can and generally should have effect in a past period in which a claimant is not already deemed to be incapable of work by virtue of regulation 28 (subject to evidence of changes in the claimant's condition in that period). But it seems to me that his submission is internally inconsistent in a similar way to Mrs Gratrex's. I do not see how his proposition that, if a claimant falls outside the operation of regulation 28, either from the beginning of a claim or after a period of operation, she must be treated as capable of work can stand with his proposition that in such circumstances the Secretary of State must arrange a PCA, whose result can relate back to the period outside the effect of regulation 28. In my view, paragraph 4 of Mrs Gratrex's submission expressed the essence of the principle endorsed by CIB/1031/2000 and CIB/3106/2003 and the following through of that principle requires a result different from that put forward by Mr Maurici.

17. I see the position as follows, using the circumstances of the present case as an example. The ceasing to provide medical evidence after 17 August 2002 was a relevant change of circumstances in the general sense, because it was material to the question of whether the claimant was incapable of work in accordance with the PCA. However, it was not a change of

circumstances that on its own justified a superseding decision removing entitlement to incapacity credits. The change of circumstances only showed that the claimant could not be treated as incapable of work, not that she was not actually incapable of work in accordance with the PCA. That could not be shown until a PCA had been arranged, as decided in CIB/1031/2000 and CIB/3106/2003. Thus, the relevant change of circumstances which justified altering the existing decision was the carrying out of the PCA in which it was determined that the claimant was not incapable of work.

18. If, as I agree to be the case, the results of the PCA could relate back to a period starting on 18 August 2002, then I would accept that the date on which the combination of the relevant changes of circumstances took effect was 18 August 2002. In the present case, the claimant's condition and its effects on her seem to have been essentially the same throughout. However, the terms of regulation 7(2)(c)(ii) and (iii) of the Decisions and Appeals Regulations must be examined closely. They provide that, where a superseding decision on the ground of relevant change of circumstances is not advantageous to a claimant, it is to take effect (leaving out references to disability benefit decisions):

> " (ii) in the case of ... an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision), where the Secretary of State is satisfied that in relation to ... the incapacity benefit determination the claimant or payee failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify, and the claimant or payee, as the case may be, knew or could reasonably have been expected to know that the change of circumstances should have been notified,
>
> (aa) from the date on which the claimant or payee, as the case may be, ought to have notified the change of circumstances, or
>
> (bb) if more than one change has taken place between the date from which the decision to be superseded took effect and the date of the superseding decision, from the date on which the first change ought to have been notified, or
>
> (iii) in any other case, except in the case of a decision which supersedes ... an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision), from the date of change."

19. The decision awarding the claimant credits was an incapacity benefit decision, as regulation 7A of the Decisions and Appeals Regulations specifically defines that phrase as including decisions awarding credits that embody determinations that the person is to be treated as incapable of work. Then it seems to me that, by the point at which a superseding decision to alter the awarding decision could be made, there had been an "incapacity determination". That is defined in regulation 7A as a "determination whether a person is incapable of work by applying" the PCA in regulation 24 of the 1995 Regulations or whether the person is to be treated as incapable in accordance with regulation 10 or 27. The carrying out of the PCA involves a determination on actual incapacity. Therefore, for that action to be treated as a relevant change of circumstances an "incapacity determination" must have been made. The result is that

regulation 7(2)(c)(iii) cannot apply, because there has been an incapacity determination after the decision to be superseded. And regulation 7(2)(c)(ii) can only apply if the condition about failing to notify a change of circumstances in relation to the incapacity determination is satisfied. In the present case I cannot see any such change that the claimant ought to have notified. Regulation 7 of the Decisions and Appeals Regulations thus makes no special provision as to the date of effect of the superseding decision. Therefore, the general rule in section 10(5) of the Social Security Act 1998 must apply, that the superseding decision takes effect from the date on which it is made (in this case, 9 May 2003).

20. Having taken that view of the law, I do not need to enter into any discussion about the basis of the Department's current practice, whether it is based on analysis of legal principle or on pragmatism. In cases like the present, where there is a period before the carrying out of a first PCA when the deeming of regulation 28 of the 1995 Regulations does not apply, a consequent supersession disadvantageous to the claimant cannot normally take effect before the date of the superseding decision. I say "normally" because there might be some unusual combination of circumstances that produces a different result. If the claimant passes the PCA (for instance, if in the present case the new appeal tribunal concludes that the claimant in fact scores enough points to pass the PCA), the result would be that the awarding decision was not to be superseded. As I have held above, the ceasing to produce medical evidence was not in itself sufficient to justify a supersession. If the PCA was then passed, the entitlement under the existing award would continue throughout the relevant period unaltered by any supersession. The current view (which I do not re-visit here) is that no supersession of an awarding decision is required when a claimant passes the PCA on its first application and deeming under regulation 28 is no longer possible.

Directions to the new appeal tribunal

21. The claimant's appeal against the decision of 9 May 2003 is referred to a differently constituted appeal tribunal for determination in accordance with the directions below. An oral hearing will be arranged, which should be at the most convenient venue for the claimant. I am sure that the new appeal tribunal will be greatly assisted if the claimant is able to attend, as is her intention, to give evidence and to answer questions in person.

22. There is to 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 13 November 2003. The new appeal tribunal must approach the case properly as one of potential supersession of an existing decision in favour of the claimant on the ground of relevant change of circumstances. It must apply the conclusions of law set out in paragraphs 19 and 20 above about the effect of a decision either that the Secretary of State has proved that the claimant does not pass the PCA (or benefit from either regulation 10 or 27 of the 1995 Regulations) or that she does pass the PCA (or benefit from regulation 10 or 27). I need give no directions of law about the interpretation of the various descriptors within the PCA. The new appeal tribunal must consider all the descriptors put in issue by the claimant's evidence and submissions. 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 remains open.

(Signed) J Mesher
Commissioner

Date: 30 September 2004