DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14 of the Social Security Act 1998. It is:

> The decision of the Sutton appeal tribunal under reference U/45/171/2003/01117, held on 8 January 2004, is not erroneous in point of law.

The issues

2. This appeal raises two issues. One was raised by the district chairman who granted leave to appeal on this ground: is there a burden of proof on the Secretary of State if a supersession is based on regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999? The other issue is that raised by the claimant, who has complained of the tribunal's conclusions and made criticisms of the medical adviser's report. I have decided that the tribunal did not go wrong in law on either issue.

History and background

3. The claimant was accepted as incapable of work from June 1998. In 2003, his capacity for work was determined under the personal capability assessment. He first completed a self-assessment questionnaire. He identified various physical disabilities and wrote that he had panic attacks at night. The claimant's GP wrote that he was not aware that the claimant had ongoing problems. The claimant was then interviewed and examined by a medical adviser, who found no disability relevant to the personal capability assessment. The decision-maker accepted the adviser's report and superseded the claimant's award of incapacity credits.

4. The claimant appealed against that decision to an appeal tribunal and opted for a hearing on the papers. His appeal disagreed with some of the medical adviser's conclusions on his disabilities. It also criticised the adviser for some of the questions he had asked. The tribunal dismissed the claimant's appeal.

5. The claimant was granted leave to appeal to a Commissioner by a district chairman on the ground set out in paragraph 2. Case management directions were given by Mr Commissioner Mesher who directed the Secretary of State:

> 'The submission should deal with all aspects of the case as well as with the point specifically mentioned by the district chairman when granting leave to appeal (which I do not at present find very persuasive as a point on which the claimant could rely to challenge the appeal tribunal's decision).'

The Secretary of State has not supported the claimant's appeal. The claimant has been invited to comment on the Secretary of State's submission, but has not replied. The case has come before me for decision.

Supersession under regulation 6(2)(g)

6. The tribunal chairman wrote:

> 'As [the claimant] was in receipt of incapacity credits since 26.6.98 the burden lay with the Decision Maker to show that [the claimant] had ceased to qualify for the benefit.'

That was correct in law.

The need for a supersession

7. When the claimant's capacity for work was assessed, he had an award of incapacity credits. In order to terminate that award, the Secretary of State had to supersede the decision making the award. That could only be done if there was ground for supersession. According to the Secretary of State's submission to the tribunal, the decision-maker relied on regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. That provision allows a decision to be superseded if

> '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'.

The medical adviser's report was given under regulation 8.

Regulation 6(2)(g) and outcome of the supersession

8. There are two ways that a decision-maker can use regulation 6(2)(g). I suspect that the way it works in practice in this. The evidence relevant to the claimant's capacity for work is collected. This will typically consist of the claimant's self-assessment, a report from the claimant's GP and the medical adviser's report. That evidence is put to the decision-maker, who considers it and decides whether the claimant is still incapable of work. If the claimant is still incapable of work, the decision-maker leaves the award in place and makes no decision on supersession. Regulation 6(2)(g) is irrelevant. But if the claimant is no longer incapable of work, the decision-maker undertakes a supersession. Regulation 6(2)(g) authorises that process. It does not dictate the outcome of the supersession. That is determined by the decision-maker's analysis of the evidence and the conditions of entitlement.

9. The other possibility is that the evidence is referred to a decision-maker who always undertakes a supersession on the authority of regulation 6(2)(g). If the claimant remains incapable of work, the decision taken is not to supersede the existing award. If the claimant is no longer incapable of work, the decision taken is to terminate that award.

10. On either approach, regulation 6(2)(g) merely authorises a supersession procedure. It does not determine the outcome. It merely recognises that evidence has been produced that may, or may not, show that the operative decision should be replaced. The outcome is determined by the conditions of entitlement for an award.

Burden of proof and regulation 6(2)(g)

11. The burden of proof is concerned only with matters of fact. See the explanation of Lord Justice Sedley in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All

England Law Reports 449 at page 477. It follows that it has no relevant to regulation 6(2)(g), which merely allows a supersession if particular evidence is produced. The legal operation of the provision is not dependent on the content of that evidence or on its effect for the claimant's entitlement.

12. But once the supersession procedure has begun, the decision-maker has to decide what the outcome should be. That involves considering the evidence that has triggered the application of regulation 6(2)(g), along with any other relevant evidence. The decision-maker then has to decide, as a matter of fact, whether the claimant is still incapable of work. At that stage the burden of proof is relevant.

13. On basic principle, the burden is on the person who seeks to overturn the existing position. In a case like this, that person is the Secretary of State, acting through the decision-maker. Accordingly, the burden of proof is on the decision-maker. That is in accordance with the principle set out, in relation to the former review procedure, by Chief Commissioner Micklethwait in *R(I) 1/71*, at paragraph 16:

> 'A claimant must in general prove his title to a benefit. Once he has done so and has been awarded, and perhaps paid, the benefit, he can fairly insist that those who contend that the award should be varied or cancelled on review must shew that there are valid grounds for review.'

14. On appeal, the tribunal reconsiders the decision-maker's decision as if afresh. The burden remains the same.

The relevance of the burden of proof

15. Lady Hale has recently considered this issue in *Kerr v Department for Social Development* [2004] UKHL 23. She set out the social security adjudication procedures and commented:

> '62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
>
> '63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof.'

16. This picture of a co-operative process may be more theoretical than real in the context of a closely fought appeal before an appeal tribunal. However, the point remains valid that the burden of proof is not relevant in the vast majority of cases. It will only be relevant in the two circumstances identified by the Commissioner in *CIS/427/1991*, at paragraphs 29 and 30. Those circumstances are: (a) if there is no relevant evidence on an issue; and (b) if the evidence on the issue is so evenly balanced that it is impossible to determine where the balance of probabilities lies.

17. In this case, the evidence was overwhelming against the claimant. The medical adviser had found almost no abnormality of function relevant to the personal capability assessment. That evidence rebutted the claimant's evidence of his disabilities. In the absence of any further evidence from the claimant, the balance of probabilities was clearly in favour of the Secretary of State.

The grounds of appeal

18. The claimant makes two points in his grounds of appeal. First, he disagrees with the tribunal's conclusions on the facts. That is not sufficient to show that the tribunal went wrong in law. As I have said, the tribunal's decision was supported by the evidence of the medical adviser. At the least, it would have been difficult for the tribunal to justify any other decision on the evidence before it.

19. Second, the claimant says that he wants to complain about the conduct of the medical adviser. Specifically, he criticises some of the questions he asked the claimant about his divorce and the custody of his children. I have no jurisdiction over this matter. My jurisdiction is limited to deciding whether the tribunal went wrong in law. Taken out of context, the questions that the medical adviser asked may seem irrelevant to an assessment of the claimant's capacity. It may be that he was merely trying to put the claimant at his ease or to establish a rapport with him. But, whatever the reason for the questions, I do not see how they can have affected the doctor's assessment of the claimant's disabilities. They did not affect the value of his evidence on the matters relevant on the appeal.

Disposal

20. The tribunal did not go wrong in law. I dismiss the appeal.

Signed on original
on 3 September 2004

Edward Jacobs
Commissioner