DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8(4) and (5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It is:

   I SET ASIDE the decision of the Birkenhead appeal tribunal, held on 19 August 2003 under reference U/06/062/2003/00791, because it is erroneous in point of law.

   I give the decision that the appeal tribunal should have given, without making fresh or further findings of fact.

   My DECISION is that the Secretary of State's decision of 7 April 2003 is confirmed. The claimant was not, and was not to be treated as, incapable of work on and from that date.

The appeal to the Commissioner

2. This is an appeal by a claimant, brought with the leave of Mr Commissioner Rowland. The case came before me for decision. In view of the issues raised by the appeal, I directed an oral hearing. It was held before me in London on 19 July 2004. The claimant was represented by Mr J Hoggart of the claimant's local Social Services Department. The Secretary of State was represented by Ms S Das, of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to both representatives for their clear and succinct submissions.

History and background

3. The claimant became incapable of work in 1999. He first received statutory sick pay. Then, on 11 April 2000, he was award incapacity benefit from and including 9 April 2000. His case was considered by a medical adviser on 15 August 2000, who certified that the claimant was in an exempt category in that he had an active and progressive form of inflammatory polyarthritis. In 2003, the claimant completed a self-assessment form for the personal capability assessment. A medical adviser considered the claimant's case and certified that he was not in an exempt category. The claimant was examined by a medical adviser, who advised that he did not satisfy the personal capability assessment. The Secretary of State's decision-maker accepted that advice and gave a decision superseding the decision of 11 April 2000 and terminating the award of incapacity benefit on and from 7 April 2003.

4. The claimant appealed against that decision to an appeal tribunal. The appeal raised as one of its issues whether the claimant was in an exempt category. However, the tribunal dealt only with the personal capability assessment, confirming the Secretary of State's decision.

The issues

5. This appeal raises two issues before the Commissioner. One issue relates to capacity for work. What is the proper interpretation of regulation 10(2)(e)(iii) of the Social Security (Incapacity for Work) (General) Regulations 1995? The other relates to the proper grounds for supersession. This was raised by Mr Commissioner Rowland in granting leave. The Secretary

of State relied on regulation 6(1)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Mr Rowland questioned whether the correct ground was not regulation 6(2)(a)(i) or (b).

Exemption – the legislation

6. For most claimants, their entitlement to incapacity benefit is determined first by a GP's medical certificate and then by the personal capability assessment. However, claimants with some conditions are not subjected to assessment under the personal capability assessment. They are treated as incapable of work. Those conditions are set out in regulation 10(2) of the Social Security (Incapacity for Work) (General) Regulations 1995. The condition relevant to this case is set out in regulation 10(2)(e)(iii). It is

> (e) that he is suffering from any of the following conditions, and there exists medical evidence that he is suffering from any of them-
>
> (iii) an active and progressive form of inflammatory polyarthritis'.

Exemption - the claimant's argument

7. Mr Hoggart argued that the words 'active and progressive form of inflammatory polyarthritis' had to be interpreted literally in their grammatical and ordinary sense, unless the context required otherwise. He argued that the conditions specified in regulation 10 were all based around symptoms. What mattered was their effect on the claimant's capacity for work, not their cause or origin in a particular disease.

8. He approached the interpretation of this expression by dissecting it into its component words, defining each of them, and then re-assembling in order to identify their combined meaning. His definitions were:

- Active – currently manifested, not quiescent.
- Progressive – worsening.
- Inflammatory – characterised by the body's usual protective response.
- Polyarthritis – bearing the symptoms of pain, swelling, restriction of movement and redness.

Exemption - the Secretary of State's argument

9. Ms Das argued that the interpretation of regulation 10(2)(e)(iii) was essentially a medical matter and that we should rely on the medical evidence of its meaning. In support of this, she provided a copy of a memorandum of 27 April 1998 by Dr Roger Thomas, a Medical Policy Adviser in the office of the Chief Medical Adviser to what was then the Department of Social Security. I have found the same material in the *Incapacity Benefit Handbook for Approved Doctors* (3 June 2004). As this is the advice currently given to medical advisers, I have reproduced it rather than the memorandum. (It is available on the Department for Work and Pensions' website.)

2.2.3.4 Active and progressive forms of inflammatory poly-arthritis (CP referrals)

It is important to note the differences between inflammatory polyarthritis and the more common osteoarthritis, which is usually not inflammatory in nature and may affect only one joint.

Osteoarthritis is used to define a group of conditions affecting the synovial joints and characterised by the loss of articular cartilage and overgrowth and remodelling of the underlying bone due to increased activity of the subchondral bone. It is thought to be due to a disturbance of the balance between the stresses applied to the joint and its capacity to stand them. There are several factors leading to this condition:

- Ageing
- Inherited predisposition
- Metabolic defects
- Abnormal joint loading
- Previous trauma to the joint
- Abnormalities of the cartilage
- Damage to the joint caused by one of the inflammatory joint diseases.

Inflammatory arthritides are a group of conditions which differ from osteoarthritis in a number of key respects. They are usually systemic illnesses which are the result of an immunological disorder. The features of the arthritis in these diseases differs from that in osteoarthritis. There is an inflammation of the synovial lining of the joint and erosion of bone rather than cartilage destruction and overgrowth of bone.

The joint changes are often associated with vasculitis (inflammation of arteries), pericarditis (inflammation of the membranes surrounding the heart) and anaemia. Such diseases include rheumatoid arthritis, Systemic Lupus Erythematosus and psoriatic arthritis.

It may be helpful to differentiate these two types of arthritis by contrasting:

- Osteoarthritis where any joint inflammation is secondary to the disease process, to the inflammatory arthritides where inflammation is the primary process and
- An inflammatory polyarthritis where all the affected joints will be involved in the primary inflammatory process, to osteoarthritis where only some, or possibly none, of the joints are involved in any secondary inflammation.

10. Ms Das also cited and relied on the decision of Mr Commissioner Rowland in *CIB/2011/2001*. The claimant in that case had osteoarthritis and the issue was whether the claimant was entitled to the benefit of regulation 10(2)(e)(iii). The Commissioner was referred

to Dr Thomas' memorandum. He decided that it correctly stated the interpretation of the provision. His reasoning is in paragraph 11:

> 'I accept that the claimant's condition was "inflammatory" but it seems to me that the use of that word as a qualification of "polyarthritis" in regulation 10(2)(e)(iii) suggests that the word "inflammatory" in the Regulations was intended to refer to a primary process rather than a secondary process. Therefore, in the absence of any medical opinion that the term "inflammatory polyarthritis" would be an apt description of osteoarthritis affecting several joints with inflammation as a secondary process, I accept the distinction drawn by Dr Thomas.'

Exemption – analysis

11. I have found this a difficult issue. The reason is that I do not understand why, if the Secretary of State's argument is correct, the law draws the distinction between primary and secondary processes. Incapacity benefit is concerned with those who cannot work, or are not expected to work. In that context, the emphasis should be on effect rather than on cause. It may be that there is some good reason for distinguishing between the two processes, but it is not in evidence before me. In directing an oral hearing, I said that I had allowed longer notice than usual so that the parties could obtain and submit medical evidence. However, the only evidence submitted was Dr Thomas' memorandum. I notice that that was also the only evidence put to Mr Commissioner Rowland.

The claimant's argument

12. I am attracted by Mr Hoggart's emphasis on the effect of a medical condition rather than its precise classification or cause. However, I do not accept his argument that regulation 10 defines conditions by reference to symptoms. In particular, I do not accept that polyarthritis is merely a way of describing particular symptoms. It is, I accept, a generic term. But it refers to a number of different conditions, such as osteoarthritis and rheumatoid arthritis, by their nature. That is wider than merely the particular package of symptoms by which they manifest themselves to those affected. It includes the underlying causes and the processes by which those causes are given effect.

13. There is, however, a more important flaw in Mr Hoggart's argument. It is that his approach to interpretation is not correct. It is a mistake to believe that the meaning of a composite expression can necessarily be found by combining the meanings of its component parts. The example I used at the oral hearing was 'fish and chips'. This expression has a definite meaning that is more specific than the meaning of its two constituent words taken in isolation. On Mr Hoggart's reasoning, a plate containing two frozen oven chips and a dead goldfish would be a plate of 'fish and chips'. But that is not what the expression means. In other words, the flaw in Mr Hoggart's approach to interpretation is that it ignores the specific meaning that can attach to a composite expression in a particular context.

The Secretary of State's argument

14. I do not find the Secretary of State's argument satisfying for the reason I have given. I also share Mr Hoggart's reluctance to allow the Secretary of State to delegate the issue to

doctors. The expression I have to interpret may be a medical one, but it is used in legislation and I have to interpret it. I cannot delegate that responsibility.

15. Having said that, I accept the Secretary of State's interpretation. I approached the issue in two stages. I considered the expression as a whole. I began with the language used and with the way that I have seen medical terminology used in other cases. The language used is not the language that I usually find associated with osteoarthritis. That form of arthritis may affect a number of joints and it may involve inflammation. But I have never heard the word 'active' used in connection with it. 'Symptomatic' and 'asymptomatic', yes, but not 'active'. Active suggests that the condition may exist without being active. I have heard of rheumatoid arthritis being in remission and, therefore, not active, but I have never heard of this in a case of osteoarthritis. Quite the contrary, I regularly see evidence that osteoarthritis will inevitably deteriorate. Deteriorate, notice, not progress. This suggests that the Secretary of State's argument is correct that osteoarthritis is not an exempt condition.

16. Having formed that provisional conclusion, I checked it by doing an internet search to see how the expression was used in medical literature. I do not claim to have made a comprehensive search. But the impression I have formed as a result of that search is that the expression in medical usage does not cover osteoarthritis. That confirms my provisional conclusion of the legislative language.

Exemption – the evidence

17. The tribunal did not deal with either the interpretation or the application of regulation 10(2)(e)(iii). It thereby went wrong in law. A rehearing is not necessary. In view of my interpretation of that provision and the terms of the evidence, no medical expertise is required in order to determine whether the evidence shows that the claimant has an active and progressive form of inflammatory polyarthritis.

18. The evidence does not show that the claimant has this condition as I have interpreted it. It shows that he has osteoarthritis, that it affects several joints and that it is inflammatory. That is not enough to satisfy the regulation. Given my interpretation of the legislation, I did not understand Mr Hoggart to take a different view of the evidence.

Supersession

19. On the facts as I have found them, there are two possibilities. One possibility is that the doctor was wrong in 2000 to certify that the claimant satisfied the condition in regulation 10(2)(e)(iii). On this basis, a permissible ground for supersession was regulation 6(2)(b)(i) – that the decision was based on a mistake as to a material fact. The other possibility is that the doctor was right at that time, but that by April 2004 the claimant no longer satisfied that condition. On this basis, there was a permissible ground for supersession in regulation 6(2)(a)(i) – that there had been a relevant change of circumstances. On either basis, there was a ground to authorise the supersession carried out by the Secretary of State without needing to rely on regulation 6(2)(g).

20. However, both parties agreed (a rare event on a supersession issue) that regulation 6(2)(g) did authorise the supersession. I accept their submissions.

21. Regulation 6(2)(g) authorises a supersession of a decision if three conditions are satisfied. Those conditions are:

- the decision to be superseded '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'.

22. The first condition requires an incapacity benefit decision. This is defined by regulation 7A(1) as:

> 'a decision to award a relevant benefit 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'.

The decision in this case is that of 11 April 2000. It awarded incapacity benefit, which is a relevant benefit, to the claimant. And it was a necessary to that decision that the claimant was treated as incapable of work under regulation 28(1) and (2)(a) of the Social Security (Incapacity for Work) (General) Regulations 1995.

23. The second condition required an incapacity benefit determination. This is defined by regulation 7A(1) as:

> '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 regulation 10 ... of those Regulations'.

The medical adviser in 2000 certified that the claimant was in an exempt category. If that certificate had not been accepted by the Secretary of State, the claimant would have immediately proceeded to assessment under the personal capability assessment. The reason he did not was that there was a determination that he was treated as incapable of work.

24. The third condition is clearly satisfied by the report of the medical adviser in 2003.

25. So, all three conditions were satisfied and the Secretary of State was entitled to rely on regulation 6(2)(g) to authorise the supersession.

Disposal

26. The tribunal went wrong in law by failing to deal with an issue raised by the appeal. I must set its decision aside. However, having considered the evidence, the Secretary of State's decision was correct in fact. I have, therefore, substituted a decision for that of the tribunal, confirming the Secretary of State's termination of the claimant's entitlement to incapacity benefit.

Signed on original
on 30 July 2004

Edward Jacobs
Commissioner