DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of the tribunal sitting in Glasgow (the tribunal) on 21 June 2004 is wrong in law. I set it aside and return the case for rehearing by a fresh tribunal.

The issues

2. These are two in number. The first is whether a decision awarding invalidity benefit may be superseded under regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the decisions regulations). The second is whether, if this is not legally permissible, there is an alternative supersession ground which can be utilised and, if so, has a tribunal the power to found on such a ground in correction of the use of regulation 6(2)(g) by the Secretary of State.

The statutory provisions

3. These are as follows:

Social Security Contributions and Benefits Act 1992

“57.—(1) For the purposes of any provisions of this Act relating to sickness benefit or invalidity benefit –

(a) subject to the provisions of this Act, a day shall not be treated in relation to any person –

…

(ii) as a day of incapacity for work unless on that day he is, or is deemed in accordance with regulations to be, incapable of work by reason of some specific disease or bodily or mental disablement,

(‘work’, in this paragraph, meaning work which the person can reasonably be expected to do);

…”

Social Security (Incapacity Benefit) (Transitional) Regulations 1995 SI No 310

“17.—(1) Where a person is entitled to invalidity benefit immediately before the appointed day, that award of invalidity benefit shall have effect on or after the appointed day as if it were an award of long-term incapacity benefit; and such an award shall be referred to in these Regulations as a transitional award of long-term incapacity benefit.

(2) Subject to the provisions in Part VI, a person’s entitlement to a transitional award of long-term incapacity benefit shall be subject to him being incapable of work as determined in accordance with Part XIIA of the 1992 Act (Incapacity for Work).
29.— A person’s entitlement to a transitional award of incapacity benefit shall, except as provided in regulation 31, be subject to him satisfying the tests of incapacity for work under Part XIIA of the 1992 Act.

31.—(1) Where it has been determined that a person is incapable of work for any purpose of the 1992 Act immediately before the appointed day and he continues to be incapable of work on or after the appointed day, the question of whether he is capable or incapable of work shall fall to be determined in accordance with the personal capability assessment, but he shall not be required to satisfy or be treated as having satisfied the condition of entitlement that he is incapable of work in accordance with that assessment until he has been assessed as to incapacity for work in accordance with regulations made under section 171C of the 1992 Act (the personal capability assessment) … so long as he satisfies the condition in paragraph (2).

(2) The condition referred to in paragraph (1) is that, in respect of each day, a person shall be required to provide evidence of his incapacity for work in accordance with the Social Security (Medical Evidence) Regulations 1976 (which prescribe the form of doctor’s statement or other evidence in each case).

...”

Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI No 991
(as amended)

“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 had effect;

...”

(g) is an incapacity benefit decision where there has been in 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;
7. …

(2) Where a decision under section 10 is made on the ground that there has been, or it is anticipated that there will be, a relevant change of circumstances since the decision had effect, the decision under section 10 shall take effect

…

(c) where the decision is not advantageous to the claimant

…

(iii) … except in the case of … an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision), from the date of the change.

…

(30) Where a decision is superseded in accordance with regulation 6(2)(a)(i) and the relevant circumstances are that there has been a change in the legislation in relation to a relevant benefit, the decision under section 10 shall take effect from the date on which that change in the legislation had effect.

7A. – (1) For the purposes of regulation … 6(2)(g) …

…

(c) …

“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 (Incacity for Work)(General) Regulations 1995 or whether a person is to be treated as incapable of work in accordance with regulation 10 (certain persons with a severe condition to be treated as incapable of work) or 27 (exceptional circumstances) of those Regulations …

…

10. A determination (including a determination made following a change of circumstances) whether a person is, or is to be treated as, capable or incapable of work which is embodied in or necessary to a decision under Chapter II of Part I of the Act or on which such a decision is based shall be conclusive for the purposes of any further such decision.”
Background

4. On 11 January 2004, a decision maker (DM) on behalf of the Secretary of State made the following decision in the claimant’s case:

“I have superseded the decision of the adjudication officer dated 11 October 1993 awarding incapacity benefit. This is because the Secretary of State has received medical evidence following an examination by an approved doctor, since that decision was given.

[The claimant] is not entitled to incapacity benefit from and including 11 January 2004.

This is because she has been assessed under the Personal Capability Test and has not attained the required number of points.

... "SS Decisions and Appeals Regulations Reg 6(2)(g)"

5. The claimant appealed to a tribunal. The only medical report in the papers was that dated 17 December 2003 by a medical adviser on behalf of the Department; this report addressed the various activities and descriptors in the personal capability assessment (PCA), and on such report the DM had relied in carrying out the adverse supersession. The claimant was represented at the tribunal hearing by Mr Christopher Orr, a welfare rights officer with Glasgow City Council Social Work Services. No presenting officer appeared to represent the Secretary of State.

The tribunal decision

6. The tribunal allowed the appeal. Its decision notice read as follows (as copied verbatim):

“The decision of the Secretary of State issued on 11/01/2004 is Revised

The appellant is entitled to Incapacity Benefit.

The decision maker is acting ultra vires in purporting to use the Social Security and Child Support (decisions and appeals) Regulations 1999. Regulation 6 to supersede the decision entitling the appellant to benefit”.

7. Its statement of reasons for its decision was the following:

“The appellant claimed incapacity benefit from and including 25.3.93. The appellant has been in receipt of Incapacity Benefit since then. The decision maker purports to supersede said decision by use of Regulations 3 and 6(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. As Deputy Commissioner Sir Crispin Agnew states inter alia at CSIB/501/03 Regulation 6(2)(g) only relates to ‘a decision to award a relevant benefit’ and one which is ‘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’ ...

Any determination in 1990 could not have been a determination under Part XIIA which came into effect in April 1995’.

Albeit said decision was dealing with a case of Invalidity Benefit if said reasoning is correct then said regulation cannot be applied to a decision made in 1993.”
Appeal to the Commissioner

8. The district chairman granted the Secretary of State leave to appeal to the Commissioner and a legal officer granted Mr Orr’s request for an oral hearing.

9. The grounds made on behalf of the Secretary of State are that the decision in CSIB/501/03 is erroneous in law and the tribunal therefore likewise erred in following it. Secondly, it is submitted that if that argument does not succeed, the tribunal erred by failing both to consider alternative grounds of supersession and to thereafter deal with and decide the issues arising under any such alternative ground.

Oral hearing

10. The case came before me for an oral hearing on 16 March 2005. The Secretary of State was represented at the oral hearing by Mr David Bartos, Advocate, instructed by Mr Colin Brown, Solicitor, of the Office of the Solicitor to the Advocate General. The respondent remained represented by Mr Christopher Orr. I am grateful to them all for their assistance. I refer to their oral arguments in the course of my own conclusion and reasons.

Reasons

Regulation 6(2)(g) of the decisions regulations

11. In CSIB/501/03, Deputy Commissioner Sir Crispin Agnew QC categorised as the sole issue in the appeal before him:

“… whether or not the Secretary of State was entitled to treat an award of invalidity benefit from 25 July 1990 as an award of incapacity benefit and so susceptible to supersession under Regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999”.

12. His reasons for deciding that the Secretary of State could not use regulation 6(2)(g) of the decisions regulations in these circumstances were as follows:

“8. I agree that “shall have effect” in Regulation 17(1) of the Transitional Regulations means that the award falls to be treated “as if it were an award of long-term incapacity benefit”. However, it is only to “have effect” as, but it is not to “become”, incapacity benefit. I also consider that the provision in Regulation 17(2) is important in that it provides that “person’s entitlement to a transitional award … shall be subject to him being incapable of work”. If the award is subject to the claimant continuing to be incapable of work, then the decision must be capable of being changed [to use a neutral word] if the claimant becomes capable of work under Part XIIA of the 1992 Act. The question is whether this change can be effected under Regulation 6(2)(g).

9. The Transitional Regulations calls the award “a transitional award of long-term incapacity benefit” and provides that it shall be referred to as such in those Regulations. It does not specify how they are to be referred to in other Regulations. Regulation 6 of the 1999 Regulations refers to an “incapacity benefit decision”, a term which is defined in Regulation 7A.

10. The critical point in this case is the definition of “incapacity benefit decision”, because Regulation 6(2)(g) relates only to such a decision. The definition relates to “a decision to award a relevant benefit” and one, which is “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”. I agree with the
submission for the claimant, that the decision to award, what is now called “a transitional award of long-term incapacity benefit” to the claimant in 1990 cannot be “a decision to award a relevant benefit … which is a determination … under Part XIIA”. Any determination in 1990 could not have been a determination under Part XIIA which came into effect in April 1995. I also consider that the “take (sic) effect” does not convert the 1990 decision into an incapacity decision, because it relates only to the continuing effect and not to a change into the new benefit.

11. I have considered whether or not the words “a decision to award” could be construed to include a decision to continue an award or a decision to stop an award, which would now be made under Part XIIA by virtue of Regulation 17(2). I consider that “to award” must be read in its normal sense and relate only to a decision to make an award. The award in this case was made in 1990.

12. For those reasons I hold that the tribunal erred in law on this preliminary point. The Secretary of State’s decision was founded on a supersession under Regulation 6(2)(g). As this Regulation cannot be used in these circumstances the Secretary of State’s decision cannot stand, so the case must go back to him for re-consideration."

13. Mr Bartos accepted that, for the purposes of regulation 6(2)(g) of the decisions regulations, the decision to be so superseded must be “an incapacity benefit decision” and as defined in regulation 7A(1)(c) of the same regulations; “a relevant benefit” is not further defined there but sections 39 and 8(3) of the enabling Act (the Social Security Act 1998) mean that incapacity benefit but not invalidity benefit is a said “relevant benefit”.

14. Mr Bartos did not suggest, and had he done so I would have considered that the grammar and overall wording precluded it, that the phrase “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” qualified “relevant benefit” rather than “decision”. His argument was rather that regulation 17 of the Social Security (Incapacity Benefit)(Transitional) Regulations 1995 (the transitional regulations) converted an invalidity benefit decision for all purposes into an incapacity benefit decision, and as such an incapacity benefit decision it then necessarily fell within regulation 7A(1)(c) of the decisions regulations and so susceptible to supersession under regulation 6(2)(g) thereof.

15. Mr Bartos submitted that an “award of long-term incapacity benefit” under regulation 17(1) of the transitional regulations is equivalent to a decision to make such an award; to distinguish between a decision and an award is to create a distinction without a difference, particularly when one has regard to the legislative intent.

16. He contended that the clear aim of regulation 17 of the transitional regulations was to ensure a continuity of individual benefit based on incapacity for work over the change from the former invalidity benefit regime to the new incapacity benefit system which came into operation on 13 April 1995. Regulation 17 ensured that a decision on invalidity benefit was deemed to be a decision on incapacity benefit instead and therefore automatically underpinned by a conclusion of incapacity applying the test set out under the present incapacity benefit scheme.
17. He continued that substance rather than form is what counts. If one award is to be treated as another type of award it must follow that the same applies also to the decision which results in the said award. “Decision” in regulation 7A(1)(c) of the decisions regulations must be given a purposive construction; the obvious statutory purpose behind regulation 6(2)(g) is that it provides a consistent ground of supersession where the substantive issue is incapacity for work and the Secretary of State has received a particular type of medical evidence. No rational distinction can be drawn in this respect between recipients of benefit for incapacity for work whose awards were created before and after 13 April 1995; and this therefore strongly points to interpreting “decision to award” in regulation 7A(1)(c) as including the deemed decision to award which, it is argued, arises under regulation 17 of the transitional regulations.

18. With great respect, I do not accept these arguments put on behalf of the Secretary of State. Doubtless the Secretary of State wanted the blanket application of regulation 6(2)(g) but it has already been demonstrated that the regulation (like so much of the statutory revision and supersession scheme) is not well drafted in order to cover all the circumstances which were probably intended. For example, it must equally be the case that the Secretary of State did not intend to distinguish in the use of regulation 6(2)(g) between those who were subject to the first application of the personal capability assessment in their incapacity benefit claim and others who required later such applications. However, in paragraphs 124 and 125 of R(IB) 2/04 the Tribunal of Commissioners strongly doubted that regulation 6(2)(g) could be interpreted as available as a ground of supersession in the former case:

“124. Whether regulation 6(2)(g) can be applicable on the first application of the personal capability assessment turns on whether the incapacity determination which leads to or is part of the superseding decision can itself qualify as the incapacity determination referred to in the words “where there has been an incapacity determination”. The argument that it can is based on the provision that the incapacity determination can be “before or after the decision” (i.e. the decision being superseded). However, Miss Lieven’s final submission to us, after the Secretary of State had been asked to give detailed consideration to this specific question, was to the contrary.

125. We consider that the better view is that the incapacity determination referred to cannot be the one which leads to or is part of the superseding decision, and therefore that regulation 6(2)(g) was not applicable in the present case. It must be remembered that in an ordinary case an incapacity benefit claimant who is subject to the personal capability assessment (or such a person who qualifies for contribution credits for incapacity for work) will at the outset be entitled as the result of being treated as incapable of work under regulation 28 of the 1995 Regulations. That deeming follows simply from the provision of medical evidence (usually statements from the claimant’s GP) “until such time as [the claimant] has been assessed [under the personal capability assessment]”. Where a decision awards a claimant incapacity benefit or credits on the basis of regulation 28, that is an “incapacity benefit decision”, but there will not have been an “incapacity determination”. The definition of “incapacity determination” does not cover a deeming under regulation 28. The meaning of regulation 6(2)(g) must be approached in that context. What entitles the Secretary of State to supersede under regulation 6(2)(g) is the receipt by him of medical evidence following an examination. If
that condition is to be met, the evidence must necessarily be received at a
time when the condition of there having been an incapacity determination is
also met. By definition, in the circumstances being considered, there will not
have been an incapacity determination until after the medical evidence is
received and the personal capability assessment is carried out.”

19. So it is immediately apparent that the Secretary of State has not succeeded in
covering all groups as subject to the applicability of regulation 6(2)(g). The
definition of “incapacity benefit decision” for the purposes of regulation 7A could so
easily have read:

“… means a decision resulting in the award of a relevant benefit or relevant
credit or what now has effect as the award of a relevant benefit or relevant
credit where entitlement to the said relevant benefit or relevant credit is
subject to incapacity for work as determined in accordance with Part XIIA of
the Social Security Contributions and Benefits Act 1992”

20. If conversion under regulation 17 of the transitional regulations makes an
invalidity benefit decision count as an incapacity benefit decision for all purposes,
then regulation 17(2) is otiose in so far as it provides that:

“… a person’s entitlement to a transitional award of long-term incapacity
benefit shall be subject to him being incapable of work as determined in
accordance with Part XIIA of the 1992 Act (Incapacity for Work)”

If it is so converted by operation of law, from one benefit to another benefit, then the
tests applying to the latter automatically apply to the former invalidity benefit award.
Moreover, calling it ‘a transitional award of long-term incapacity benefit’
underscores that it is not identical to a regular award of the same. Regulation 29 of
the same regulations is also rendered redundant to a degree.

21. But I prefer the reasoning of Deputy Commissioner Sir Crispin Agnew QC in
all respects on the interpretation of the relevant provisions and Mr Orr urged me to
uphold it. Mr Bartos submitted that, “in terms”, regulation 17 meant that from the
appointed day the decision awarding invalidity benefit is transformed into a decision
awarding long-term incapacity benefit, subject to the conditions set out in the
regulation, so that the last sentence of paragraph 10 of CSIB/501/03 is incorrect.
However, patently regulation 17 does not on its face contain any such express
conversion, and in my judgement nor does it arise by necessary implication.

22. The award is treated as one of long-term incapacity benefit but the decision
leading to that award, which decision when made was a decision to award invalidity
benefit, was in no sense a decision critical to which was a determination of
incapacity under the new scheme; ex hypothesi at the relevant date the test
underpinning the basis of the award was the one germane to sickness or invalidity
benefit under section 57(1) of the Social Security Contributions and Benefits Act
1992. On their present wording, nothing in regulation 17 of the transitional
regulations, nor in the definition of “incapacity benefit decision” under regulation
7A(1)(c) of the decisions regulations, turns an invalidity benefit decision into one
which used anything other than the then invalidity benefit test when it was made; that
the effect of an award resulting from such decision is changed for some purposes by
legislative fiat from 13 April 1995 is a different matter entirely.

A tribunal’s jurisdiction to carry out a correct decision
23. CSIB/501/03 was, strange as it may seem, signed on the very same day (21 January 2004) as were the combined decisions of the Tribunal of Commissioners which make up R(IB) 2/04. The Deputy Commissioner apparently took the view that, if a ground of supersession under regulation 6(2)(g) had not been made out by the Secretary of State, then all that a tribunal could do was to send the matter back to the Secretary of State for reconsideration. However, the Tribunal of Commissioners stated at paragraph 74 of R(IB) 2/04:

“We therefore reject the submission … that any shortcoming in a supersession decision (e.g. a failure to acknowledge that an existing decision needs to be superseded, a failure to state the ground for supersession, or reliance on what the appeal tribunal holds to be the wrong ground for supersession), other than a minor one, requires the appeal tribunal simply to hold the supersession to have been invalid. It is plainly desirable, in the interests of claimants and the appeal process, that decisions made on behalf of the Secretary of State should be properly and fully spelled out. However, a failure of the Secretary of State in this regard is of less significance than our conclusion that the intention displayed by the statutory scheme is that the appeal tribunal should on appeal have jurisdiction to determine whether the outcome arrived at by the Secretary of State was correct and, if it was incorrect, to make a correct decision.”

Therefore, although the tribunal did not err in following CSIB/501/03, it erred in failing to follow the above approach set out by the Tribunal of Commissioners.

24. If there had been a supersession at the same rate in the claimant’s case following an earlier application of the personal capability assessment which she passed, then regulation 6(2)(g) would certainly have been available as a ground of supersession, albeit of a different decision which the tribunal could have substituted. It is clear from the voluminous documentation submitted to me from the Secretary of State following my direction, that there have been several personal capability assessments since 1995, before the first adverse one which led to the supersession under appeal to the tribunal; but has any earlier determination that she then satisfied the personal capability assessment led to a decision? Mr Orr suggested that the answer is in the negative and I agree.

25. It would appear from the computer record allied with the point that the Secretary of State has throughout relied on the 1993 decision of an adjudication officer as the last operative decision in the case (although incorrectly referring to it as an award of incapacity benefit, just as the tribunal states that the claimant has been in receipt of incapacity benefit since 1993 yet goes on to state that CSIB/501/03 applies even though that decision was concerned with invalidity benefit, both decision maker and tribunal thereby displaying somewhat confused reasoning) that there has been no previous supersession. This accords with the majority opinion of the Court of Appeal in Wood v Secretary of State for Work and Pensions [2003] EWCA Civ 53, R(DLA) 1/03 that a superseding decision is one that alters an earlier decision. In the event, as Mr Commissioner Mesher similarly determined in CIB/451/2004, in the present case it is not necessary to decide whether there ought to have been a supersession decision when the claimant passed the PCA on its first application. If there was such a supersession decision, then patently regulation 6(2)(g) of the decisions regulations could be utilised; if not, then to which I shall now turn, an alternative ground for
superseding the 1993 invalidity benefit decision is regulation 6(2)(a) of the decisions regulations.

**Relevant change of circumstances**

26. One possible change of circumstances is that the claimant’s condition has improved since those applications of the personal capability assessment which she passed. For that purpose, a tribunal necessarily has to compare and contrast the evidence in the case about her health over a period. Mr Bartos and Mr Orr both raised this kind of situation. However, an alternative relevant change of circumstances, which neither advocate addressed, is the change in the legal test governing her incapacity for work. It has never been disputed that the coming into operation of a new rule of law constitutes a relevant change of circumstances for the purposes of altering a prior decision as from the date when it impacts on a claimant’s case. When I raised this point, neither Mr Orr nor Mr Bartos suggested that it was inapplicable here, and so I follow through the principle under the relevant legislation.

27. The first carrying out of the personal capability assessment was a change of circumstances, because it brought to an end the deeming of entitlement to a transitional award of long-term incapacity benefit from which the claimant benefited through the provision of medical evidence under regulation 31(2) of the transitional regulations. However, it was not a relevant change of circumstances because, by the effect of regulation 17(2) of the transitional regulations and affirmed in regulation 29, the deeming of such an award on a different basis was able to continue so long as she satisfied the tests of incapacity for work under the new scheme.

28. “A relevant change of circumstances” arose when, for the first time, alteration of the existing decision was justified because, having carried out the personal capability assessment, a DM determined that the claimant was no longer incapable of work; by that trigger the deeming of her award as one of long-term incapacity benefit fell entirely. At that stage, therefore, the intervening introduction of the new legislative scheme of incapacity benefit impacted on the claimant’s entitlement: following her failure of the personal capability assessment, her award reverted to one of invalidity benefit to which, by the change in the law, she no longer had entitlement nor did she now have any other basis to underpin an award.

29. Thus, the effect of a determination that the claimant is incapable of work operates in reverse order in the present situation to what happens under the use of regulation 6(2)(g). Most claimants now have an initial award of incapacity benefit so that the use of regulation 6(2)(g) is the instrument of choice by the DM for a ground of supersession. In regulation 6(2)(g) cases, establishing that ground of supersession is really a formality for the Secretary of State and the true hurdle lies rather in having to demonstrate that the resultant superseding decision should be adverse to the claimant because, on the merits, the claimant fails the personal capability assessment.

30. Circumstances like those of the present case are diminishing because they involve an award made prior to 13 April 1995, where a claimant has, until recently, continued to satisfy the PCA. As always, the burden lies on the Secretary of State on both issues, that of establishing a ground of supersession and that the superseding decision should alter the award to the claimant’s detriment. However, in these relatively rare instances, the effective hurdle for the Secretary of State is constituted by the first stage, that of showing a relevant change of circumstances. Proving that the claimant now fails the personal capability assessment is integral to this ground; it
stops the deeming of an incapacity benefit award and exposes her invalidity benefit award to the repeal of the invalidity benefit scheme. This process is the relevant change of circumstances and, if made out as correct, inevitably leads to an outcome decision which is supersession of the decision which awarded her invalidity benefit.

The effective date of the relevant change of circumstances

31. Regulation 7(2)(c) of the decisions regulations applies because the supersession is not advantageous to the claimant. Having regard to the reasoning already set out above in consideration of CSIB/501/03, the invalidity benefit decision to be superseded is not an incapacity benefit decision under regulation 7(2)(c)(iii) and therefore the supersession under section 10 takes effect from “the date of the change”. Having regard to the structure of regulation 7(2), it is apparent that this refers to the date of relevant change. In my judgement, the relevant change is when the trigger of the DM’s determination that a claimant fails the personal capability assessment takes her out of the incapacity regime and back into the invalidity benefit one so that she thereafter no longer qualifies because the former legal criteria under which she did so no longer exist.

32. Therefore, the practical result is that the same effective date normally applies as with a supersession under regulation 6(2)(g); that is to say from the date of the determination under the personal capability assessment because, although under regulation 6(2)(g) the effective date is the date of the supersession, the preceding PCA in each case is invariably the same day as the date of the consequent supersession of the awarding decision. Regulation 7(30) does not affect the above analysis as the change in the legislation had effect in the claimant’s case only from the first adverse PCA determination and the claimant was neither directly disadvantaged from 13 April 1995, nor did she seek advantage from that date.

Adjournment

33. Considering whether the tribunal should have adjourned for prior papers is academic because, in the legal situation as the tribunal mistakenly saw it to be, the issue did not arise. Given, however, that I hold that there is a ground for supersession and that its merits may now be addressed immediately, it would not be appropriate for me to substitute my own decision because the relevant findings require the expertise of the members of the new tribunal.

34. Likewise academic is the point made on the Secretary of State’s behalf that the tribunal’s decision was wrong in seeking to revise a decision which it then said was invalid.

Summary

35. The appeal is therefore remitted to a new tribunal to begin again. It is emphasised that there will be a complete rehearing on the basis of the evidence and arguments available to the new tribunal, and in accordance with my guidance above, and the determination of the claimant’s case on the merits is entirely for them. Although the Secretary of State has been successful in this appeal limited to issues of law, the decision on the facts in the claimant’s case remains open.

36. The new tribunal is however directed that, while it may not use regulation 6(2)(g) of the decisions regulations to supersede the 1993 invalidity benefit decision, nevertheless it can and should (if appropriate) rely on regulation 6(2)(a); to establish the necessary basis for a relevant change of circumstances, which will be effective
from the date of the DM’s determination, the Secretary of State must demonstrate that from that date the claimant no longer satisfies the PCA. If that onus is discharged, then supersession of the 1993 decision is inevitable as the award reverts, following the failed PCA determination, to being one of invalidity benefit which is thus terminated because it no longer has a legal basis.

37. It would seem that the claimant’s condition is variable, so that the new tribunal will wish to consider the previous assessments, which may be relevant to whether the Secretary of State satisfies it that, on 11 January 2004, she nevertheless failed the personal capability assessment. But as Commissioner Jacobs pointed out in paragraphs 35 to 37 of CIB/2338/2000:

“35. … It [the new tribunal] does not as a matter of law have to undertake in every case a comparison with the basis of the previous assessment, although that assessment may be relevant to a greater or lesser extent as evidence.

36. This does not leave claimants exposed to the whim of arbitrary determinations by the Secretary of State or appeal tribunals. In practice, there are three reasons that led to a different assessment under the pre-1998 adjudication scheme: (a) the wrong conclusion was reached on the evidence available at the time of the earlier assessment; (b) there is different evidence now available; (c) there has been a change in the nature or extent of the claimant’s disabilities. Those reasons will still exist under the new scheme. They will underlie determinations. What has changed is that it is no longer necessary for the Secretary of State or tribunals to deal with them as an essential legal requirement in determining capacity for work.

37. Claimants are adequately protected. Determinations by the Secretary of State must be based on relevant evidence and have to be justified on scrutiny by a tribunal on an appeal. Determinations of tribunals have to be made judicially and on a rational evaluation of relevant evidence. They are subject to scrutiny for mistake of law by a Commissioner.”