[2014] AACR 30

(JC v Department for Social Development (IB) [2011] NICom 177)

His Honour Judge Martin QC, Chief Commissioner **C10/10-11(IB)(T)**
Mr K Mullan, Commissioner
Mr J P Powell, Deputy Commissioner
25 July 2011

Supersession – whether there is a requirement under regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 for the tribunal to consider papers relating to previous personal capability assessments

The claimant became unfit for work and was awarded incapacity credits. On 11 April 2003 a doctor examined the claimant on behalf of the Department. On receipt of a report following the examination, a decision-maker decided that the claimant did not satisfy the personal capability assessment (PCA), superseded and disallowed the award of incapacity credits from and including 3 June 2003. The claimant's subsequent appeal was allowed by an appeal tribunal on 26 November 2003. In connection with the PCA, the claimant completed a self assessment form on 19 November 2007. On 6 March 2008 a doctor examined the claimant on behalf of the Department. On receipt of this report the decision-maker, on 26 June 2008, decided that the claimant did not satisfy the PCA, superseded and disallowed the award of incapacity credits from and including that date. The claimant's appeal against the decision-maker's decision was disallowed by the tribunal on 18 September 2008. The claimant subsequently appealed to the Social Security Commissioner. The Chief Social Security Commissioner directed that the appeal be dealt with by a Tribunal of Commissioners.

Held, dismissing the appeal, that:

1. the purpose of the introduction of regulation 6(2)(g) of the Social Security (Decisions and Appeals) Regulations (Northern Ireland) 1999 was to provide that the obtaining of a medical report or medical evidence following an examination is in itself a ground for supersession (paragraph 50(i));

2. accordingly, there is no requirement to identify a regulation 6(2)(a)(i) change of circumstances in order to supersede an incapacity benefit decision (paragraph 50(ii));

3. there is a difference between the evidential requirement to determine the ground for supersession and the evidential requirement to establish whether an individual is incapable of work in connection with the all work test or personal capability assessment (paragraph 50(iii));

4. it is no longer necessary as a matter of law for a tribunal to have before it and consider the evidence of the claimant's previous assessments in connection with the all work test or PCA (paragraph 50(iv));

5. a tribunal can call on whatever evidence it considers relevant to the proper determination of the issues arising in the appeal (paragraph 50(v));

6. it would depend entirely on the relevance of the earlier assessments in connection in determining the claimant's incapacity for work at the date of the supersession decision as to whether the tribunal is required to consider the evidence associated with previous favourable assessments (paragraph 50(vi));

7. if the claimant asserts that there has been no change in his medical condition or disablement **and** the evidence associated with previous assessments is relevant to that continuing disablement, a tribunal will be required to consider the evidence associated with previous favourable assessments. In such circumstances the last previous assessment is likely to be of more relevance than earlier ones and the relevance of any particular assessment is likely to diminish with the passage of time (paragraph 50(vii));

8. variability in condition may increase the relevance of older assessments carried out before the last previous assessment (paragraph 50 (viii));

9. details of a claimant's previous assessments in connection with the all work test or personal capability assessment may be of no relevance in a case eg, if there is evidence that the claimant's condition has changed in a way that renders the details of the earlier assessment irrelevant (paragraph 50(ix));

10. where the evidence associated with a previous favourable assessment is no longer available it does not follow that the award based on that favourable assessment should automatically continue simply because a comparison cannot be made. The tribunal must reach a decision based on whatever evidence is available to it (paragraph 50(x));

11. the value of the evidence associated with a previous favourable assessment in connection with the all work test or personal capability assessment may be minimal. This may be the case where a tribunal has replaced a decision of the Department with its own decision, and there are no relevant findings in fact or reasons for the tribunal's decision because the success of the appeal obviated the requirement to call for these (paragraph 50(xi));

12. where evidence of previous assessments is of relevance in cases, for example, where the claimant's condition is variable, the tribunal may call for evidence associated with a previous unfavourable assessment as this evidence may assist in determining the claimant's overall capacity (paragraph 50(xii));

13. it is recommended that the practice is adopted of listing details of all previous PCA determinations in appeal submissions concerning incapacity benefit and its successor, employment and support allowance (paragraph 51);

14. even though details of the previous adjudication history are set out in the appeal submission it is not necessary for the associated paperwork to be made available in each case. The previous adjudication history will become relevant where the tribunal determines that to be so. It will be only in a limited class of case where the previous adjudication history will be relevant (paragraph 52);

15. the practical difficulties associated with the location and provision of paperwork should not thwart the tribunal's requirement to have before it evidence which is relevant to the issues arising in the appeal. The relevance of the previous adjudication history will ultimately be a matter for the tribunal to determine. Additionally, appeal tribunals should not be overwhelmed with submissions that there has been no change in the appellant's medical condition and that, accordingly, the evidence associated with previous determinations in connection with the all work test or personal capability assessment should be produced (paragraph 53).

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. The decision of the appeal tribunal dated 18 September 2008 is not in error of law. Accordingly, the appeal to the Social Security Commissioners does not succeed. The decision of the appeal tribunal to the effect that the appellant was not incapable of work in accordance with the personal capability assessment and not entitled to incapacity benefit (IB) credits from and including 26 June 2008 is confirmed.

Background

2. The decision under appeal to the appeal tribunal was a decision of the Department, dated 26 June 2008, which decided that:

> (i) grounds existed to supersede an earlier decision of a social security appeal tribunal, dated 26 November 2003 which had awarded an entitlement to IB credits, from and including 3 June 2003; and
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> (ii) the appellant was not incapable of work in accordance with the personal capability assessment and not entitled to IB credits from and including 26 June 2008.

3. An appeal against the decision dated 26 June 2008 was received in the Department on 10 July 2008. The decision dated 26 June 2008 was reconsidered on 13 August 2008 but was not changed. The appeal tribunal hearing took place on 18 September 2008. The appellant was present and was accompanied by his niece. He was also represented by the Citizens Advice Bureau (CAB).

4. The appeal tribunal disallowed the appeal. It did not confirm the decision dated 26 June 2008 but substituted its own decision. That decision was to the effect that the appellant scored nine points in respect of the physical descriptors and activities associated with the personal capability assessment and four points in connection with the mental descriptors and activities associated with the personal capability assessment. Nonetheless, this meant that the appellant did not satisfy the personal capability assessment. The outcome decision, in terms of his entitlement to IB credits, remained the same.

5. On 13 January 2009 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service. On 27 January 2009, the application for leave to appeal was refused by the legally qualified panel member (LQPM).

Proceedings before the Social Security Commissioners

6. On 12 March 2009, a further application for leave to appeal to the Social Security Commissioner was received in the Office of the Social Security Commissioners and Child Support Commissioners.

7. On 15 June 2010, following an exchange of observations, and observations in reply, and consideration as to whether the appeal should be dealt with by a Tribunal of Commissioners, leave to appeal was granted by a Social Security Commissioner. In granting leave to appeal, the Commissioner cited, as a reason, that an arguable issue arose as to whether the appeal tribunal, in considering whether the appellant satisfied the personal capability assessment, in relation to a claim for IB credits, should have considered the papers and documentation relating to previous assessments for the purposes of the personal capability assessment.

8. On 6 October 2010, the Chief Social Security Commissioner directed, in accordance with article 16(7) of the Social Security (Northern Ireland) Order 1998 (SR 1998/1506 N.I.10), that the appeal be dealt with by a Tribunal of Commissioners.

9. An oral hearing of the appeal took place on 19 January 2011. At the oral hearing, the appellant was represented by Mr Owen McCloskey from the CAB, and the Department was represented by Mr Seamus Toner of the Decision Making Services section (DMS). Gratitude is extended to both representatives for their detailed and constructive observations, comments and suggestions in relation to this most difficult and convoluted matter.

10. During the course of the oral hearing, issues were raised concerning the policy of IB Branch in preparing appeal submissions for appeal tribunal hearings; differences in ethos between IB Branch and Disability Living Allowance Branch concerning the content of appeal tribunal submissions; the practicality of the provision of a previous adjudication history to appeal tribunals in IB appeals; and whether there had been any change in the practice in IB Branch, in connection with the provision of previous adjudication history since the introduction of regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 (SR 1999/162), as amended. Mr Toner and Mr McCloskey agreed to

provide additional submissions on these particular issues, which were subsequently received on 27 January 2011 and 1 February 2011.

The submissions of the parties

11. In the application for leave to appeal to the Social Security Commissioner, the applicant's representative, Mr McCloskey submitted that the decision of the appeal tribunal is in error of law on the basis that:

> (i) as there had been a previous award of IB, the appeal tribunal should have examined the papers relating to this award in order to explain why it was felt that there had been an improvement in the appellant's condition;
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> (ii) the appeal tribunal failed to give adequate reasons for its decision. More particularly, the appeal tribunal failed to explain why it attached weight to the report of the medical officer of the Department, while disagreeing with its core findings;
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> (iii) the appeal tribunal should have exercised its discretion to adjourn the appeal in order to obtain and view the appellant's general practitioner (GP) records, given the extensive diagnosis, the previous award and attendance at a consultant psychiatrist;
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> (iv) there was evidence before the appeal tribunal, in the form of correspondence from the appellant's niece, that she cared for him. In the statement of reasons for the appeal tribunal's decision it is recorded that the niece had said that the appellant "self-cared".

12. In the initial observations on the application for leave to appeal, the Department, through Mr Toner for DMS, did not support the application on any of the grounds cited by Mr McCloskey. In rejecting the first ground, Mr Toner submitted that the decision of the Deputy Commissioner in Great Britain in CIB/4232/2007, which had been cited by Mr McCloskey, could be distinguished and, further, cited the decision of the Deputy Commissioner in Great Britain in CIB/103/2001, as support for the submission that the appellant was not disadvantaged by the appeal tribunal not having sight of the papers from a previous personal capability assessment.

13. In written observations in reply to the observations from DMS, Mr McCloskey rejected the proposition put forward by Mr Toner as to the applicability of CIB/103/2001. Further Mr McCloskey cited the decision of the Commissioner in Great Britain in CIB/516/2008 as support for the requirement to consider the papers relating to previous personal capability assessments. Mr McCloskey continued to submit that the decision of the appeal tribunal was also in error of law on the basis of the two other cited grounds.

14. In yet further observations in reply, Mr Toner continued to submit that the appellant was not disadvantaged by the appeal tribunal not having sight of the papers from a previous personal capability assessment.

15. In further correspondence, Mr McCloskey forwarded a very detailed submission which he submitted was before the appeal tribunal and which outlined variances between the evidence of the appellant, his GP, and the medical officer of the Department in relation to each of the disputed activities and descriptors.

16. In correspondence dated 5 January 2011, Mr McCloskey enclosed copies of screen prints which he had received from DMS and which, he submitted, demonstrated that there had been a determination in 2005 that the appellant had been found to be incapable of work. In the case summary prepared for the oral hearing of the appeal, Mr McCloskey made a further reference to determination(s) since 2003, indicating that the background and details of those determinations included relevant information which should have been before the appeal tribunal.

The supersession decision

17. As was noted and summarised above, the decision under appeal to the appeal tribunal was a decision of a decision-maker of the Department, dated 26 June 2008.

18. Regulation 6 of the Social Security (Decisions and Appeals) Regulations (Northern Ireland) 1999 sets out the grounds on which a decision of the Department might be superseded. The ground in regulation 6(2)(g) is:

> "(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 Department has received medical evidence following an examination in accordance with regulation 8 of the Incapacity for Work Regulations from a doctor referred to in paragraph (1) of that regulation;"

19. Regulation 6(2)(g) was introduced through amendments made in 1999 through the Social Security and Child Support (Decisions and Appeals) (Amendment No. 2) Regulations (Northern Ireland) 1999 (SR 1999/267), as amended. The purpose of the amendment was to provide that the obtaining of a medical report or medical evidence following an examination is in itself a ground for supersession. Previously, case law in Great Britain had held that the obtaining of a new medical opinion did not itself amount to a change of circumstances although it might constitute evidence that such a change had occurred – R(IS) 2/97 and R(DLA) 6/01.

20. Regulation 6(2)(g) has been, since its introduction, the principal basis on which decisions relating to IB have been superseded. However, as Mr Commissioner Mullan indicated in C9/08-09(IB), and in various other cases, it is important to note that this does not mean that there cannot be a supersession on any other ground contained in regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended.

21. It is possible to supersede, for example, on the basis that there had been a relevant change of circumstances, under regulation 6(2)(a)(i). To do so, however, would require the decision-making authority to identify the relevant change of circumstances, and the date from which the supersession took effect.

22. In the instant case, in the written submissions prepared for the appeal tribunal hearing, the appeals writer dealt with the supersession decision in considerable detail. Firstly, at paragraph 9 of section 4 of the written submissions, the appeals writer refers to the decision-maker having made a supersession decision on 26 June 2008. Secondly, at paragraph 18 of section 5 of the written submissions, the appeals writer states that:

> "The law says that the Department may supersede a decision awarding incapacity credits on receipt of medical evidence following an examination by a medical officer of the Department. In this case a report was received following an examination on 06/03/08 and

> the Department, on consideration of all evidence, determined that (the claimant) is not incapable of work in accordance with the personal capability assessment."

23. The appeals writer is submitting that the decision dated 26 June 2008 was made under the provisions of regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended.

24. At Tab 7 is a copy of the decision dated 26 June 2008. In the decision it is noted that:

> "I have superseded the decision dated 26/11/03 of the SSAT giving entitlement to Incapacity Credits from and including 03/06/03.
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> This is because the Department has made a determination that (the claimant) is no longer incapable of work from medical evidence received following an examination in accordance with regulation 8 of the Incapacity for Work Regulations."

25. There is a further reference, in the decision, to regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended.

The appellant's grounds for appealing to the appeal tribunal

26. In the letter of appeal against the decision dated 26 June 2008, a copy of which was attached to the original appeal submission as Tab No 8, the appellant made reference to the unfairness of not having been awarded any points in connection with the personal capability assessment. Further, the appellant referred to a number of medical conditions and outlined how he should have been awarded certain points based on those medical conditions. The appellant enclosed a letter from his GP in support of the submissions in his letter of appeal.

27. At the oral hearing of the appeal, the appellant was represented by Ms Bowman of the CAB. The record of proceedings for the appeal tribunal hearing records that the appellant's representative handed into the appeal tribunal, amongst other things, a written submission. A copy of that submission has been made available to the Social Security Commissioners. The submission begins with the following statements:

> "Once Incapacity Benefit is awarded there must be a relevant change in circumstances to remove the award. This has to be a genuine change in circumstances and not just a change in medical opinion."

28. We are in a position to deal with this submission straightaway. That submission is clearly an incorrect statement of the proper legal position. As was noted above, regulation 6 of the Social Security (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, sets out the grounds on which a decision of the Department might be superseded. The ground in regulation 6(2)(g) was introduced to provide that the obtaining of a medical report or medical evidence following an examination is in itself a ground for supersession. Before the amendments, case law in Great Britain, as already indicated, had held that the obtaining of a new medical opinion did not itself amount to a change of circumstances.

29. Regulation 6(2)(g) has been, since its introduction, the principal basis on which decisions relating to IB have been superseded, and it means, contrary to the submission made by Ms Bowman, that there does not have to be a relevant change of circumstances in order to supersede

an IB decision. This does not mean that there cannot be a supersession on any other ground contained in regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, including a regulation 6(2)(a)(i) change of circumstances.

30. The submission from Ms Bowman then goes on to state that:

> "(The claimant) nor [*sic*] his GP believe there has been an improvement in his circumstances or condition. In fact, he has a degenerative condition which is worsening (Osteoarthritis) and is still under investigation (e.g. X-Rays)."

31. We shall analyse the significance of that submission below.

32. It is important to note that the submission from Ms Bowman made a series of detailed points in connection with the issues arising in the appeal and that there was other documentary evidence submitted by her on behalf of the appellant. At the oral hearing of the appeal before the appeal tribunal, Ms Bowman made no specific further submission concerning a change of circumstances but did make a reference to the appellant having a "history" of taking medication.

The relevance of evidence contained in the previous personal capability assessments and/or decisions of an appeal tribunal

33. In the application for leave to appeal to the Social Security Commissioner, and in support of the first ground for seeking leave to appeal, namely that as there had been a previous award of IB, the appeal tribunal should have examined the papers relating to this award in order to explain why it was felt that there had been an improvement in the appellant's condition, Mr McCloskey relied on the decision of Ms Deputy Commissioner Ovey in Great Britain in CIB/4232/2007. In that case, Ms Deputy Commissioner Ovey stated, at paragraphs 21 to 24:

> "21. These difficulties arise in the context of a claimant who had previously been awarded incapacity credits and who was losing his benefit. The tribunal correctly reminded itself that the burden was on the Secretary of State to show that he was no longer entitled. Yet there is nothing in the decision which addresses expressly why, in a case where the claimant was complaining of additional health problems since the last assessment, he no longer satisfied the personal capability assessment. There is no express reference to the physical descriptors, other than the statement that they were all considered. It does not appear from the statement of reasons, except indirectly through the error mentioned in the previous paragraph, that the tribunal had considered the papers relating to the original award of incapacity credits.
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> 22. I accept that, as submitted in the decision-maker's submission to the tribunal and adopted by it, an existing decision in favour of a claimant may be superseded on the ground that there has been a fresh medical examination: see regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, S.I. 1999 No. 991. It nevertheless remains the decision-maker's duty to decide on the claimant's entitlement having regard to all the relevant evidence, which may include the evidence of previous medical examinations. That proposition applies with at least equal force to tribunals, who may well find that a principal ground of appeal is that the claimant's condition has not improved.

23. In the present case, the decision-maker rightly, in my view, put the evidence of the claimant's previous favourable assessment before the tribunal. It appears to me, however, that the submission to the tribunal plays down the effect of the decision of Mr. Commissioner Bano in CIB/3179/2000 as to the relevance of previous assessments. While the Commissioner made clear that it was no longer necessary for a tribunal to compare its findings with a previous assessment to see whether a ground for review was established, he did not accept the Secretary of State's submission that assessments made two or three years previously were not relevant because they shed no light on the claimant's capability at the date of the supersession decision and found that the tribunal had erred in law in failing to consider whether to adjourn or postpone the hearing in order to obtain previous medical reports and in failing to take account of previous favourable assessments. There are numerous other decisions of the Commissioners drawing attention to the relevance of previous assessments.

24. The potential relevance of the previous assessment in the present case is highlighted by the further submission to the tribunal that the decision-maker has regarded the clinical findings and observations contained in the previous assessments but chose to give greater weight to the medical assessment of 30th May 2007 as it was a much more contemporaneous appraisal of the claimant's abilities. I can see nothing in the papers before the tribunal which supports that submission. If the decision-maker intended to refer to the references at p.49 to 'the evidence held', I regard those references as an insufficient basis for the submission."

34. There is further reference to CIB/3179/2000 below.

35. Mr McCloskey also made reference to the decisions of the Commissioners in Great Britain in CIB/516/2008, CIB/2338/2000 and CIB/378/2001.

36. In CIB/516/2008, Mr Deputy Commissioner Paines stated, at paragraphs 14 to 18:

"14. In CIB/103/2001 the claimant had told the appeal tribunal that he had won his last two appeals and was not improving. The tribunal did not refer to this in their reasoning. Mrs Ramsay held that that was not an error of law. She pointed out that cases in which previous personal capability assessments had been favourable to a claimant were different from cases in which they were unfavourable: the examining doctor's unfavourable report was unlikely to assist the claimant and the earlier tribunal's favourable decision was unlikely to provide much illumination as it was unlikely that anybody would have requested a full statement of reasons. While the Secretary of State was under a duty to produce relevant evidence, the papers relating to the claimant's previous appeals were not relevant for the reasons just given and it was incumbent on a claimant to produce them if he wished to the tribunal to take them into account.

15. That was a case where the tribunal knew that the claimant had had previous favourable tribunal decisions. In the present case the tribunal were induced, by a combination of the claimant's silence on the point and the misleading terms of the Secretary of State's submission, to believe that there had been no previous personal capability assessment of the claimant, when in fact there had been a personal capability assessment in terms which led the previous tribunal to conclude upon reading it that he scored 17 points and was incapable of work in accordance with it.

16. I do not call in question the well-established principle that it is not an error of law for a tribunal to fail to find a fact (even if true) for which there is no evidence before them. But the issue in the present appeal does not merely concern the tribunal's failure to find as a fact that there had been a previous favourable personal capability assessment. Their ignorance of the previous personal capability assessment prevented them taking it into account, as they would have obliged to do had they known of it, in deciding whether the Secretary of State had discharged the burden of showing that an award of incapacity credits was no longer justified. In the result, the tribunal adopted the correct approach, but not to all of the legally relevant material.

17. Nor do I call in question Mrs Deputy Commissioner Ramsay's decision in relation to the case before her. It is (with respect) entirely understandable that she did not consider a tribunal to have erred in law in failing to adjourn a hearing in what she pithily described as a probably 'futile attempt to obtain evidence which might have illuminated the basis on which the two previous tribunals had made their decisions'. I do not say that the present tribunal would have been obliged to undertake any further enquiries had they known of the previous tribunal's decision. But the information contained in the 2005 decision notice – that there had been a personal capability assessment in terms which led the previous tribunal to conclude upon reading it that the claimant was incapable of work – would have been a relevant piece of information that they would have had to consider.

18. Their failure to consider it means that, objectively speaking, they adopted a legally erroneous approach. The judgment that they were called upon to make required them to take the earlier personal capability assessment into account in their evaluation: see by analogy *Secretary of State for Education v Tameside MBC* [1977] AC 1014 at 1047D-F. Their decision is accordingly vitiated by an error of law for which they, of course, take no blame."

37. In CIB/378/2001, Mr Commissioner Williams stated, at paragraphs 11 to 13:

"11 I reject the submission of the Secretary of State quoted above. The requirements of 'the law' are not confined to the express terms of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. They also include other requirements on the Secretary of State of two kinds: requirements to keep evidence relevant to an ongoing award so as to ensure that claimants are dealt with fairly in the event of any dispute, and more general requirements imposed on public departments handling individual claims and keeping public records.

12 In CIB 1972 2000 the Commissioner said (at paragraph 8 of the appendix):

> '… the representative told me that his request for a copy of the earlier all work test was either refused on the basis of regulation 6(2)(g) or simply ignored. He also told me he had heard a rumour that the Benefits Agency was planning to clear our all old all work tests later this year, so that the could not thereafter be produced. In the light of my observations as to reconsideration and appeal, I would think this most unwise.'

I respectfully entirely endorse that opinion. The burden of proof is on the Secretary of State to establish grounds for making a supersession decision. Regulation 6(2)(g) authorises, but does not require, the Secretary of State to consider a supersession. It

certainly does not justify suppressing evidence relevant to identifying whether there should be a supersession. Of course, the report of a medical officer may contain factual evidence about capacity to work that indicates supersession without further reference to earlier reports. But in cases such as this the disputed part of an examining medical officer's report may consist largely of opinions about or reports of what the claimant stated, not clinically observed facts. And the claimant may have stated consistently, as here, that her condition has not changed. In such cases, if the Secretary of State is unable to establish specific grounds for a supersession because he has ordered the destruction of the relevant records, then he may not be able to discharge the burden of proof.

13 Further, the Secretary of State has 'requirements in law' under other legislation (the Public Records Act 1958, the Data Protection Act 1968, the Human Rights Act 1998, and the Freedom of Information Act 2000 may all be relevant) and any 'clear out' of public records of continuing relevance will need to be considered in those contexts too. Commissioners are of course aware of the exemplary approach of other sections of the Department of Social Security in keeping industrial injuries decisions and medical reports and disability living allowance claim forms and reports of continuing relevance. It would be most unfortunate if incapacity benefit claimants and their advisers found themselves having to require and keep copies of all documents from the Department of Social Security at the time any report or decision was made so as to ensure that future disputes about awards could be considered fairly on all the evidence."

38. In CIB/516/2008, Mr Deputy Commissioner Paines had referred to the decision of Mrs Deputy Commissioner Ramsay in Great Britain in CIB/103/2001.

39. In that decision, Mrs Deputy Commissioner Ramsay stated, at paragraph 10:

"A number of Commissioners have been critical of the current practice of the Secretary of State in not providing copies of earlier decisions where a claimant has satisfied the All Work Test on a previous occasion. In the present case, however, the claimant had not been found to satisfy the All Work Test on the basis of a medical examination conducted by a doctor on behalf of the Benefits Agency. Accordingly, it cannot be argued that the claimant had been disadvantaged by the failure of the Secretary of State to produce these papers to help the tribunal to get a wider picture of the disabilities which affected the claimant. Regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (as amended by Regulation 3 SI 1999 No 1623) allows an incapacity benefit decision to be superseded where there has been an incapacity determination and where there has been a further medical report on behalf of the Benefits Agency. The effect of this amendment is to reverse what was previously required by CIB/3899/1997: a requirement for the tribunal to have before it the previous All Work assessment. However, the fact that this requirement has been removed does not in my view exonerate the Secretary of State from producing relevant evidence to a tribunal. A claimant to incapacity benefit should not be judged solely on the way a person is on a particular day, and such evidence as provides a picture of that person's functional ability over time should always be considered where such evidence is available. It is the Secretary of State who has these previous report [*sic*]. A claimant does not usually have sight of these unless he or she has been previously involved in an appeal. The fact that the Secretary of State does not have the burden of showing that a subsisting benefit award should be terminated does not change the fact that the tribunal has an inquisitorial jurisdiction. It needs to investigate as much relevant evidence as is readily available."

40. In the written observations, Mr Toner submits that:

> "I submit that this case can be distinguished from that in decision CIB 4232/2007 in that in that case there was medical evidence relating to when it had been decided that the claimant satisfied the personal capability assessment whereas in this case a decision-maker has decided on both occasions that (the claimant) did not satisfy the personal capability assessment. I further submit that (the claimant's) appeal was not disadvantaged by the tribunal not having sight of the papers from the medical examination 11 April 2003."

41. In reply to the written observations from DMS, Mr McCloskey doubted the reliance by DMS on CIB/103/2001 and re-submitted his own reliance on CIB/516/2008.

Other relevant jurisprudence

42. In CIB/2338/2000, Mr Commissioner Jacobs, when dealing with equivalent Great Britain legislation, stated, at paragraphs 30 to 34:

> "30. I need only deal with the matter from the perspective of an appeal tribunal dealing with an appeal that raises the issue of capacity for work. The issue for the tribunal is whether the claimant was, at the effective date of the decision, incapable of work. In dealing with that issue, the tribunal must take account of all relevant evidence. It must not merely rubber stamp the views of the examining doctor, or of anyone else for that matter.
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> 31. It will always be relevant to know that the claimant was previously accepted or assessed as incapable of work. But the extent to which the tribunal will need to take account of the details of the basis of the claimant's previous incapacity will depend on the circumstances of the case. Take these three possibilities as examples.
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> 32. *First*, the details of the basis of the claimant's previous assessment may be an essential part of the tribunal's consideration. This will be the case if the grounds of appeal allege that the claimant's capacity and condition have not changed from the previous assessment. If that is alleged, the tribunal has to consider the details of the previous assessment. It has to do this, because the claimant's disabilities are asserted to be the same then as now, not because it has to be satisfied that there has been a change of circumstances since, or a mistake of fact in, the previous assessment.
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> 33. *Second*, the details of the basis of the claimant's previous assessment may be relevant evidence of the claimant's overall capacity. This is most likely to be the case if the claimant has a variable condition. The clinical findings of a claimant who has asthma may vary from examination to examination. The findings on a particular day can only provide a snapshot of the claimant's condition at that time. A better view of the claimant's overall capacity for work is obtained by taking account of findings at different examinations. If the claimant's condition is variable, the tribunal has to consider the details of previous assessments, because those details are relevant to an assessment of the claimant's present capacity for work. The tribunal is not concerned with whether there has been a change or circumstances since those assessments were made or whether there was a mistake of fact in them. (This assumes, of course, that there has not been an overall change in the claimant's capacity for work.)

34. *Third*, the details of the basis of the claimant's previous assessment may be of no relevance. This will be the case if there is evidence that the claimant's condition has changed in a way that renders the details of the earlier assessment irrelevant. One example would be if the previous assessment had taken place shortly after a surgical operation. Another would be if there had been a change in the condition identified as relevant to capacity for work, say from depression to heart disease. In circumstances like these, the only relevance of the basis of the previous assessment is that it shows that the evidence from that assessment is irrelevant to the claimant's present incapacity. It is not relevant as showing a change of circumstances since, or a mistake of fact in, the previous assessment."

43. In Great Britain, in CIB/1972/2000 and CIB/3667/2000, Miss Commissioner Fellner issued a common Appendix which reads, in part, as follows:

"5. Be that as it may, I conclude that subparagraph (g) means what it says: receipt of a new adverse AWT report entitles (though does not bind, since the whole of s10 and of regulation 6 is couched in terms of 'may', not 'shall') the Secretary of State to supersede an existing award of incapacity benefit. I am fortified in this view by s10(2) of the primary legislation, which absolves him from considering any issue which did not cause him to act on his own initiative. I adhere to my previously-expressed view that subparagraph (g) was enacted to reverse the effect of CIB/3899/1997, under the old law on review, which caused many probably perfectly respectable tribunal decisions to be remitted because of the absence of the earlier AWT report, no doubt leading to ultimate disappointment for claimants.

6. This takes care of the Secretary of State's officer's powers on the initial decision to supersede. The officer may of course decide not to do so, for example if s/he does not find the AWT report convincing or thinks more points might on the claimant's or other evidence be awarded which would reach the necessary total of 15 on physical or combined physical and mental descriptors, or 10 on mental descriptors alone. This was sometimes done under the old law, because the decision was, then as now, the officer's and not the doctor's. Advice may be sought from departmental doctors. The earlier AWT may also, if the officer thinks fit, be considered. This might happen if it is said in the IB50 questionnaire, or recorded as having been said to the examining doctor, that the claimant has not improved, or has got worse. But what subparagraph (g) does is render this no longer obligatory. It is no longer necessary, as it was under the old law, to identify a ground, such as change of circumstances, or that the earlier AWT was made in ignorance of some material fact, for superseding the awarding decision based on it. (Nor does this in fact leave people worse off than they were before, because where they did not appeal a decision that might have been glaringly wrong, they were no better off under the old law.)

7. What happens if there is a request for revision under s9 and regulation 3 (confusingly termed 'reconsideration')? This may well be the point at which the Secretary of State's officer learns that a claimant says he is no better than when he passed the earlier AWT, or has got worse. Subsection (2) of s9 provides that s/he need not consider any issue that is not raised by the application or, as the case may be, did not cause him or her to act on his or her own initiative. But in this situation, the revision request is the application which raises the issue; the officer will not have acted

unprompted. If the issue of no improvement is raised, it must be considered, by looking at the earlier AWT. This, indeed, is what happened in CIB/3667/2000 at pages 75-6; though the officer disclaimed any actual obligation to do so, he nonetheless looked both at the earlier AWT examination report and at the tribunal decision subsequently made, and I consider that he was right to do so and wrong to say that he need not. The papers were placed on the file and were available to the later tribunal.

8. In CIB/1972/2000, on the other hand there is at page 56A a bare, unreasoned statement that following reconsideration the decision is not changed, though it is recited pro forma that the decision-maker had considered all the available evidence (unspecified) when making the original decision. This, I think, is not good enough. And the representative told me that his request for a copy of the earlier AWT was either refused on the basis of regulation 6(2)(g) or simply ignored. He also told me he had heard a rumour that the Benefits Agency was planning to clear out all old AWTs later this year, so that they could not thereafter be produced. In the light of my observations as to reconsideration and appeal, I would think this most unwise.

9. It is also necessary for a tribunal properly to consider the evidence. This will not always require seeing an earlier AWT. Mr Commissioner Jacobs in CIB/2905/2000 noted that in that case the later AWT was detailed, it contained a statement that there had been improvement, and the claimant did not raise any point of comparison with the earlier test. In CIB/2338/2000 he cited a change in the condition identified as relevant to capacity for work, or the fact that on the earlier test the claimant had recently had an operation, as situations where the previous test results would not be relevant. But in the same decision he suggested that where the comparison was expressly raised, or the condition was a variable one so that it would be useful to have more than one snapshot of eg peak flow readings in assessing a claimant's overall condition, then it would be relevant for the tribunal to see the earlier test.

10. I agree with this view. A tribunal is not to be circumscribed by the power given to the Secretary of State on the initial decision to supersede purely on the basis of a new adverse AWT. It will need to satisfy itself that one of the supersession grounds set out in regulation 6 applies. This may be regulation 6(2)(g) in an appropriate case. In an inappropriate case, it will be one of the others.

11. Mr Commissioner Jacobs in CIB/2338/2000, points out, correctly it seems to me, that the question of incapacity for work is under the 1998 Act a 'determination' which is not in itself appealable. It is but a building block on the way to an 'outcome' decision which affects a claimant's pocket (in the present cases, the withdrawal of benefit). That is the decision which is open to appeal. But a tribunal will still have to consider incapacity as part of its own outcome decision. I do not think that I follow my learned colleague to his conclusion that the introduction of regulation 6(2)(g) was misconceived because it was unnecessary. I can see a use for it, as stated above. However I do agree with him that the new adjudication regime should prevent decisions being overturned on purely formal grounds, as happened under CIB/3899/1997, where one had the bizarre experience of the Benefits Agency persistently omitting to produce to tribunals, or even advert to, an earlier favourable AWT (and often purporting to review and revise some ancient invalidity benefit decision), while Central Adjudication Services, as it then was, urged Commissioners to overturn and remit tribunal decisions for not having looked at the

earlier test. Too much procedural formality does no-one any favours, as the appellant's representative in CIB/1972/2000 very fairly admitted.

12. Neither in written nor in oral submissions did the Secretary of State dissent from the view that tribunals were entitled to call for whatever they thought necessary to reach a correct decision, including earlier AWTs. Where the dispute arose was (a) whether the Secretary of State was ever obliged to rely on anything other than subparagraph (g), and (b) when a tribunal should exercise its right to call for the earlier results. Mrs Aldred at the oral hearing accepted that regulation 6(2)(g) did not reverse the burden of proof on the Secretary of State to show that there were grounds to supersede, but argued that he was not technically obliged to look at anything other than the current adverse AWT, though she conceded that he might be entitled to look at *other* new medical evidence produced by the claimant. She accepted that tribunals were entitled to call for the earlier AWT but were not required to do so, and urged that they should only do so where there was a *strong* indication that it might be relevant. She reminded me that it was the situation at the date of the latest decision that was to be looked at, and that the earlier test could only be relevant if its contents were fairly referable to that later date (in the same way as later evidence could only be looked at if it was fairly referable back to the date of the decision).

13. The representatives argued for a somewhat looser test, essentially where a claimant raised the comparison issue by saying that he was no better than before, or was worse. They further, understandably, argued that this should apply at the revision/reconsideration stage, and not only before a tribunal.

14. I asked what was to happen if the previous AWT was not available. I hardly imagined it could be argued that in that case any award would have to continue wherever a claimant, or more likely in view of this decision, a representative, raised the comparison issue. Mrs Aldred suggested bespeaking a new examination, if its results could properly be referable to the earlier date (ie the date of the original test which the claimant had passed). I observed that in my experience any suggestions of this kind were routinely refused as impracticable. The representatives suggested having recourse to the GP's notes or, where there had been a DLA award, to any factual reports made in connection with that application.

15. My conclusions, as will be appreciated, are somewhat broader than the position contended for by Mrs Aldred. Regulation 6(2)(g) is of use to the Secretary of State on the initial decision, but once a comparison issue is raised on a review/reconsideration application, the earlier AWT may become relevant evidence. Certainly a tribunal is entitled to see it if it thinks fit.

16. This has administrative implications. The last thing Commissioners want is to be besieged with applications to set aside tribunal decisions on the ground that they erred in not calling for the earlier test. Doubtless the Appeals Service can do without applications to set aside on the ground that the relevant documents were missing. It has to be said that the sensible course would be for the Benefits Agency routinely to include the immediately previous successful AWT papers in the tribunal papers. I have of course no power whatever to direct this. I merely warn of the possible consequences if it is not done. This does not mean that the Secretary of State must consider the earlier results if his officer does not think it necessary. It simply seems more straightforward than

introducing some qualification that it need be done only where the comparison is invoked. This would in any event leave it open to unscrupulous representatives to raise the question routinely, whether justified or not. I hasten to say that I absolve either of the representatives who appeared before me, of whose integrity I have no doubt whatever, from any such suggestion."

44. In CIB/3179/2000, in Great Britain, Mr Commissioner Bano reviewed the decisions in CIB/2338/2000, CIB/1972/2000, CIB/3667/2000 and CIB/378/2000. He stated, at paragraphs 8 to 10:

> "8. What is clear, however, is that the obtaining of a new medical opinion in accordance with regulation 8 of the Incapacity for Work Regulations is by itself sufficient to allow supersession to take place, irrespective of any change of circumstances or any other of the former grounds for review. In my view, the need for the tribunal to consider previous favourable assessments in such cases depends entirely on the relevance of the earlier assessments to the determination of the claimant's incapacity for work at the date of the supersession decision …
>
> 9. In paragraph 5 of the Common Appendix to *CIB/1972/2000 and CIB/3667/2000* the Commissioner drew attention to section 10(2) of the Social Security Act 1998, which provides that in making a supersession decision:
>
> > **'… the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative.'**
>
> However, I agree with the Secretary of State's representative that section 10(2) is concerned with issues, and not with evidence, and therefore does not provide any basis for excluding evidence of earlier assessments which is relevant to a claimant's incapacity for work at the time of the supersession decision. In *R(S) 1/53* the Commissioner held that a tribunal must have regard to all the relevant evidence in deciding whether a claimant is incapable of work. I therefore consider that if an earlier assessment is relied on by a claimant before a tribunal, and that assessment is relevant to the determination of incapacity at the date of the supersession decision, the tribunal must take the earlier assessment into account.
>
> 10. The weight to be attached to earlier assessments is entirely a question of fact for the tribunal. However, as Mr Commissioner Williams pointed out in paragraph 12 of *CIB/378/2000*, assessments will normally be based partly on clinically observed facts, and partly on opinions and reported facts, and a tribunal will often be entitled to place greater weight on clinical findings in earlier assessments than on expressions of opinion and disputed statements of fact. The fact that a tribunal does not have available the medical reports on which an earlier assessment was based, for example, because they have been destroyed, will not prevent the assessment from being considered by a tribunal and, as the Commissioner showed in *CIB/378/2000*, in some cases it may make it more difficult for the supersession decision to be upheld."

45. Further, at paragraphs 12 and 13, he added:

"12. I do not agree that the tribunal were entitled to disregard the earlier favourable all work test assessments because no issues of comparison between those assessments and the most recent personal capability assessment were raised at the hearing. Under the former review provisions, it was necessary for a tribunal to compare its findings of fact with the findings (actual or assumed) on which the previous decision was based, in order to decide whether a ground for review had been established. No such comparison is required on supersessions under regulation 6(2)(g), and, for the reasons I have given, the earlier assessments are relevant only in so far as they cast light on the claimant's condition at the time of the supersession decision.

13. I cannot agree with the Secretary of State's representative that assessments made approximately two years and three years previously were irrelevant because they shed no light on the question of whether the claimant was incapable of work at the time of the supersession decision …"

46. In CIB/3985/2001, a decision in Great Britain, the key issue identified by Mr Commissioner Jacobs was whether the appeal tribunal should have obtained and considered the evidence of the claimant's previous assessments in connection with the all work test or personal capability assessment. The Commissioner thought that it was no longer necessary as a matter of law for an appeal tribunal to have before it and to consider such previous assessments. Nonetheless, it could be necessary in the circumstances of a case for an appeal tribunal to have and to consider such previous assessments. In the particular circumstances of the case which was before him, it was necessary, for two reasons, as follows:

(i) a fair hearing – natural justice and equality of arms; and

(ii) variability.

47. In relation to the first reason Commissioner Jacobs stated, at paragraphs 6 to 9:

"6. A claimant has to have a fair hearing. That has always been a requirement of natural justice. It is also now part of a claimant's Convention right under article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. Part of that right requires the tribunal to follow a procedure that ensures equality of arms between the claimant and the Secretary of State. That means that it must maintain a fair balance between the parties: see the decision of the European Court of Human Rights in *Dombo Beheer BV v The Netherlands* (1993) 18 European Human Rights Reports 213 at paragraph 33.

7. The tribunal had to consider relevant issues raised by the claimant. In this case the claimant raised the issue of the continuity of his disablement. He identified evidence that he considered relevant to that issue. He could not produce it himself, because it was held by the other party to the proceedings, the Secretary of State. The Secretary of State did not produce that evidence. The only way that the claimant could obtain it was by direction of the tribunal. The tribunal refused to obtain it, because

> 'The tribunal was satisfied that there was sufficient evidence to make a decision in this case, having got a detailed medical report.'

That report must be the examining doctor's report.

8. The tribunal had in effect, if not in so many words, a request by the tribunal to adjourn and direct the Secretary of State to produce the earlier assessments. The tribunal had to decide whether that evidence was potentially relevant. In some circumstances a later report may show that an earlier report is not relevant. It might, for example, show a significant change, like an operation or a new injury. However, there was nothing of that kind in the examining doctor's report in this case. If the evidence was relevant, the tribunal should have adjourned for the evidence to be produced, unless the claimant was to blame for the evidence not being available: see the decision of the Court of Appeal in *R v Medical Appeal Tribunal (Midland Region), ex parte Carrarini* reported with *R(I) 13/65*.

9. The fact that the earlier assessments were not available was in no way the fault of the claimant. He had referred to the history of his illness in his letter of appeal. Despite that, the Secretary of State had not included the earlier evidence in the submission to the tribunal. The only issue was relevance. The tribunal's reason, however, does not deal with that. Rather, it begs the question, by accepting as accurate and sufficient the report which, on the claimant's argument, the other evidence would show to be incomplete and insufficient. The flaw in the tribunal's reasoning is self-evident."

48. In relation to the second reasons, the Commissioner observed, at paragraphs 10 to 11:

"10. The second reason why the tribunal should have obtained the evidence of previous assessments is that the claimant's condition was variable. This was acknowledged by the decision-maker on page 47. If a claimant's condition is variable, the examination may reflect the claimant's condition at the time, but not give an accurate overall picture. Assuming that the claimant's condition has not improved, the variation in that condition is better viewed over a series of assessments.

11. The tribunal's explanation that it had a detailed medical report did not justify its refusal to obtain the earlier assessments, because it did not deal with the issue of variation and the relevance of variation to that."

49. The decision in CIB/3985/2001 was considered in Great Britain by Mr Commissioner May QC in CSIB/964/2002. In that appeal, one of the grounds on which leave to appeal was sought was that the appeal tribunal had not enquired as to whether the claimant's medical condition had improved from the date of a previous assessment for the purposes of the all work test. Mr Commissioner May decided that:

"5. I do not consider that there is any merit in this ground of appeal. The reason for this is that the ground for supersession identified by the tribunal in their statement was regulation 6(2)(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. That ground for supersession is based upon receipt by the Secretary of State of medical evidence following an examination in accordance with the appropriate regulations by a doctor specified in those regulations. Once such grounds are found to be established the tribunal must weigh the evidence presented to them and determine what if any points-scoring descriptors are satisfied by the claimant and if there are such points-scoring descriptors satisfied whether the total points are sufficient to cross the threshold. What evidence and argument is advanced before the tribunal in relation to these matters is for the parties to the appeal to decide. However, I would underline that it is not

necessary for the tribunal in determining what points-scoring descriptors, if any, apply that they make an enquiry as to whether the claimant's condition has improved from the dates of a previous medical examination and favourable decision following thereon. That is not a process which is required by virtue of the particular ground for supersession relied upon for the replacement of an existing favourable decision. I should further add that it was not incumbent upon the tribunal as is suggested in paragraph 7 of the Secretary of State's submission that a tribunal make reference to earlier reports. I do not consider that CIB/2985/2001 supports the claimant's ground of appeal. The circumstances in that case were as set out in paragraph 7 of Mr Commissioner Jacob's decision. In particular what the claimant in that case did was raise the issue of the continuity of his disablement. It was his position in that case that the evidence in previous reports was relevant to that issue. If that is a position adopted by a claimant then clearly the tribunal required to look at it from the point of view of determining which points-scoring descriptors are satisfied. However it is not asserted in the grounds of appeal in this case that such a position was adopted by the claimant before the tribunal."

Analysis

50. The implications of the introduction of the Great Britain equivalent of regulation 6(2)(g) of the Social Security (Decisions and Appeals) Regulations (Northern Ireland) 1999 and, more particularly, the effect of the introduction of that provision on the requirement to consider previous adjudication history, have been considered by the Social Security Commissioners in Great Britain in a number of well-analysed and thorough decisions. From those decisions we derive and accept the following principles:

(i) there was a clear purpose to the introduction of regulation 6(2)(g) of the Social Security (Decisions and Appeals) Regulations (Northern Ireland) 1999, which was to provide that the obtaining of a medical report or medical evidence following an examination is in itself a ground for supersession;

(ii) accordingly, there is no requirement to identify a regulation 6(2)(a)(i) change of circumstances in order to supersede an IB decision;

(iii) there is a difference between the evidential requirement to determine the ground for supersession and the evidential requirement to establish whether an individual is incapable of work in connection with the all work test or personal capability assessment;

(iv) it is no longer necessary **as a matter of law** for an appeal tribunal to have before it and to consider the evidence of the claimant's previous assessments in connection with the all work test or personal capability assessment;

(v) an appeal tribunal is entitled to call for whatever evidence it considers to be relevant to the proper determination of the issues arising in an appeal;

(vi) the requirement for an appeal tribunal to consider the evidence associated with previous favourable assessments in connection with the all work test or personal capability assessment depends entirely on the relevance of the earlier assessments to the determination of the claimant's incapacity for work at the date of the supersession decision;

(vii) an appeal tribunal will be required to consider the evidence associated with previous favourable assessments where an appellant asserts that there has been no change in his medical condition or disablement **and** that the evidence associated with previous assessments is relevant to that continuing medical condition or disablement. In such circumstances the last previous assessment is likely to be of more relevance than earlier ones and the relevance of any particular assessment is likely to diminish with the passage of time;

(viii) details of the basis of the claimant's previous assessments in connection with the all work test or personal capability assessment may be relevant evidence of the claimant's overall capacity, particularly where the claimant has a variable condition. Variability may increase the relevance of older assessments carried out before the last previous assessment;

(ix) details of the basis of the claimant's previous assessments in connection with the all work test or personal capability assessment may be of no relevance in a case, for example, where there is evidence that the claimant's condition has changed in a way that renders the details of the earlier assessment irrelevant;

(x) where the evidence associated with a previous favourable assessment in connection with the all work test or personal capability assessment is no longer available, it does not follow that the award of entitlement to benefit or credits, based on that favourable assessment, should automatically continue, simply because a comparison cannot be made. The appeal tribunal must reach a decision based on whatever evidence is available to it;

(xi) the value of the evidence associated with a previous favourable assessment in connection with the all work test or personal capability assessment may be minimal. This may be the case where an appeal tribunal has replaced a decision of the Department with its own decision, and there are no relevant findings in fact or reasons for the appeal tribunal's decision because the success of the appeal obviated the requirement to call for these;

(xii) an appeal tribunal may call for evidence associated with a previous unfavourable assessment in connection with the all work test or personal capability assessment. It follows that where evidence of previous assessments is of relevance in cases, for example, where the claimant's condition is variable, the evidence may assist in determining the claimant's overall capacity.

Practical consequences

51. We realise, as did Miss Commissioner Fellner in CIB/1972/2000 and CIB/3667/2000 that there are practical implications arising from the principles which we have set out above. Following a request to that effect, the Department has confirmed to us, however, that "… it should be straightforward in most cases to list details of all previous PCA determinations within a current claim from computer records". We recommend that this course of action is adopted. We have noted that appeal submissions for appeals concerning disability living allowance routinely contain information concerning previous adjudication history in connection with the claimant and we advocate the adoption of a similar practice in appeal submissions for appeals concerning IB, and its successor benefit, employment and support allowance.

52. The Department has baulked somewhat at the idea that the paperwork associated with previous determinations in connection with the all work test or personal capability assessment may have to be made available. We allay those fears, as follows. While recommending that details of the previous adjudication history are set out in the appeal submission, we do not assert that the associated paperwork is made available in each case. The previous adjudication history will not be relevant in every appeal concerning IB. As set out above, the previous adjudication history will become relevant where the appeal tribunal determines that to be so. That will be, in our view, in a limited class of case, where there is an assertion that there has been no change in the claimant's condition, and where the evidence associated with the previous adjudication history is relevant to that submission or, for example, where the claimant's medical condition, and the evidence associated with the previous adjudication history assists in the assessment of the claimant's overall capacity.

53. We would note, however, as did Mr Commissioner Williams in CIB/378/2001 that the practical difficulties associated with the location and provision of paperwork should not be permitted to thwart the appeal tribunal's requirement to have before it evidence which is relevant to the issues arising in the appeal. There are also duties, however, for appellants and their representatives. Appeal tribunals should not be overwhelmed with submissions that there has been no change in the appellant's medical condition and that, accordingly, the evidence associated with previous determinations in connection with the all work test or personal capability assessment should be produced. As was noted above, it will only be in a limited class of case where the previous adjudication history will be relevant. In any event, the relevance of the previous adjudication history will ultimately be a matter for the appeal tribunal to determine.

Application of these principles to the instant case

54. At first sight it is arguable that the single sentence statement, contained in the written submission, handed to the appeal tribunal on the day of the oral hearing of the appeal, that " … (the claimant) nor [*sic*] his GP believe there has been an improvement in his circumstances or condition" was sufficient to trigger a requirement on the appeal tribunal to consider whether the evidence associated with previous assessments in connection the personal capability assessment was relevant and should be called for. For the reasons which follow we are of the view that no such requirement arose.

55. Firstly, the statement was made in connection with an inaccurate statement of law that there could be no supersession of an IB decision unless there had been a relevant change of circumstances. Secondly, there was no parallel submission that the evidence in connection with previous assessments was relevant to there being no change in the appellant's medical condition. The appellant was represented at the oral hearing of the appeal by a representative with experience in benefit entitlement. Accordingly, the parallel requirement of relevance of the evidence to the lack of change in condition is not met. Thirdly, the appellant was not disadvantaged in that the evidence associated with the previous assessments was not before the appeal tribunal. Looking at the statement of reasons for the appeal tribunal's decision, it is clear that the appeal tribunal accepted that the appellant had a number of ongoing medical conditions which caused him a degree of limitation. Fourthly, the decision which was the subject of the supersession in the instant case was a decision of an appeal tribunal in 2003 which, in turn, had overturned a decision of the Department which had been adverse to the appellant. As was noted above, because the 2003 decision of the appeal tribunal was in the appellant's favour, it would be unlikely that any statement of reasons for that appeal tribunal's decision would have been

sought, and that any relevant findings of fact were retained. In turn, the evidence associated with the 2003 decision of the Department which was adverse to the appellant was unlikely to have been to his advantage in his 2008 appeal to an appeal tribunal.

The appellant's other grounds for appealing

56. In the application for leave to appeal to the Social Security Commissioner, the appellant, through Mr McCloskey argued that the decision of the appeal tribunal was in error of law on the basis of three other grounds. We deal with each of these in turn.

57. The first ground was that the appeal tribunal had failed to give adequate reasons for its decision. More particularly, the appeal tribunal had placed reliance on a medical report undertaken by a medical officer of the Department. The medical officer had given the opinion that the appellant did not score any points in connection with the personal capability assessment. The appeal tribunal had decided that the appellant scored nine points in connection with the personal capability assessment. There was, therefore, a clear incongruence between an acceptance by the appeal tribunal of the report and the award of additional points.

58. We would note that there is an error in how the LQPM of the appeal tribunal completed the second page of the "score-sheet" associated with the decision notice. The appeal tribunal decided that descriptors 15(b), 16(e) and 17(d), from Part II of the Schedule to the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995 (SR 1995/41), as amended, were applicable to the appellant. Those descriptors attract a total score of four points. The LQPM has entered the score of four points at the bottom of the relevant page of the "score-sheet". Regulation 26(1)(b) of the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995, as amended, provides that an aggregate score of less than six points in respect of descriptors specified in Part II to the Schedule shall be disregarded. Therefore the overall score should have been nine points. Nothing turns, however, on that error in the completion of the score sheet.

59. In relation to the substantive point, we do not agree that the reasons for the decision of the appeal tribunal are inadequate. In general terms, it is clear that the appeal tribunal undertook a rigorous and rational assessment of all of the evidence before it. The appeal tribunal gave a sufficient explanation of its assessment of the evidence, explaining why it took the particular view of the evidence which it did. Any conflict in the evidence before the appeal tribunal has been clearly resolved and explained. The appeal tribunal made sufficient findings of fact, relevant to its decision, all of which are wholly sustainable on the evidence, and all of which are supported by relevant evidence. None of the appeal tribunal's findings are irrational, perverse or immaterial.

60. More specifically, the statement that the appeal tribunal found the examination conducted by the medical officer of the Department to be "thorough" was in the context of a comparison between the framework of a medical examination conducted in the context of benefit entitlement by a medical officer with experience of that benefit, and a report by the appellant's GP, who had not conducted a parallel contextual examination. In addition, we do not accept that there is incongruence in the appeal tribunal's handling of the report of the medical officer of the Department. The award by the medical officer of the Department of nought points in connection with the personal capability assessment reflects the opinion of the medical officer that the appellant did not have a sufficient degree of limitation such that he was unable to perform, to a lesser or greater extent, certain of the activities as prescribed. The appeal tribunal was of the

view that the appellant did have a degree of limitation such that he was unable to perform, to a lesser or greater extent, certain of the activities as prescribed. We see no problem in the appeal tribunal differing in its opinion as to the level of limitation and the effect of that limitation of an ability to carry out certain prescribed activities.

61. The second additional ground relied on by Mr McCloskey was that, given the appellant's medical history, consideration should have been given to the obtaining of the appellant's GP records. The failure by the appeal tribunal to give consideration to this was in breach of the rules of natural justice.

62. An appeal tribunal has the legislative power, under regulation 51(4) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, to adjourn an appeal tribunal of its own motion. Such an adjournment might be for the attendance of an appellant or other witness, or for the production of additional evidence. A decision by an appeal tribunal as to whether or not to adjourn is one within its own judicial discretion.

63. Appeal tribunals should, of course, consider critically the issue of adjournment. The appeal tribunal should first ask whether the evidence to be obtained is necessary and if so whether it is likely to assist in determining the matter when the case comes back. The precise nature and relevance of the additional evidence should be identified. Only if the evidence is material to the issues arising in the appeal, and not presently available to the appeal tribunal, should an adjournment to obtain that evidence be considered. Appeal tribunals should also take into account the opportunity which the parties have had to obtain the evidence, the need to avoid delays to others, and whether there is a reasonable prospect of obtaining the evidence. A conflict of evidence between parties may not necessarily be resolved by seeking further evidence. Rigorous evaluation of the available evidence to resolve the conflict is often more appropriate.

64. Additionally, it should not be assumed that because an appeal tribunal gives a direction as to evidence, it will be supplied. Some thought should also be given to how long the delay might be in obtaining evidence, especially in relation to medical reports which may not be given priority by medical practitioners. Consideration should also be given to the person who will take responsibility for (i) obtaining the evidence and (ii) preparing the evidence.

65. In summary, adjournments for further evidence require very careful consideration to determine whether they are really needed and, if so, whether they will achieve the intended outcome of providing the additional evidence needed.

66. In the present case, there is nothing to suggest that the appeal tribunal did not give careful consideration to the issue of obtaining additional medical evidence, and it clearly adhered to the proper adjournment principles, as outlined above. We have noted that the appellant was represented at the oral hearing of the appeal by a representative from the CAB. That representative could have made a submission to the appeal tribunal that in light of the appellant's previous medical history, the appeal tribunal should seek access to the appellant's GP records and sought an adjournment to effect that access. The appellant's representative did not make such a submission and did not seek an adjournment.

67. As was indicated by the Mrs Commissioner Brown at paragraph 16 of C6/05-06(IB):

> "I do not consider that the tribunal need even consider adjourning unless there is something to indicate that the appeal should not be heard on the papers. It therefore follows that unless there is some such indication the tribunal need not consider adjourning and need not refer to having considered adjourning … If there is no indication that determination on the papers would not lead to a fair hearing the tribunal need not adjourn nor even consider adjourning."

68. The appeal tribunal's decision to proceed to determine the appeal on the basis of the evidence before it was rational and one which it was entitled to make.

69. The final additional ground relied on by Mr McCloskey concerned the manner in which the appeal tribunal dealt with the evidence from the appellant's niece. More specifically, Mr McCloskey noted that the appeal tribunal had recorded, in the statement of reasons for its decision that the appellant's niece had indicated that he "self-cared", but that the appellant's niece had also provided a letter giving evidence that she cared for him.

70. In the record of proceedings for the appeal tribunal hearing, the appellant's niece is recorded as having stated:

> "I work part time. He can look after himself. Just make sure he is OK. Stay 3 hours and do his housework. No carer's allowance. Was my late mother's carer. Didn't work. One condition affects the other."

71. In the letter which was provided for the appeal tribunal hearing, the appellant's niece stated that:

> "As a niece of the (the claimant) I have seen my uncle change over the past number of years. I visit him everyday to make sure that he is doing ok and to keep him company.
>
> Since being diagnosed with arthritis a few years ago, my uncle is unable to do things which he could do before, such as walking long distances and cleaning. I have to do the work that he can't like shopping, the heavy cleaning and the washing. However I do try to encourage him to do as much as he is capable of."

72. The evidence of the appellant's niece is related principally to her provision of assistance with domestic tasks. While accepting that domestic tasks such as cleaning and laundry involve physical activities such as form part of the personal capability assessment, the appellant's evidence, apart from the activity of walking, is of limited value in connection with the issues arising in the appeal. The appellant's niece does make reference to the activity of walking. In our view, however, the appeal tribunal has given an adequate explanation as to why it determined that the appellant has no limitation with respect to this activity.

Disposal

73. The decision of the appeal tribunal dated 18 September 2008 is not in error of law. Accordingly, the appeal to the Social Security Commissioners does not succeed. The decision of the appeal tribunal to the effect that the appellant was not incapable of work in accordance with the personal capability assessment and not entitled to IB credits from and including 26 June 2008 is confirmed.