IN THE UPPER TRIBUNAL **Appeal No: CE/633/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Liverpool on 8 September 2016 under reference SC121/16/00268 involved an error on a material point of law and is therefore set aside.

The Upper Tribunal substitutes its own decision for that of the First-tier Tribunal. The substituted decision of the Upper Tribunal is to set aside the Secretary of State's decision of 3 June 2016 and replace it with a decision that the appellant was to be treated as having limited capability for work (under regulation 30 of the Employment and Support Allowance Regulations) and is entitled to employment and support allowance, subject to any waiting days, from and including 25 May 2016.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007

Representation: The appellant was represented by Martin Williams of the Child Poverty Action Group at both hearings.

Huw James, solicitor, appeared at the first hearing for the Secretary of State for Work and Pensions and Zoe Leventhal of counsel represented the Secretary of State at the second hearing, both instructed by the Government Legal Service.

REASONS FOR DECISION

Introduction

1. In this appeal, which has been chosen as the lead or test case, I am asked to decide whether the decision I made in *EI v SSWP* (ESA) [2016] UKUT 397 (AAC) was wrong, at least in two respects. No party objected to me ruling on whether I had wrongly construed the law in *EI*.

2. The first issue concerns the powers of the First-tier Tribunal on an appeal from a decision made by the Secretary of State under regulation 30 of the Employment and Support Allowance Regulations 2008 ("the ESA Regs") on a second or repeat claim for employment and support allowance ("ESA"). It is said, now by both parties before me, that I was wrong when I limited the First-tier Tribunal's powers on such an appeal in the following way in paragraph 22(ii) of *EI*.

> "22. Indeed it seems to me……. that if the Secretary of State has decided the repeat claim immediately pursuant to regulations 19 and 21 and Schedule 2 of the ESA Regs within 6 months of a previous adverse ESA decision on limited capability for work that the claimant does not in fact have limited capability for work and cannot be treated by as having limited capability for work (under regulations other than regulation 30) then:
>
> (i) that is all the Secretary of State need decide and he should not (indeed cannot as matter of law) decide whether there has been significant worsening or a new medical condition so as to treat the claimant as having limited capability for work under regulation 30(2); and
>
> (ii) on any appeal against such a decision the sole issue for the First-tier Tribunal to decide is whether the claimant has limited capability for work under regulation 19 and Schedule 2 to the ESA Regs or can be treated as having limited capability for work under the ESA Regs other than under regulation 30 (e.g. under regulation 29(2)(b))."

The reference to 'within 6 months' in the above passage is because of the time limitation found in regulation 30(2) of the ESA Regs as that regulation stood prior to amendment on 30 March 2015. As can be seen from the statutory materials set out below, this appeal concerns the version of regulation 30 of the ESA Regs as amended with effect

from 30 March 2015. However, nothing of any material relevance arises from this distinction in respect of either of the legal issues with which I have to grapple on this appeal.

3. The second issue concerns the following wording in regulation 30(1) of the ESA Regs "is….to be treated as having limited capability for work until such time as it determined (a) whether or not the claimant has limited capability for work [in fact]". I have underlined the words which give rise to the second issue, namely what legal effect those words have in a situation where, after the repeat claim for ESA has been made, the Secretary of State determines whether the claimant has limited capability for work in fact. The effect of the decision in *EI*, admittedly based only on assumption rather than argument, is that the determination as to limited capability for work in fact takes effect from the date of the repeat claim in all circumstances.

4. To understand how these two issues arise on this appeal it is best first to set out the key aspects of the factual background. It may assist, however, if I indicate at the outset that I have concluded that *EI* was wrong on both points.

Relevant factual background

5. The Secretary of State's decision under appeal to the First-tier Tribunal was made on 3 June 2016 and disallowed a repeat claim for employment and support allowance ("ESA") which the appellant had made on 25 May 2016. This claim had followed a decision on a previous claim, that decision being dated 15 July 2015, which had decided that the appellant did not have limited capability for work. The form of the decision of 3 June 2016 was, insofar as relevant, as follows (the bold is in the original record of the decision):

> "[The appellant] has made a repeat claim to ESA on 25/05/16 with a health condition of stress.

> The most recent determination on 15/07/15 was that she did not have limited capability for work.
>
> The health condition on the previous claim was Depression.
>
> I have determined whether [the appellant] has limited capability for work based on the evidence obtained when the previous determination was made. This is because I am satisfied that there has been no change since the evidence was obtained.
>
> I have considered the Healthcare Professional's report and the limited capability for work Questionnaire along with any evidence provided: I do not consider that any special rules apply or that [the appellant] has achieved 15 points from the appropriate descriptors.
>
> **As a result [the appellant] does not have Limited Capability for Work and is not entitled to Employment and Support Allowance from 25/05/16.**"

6. The appellant was assisted by the Halton CAB in making her appeal to the First-tier Tribunal against this decision. The CAB argued that previously the appellant had had 'depression' but now she had 'stress and anxiety' and the latter amounted to a new "specific disease or bodily or mental disablement" for the purpose of regulation 30(4) of the ESA Regs (that is, a specific mental disease or disablement from which she had not been suffering previously when she had 'depression'). The CAB argued in the alternative that if the stress and anxiety was the same as the depression and not a new disablement, it was a disablement which had "significantly worsened" under regulation 30(4) since the decision of 15 July 2015.

7. By a decision dated 8 September 2016 the appeal was refused by the First-tier Tribunal ("the tribunal"). It is apparent from its reasoning that the tribunal accepted that the stress from which the appellant was suffering was a new medical condition for the purposes of regulation 30(4) of the ESA Regs. It said this (omitting the paragraph numbers in the statement of reasons):

> "The Tribunal was asked to consider and decide whether the appellant satisfies any of the conditions for being treated as having limited capability for work.

> The Tribunal was also asked to consider whether the present application 25/05/2016 based on stress and anxiety was in effect the same as the previous application based on depression. In the opinion of the Tribunal medical member the current diagnosis of stress and anxiety indicated by the applicants GP is materially different from the previous diagnosis of depression made by the GP and the present application is therefore validly made and falls to be decided on its merits."

8. Pausing at this point, I do not understand the reference to the application being 'validly made' and falling to be decided 'on its merits'. On any analysis regulation 30 of the ESA Regs permits repeat claims for ESA to be made, and once made such claims fall to be decided (see section 8(1) of the Social Security Act 1998, set out below). Regulation 30 (or any other regulation for that matter) does not provide any 'validity' filter to the claim. Nor are the terms of regulation 30(4) of the ESA Regs being satisfied a legal condition precedent to the repeat claim being determined 'on its merits' (in the sense of considering whether sufficient points are scored under Schedule 2 to the ESA Regs or one of the 'exceptional circumstances' in regulation 29 of those regulations applies).

9. Be that as it may, the important point for present purposes is that the tribunal found that the appellant had a new medical condition (i.e. a new 'specific disease or bodily or mental disablement') by the time of her further claim for ESA on 25 May 2016. However, and also importantly, the tribunal then went on to decide that the appellant did not have limited capability for work in fact (because she did not score the necessary fifteen points under Schedule 2 to the ESA Regs and did not satisfy regulation 29 of those regulations) and upheld the decision under appeal that the appellant was not entitled to ESA from the date of her further claim on 25 May 2016.

10. Given the issues that arise before me on this appeal, two central features of the tribunal's decision need to be emphasised. First, the tribunal did not consider that its conclusion that the appellant had a new medical condition could lead to a decision in the appellant's

favour based simply on that conclusion. Second, and related to the first feature of the tribunal's decision, the tribunal concluded that its decision that the appellant did not have limited capability for work in fact took effect from the date of the repeat claim regardless of its view that the appellant had a new medical condition at the time of that repeat claim. For the reasons I develop below, the tribunal erred in law in both these aspects of its decision.

11. In giving the appellant permission to appeal against the tribunal's decision Upper Tribunal Judge Turnbull raised a concern about a possible breach of natural justice in the proceedings. This was because the Secretary of State in her appeal response to the First-tier Tribunal had stated that if the tribunal found that the appellant's medical condition had changed, "I respectfully request that they treat [the appellant] as having limited capability for work from the outset of her claim pending a further work capability assessment where [her] eligibility can be determined". Judge Turnbull pointed out that had the CAB appreciated that the matter would not be remitted by the tribunal to the Secretary of State on the latter's request, the CAB might have wished to submit additional medical evidence. I consider this error of law ground is made out and will return to it further below.

12. The appeal was then transferred to Upper Tribunal Judge Mesher. After he had conducted an oral hearing in another appeal in which the same issues arose, he gave directions on 26 July 2017 in which he suggested that the central issue on the appeal, given the tribunal's finding that the appellant had a new specific disease or bodily or mental disablement which she had not been suffering from at the time of the 15 July 2015 decision, was whether:

> "*EI* [should] be qualified to the extent that the claimant should be treated as having limited capability for work for the period from 25 May 2016 (the date of the new claim) to 2 June 2016 (the day before the date of the of the Secretary of State's decision on the new claim), so that the decision of the Secretary of State on the new assessment (if otherwise upheld) should operate only from 3 June 2016, on the basis that the deeming under regulation 30 can only operate "until such

> time as" a determination is made on actual limited capability for work?".

Judge Mesher added:

> "Should the approach put forward in *EI* also be qualified in relation to the powers of a First-tier Tribunal on an appeal in such cases in relation to the period from the date of the new claim down to the date of the Secretary of State's decision on the claim?".

13. The appeal was then passed to me to deal with, with four other similar appeals concerning different claimants, and in January of 2018 I gave directions seeking to identify the best case to take forward as the lead case. That process and seeking the assistance of the Child Poverty Action Group to provide specialist legal representation on this appeal, and then the hearings on the appeal (the first of which was effectively abortive as far as any substantive contribution from the Secretary of State at the hearing was concerned), have all contributed to the appeal taking some time to be decided; though I too have added to that time.

14. Insofar as it remains relevant, I said the following in the directions of 10 January 2018 about what I then saw as the central legal issue in this appeal.

> "This appeal has been passed to me to consider, along with four other appeals in which the same issues would seem to arise.
>
> Those issues concern whether my decision in *EI –v- SSWP* [2016] UKUT 397 (AAC) was wrongly decided or may need to be modified in respect of the ability to treat a claimant as having limited capability for work under regulation 30(4) of the Employment and Support Allowance Regulations 2008 for the period between the repeat claim and the decision on that claim if their medical condition has significantly worsened or they have developed a new medical condition since the previous determination that they did not have limited capability for work was made, even if on the decision on that repeat claim it is determined that the claimant does not in fact have limited capability for work. Putting the point another way, the key issue appears to be whether, as EI seemed to decide, when the decision is made on the repeat claim for ESA that the claimant in fact does not have limited capability for work, that decision takes effect from the date of the repeat claim. The alternative argument, arguably contrary to *EI*, is that such a decision only takes effect from the date of the

> decision if regulation 30(4) is satisfied, with the claimant then being treated as having limited capability for work for the days starting with the effective date of the repeat claim and ending on the day before the date of the decision on that claim.
>
> These issues may turn on the scope of the wording "treated as having limited capability for work until such time as it is determined whether or not the claimant has limited capability for work" (my underlining added for emphasis), as well as, perhaps, general caselaw on from when a social security decision on a claim takes effect.
>
> It may be fair to observe that the reasoning in *EI* does not address the arguments raised by Judge Mesher as I have sought to summarise them above. However the effect of the decision in *EI* is undoubtedly that the decision made on 10 September 2012 that *EI* did not in fact have limited capability for work took effect from the date of her repeat claim on 21 August 2012 and so removed any need, indeed legal ability, to consider the effect of significant worsening or a new medical condition in the period between the repeat claim and the decision on it (see the final sentence in paragraph 21 of *EI*).....
>
> [this appeal] would appear to be the only one where the First-tier Tribunal made a clear finding of fact that the claimant had a new medical condition.
>
> .....[this appeal] arguably raises most starkly the effect of regulation 30(4)(a) of the ESA Regs, given the First-tier Tribunal's clear finding of fact in that appeal that the claimant was suffering from a new medical condition....."

Relevant law

15. Section 1 of the Welfare Reform Act 2007 sets out what it terms "the basic conditions" (see section 1(2) of that Act) of entitlement to ESA. Amongst these is section 1(3)(a) which provides the condition that "the claimant has limited capability for work". Section 8 of the same Act then provides that the determination of whether a person has limited capability for work shall be "on the basis of an assessment of the person concerned" (s.8(2)(a)), and that the assessment is to be defined "by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may prescribed" (s.8(2)(b)). The activities and "extent to which" are codified in Schedule 2 to the ESA Regs.

16. Section 8(5) and (6) of the Welfare Reform Act 2007 provide the *vires* (power) under which regulation 30 of the ESA Regs is made. These subsections are as follows.

> "(5)Regulations may provide that, in prescribed circumstances, a person in relation to whom it falls to be determined whether he has limited capability for work, shall, if prescribed conditions are met, be treated as having limited capability for work until such time as—
>
> (a)it has been determined whether he has limited capability for work, or
>
> (b)he falls in accordance with regulations under this section to be treated as not having limited capability for work.
>
> (6)The prescribed conditions referred to in subsection (5) may include the condition that it has not previously been determined, within such period as may be prescribed, that the person in question does not have, or is to be treated as not having, limited capability for work."

17. Regulation 19 of the ESA Regs gives effect to section 8(2) of the Welfare Reform Act 2007 and provides relevantly as follows:

> "**Determination of limited capability for work**
> **19.**—(1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.
> (2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities……..
>
> (7) Where a claimant—
> (a) has been determined to have limited capability for work; or
> (b) is to be treated as having limited capability for work under regulations 20, 25, 26, 29 or 33(2),
> the Secretary of State may, if paragraph (8) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work.
> (8) This paragraph applies where—
> (a) the Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant's physical or mental condition;
> (b) the Secretary of State wishes to determine whether the previous determination of limited capability for work or that the claimant is to be treated as having limited capability for work, was made in ignorance of , or was based on a mistake as to, some material fact; or

> (c) at least 3 months have passed since the date on which the claimant was determined to have limited capability for work or to be treated as having limited capability for work."

18. Regulation 21 of the ESA Regs deals with the information required for determining capability and is in the following terms:

> "**Information required for determining capability for work**
> **21.**—(1) Subject to paragraphs (2) and (3), the information or evidence required to determine whether a claimant has limited capability for work is—
> (a) evidence of limited capability for work in accordance with the Medical Evidence Regulations (which prescribe the form of doctor's statement or other evidence required in each case);
> (b) any information relating to a claimant's capability to perform the activities referred to in Schedule 2 as may be requested in the form of a questionnaire; and
> (c) any such additional information as may be requested.
> (2) Where the Secretary of State is satisfied that there is sufficient information to determine whether a claimant has limited capability for work without the information specified in paragraph (1)(b), that information must not be required for the purposes of making the determination.
> (3) Paragraph (1) does not apply in relation to a determination whether a claimant is to be treated as having limited capability for work under any of regulations 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients), 26 (claimants receiving certain regular treatment) and 33(2) (additional circumstances in which a claimant is to be treated as having limited capability for work)."

19. Regulation 21 does not require a medical examination to be carried out. That is catered for in regulation 23, which provides insofar as may be relevant:

> "**Claimant may be called for a medical examination to determine whether the claimant has limited capability for work**
> **23.**—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination."

Unlike regulation 21, the medical examination is discretionary and is not therefore a necessary requirement before a determination of limited capability for work can be made.

20. The central statutory provision with which this appeal is concerned is regulation 30 of the ESA Regs. This has been in the following form since 30 March 2015:

> "**Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made**
> 30.—(1) A claimant is, if the conditions set out in paragraph (2) are met, to be treated as having limited capability for work until such time as it is determined–
> (a) whether or not the claimant has limited capability for work;
> (b) whether or not the claimant is to be treated as having limited capability for work otherwise than in accordance with this regulation; or
> (c) whether the claimant falls to be treated as not having limited capability for work in accordance with regulation 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work).
> (2) The conditions are–
> (a) that the claimant provides evidence of limited capability for work in accordance with the Medical Evidence Regulations; and
> (b) in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined–
> (i) in the last determination preceding the date of claim for an employment and support allowance, that the claimant does not have limited capability for work; or
> (ii) within the 6 months preceding the date of claim for an employment and support allowance, that the claimant is to be treated as not having limited capability for work under regulation 22 or 23,
> unless paragraph (4) applies;
> (3) Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State, and that appeal has not yet been determined by the First-tier Tribunal.
> (4) This paragraph applies where–
> (a) the claimant is suffering from some specific disease or bodily or mental disablement from which the claimant was not suffering at the time of that determination;
> (b) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or
> (c) in the case of a claimant who was treated as not having limited capability for work under regulation 22 (failure to provide information), the claimant has since provided the information requested under that regulation.
> (5) In this regulation a "relevant decision" means–
> (a) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work; or
> (b) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work since

> a previous determination by the Secretary of State or appellate authority that the claimant does have limited capability for work.
> (6) In this regulation, "appellate authority" means the First-tier Tribunal, the Upper Tribunal, the Court of Appeal, the Court of Session, or the Supreme Court."

21. Turning then to decision making and appeals, section 8 of the Social Security Act 1998 ("SSA 1998") provides, in so far as is relevant, as follows:

> "**Decisions by Secretary of State**
> 8.—(1) Subject to the provisions of this Chapter, it shall be for the Secretary of State–
> (a) to decide any claim for a relevant benefit; and…
> (c) …….. to make any decision that falls to be made under or by virtue of a relevant enactment;
> (2) Where at any time a claim for a relevant benefit is decided by the Secretary of State–
> (a) the claim shall not be regarded as subsisting after that time; and
> (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.
> (3) In this Chapter "relevant benefit", means any of the following, namely…..
> (ba) an employment and support allowance;]
> (4) In this section "relevant enactment" means any enactment contained in…..Part 1 of the Welfare Reform Act 2007……."

22. Section 10 of the SSA 1998 deals with supersession of decisions and provides as follows:

> "**Decisions superseding earlier decisions**
> 10.—(1) Subject to subsection 3 below, the following, namely–
> (a) any decision of the Secretary of State under section 8 above or this section, whether as originally made or as revised under section 9 above;
> (aa) any decision under this Chapter of an appeal tribunal or a Commissioner; and
> (b) any decision under this Chapter of the First-tier Tribunal or any decision of the Upper Tribunal which relates to any such decision
> may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative.
> (2) In making a decision under subsection (1) above, 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.
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section.
> (4) …
> (5) Subject to subsection (6) and section 27 below, a decision under this section shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.

> (6) Regulations may provide that, in prescribed cases or circumstances, a decision under this section shall take effect as from such other date as may be prescribed.
> (7) In this section-
> "appeal tribunal" means an appeal tribunal constituted under Chapter 1 of this Part (the functions of which have been transferred to the First-tier Tribunal);
> "Commissioner" means a person appointed as a Social Security Commissioner under Schedule 4 (the functions of whom have been transferred to the Upper Tribunal), and includes a tribunal of such persons."

23. Appeals to the First-tier Tribunal are dealt with in section 12 of the SSA 1998, as follows (in so far as relevant):

> "**Appeal to First-tier Tribunal**
> 12.-(1)This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which—
> (a)is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
> (b)is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act.....
> (2)In the case of a decision to which this section applies the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal, but nothing in this subsection shall confer a right of appeal in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision.
> (3)Regulations under subsection (2) above shall not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required."

24. Lastly, as far as the SSA 1998 is concerned, section 17(1) provides as follows:

> "**Finality of decisions**
> 17.—(1) Subject to the provisions of this Chapter and to any provision made by or under Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulations under section 11 above, any decision made in accordance with those regulations shall be final."

25. Regulations 6(2)(r) and 7(38) to (40) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the DMA Regs") are also relevant. They deal with supersession of ESA decisions and the dates from which such supersessions are effective, and provide as follows:

"**Supersession of decisions**
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-
(r)is an employment and support allowance decision where, since the decision was made, the Secretary of State has—
(i)received medical evidence from a health care professional approved by the Secretary of State, or
(ii)made a determination that the claimant is to be treated as having limited capability for work in accordance with regulation 20, 25, 26 or 33(2) of the Employment and Support Allowance Regulations.

Date from which a decision superseded under section 10 takes effect
7.—(1) This regulation–
(a)is, except for paragraphs (2)(b), (bb) or (be), (29) and (30), subject to Schedules 3A, 3B and 3C; and
(b)contains exceptions to the provisions of section 10(5) as to the date from which a decision under section 10 which supersedes an earlier decision is to take effect.

(38) A decision made in accordance with regulation 6(2)(r) that embodies a determination that the claimant has—
(a)limited capability for work; or
(b)limited capability for work-related activity; or
(c)limited capability for work and limited capability for work-related activity
which is the first such determination shall take effect from the day after the last day of the relevant period as defined in regulation 4(4) of the Employment and Support Allowance Regulations.

(39) A decision made in accordance with regulation 6(2)(r), following an application by the claimant, that embodies a determination that the claimant has limited capability for work-related activity shall take effect from the date of the application."

(40) A decision made in accordance with regulation 6(2)(r) that embodies a determination that the claimant has—

(a)limited capability for work; or

(b)limited capability for work-related activity; or

(c)limited capability for work and limited capability for work-related activity

where regulation 5 of the Employment and Support Allowance Regulations (assessment phase – previous claimants) applies shall take effect from the beginning of the 14th week of the person's continuous period of limited capability for work."
(my underlining added for emphasis)

Discussion

First-tier Tribunal' powers on appeal against ESA repeat claim decision

26. The starting point of CPAG's argument on behalf of the appellant about the First-tier Tribunal's powers on an appeal against a decision on a repeat claim for ESA (and one which also illuminates the second issue on this appeal) is that when the Secretary of State's decision maker decided that repeat claim he or she was making an 'outcome' decision as to entitlement to ESA on that claim under section 8 of the SSA 1998. That decision, moreover, will have typically involved a number of determinations (sometimes described as 'building blocks') along the way to the outcome decision as to entitlement. These will have included whether there was sufficient evidence to enable a determination to be made on whether the claimant had limited capability for work in fact (under regulation 19 of the ESA Regs) and whether the deeming under regulation 30 of the ESA Regs applied until it could be determined whether the claimant in fact had limited capability for work[1].

27. The need to identify sufficient evidence to determine whether a claimant has limited capability for work will therefore involve a consideration on the facts of whether there has been a relevant change in the claimant's circumstances since the last determination that he or she did not have limited capability for work. Evidentially that will include consideration as to whether the claimant has a new medical condition or his or her medical condition has significantly worsened since the last determination. (I am using 'medical condition' here (and elsewhere in this decision) as a shorthand for "some specific disease or bodily or mental disablement".)

[1] Other of the statutory routes to entitlement may also be relevant in a limited number of cases: for example, the deeming as having limited capability for work under regulation 20 of the ESA Regs. However, regulation 29 of the ESA Regs would only apply if the decision maker had determined that there was sufficient evidence to determine limited capability for work in fact but had then determined under regulation 19 that the claimant does not have limited capability for work (see the opening words of regulation 29(1) of the ESA Regs).

28. There are several determinations or decisions which could be made by a Secretary of State decision maker on a repeat claim for ESA. One is where there is sufficient evidence on the repeat claim to determine whether the claimant has limited capability for work and where there has been no change in the claimant's medical conditions. Another is where there is not sufficient evidence because one of either regulation 30(4)(a) or (b) of the ESA Regs is satisfied[2] and (most likely because of that change) it cannot be determined whether the claimant has limited capability for work in fact without obtaining further evidence (medical or otherwise) under regulations 20 and 23 of the ESA Regs. In such a case the result ought then to be, assuming regulation 30(2)(a) is satisfied, a decision treating the claimant as having limited capability for work until it can be determined, on sufficient evidence, whether he or she in fact has limited capability for work.

29. However, satisfaction of either regulation 30(4)(a) or 30(4)(b) of the ESA Regs does not preclude a decision maker on behalf of the Secretary of State going on to determine whether the claimant has limited capability for work on the repeat claim without, for example, further evidence gathered at a medical examination under regulation 23 of the ESA Regs. That is not what the terms of regulation 30 say – the treating, if regulation 30(4) is met, applies only <u>until such time as it is determined</u> whether or not the claimant has limited capability for work. Moreover, it can be envisaged that there may be cases (a) where the new medical condition (perhaps minor new medical conditions such as a sprained wrist or ones which are asymptomatic) does not really call into question the evidence underlying the previous determination that the claimant did not have limited capability for work, or (b) the new medical condition or the worsening of the old condition is such that it can be determined, without the need for a medical examination under regulation 23 of the ESA Regs, that the claimant has limited capability for work on the repeat claim. This example does, however, give rise to the issue of for how long the

[2] Nothing in this appeal turns on, or was argued around, regulation 30(4)(c) of the ESA Regs.

treating as having limited capability for work under regulation 30 may apply in circumstances where a determination can be made as to limited capability for work in fact.

30. Another possible result is that the Secretary of State's decision maker forms the view when considering the repeat claim that, even though there is no new medical condition or a worsening of the old condition, there is not sufficient information for a determination as to limited capability for work to be made on the claim (under section 8(1)(a) of the SSA 1998) because he or she considers the evidence that led to the previous determination of no limited capability for work is inadequate or unreliable.

31. CPAG argues that the underlying all these possible determinations on a repeat claim for ESA is the following key consideration: whether the evidence that led to the previous determination that the claimant did not have limited capability for work remains reliable and so can be used to determine that issue again on the repeat claim.

32. I turn now to the heart of the first issue on this appeal, namely the First-tier Tribunal's powers on an appeal against a decision on a repeat ESA claim. CPAG argue, and I agree with it on this (as does the Secretary of State), that the Secretary of State's decision deciding entitlement to ESA on the repeat claim will – as in this case – typically include determinations (a) on whether claimant can be treated as having limited capability for work under regulation 30 of the ESA Regs **and** (b) whether the claimant in fact had limited capability for work under regulation 19 of the ESA Regs or could the be treated as having limited capability for work under regulation 29 of the ESA Regs.

33. Given this, it is argued, and again the Secretary of State agrees and in my judgment is correct to do so, that on an appeal against such an entitlement decision the First-tier Tribunal can give any decision that the Secretary of State could have made, through her decision maker,

on the repeat claim. This follows from paragraphs 12-15 of the Tribunal of Commission's decision in *R(IB)2/04*, where the following was said.

> "12. It is notable that section 12(2) [of the SSA 1998] provides simply that in the case of decisions specified in section 12(1) "the claimant … shall have a right to appeal to an appeal tribunal" and that the legislation does not expressly specify the powers - any powers - of the appeal tribunal in relation to the decision under appeal. There are provisions limiting an appeal tribunal's powers (notably section 12(8)(a) and (b)), but otherwise the legislation does not even expressly specify that an appeal tribunal may allow or disallow an appeal, or confirm or vary the decision under appeal. Therefore **all** the powers of an appeal tribunal – including even the most basic – must be implied. They must be derived from the fact that the statute gives a right of appeal, and from the nature of such an appeal in the context of the statutory scheme.
> 13. The following features of an appeal to an appeal tribunal are in our judgment clear.
> 14. First, the appeal is general, i.e. it is an appeal on fact and law. This was common ground between the parties to the appeals before us, and has been universally accepted since the introduction of the statutory scheme. Indeed, the appeal tribunal is designed to be a superior fact finding body, and is able to investigate the facts in greater depth than usually occurs before the decision-maker. The composition of appeal tribunals (with one or two members in addition to the legally qualified chairman, where considered appropriate by the legislature) is designed to enable them most effectively to make the necessary findings of fact. Unlike the decision-maker, appeal tribunals hear oral evidence where necessary. In the light of the fact that the initial decision is made by the Secretary of State (i.e. a person patently lacking in independence) and of the limited scope for the claimant to make representations to the Secretary of State, nothing less than such a superior fact finding body would be sufficient to comply with Article 6 of the European Convention on Human Rights ("the Convention"). We return to this point below.
> 15. Second, and as a consequence of the first feature to which we have referred, the appeal tribunal's jurisdiction is not limited to affirming or alternatively setting aside the decision under appeal. If, having made its own findings of fact, it considers the decision to be wrong, it has power to make the decision on the claim which it considers the Secretary of State ought to have made on the basis of the facts which it has found. In cases where the appeal tribunal makes a different decision from that made by the Secretary of State, the appeal tribunal's decision simply replaces that of the Secretary of State - and it is at least arguable that this is also the case where the appeal tribunal confirms the Secretary of State's decision and dismisses the appeal (see, for example, the decision of the tribunal of Commissioners in R(I) 9/63)." (my underlining added for emphasis – the other emphasis is in the original)

R(IB) 2/04 is also authority (see paragraphs [19]-[26] of the decision) that on an appeal the First-tier Tribunal conducts a complete rehearing of the entitlement issues that arise on the appeal.

34. It is thus clear, following *R(IB) 2/04*, that the First-tier Tribunal can make any decision the Secretary of State could have made on the repeat claim for ESA and is not in any sense bound by the Secretary of State's decision on that claim. The type of decision the First-tier Tribunal can make on such a claim may therefore include, but is not limited to, deciding that the claimant met the terms of regulation 30 of the ESA Regs at the date of the repeat claim (or any point down to the date of the decision on that repeat claim- see section 12(8)(b) of the SA 1998) **and** that it could not then be determined (without, for example, a further medical examination under regulation 23) whether he or she had limited capability for work in fact. In other words, the First-tier Tribunal can replace the Secretary of State's decision under appeal with its own decision treating the claimant as having limited capability for work under regulation 30 of the ESA Regs. And as a matter of law that can apply even where the Secretary of State's decision (as here) is to the effect that the claimant did not have limited capability for work in fact at the date of the repeat claim. Moreover, assuming all the other conditions of entitlement are satisfied, the First-tier Tribunal's decision will amount to an entitlement decision on the claim because it will deem section 1(3)(a) of the Welfare Reform Act 2007 to have been met on the repeat claim.

35. I should add that my conclusion above as to the First-tier Tribunal's powers on an appeal from a decision on a repeat claim for ESA turns importantly, following *R(IB) 2/04*, on what the Secretary of State *could* have decided on the repeat claim. At least two important consequences follow from this.

36. First, the same range of possible determinations, and thus bases for outcome decisions on the repeat claim, vest in the Secretary of State. In this appeal the decision maker determined that regulation 30 was not satisfied but also that the appellant did not have limited capability for work in fact on her repeat claim. That was the decision under section 8(1)(a) of the SSA 1998 on the repeat claim and thus gave rise to an appeal to the First-tier Tribunal under section 12(1)(a) of the SSA 1998. This case is therefore not one where an issue arises as to whether there is a right of appeal against a stand-alone determination, if such is ever made in fact, that regulation 30 is not satisfied on the repeat claim. In these circumstances, I do not think it either wise or appropriate for me to trespass in this case into the area of rights of appeal against a negative regulation 30 determination, despite my having sought and received post-hearing submissions from the Secretary of State and CPAG on this issue. (I should add, in fairness, that both parties in their post-hearing submissions expressed the view, albeit perhaps to differing degrees, that I should not express any view on this issue in this appeal.) The decision in *EI* sets out some *obiter* views of mine on this issue at paragraphs 43-59, though some of the thinking there set out may need to yield or be qualified by what I have concluded above about the powers of the First-tier Tribunal.

37. Second, as the First-tier Tribunal is able to give any decision the Secretary of State *could* have given, as I have said it is not in any sense constrained by the terms or the fact of the Secretary of State's decision. And this itself has two important aspects. Firstly, even if the Secretary of State has decided that regulation 30 is not met but the claimant has limited capability for work because he or she scores the fifteen points needed under regulation 19 and Schedule 2 to the ESA Regs (because a different view is taken of the medical evidence that led to the previous determination that the claimant did not have limited capability for work), in theory at least this would not preclude the First-tier Tribunal on an appeal against such a decision deciding

that regulation 30 applied and concluding that a further medical examination was required under regulation 23 of the ESA Regs to determine limited capability for work in fact. Secondly, I was **wrong** in what I said in paragraph 22(ii) of *EI*. This is because the fact that the Secretary of State may have determined limited capability for work in fact on the repeat claim is not a binding determination, either in fact or law, on the First-tier Tribunal.

38. The mistake I made in paragraph 22(ii) of *EI* was to treat the determination of limited capability for work made on the facts by the Secretary of State consequent upon the deeming provisions in regulation 30 not applying as some sort of binding, precedential historical fact ('there has been a determination on limited capability for work in fact') which neither she nor the First-tier Tribunal could go behind or disagree with. Accordingly, so I wrongly proceeded in *EI*, once that determination had been made it stood for all purposes and all decision-makers, including the First-tier Tribunal. I now accept, on effectively what are now the submissions of both parties before me, that this is wrong as a matter of law. Nothing in the language of regulation 30 of the ESA leads to the result that the Secretary of State's determination on the facts of limited capability for work on an ESA repeat claim binds the First-tier Tribunal on any subsequent appeal against her decision on the repeat claim. The language in regulation 30 of 'until such time as it is determined' does not mandate such a conclusion. Nor does anything in the SSA 1998. Indeed, section 17 of that Act points firmly against any such conclusion because the finality of decisions dealt with in that section is subject to the revision, supersession **and appeal** stages set out in that Act and Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007. In other words, the Secretary of State's decision (including the determination on limited capability for work in fact) is not final and cannot bind the First-tier Tribunal on an appeal. Furthermore, the breadth of the First-tier Tribunal's (implied) powers on an appeal are such that it can 'unmake' the

Secretary of State's decision under appeal (by setting it aside), and once this occurs there is as a matter of law no determination as to limited capability for work on the repeat claim.

39. Applying this conclusion to the decision of the tribunal in this case, even ignoring its legally wrong view about regulation 30 providing a 'validity' filter as a condition precedent to deciding if the appellant had limited capability for work in fact, in my judgment it erred in law in not following the law as set out above and, in consequence, not properly turning its consideration to whether the appellant could have had an award of ESA on her repeat claim as a result of satisfying regulation 30 of the ESA Regs. Moreover, for the reasons I go on to develop under the second issue below, that error of law was a material error of law because it ought to have led to the appellant at least being awarded ESA from the date of her repeat claim down to the date of the decision on that claim (subject to any waiting days).

40. Further and in any event, the tribunal also erred in law in my view by breaching the rules of natural justice and the right to a fair hearing. It did so by not having any, or any sufficient, regard to the Secretary of State's request that it remit the issue of whether the appellant had limited capability for work in fact to her if it found the appellant had a new medical condition (or significant worsening of an existing medical condition). As a consequence, the tribunal failed to alert the appellant or her representative to the possibility that no such remission would take place and so placed the appellant at a disadvantage. Had the tribunal remitted the matter as requested, this would have had the result that the appellant would have been entitled to ESA on her repeat claim, from and including 25 May 2016. It is largely for this reason, as I understand it, that the Secretary of State is content for me to redecide the first instance appeal in the terms set out above.

41. Had the tribunal remitted the issue of limited capability for work in fact as it had been requested, it would have then been for the Secretary of State to gather further evidence, almost certainly through another medical examination under regulation 23 of the ESA Regs, and decide whether the appellant had limited capability for work in fact under regulation 19 of the ESA Regs (or could be treated as so having under regulation 29 of the same regulations). As, however, the effect of the tribunal's decision, had it got to the remittal stage, would have been that the appellant was entitled to ESA on her repeat claim, any attempt by the Secretary of State to change that decision on the basis of her subsequent determination as to limited capability for work (having gathered further medical evidence) would have to have been by way of supersession of the tribunal's regulation 30 awarding decision under section 10 of the SSA 1998 and regulation 6(2)(r) of the DMS Regs. And the effective date of such a decision would have been either the date of the supersession decision itself (per section 10(5) of the SSA 1998) or, if applicable, one of regulations 7(38) or (40) of the DMA Regs.

42. These last considerations provide a convenient bridge to the second issue that arises on this appeal, the legal effect of the words "until such time as it is determined" in regulation 30 of the ESA Regs.

'Until such time as it is determined'

43. To provide a reminder, the issue here is whether *EI* was correct in deciding, in effect, that once the determination as to limited capability for work in fact is made, it always takes effect from the date of the repeat claim whether the determination finds the claimant has limited capability for work or not.

44. This issue needs to be addressed by giving consideration to two different scenarios, both of which are grounded in the two most realistic outcomes on the appellant's case. The first is the one posited in paragraph 41 above where the decision as to limited capability for

work in fact is made some time after the determination was made that regulation 30 was satisfied, and is by way of supersession of the 'regulation 30 awarding decision' on the repeat claim. That would have arisen in this case had the tribunal made the remission requested by the Secretary of State.

45. The second scenario concerns where the decision under appeal includes both the determination under regulation 30 and the determination as to limited capability for work in fact, as was the case in the decision under appeal in this case. Extending this second scenario therefore to this case (waiting days aside), could the tribunal in this case have decided that the appellant was to be treated as having limited capability for work under regulation 30 of the ESA Regs from the 25 May 2016 date of the repeat claim down to the date of the 3 June 2016 decision under appeal, even if it and the Secretary of State had been correct to determine, as at the decision date of 3 June 2016, that the appellant did not have limited capability for work in fact on her repeat claim?

46. An argument has been made by the Secretary of State that the second issue does not arise on this appeal and so, like the appeal rights in respect of negative regulation 30 determinations, there is no need for me to address it in deciding this appeal. I do not accept this. It was a central consideration raised by Judge Mesher and one which, in my judgment, is not rendered nugatory by my conclusion on the first issue. I say this because it follows from my conclusion on the first issue that the tribunal having determined that regulation 30 was met - as it ought to have done on its unchallenged finding that the appellant had a new medical condition by the time of her repeat claim for ESA - ought then to have grappled with the legal effect of its regulation 30 determination given the determination it did make as to the appellant not having limited capability for work in fact. In other words, could the regulation 30 determination have had any material benefit for the appellant given the determination that she did not have limited capability for work in fact? I should add that this

second issue has been addressed in argument and in relation to a list of scenarios I had put forward to try and better understand how regulation 30 operates within the statutory scheme.

47. It is I think useful and instructive to start with the first scenario, per paragraph 41 above. I have already explained that a determination that a claimant on a repeat claim for ESA is to be treated as having limited capability for work under regulation 30 of the ESA Regs will probably in most cases lead to that claim being decided and ESA awarded to the claimant. In this case, waiting days apart, that would have been, on the first scenario, an entitlement decision awarding the appellant ESA from and including 25 May 2016. There is nothing, however, in the language of regulation 30, and in particular the wording "until such time as it is determined that", which in my judgment requires or implies that once it has been determined whether the claimant has limited capability for work, that determination is to take effect from the date of the repeat claim. A number of considerations point decisively against this, on this first scenario.

48. Firstly, and focusing just on regulation 30, on a repeat claim where the claimant has a new medical condition (or significant worsening of the old condition) he or she under the statutory language in regulation 30 "**is** to be treated as having limited capability for work until such time as it is determined whether or not [he or she] has limited capability for work…" (my emphasis in both places). That speaks of a requirement to so treat *until* the subsequent determination has taken place. The language in regulation 30 does not easily accommodate the subsequent determination having retrospective effect. If the subsequent determination on limited capability for work in fact was to apply from the outset of the repeat claim then this would both (i) remove the deeming the opening words of regulation 30(2) required to be made for the period up to the date of the subsequent determination, and (ii) render the words 'until such time' as having little or no effect.

49. Secondly, on this first scenario, and stepping outwith the focus on the language in regulation 30 alone, the determination as to limited capability for work arises by way of supersession of the regulation 30 awarding decision and, as has been identified in paragraph 41 above, nothing in the relevant supersession rules provides for the regulation 30 awarding decision to be overset retrospectively on supersession. This, moreover, is underscored by the consideration that a regulation 30 awarding decision has been made on the repeat ESA claim. Once the repeat claim has been decided, whether by the Secretary of State's decision maker or the First-tier Tribunal standing in her shoes, it ceases to subsist: see section 8(2)(a) of the SSA 1998. It cannot therefore be the case that the subsequent determination as to limited capability for work in scenario one takes effect as a decision on the repeat claim and therefore can reach back to that claim or be the decision on it. The mechanism provided by the statute is for the subsequent determination on limited capability for work in fact to take effect, in this scenario, by way of supersession of the 'regulation 30' decision awarding benefit on the repeat claim, and such a decision is not retrospective.

50. In a search for pointers in the statutory scheme that might sit against this reading of regulation 30 of the ESA Regs, I had tentatively suggested in the directions set out in paragraph 14 above that the answer may lie in when a decision on a social security claim takes effect. Put very generally, under social security the decision on the claim will usually take effect from the date of claim. The thought that lay behind the direction was that a decision on a repeat claim which determines that the claimant does not have limited capability for work in fact may take effect from the date of the repeat claim and therefore overset any deeming that may have been conferred initially by regulation 30. I do not consider that this is or can be the case, for reasons I have just given.

51. I do not consider any different result holds under scenario two, though the context is different and is not concerned with decisions then being superseded. The scenario here is concerned with a decision made on the repeat claim which includes the determination under regulation 30 **and** the determination that the claimant does not have limited capability for work in fact. The decision then made disposes of the claim under s.8(2)(a) of the SSA 1998 and that Act does not extend the reach of supersession into matters which occur *before* the decision on the claim has been made (i.e. the determinations along the way to the decision). The effective date of supersession is therefore of no assistance and the primary guide as to statutory intendment to is left as regulation 30 of the ESA Regs.

52. However, in my judgment the language of regulation 30 points clearly to the same result. If a claimant has a new medical condition (or his or her previous medical condition has significantly worsened) at the time of the repeat claim for ESA (or any time after the date of the repeat claim but before the date of the decision on that claim, assuming such a decision determines limited capability for work in fact), the claimant **is** (to emphasise again the language in regulation 30) to be treated as having limited capability for work *until such time as it is determined* whether or not he or she has limited capability for work in fact. That is the requirement in regulation 30.

53. The repeat claim here was made on 25 May 2016. On the facts the appellant satisfied the deeming provisions in regulation 30, because she had a new medical condition, as at the date of her repeat claim. Crucially, however, she was not determined not to have limited capability for work in fact until 3 June 2016. Waiting days aside, on the language of regulation 30 she was in my view therefore required to be treated as having limited capability for work *until* it was determined that she did not have limited capability for work on 3 June 2016. That determination once made may have had consequences for the appellant from the date it was made, but to treat the determination as then made as having effect before its date would

run flatly contrary to the use of 'until' in regulation 30. The protection and deeming given in regulation 30 runs up to the determination of limited capability for work in fact, as is made clear by the rise of the word 'until'. Accordingly, if there is any general principle in social security law that a decision on a claim should take effect from the date of claim it has, in my judgment, to here yield to the more specific language in regulation 30 of the ESA Regs.

54. Moreover, nothing in section 8(2)(a) of the SSA 1998 precludes this conclusion as it is only concerned with excluding matters from being taken into account which fall *after* the date on which the claim is decided and not matters that may arise between the date of the claim and the date on which it is decided.

55. My decision in *EI* was not assisted by my conflating being immediately assessed or determined as not having limited capability for work in fact on a repeat claim with that determination occurring at the time of the decision on the repeat claim: see paragraph 22 of *EI*. However, there was no 'immediate' determination about whether the appellant had limited capability for work in fact on her repeat claim of 25 May 2016. For that to have occurred, the determination would have to have been made on the date of the claim, i.e. on 25 May 2016. That determination was not made immediately but on 3 June 2016. That is a short period but the construction of the protection afforded under regulation 30 does not depend on the length of the time until it is determined whether the claimant has limited capability for work in fact.

56. I should make one last matter clear. Nothing in this decision addresses what is meant by "significantly worsened" in regulation 30(4)(b) of the ESA Regs, although CPAG sought to present some argument that what I said about this in paragraphs [34]-42] of *EI* was wrong on this issue as well. My not dealing with that issue in this decision is deliberate as it does not arise on the facts of this case as I

am treating them as found. Moreover, it does arise in another appeal before the Upper Tribunal which has been stayed behind this appeal.

57. Following the negative decision on the repeat claim for ESA, the appellant claimed and was awarded jobseekers allowance with effect from 12 July 2016. She then claimed universal credit with effect from 3 November 2016. The gap in her entitlement to ESA is thus for a seven week period form 25 May 2016 to 12 July 2016. In these circumstances, the Secretary of State recognises that there would be no material in my allowing the appeal, making an award of ESA to the appellant under regulation 30 of the ESA Regs from 25 May 2016 and then remitting to the Secretary of the State the issue of limited capability for work in fact to be determined. However, this factual conclusion on the appeal does not affect the conclusions as to the law as set out above or why the tribunal erred in law as a result of those conclusions.

Conclusion

58. For the reasons given above, this appeal is allowed and the decision the First-tier Tribunal ought to have given is set out at the beginning of this decision.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 6th September 2019