IN THE UPPER TRIBUNAL **Appeal No: CE/4647/2013**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal disallows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Ashford on 23 August 2013 under reference SC151/13/01438 did not involve any error on a material point of law and therefore the decision is not set aside.

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

Representation: The appellant did not appear and was not represented.

Ms Fiona Scolding, instructed by the Government Legal Service, represented the Secretary of State for Work and Pensions

REASONS FOR DECISION

Introduction

1. I gave permission to appeal in this case in order to explore how regulation 30 of the Employment and Support Allowance Regulations 2008 ("the ESA Regs") – in the form regulation 30 was in as at the date of the Secretary of State's decision under appeal – properly applied on the facts of the appellant's case. Broadly speaking regulation 30 is the provision that enables a claimant to be treated as having limited capability for work pending their being assessed under the limited capability for work assessment, subject to their satisfying certain conditions. The conditions I thought might be relevant were those applying under regulation 30(2) of the ESA Regs where, at the

time relevant to the decision under appeal, there had within the six months prior to the new claim for employment and support allowance ("ESA") been a decision that the claimant did not have limited capability for work.

2. I have since the grant of permission to appeal been persuaded that those conditions did not as matter of fact arise on this appeal because in the decision under appeal there had in fact been an assessment that the appellant did not have limited capability for work, and in those circumstances the conditions in regulation 30(2) did not (indeed could not) apply.

3. I have considered since the hearing of this appeal before me - for overly long I am afraid (and for which long delay I apologise) - on the usefulness of my nonetheless addressing how regulation 30(2) ought to have applied if the decision under appeal had not embodied a decision that the appellant, following an assessment, did not have limited capability for work. On the one hand, the issues I have raised concerning regulation 30 have been addressed very fully in the submissions of the Secretary of State and in the arguments made on his behalf by Ms Scolding before me. On the other hand, neither the appellant nor her named representative has played any real role in this appeal and, in particular, has not presented any argument on regulation 30[1]. Therefore, there has not been any contested argument on regulation 30 and regulation 30(2) in particular. Moreover, any conclusions drawn on regulation 30(2) of the ESA Regs would have no effect on this appeal and would not in any proper sense be either binding or authoritative. A further consideration is that regulation 30 of the ESA Regs has been substantially recast since 30 March 2015

[1] The appellant's representative changed during the course of the Upper Tribunal proceedings. One hearing of the appeal before the Upper Tribunal – ostensibly on the regulation 30 issues - was postponed to enable the appellant's (second) representative to attend, but he did not attend the new hearing nor did he provide any submissions in reply to the written arguments made by the Secretary of State after the hearing, despite his being directed by me to provide such a submission.

and so what is said in this decision about regulation 30(2) may have limited relevance to the version of regulation 30 currently in place.

4. Given these considerations I have concluded that it would only be right for me to express some provisional views on issues that can arise under regulation 30(2). What I say below about the conditions in regulation 30(2) if they apply is not, therefore, in any sense binding and should not be treated as such.

Relevant factual background

5. The decision under appeal to the First-tier Tribunal is dated 10 September 2012 and arose on a claim for ESA made by the appellant on 21 August 2012. In the ESA claim form the appellant said she wanted to claim ESA from 15 August 2012. She described her "illness or disability" on that form as stenosis of the spine, injured right leg and depression. The claim form was dated 4 September 2012.

6. This claim was refused by the Secretary of State's decision maker on 10 September 2012. That decision said (the emphasis is in the original):

> "[The appellant] cannot be treated as having limited capability for work from 15/08/12.
>
> This is because there has been a determination within the 6 months preceding 21/08/12, the date of her claim, that she is capable of work. [The appellant] appealed this decision but her appeal was dismissed on 10/07/12.
>
> She has not provided evidence to show that she is suffering from a specific disease or bodily or mental disablement which she was not suffering from at the time of the determination and there is no evidence that the disease or bodily or mental disablement she was suffering from at the time has significantly worsened. Her back problems and depression were taken into account at her previous medical assessment and subsequent determination.
>
> Therefore based on the evidence and information supplied, including the previous medical assessment, I have determined that **[the appellant] does not have limited capability for work and**

> **cannot be treated as having limited capability from and including 15/08/12**."

There is much in the (seemingly standardised) format of the decision that could have been made clearer and improved. I return to this later.

7. The appeal bundle put before the First-tier Tribunal helpfully (and quite correctly – see rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules) included copies of: (i) the appellant's previous form ESA 50 (dated received on 18 November 2011); the ESA85 medical report form, dated 17 February 2012 (which gave the appellant nil points under regulation 19 and Schedule 2 to the ESA Regs); the Secretary of State's supersession decision, dated 2 March 2012, deciding, based in large part on the ESA85 report, that the appellant did not have limited capability for work from 2 March 2012; and a Decision Notice of a First-tier Tribunal dated 15 August 2012 upholding on appeal the Secretary of State's decision of 2 March 2012.

8. The appellant appealed the decision of 10 September 2012. She did so on the (fairly common) ground that she had reapplied for ESA after her first appeal had been dismissed on 15 August 2012 because her condition had deteriorated a great deal since her original application. Her condition, she said, was degenerative and now had become so physically debilitating that she had been advised to undergo spinal surgery in an attempt to reduce the pain and lack of mobility. She said she was also suffering depression to a much higher level than she had done previously.

9. The appeal was heard by the First-tier Tribunal on 23 August 2013 ("the tribunal"), at a hearing which the appellant attended. The tribunal dismissed the appeal. In its summary of reasons for its decision as set out in its Decision Notice the tribunal said, inter alia:

> "....while her back pain is worse and...her depression has not improved these changes did not amount to a 'significant deterioration' as required by Reg 30(2).
>
> The Tribunal accepted that the Appellant suffers from conditions including back pain, depression and anaemia and that her ability to function was restricted. However, these findings did not support the award of more than 6 points for mobility, Activity 1(d)."

These summary reasons were expanded upon in the tribunal's statement of reasons for its decision but not in a way that altered the basic two-staged approach of the tribunal as set out in the Decision Notice. However, it did say in its statement of reasons:

> "having found that [the appellant's] condition had changed after the date of the original decision but that this change was not significant, [the tribunal] is required by Regulation 30(2), and followed Commissioner Jacobs ruling in CIB/1031/00 consequently considering and considered [the appellant's] capacity for work for the period covered in her claim, that is from 16/08/12/. The Tribunal considered there was sufficient evidence before it to consider and conclude the matter and that a further medical examination and report would be unnecessary."

Relevant law

10. Section 1 of the Welfare Reform Act 2007 sets out the basic conditions of entitlement to ESA, amongst which is section 1(3)(a) which provides the requirement 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.

11. 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—
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> (a)it has been determined whether he has limited capability for work, or
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> (b)he falls in accordance with regulations under this section to be treated as not having limited capability for work.
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> (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."

12. Regulation 19 of the ESA Regs gives effect to section 8(2) of the Welfare Reform Act 2007 and provided at the material time 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."

13. It is important to also consider regulation 21 of the ESA Regs, which as in form at the time relevant to this appeal provided as follows.

> "**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 will 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)."

It is to be noted that regulation 21 does not require a medical examination to be carried out. That is catered for in regulation 23 of the ESA Regs.

14. Regulation 23 deals with medical examinations (leading to the ESA85 forms), and provided at the material time relevantly as follows:

> "**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.

15. The central statutory provision with which this appeal is concerned is regulation 30 of the ESA Regs. As in force at the material time this provided relevantly as follows:

> "**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) that it has not, within the 6 months preceding the date of claim, been determined, in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, that the claimant does not have limited capability for work or is to be treated as not having limited capability for work under regulation 22 or 23 unless—
> (i) 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;
> (ii) a disease or bodily or mental disablement from which the claimant was suffering at the time of that determination has significantly worsened; or
> (iii) 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…….
> (3) Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a decision that embodies a determination that the claimant does not have limited capability for work and that appeal has not yet been determined by an appeal tribunal constituted under Chapter 1 of Part 1 of the Social Security Act 1998."

16. As noted above, regulation 30 of the ESA Regs was substantially amended with effect from 30 March 2015 by regulation 3 of the Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015. I will not

set out here regulation 30 in the form it was amended to with effect from 30 March 2015.

17. In terms of its effect the new form of regulation 30 still only allows for treating a claimant as having limited capability for work until such time as it is determined, inter alia, whether the claimant has limited capability for work. The relevant change introduced by the amendment, however, is to remove the deeming or treating as having limited capability for work under regulation 30(1) if at any time in the past (i.e. not just within the 6 months preceding the date of the new claim as applies in the form of regulation 30 set out above) the claimant has been determined by the Secretary of State not to have limited capability for work, *unless* since that determination the claimant has developed a new medical condition or his existing conditions have significantly worsened.

18. The purpose of the amendment appears not to change the need to show significant worsening of an existing condition or a new medical condition on a new claim for ESA (though the time within which such tests arise has changed), but to remove the ability of claimants to be deemed as having limited capability for work on an ESA repeat claim simply by their making that claim more than six months after a previous decision of the Secretary of State finding them not to have limited capability for work. Whether that purpose has been achieved by the amended form of regulation 30 is not for me to decide. In its amended form, however, regulation 30 still requires significant worsening or a new condition to be shown for the deeming it allows for to apply.

Discussion and conclusion

19. In giving permission to appeal I said this:

> "I do not consider the grounds of appeal put forward on behalf of the appellant raise any arguable error of law that was material to the First-tier Tribunal's decision. The tribunal here was aware of the DLA award and had before it the previous ESA85. The point of Judge Mark's decision in *CE/3883/2012* was the competence of physiotherapists to give opinion evidence on mental health issues. Mental health was not a determinative issue here and the ESA85 was completed by a nurse and not a physiotherapist. In any event, the adequacy of the ESA85 was not a central consideration on this appeal.
>
> However, I give permission to appeal to enable the following potentially important points to be explored and decided by the Upper Tribunal; points which may arguably show that the First-tier Tribunal erred in law in coming to its decision.
>
> First, given that the date [the appellant] submitted her second claim was either on or after 4 September 2012 (see page 69) and that date fell more than 6 months after the previous negative limited capability for work decision of 2 March 2012, did the Secretary of State in his decision of 10 September 2012, and then the First-tier Tribunal on appeal, not err in law in not deciding that [the appellant] could be treated as having limed capability for work under regulation 30 of the ESA Regs from the actual date of claim: see para. 8.7 of *R(IB)8/04*? Put another way, why was the date that [the appellant] *sought* to make this claim from – 15 August 2012 (page 20) - treated as the sole determinative date for the purposes of regulation 30?
>
> Second, assuming, notwithstanding the first point above, that this arises, what is the correct test for deciding whether the health conditions have "significantly worsened" under regulation 30(2)(b)(ii) of the ESA Regs. Is it – per *CIB/1959/1997* – measured in terms of whether the person would now score 15 points under the limited capability for work assessment? That approach was doubted in *SK –v- SSWP* [2009] UKUT 121……It is also an approach that may sit uneasily with: (a) the overall structure of regulation 30 of the ESA Regs, as if significant worsening means in fact meeting the 15 point threshold what then is the point of the deeming provision in regulation 30(1) of those regulations?; and (b) the fact that under regulation 30(2)(b)(i) of the ESA Regs a person will fall within the deeming provision (subject to providing medical evidence) merely on the basis of having a new health condition that they did not have at the time of the previous limited capability for work decision, which would not seem to entail that the claimant would necessarily meet the 15 points threshold. Additionally, whichever is the correct test for "significantly worsened", did the First-tier Tribunal here apply it and did it explain sufficiently what the test was that it was applying?
>
> Third, assuming, contrary to the first point above, that the second claim for ESA was made within 6 months of the 2 March 2012

> determination and there was no significant worsening, if no new limited capability for work determination has been made by the Secretary of State what empowered the First-tier Tribunal to carry out that assessment? The tribunal relied on *CIB/1031/2000* as enabling it to carry out the limited capability for work assessment, but is that decision correct. If a claimant is not deemed to have limited capability for work under reg 30, does it not then fall to the Secretary of State to make a decision under section 8 of the Social Security Act 1998 based on an "assessment" under regulation 19 of the ESA Regs on whether the claimant actually has limited capability for work (see paragraph [6] of *CIB/3106/2003*....)? In other words, unless and until that section 8 decision has been made, does the tribunal have any jurisdiction under section 12 of the Social Security Act 1998 to make such a decision? (And are the points made below relevant here?) Further and in the alternative, if the tribunal had the power to carry out this assessment did it not err in law in considering it was required to do so?
>
> Fourth, assuming the tribunal was empowered to carry out the limited capability for work assessment, when is that determination effective from? Section 12(8)(b) of the Social Security Act 1998 would suggest it is the date of the decision under appeal (here, 10 September 2012). But as the tribunal was only able to undertake the assessment because in its view the new claim for ESA was made with effect from 15 August 2012 and so was within 6 months of the last limited capability for work determination, is its assessment not effective from 15 August 2012?
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> Fifth, if the tribunal's limited capability for work assessment is effective from 15 August 2012 then does that not rob the deemed limited capability for work that might otherwise arise from 4 September 2012 under regulation 30 of the ESA Regs (that is, under the first point above) of no effect because the effect of the tribunal's decision is that by 4 September 2012 it has already been determined (per reg 30(1)) that [the appellant] does not have limited capability for work (per reg 30(1)(a))? And does this point not then call into question decisions such as *R(IB)8/04*?"

20. The first point of concern I raised can be cleared out of the way immediately. This is because on the appeal to the Upper Tribunal the Secretary of State has provided evidence to show that the appellant telephoned the Department for Work and Pensions on 21 August 2013 to make a new claim for ESA. This evidence has not been contested by the appellant. That date counts as the date of claim – see regulations 4G and 6(1F) of the Social Security (Claims and Payments) 1987 (it was either a defective claim or an intention to make a claim, either of which was made good by the claim later submitted) – and so was a claim which fell within 6 months of the

previous adverse limited capability for work decision made on 2 March 2012. (It is clear that it is this decision date which counts for the purposes of regulation 30 and not the later First-tier Tribunal decision of 15 August 2012 upholding it: see paragraphs 9-11 of *CIB/1031/2000*, paragraph 5 of *CIB/3106/2003* and paragraph 8.4 of *R(IB)8/04*).

21. As the new claim for ESA was made within 6 months of the previous determination that the appellant did not have limited capability for work, this potentially brought regulation 30(2) of the ESA Regs into play. However, its deeming or treating can only apply for the period up until it has been decided (again) whether the claimant has limited capability for work. This is what previous caselaw has held – see for example *CIB/1959/1997* – but in any event is made clear by the words of regulation 30(1) of the ESA Regs which limits any treating as having limited capability for work under regulation 30 "until such time as it is determined…whether or not the claimant has limited capability for work…" (my underlining added for emphasis). And any other construction would run contrary to the regulation making power in section 8(5) of the Welfare Reform Act 2007, which also uses the words underlined above. It follows that if in fact it was decided by the Secretary of State on the second claim for ESA that the appellant did not have limited capability for work then the conditions set out in regulation 30(2) simply did not arise. They are conditions which if satisfied allow for the treating that the determination of actual limited capability for work has excluded.

22. This conclusion is consistent with Upper Tribunal Judge Hemingway's decisions in *CE/3647/2014* (at paragraph 16) and *CE/2327/2015* (at paragraph 12 in particular). Indeed it seems to me, as perhaps *CE/3647/2014* may not make explicitly clear, 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)).

23. I am, moreover, persuaded by the submissions of the Secretary of State, despite the opacity and confusion of his delegate's written decision notice of 10 September 2012, that his decision of 10 September 2012 was such a decision: i.e. it did decide the claim and did find on the evidence that the appellant did not have limited capability for work. The appellant has not sought to argue the contrary. This conclusion must, it seems to me, be the consequence of the decision maker saying (ignoring the unfortunate "Therefore"): "based on the evidence and information supplied, including the previous medical assessment, I have determined that [the appellant] does not have limited capability for work..... from and including 15/08/12."

24. Part of the problem it has to be said is the confusion caused by decision notice referring to the tests for treating a person as having limited capability for work under regulation 30(2) of the ESA Regs and finding them not to be satisfied as well as that notice deciding that the appellant did not have limited capability for work. For the

reasons I have given in paragraph 21 above, the regulation 30(2) tests are irrelevant if the decision maker is deciding whether the claimant has limited capability for work under Regulation 19 and Schedule 2 to the ESA Regs. The tests under regulation 30(2), moreover, do not act as some form of legal gateway or threshold test for whether to decide if the claimant has limited capability for work: for example, and as the tribunal seems to have thought, allowing a decision based on regulation 19 and Schedule 2 of the ESA Regs to be made only if the regulation 30(2) tests are not satisfied. It is perhaps all the more surprising that the decision notice of 10 September 2012 was set out in such a confusing and legally incorrect way given that it appears that the guidance to decision makers was to the effect if a decision on limited capability for work could be made on the evidence then that is all that needed to be decided (see what was, as I understand it at the relevant time at least, paragraph 42333 in Chapter 42 of the *Decision Makers Guide*).

25. I can well see that as a matter of evidence whether a claimant's existing medical condition has significantly worsened, or a new condition has since arisen, might affect whether the claimant would score 15 points under Schedule 2 to the ESA Regs on their repeat claim for ESA if such a Schedule 2 decision was to be made, such that if there has been no change the Schedule 2 score might be thought less likely to have changed. But these are only matters of evidence, to be taken into account when deciding whether the claimant has limited capability for work under regulation 19 and Schedule 2. As a matter of statutory construction, however, if a decision is made whether a claimant has limited capability for work then it is legally irrelevant – in terms of the statutory basis of the decision to be made - whether the claimant's condition has significantly deteriorated or they have a new medical condition. This is because at the point that decision is made regulation 30(2) can have no purchase. (And the same applies where the decision made is whether the claim can *otherwise* be treated as having limited capability for work (for

example under regulations 25 or 29 of the ESA Regs) or is whether the claimant is to be treated as not having limited capability for work under regulations 22 or 23 of the ESA Regs.)

26. A potential difficulty arising from the Social Security (Incapacity for Work) (General) Regulations 1995 ("the IFW Regs"), and the incapacity for work scheme more generally, may lie in a distinction thought perhaps to have drawn between the assessment of incapacity for work under the personal capability for work assessment and the decision on incapacity for work. Thus paragraph 28 of *CIB/1959 and 2198/1997* drew a distinction between a claimant being "assessed" under the personal capability for work assessment and a "decision" on incapacity for work (doubted on this at paragraph 8 of *SK –v- SSWP* [2009] UKUT 121 (AAC)), and paragraph 6 of *CIB/3106/2003* said:

> "in any case where a claim is made on the ground of incapacity for work and it is decided by the Secretary of State that the claimant cannot be treated under regulation 28 as incapable of work pending the assessment, the Secretary of State must still arrange a personal capability assessment in order to determine whether the claimant is *actually* incapable of work in accordance with the assessment".

27. However I do not consider that anything in this caselaw was holding that as a matter of law the personal capability assessment could *only* be conducted either by or after a medical examination had been conducted pursuant to regulation 8 of the IFW Regs and a report given in form IB85, such that if it was found under regulation 28 of the IFW Regs (the equivalent of regulation 30 of the ESA Regs) that there had been no new medical condition or significant worsening of a claimant's existing condition within the 6 month period then the adjudication officer could not decide whether the claimant was incapable of work in accordance with the personal capability assessment (per section 171C of the Social Security Contributions and Benefits Act 1992) in the absence of such a report. Such a perspective would in my view be contrary section 171C of the Social Security

Contributions and Benefits Act 1992 and regulations 6, 8, 24, 25 and 28 of the IFW Regs, which in relevant material respects have the same effect as the equivalent statutory provisions governing ESA set out above. It would also be contrary to caselaw under the IFW Regs: see for example paragraph 16 of *CIB/1031/2000*.

28. Moreover, as far ESA is concerned the decision in *SSWP –v- RM* [2014] UKUT 0042 (AAC) holds that no distinction is to be drawn between the "assessment" and "determination" of limited capability for work. As Upper Tribunal Judge Jacobs says in paragraph 20 of *RM*:

> "Against this background of the decision-making process, it is possible to see how regulation 19(2) fits in. An assessment is, to summarise, an assessment of the extent to which a claimant's physical and mental condition restricts or prevents performance of the activities in Schedule 2. That is something that requires findings of fact and they can only be made by the decision-maker. This leads to the conclusion that the assessment is undertaken, or at least completed, by the decision-maker, not the health care professional. It therefore follows that the determination on the basis of a limited capability for work assessment, to which regulation 19(1) refers, does not involve two separate stages. One analysis is that the assessment is made, and only made, by the decision-maker, on the basis of evidence and information provided by, amongst others, the health care professional. This is the analysis I prefer. Another analysis is that the assessment is a process that is only completed by the decision-maker. Either way, it is not possible to sever the assessment and the determination in the way that Mr McKendrick argued."

That analysis in my judgment applies with equal force to regulation 30 of the ESA Regs.

29. I therefore do not consider there is any scope for an argument that under regulation 30(1) of the ESA Regs in force at the material time the Secretary of State's decision maker could not decide if the claimant had limited capability for work within 6 months of decision that the claimant did not have limited capability for work without a further medical ESA85 report. Such is not required by regulation 23 of the ESA Regs. The assessment/decision on limited capability for work is for the decision maker to make if they consider they have

sufficient evidence to do so, and that will include any ESA85 report obtained before the previous decision was made.

30. The decision maker in this case was therefore entitled as a matter of law to decide whether the claimant had limited capability for work as at 10 September 2012 and, despite the confused state of her decision notice, did so decide. Having so decided, the question of significant worsening fell away and both the decision maker and the tribunal erred in law in addressing it as a basis for entitlement arising under regulation 30(2) (though, as I have said, any worsening (or new condition) might as a matter of fact be relevant to what points were to be scored under regulation 19 and Schedule 2 on the assessment.)

31. However, this error of law the tribunal made was not material to its decision because it went on to decide whether the appellant had limited capability for work under regulation 19 and Schedule 2 to the ESA Regs and arrived at a perfectly lawful decision in so doing. No serious argument has been made that the tribunal erred in law in its findings and reasoning under regulation 19 and Schedule 2 and, in any event, permission to appeal was not given to enable this aspect of the tribunal's decision be challenged. It is for this reason that I have refused to set aside the tribunal's decision.

32. The above conclusion is sufficient to dispose of this appeal. It also means that some of the issues I raised when giving permission to appeal fall away. The important remaining issues were addressed in directions I gave after the oral hearing of this appeal. These were:

    (i) what is meant by "significantly worsened" in regulation 30(2)(b)(ii), and

    (ii) whether there is a right of appeal pursuant to section 12 of the Social Security Act 1998 against an adverse "treating as having limited capability for work" decision under regulation 30 (i.e. where it is decided that the "unless" conditions in regulation 30(2)(b) do not apply and it is not at the same time possible to determine

> whether the claimant has limited capability for work), and if it not why not (e.g. why is such an adverse decision under regulation 30 not a decision on a claim under section 8 of the SSA 1998)?

33. I will deal with both of these issues here, though with the caution I have expressed above.

Significantly worsened

34. If there is no right of appeal against a Secretary of State's determination that regulation 30(2) does not apply when he has been unable at the same time to decide if the claimant has limited capability for work, it would follow that the question of what can amount to "significant worsening" cannot arise on any appeal, and therefore it is not the Upper Tribunal's function on a statutory appeal to rule on this issue. That said I have not concluded that here is no right of appeal and, in any event, some guidance may be of assistance to decision makers.

35. The commentators in Volume I of Sweet and Maxwell's *Social Security Legislation – Non Means Tested Benefits and Employment and Support Allowance* construe the phrase as meaning that "the claimant would satisfy [the] test of limited capability for work if he were subjected to it"(my emphasis supplied). I do not consider that this can be correct. For the reasons I have given above, if the decision maker is of the view that, whatever the worsening, the claimant does not have limited capability for work under regulation 19 and Schedule 2 to the ESA Regs then they can, and should, simply make that decision. That, however, will involve consideration of how the claimant is affected functionally by their medical conditions as at the date of the decision on the repeat claim and 'scoring' against the Schedule 2 descriptors: see paragraphs 39, 52 and 83 of *SSWP –v- RW and RW* (ESA) [2015] UKUT 0235 (AAC). Even if in a case where there has been no worsening at all this may only involve the decision maker carrying across the previous Schedule 2 points score, it seems

to me that this form of conscientious adjudication is of a different order from that required if such a 'Schedule 2' decision cannot be made on the evidence and instead the question is whether there has been "significant worsening". The latter, it seems to me is intended to involve a less onerous and more summary form of adjudication.

36. For these reasons, in my judgment the test of "significant worsening" cannot be equated with *would* now satisfy the test for limited capability for work in Schedule 2 as that would render it superfluous as a separate test, which it is plainly intended to be. On the other hand it seems to me that the significant worsening has to be judged against the previous limited capability for work assessment. That assessment judged the extent of the claimant's capability to perform the Schedule 2 functional tests (see regulation 19(2) of the ESA Regs) and, in the context of regulation 30 and the ESA scheme more generally, the underlying disease or bodily or mental disablement having "worsened" must mean broadly, it seems to me, in terms of its functional effects; and whether it has significantly worsened likewise has to relate back to the previous functional assessment made under regulation 19(2) and Schedule 2 in which the claimant did not secure the necessary 15 points

37. The commentary referred to above appears to be drawn from what Mr Commissioner Jacobs (as he then was) said in *CIB/1959 and 2198/1997* at paragraph 30, where he said:

> "Those words [significantly worsened] are not defined. If the condition applies, its effect is to treat the claimant as satisfying the all work test. The words must be related to that test. In other words, a claimant's disablement has significantly worsened only if it is proved to have worsened to the extent that it is fair to assume that the claimant would satisfy the all work test if subjected to it." (my underlining added for emphasis)

38. In *SK-v SSWP* [2009] UKUT 121 (AAC) Upper Tribunal Judge Turnbull said he was unsure about this test and said "I doubt whether the question of "significant worsening" requires that a judgment be made as to whether the personal capability assessment might be satisfied".

39. For the reasons given above, I respectfully agree, in broad terms, with what Commissioner Jacobs said and disagree with Judge Turnbull's *obiter* remarks. In my judgment the test of 'significant worsening' under the statutory scheme needs to relate to back to the previous assessment of limited capability for work because it treats the claimant as having limited capability for work until it can be decided whether they actually have limited capability for work, and the test of significant worsening therefore should not be divorced from the 'basic' condition of entitlement it may deem the claimant to meet.

40. Where the *Sweet and Maxwell* commentary has gone wrong, in my respectful opinion, is in ignoring the words underlined above from Commissioner Jacobs decision and it being "fair to assume" that the claimant would satisfy the limited capability for work test when they are subjected to it. I agree with the Secretary of State that this can be formulated another way as meaning that the decision maker who cannot make the regulation 19 and Schedule 2 decision immediately on a repeat claim is satisfied that the claimant "would be likely to score 15 points or more when the regulation 19 and Schedule 2 decision can be made". That test it seems to me preserves the separate nature of the significant worsening test and provides a rational basis for applying a test which by its nature falls short of deciding limited capability for work but which at the same time respects it as one which treats the claimant as having limited capability for work.

41. Nor do I consider it to be a difficult test to operate. The decision-makers will, or ought to, have in such cases the previous Schedule 2 score and, if based on a medical examination, the ES85 form. If the claimant received a points score of zero previously then there may

need to have been a considerable worsening in their condition in fact for it to be significant enough, in the sense of it being likely that they would score 15 points when a fresh regulation 19 and Schedule 2 decision is made. On the other hand if a claimant, for example, scored 9 points for mobilising under Schedule 2 previously on the basis of their heart condition and poor exercise tolerance and credible evidence is presented that the heart condition has deteriorated in the last 6 months, a decision maker might conclude that it is likely that 15 points will be scored when the new assessment under regulation 19 and Schedule 2 is made.

42. I should add that I do not consider that the above perspective is undermined by other test for deeming under regulation 30(2) arising simply on the basis of the claimant suffering from a "specific disease or bodily or mental disablement" which they did not have within the last 6 months. I accept, as did the Secretary of State, that this test does not relate to the previous regulation 19 and Schedule 2 decision in the sense described above and will treat a claimant as having limited capability simply on the basis of a medical condition that they did not have before, even in cases where the new medical condition may have no obvious functional impact. This, however, is because the fact of the new medical condition means that the previous assessment of limited capability for work under regulation 19 and Schedule 2 may not act as a safe evidential starting point because it did not take account (and could not have taken account) of the new medical condition, and so deeming is necessary until a fresh assessment can be made of the functional limitations arising from all the conditions the claimant now suffers from. Regulation 30(b)(i) of the ESA Regs (as they were at the time relevant to this decision) thus has a different focus and meets a different statutory purpose from the 'significantly worsened' test in regulation 30(b)(ii).

Appeal right on regulation 30(2) decision

43. The problem here arises not where the Secretary of State's decision maker on a repeat claim for ESA immediately makes the limited capability for work decision under regulation 19 of the ESA Regs, because if that is an adverse decision there is no dispute that the claimant will have a right of appeal against such a decision. Nor does the problem arise where the regulation 19 limited capability for work decision cannot be made immediately but the decision maker concludes that there has been significant worsening, or a new medical condition has developed, over the least 6 months, as no useful appeal can arise against such a decision.

44. Where the problem arises, however, is in the situation where the limited capability for work decision cannot be made immediately on a repeat claim made within 6 months (or now at any time) and the decision maker determines there has been no significant worsening or new medical condition. In one sense the 'decision' that the claimant's medical condition has not worsened significantly over the last 6 months deprives the claimant of being treated as having limited capability for work and means they will not be paid the assessment phase rate of ESA until the regulation 19 and Schedule 2 decision is made. On the other hand, and putting matters quite broadly at this stage, if the regulation 19 and Schedule 2 decision once made finds the claimant to have limited capability for work (or they can be treated as meeting that test other than under regulation 30), that decision will confer payment of ESA back to the date of the repeat claim.

45. Some of the caselaw of the Upper Tribunal and social security commissioners might suggest that there is a right of appeal. Thus *CIB/1959 and 2198/1997*, CIB/1031/2000, *R(IB)8/04* and *SK –v- SSWP* [2009] UKUT 121 (AAC) all on the face of it proceeded as appeals in which 'significant worsening' was an issue which it was open to be decided on the appeal. However, whether there was a

right of appeal against what I will call the 'significant worsening' decision was not the subject of argument in any of those decisions and it seems to have been assumed that there was a right of appeal. Moreover, in some of the cases an issue arose as to whether (what is now) the First-tier Tribunal had erred in law by not considering the issue of significant worsening or limiting its consideration only to that issue, when consideration had been given in the decision under appeal to whether (in the language of the ESA scheme) the claimant actually had limited capability for work, from which a right of appeal did, and does, unquestionably arise.

46. The closest authority – finding there to be a right of appeal against an adverse determination under what would now be regulation 30(2) of the ESA Regs – is *R(IB)8/04*, in which Mr Commissioner Howell QC (as he then was) set aside the decision of the tribunal and gave the decision it "should have given" to the effect, inter alia, that for the period of the repeat made claim within 6 months of the last adverse decision the claimant was not entitled to be treated as being incapable of work under regulation 28 of the IFW Regs pending a personal capability assessment because there had been no significant worsening and no new medical condition developed within that 6 month period: see paragraph 2.1 of the decision. On the face of it that was a decision made on an appeal about what would now be a determination under regulation 30(2) of the ESA Regs. That issue of jurisdiction was not, however, contested and on the facts it was plain that the Secretary of State had made the wrong decision for another part of the 6 month period under regulation 28 of the IFW Regs and that error needed to be corrected. The jurisdiction is contested now by the Secretary of State (albeit he says, quite rightly, that it does not arise on the facts of this case), and consistent with that he no doubt would argue that Commissioner Howell had no jurisdiction to remake the regulation 28 IFW Regs decision.

47. The Secretary of State argues first that the decision or determination under regulation 30(2) of the ESA is not a decision disposing of the claim under section 8 of the Social Security Act 1998 as the repeat claim can only be fully disposed of when the regulation 19 and Schedule 2 decision/assessment is made on whether the claimant actually has limited capability for work on the repeat claim. He argues that the regulation 30(2) decision is an "interregnum position pending the assessment of the claim for benefit". He relies in this regard on paragraph 55 of *R(IB)2/04* and paragraphs 24 and 25 of *CIB/2338/2000*. The most relevant parts of the former, which sets out the latter's paragraphs, says this:

> "Section 12(1)(a) provides that the appeal to an appeal tribunal is to be against decisions under section 8 or section 10 "made on a claim for, or an award of, a relevant benefit". In our view, this serves to emphasise that, in at least the great majority of cases, the appeal to an appeal tribunal is against what might be termed an "outcome decision", that is to say a decision which directly determines the claimant's entitlement to benefit, either on the initial claim or subsequently. In this respect we adopt the analysis of Mr Commissioner Jacobs in paragraphs 24 and 25 of CIB/2338/2000:
>
> > "24. Standing back from the details of the Social Security Act 1998 and the regulations made under it, there is a clear theme uniting most of the decisions that are appealable. This is that they are, to use the new jargon, 'outcome decisions'. This is not a term of art. It is merely a useful expression to refer to decisions that have, in crude terms, an impact on a claimant's pocket. In other words, an outcome decision is one that directly affects the money that the claimant receives or might receive in the future.
> >
> > 25. The determinations that are the building blocks of outcome decisions also, of course, affect the money that the claimant receives or might receive in the future. But they do not have this effect directly. They have this effect only when incorporated in an outcome decision. The claimant is able to appeal against the outcome decision and is able to challenge, as an issue arising on that appeal, the underlying determination."
>
> Taking first the position of an appeal against the initial decision on a claim, the section 8 outcome decision under appeal will have been either to award or not to award benefit. As described above (paragraphs 24-26), unless there is some express provision to the contrary, the appeal tribunal's jurisdiction on the appeal is to make any decision which the Secretary of State could have made on the claim (although in doing so it need not consider any issues not raised by the appeal). That seems to us to follow simply from (a) the decision under appeal being generally an outcome decision deciding

> entitlement to benefit on the claim and (b) the appeal being a full appeal by way of rehearing on fact and law. In short, the appeal tribunal either upholds the Secretary of State's decision or holds it to have been wrong: but, if the latter, it goes on to make the decision on the claim which it considers the Secretary of State ought to have made. This may involve the appeal tribunal considering issues which have not been considered by the Secretary of State.
>
> Turning to the position on an appeal following a decision to revise (or not to revise), or to supersede (or not to supersede), that decision will either have changed or have left unchanged the claimant's entitlement to benefit. The reality is that the concern of the claimant (and indeed the Secretary of State) on such an appeal will be with whether the claimant's entitlement to benefit ought or ought not to be changed, not with the potentially much narrower question whether the Secretary of State was right to act under a particular section (section 9 or section 10). Parity of reasoning with the position on an appeal against the initial decision on a claim would suggest that, the appeal being again a full appeal by way of rehearing on fact and law, in providing in section 12(2) that "the claimant shall have a right to appeal to an appeal tribunal" against section 8 decisions which have been revised and against section 10 decisions, Parliament intended that the appeal tribunal should have the power to decide the question of substance as to whether the claimant's entitlement to benefit should be changed, and if so how. It would be illogical if the appeal tribunal's powers on an appeal against a decision changing (or not changing) the claimant's entitlement were in effect substantially more restricted in terms of making what it considers to be the correct outcome decision than is the case on an appeal against a decision on the initial claim. We do not consider that Parliament could have intended any such illogical distinction.
>
> That conclusion derives some support from the language of section 12(1) itself. Appeals against (i) original decisions under section 8, (ii) section 8 decisions which have been revised and (iii) section 10 decisions, are all dealt with in one breath; and all such decisions not falling within Schedule 3 are regarded as capable of being "made on a claim for, or an award of, a relevant benefit" (section 12(1)(a)). The emphasis is on the outcome of the decision, not the narrow technical issue of the section under which the decision was made."

48. The problem as I see it with this part of this argument, and one which the Secretary of State would seem to later accept in his second skeleton argument, is that it is difficult to characterise a regulation 30(2) decision that there has been no significant worsening as a building block for any other decision: it seems to stand on its own. Moreover, in one sense, particularly if there are delays in arranging a new medical examination assessment which the Secretary of State considers is needed, a negative regulation 30(2) decision is an "outcome decision" in the sense that it deprives the claimant of the

benefit of being treated as having limited capability for work until the medical examination and new regulation 19 decision is made.

49. I accept that the limited, *treating* focus of regulation 30(2) cannot dispose of the repeat claim for ESA. That can only be done once a decision has been made on whether the "basic condition of entitlement" that the claimant "has limited capability for work" – per section 1(3)(a) of the Welfare Reform Act 2007 – has been decided under regulation 19 and Schedule 2 to the ESA Regs (or the claimant can be treated as having limited capability for work other than under regulation 30). This is well explained by Mr Commissioner Mesher (as he then was) in paragraph 11 of *R(IB)1/05*, where he said, relevantly:

> "In the context of claims for incapacity benefit where at the outset a necessary condition for the operation of regulation 28 (not having been found capable of work in the previous six months) did not exist, Commissioners have held in decisions CIB/1031/2000 and CIB/3106/2003 that the claim could not be disallowed on that ground alone. A judgment would have to be made on whether or not the claimant actually satisfied the PCA as at the date of claim and down to the date of the decision. Depending on the circumstances, that could be by reference to existing evidence, such as a recent EMP examination that had led to the PCA being failed and the removal of entitlement by supersession, or might need the obtaining of new evidence before a PCA could be carried out by a decision-maker. The decisions assumed (and, indeed, positively stated in paragraph 6 of CIB/3106/2003) that, if a new PCA were carried out by a decision-maker, which the claimant passed, the claim would be allowed from the outset, not merely from the date of the decision. I agree with those decisions and consider that the principles stated apply equally to a case where regulation 28 did apply at the beginning of a claim or period, but a necessary condition for its operation ceases to exist." (my underling added for emphasis)

50. Section 8 of the Social Security Act 1998 ("SSA 1998") provides, in so far as is relevant, as follows:

> "**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....."

51. I will return to what section 12 of the SSA 1998 says about rights of appeal shortly, but it is not readily apparent to me that even if when a negative regulation 30(2) decision is made it is not a decision deciding the claim (per section 8(1)(a) of the SSA 1998, it is not nevertheless a decision that falls to be made under or by virtue of a relevant enactment (per section 8(1)(c)). Part 1 of the Welfare Reform Act 2007 is such an enactment and section 8(5) of that Act – which provides the *vires* for regulation 30(2) of the ESA Regs – falls within Part 1 of that Act.

52. I also agree, see the second underlining in the passage quoted in paragraph 49 above, that if once the regulation 19 and Schedule 2 decision has been made on the repeat the claimant is found to have limited capability for work that would take effect from the date of the repeat claim. As Mr Commissioner Rowland (as he then was) explained in *CIB/3106/2003*, *R(IB)1/01* and *RIB)2/01*, "[t]he point of regulation 28 [now regulation 30] is merely that it enables benefit to be paid before the assessment and irrespective of the eventual result of that assessment".

53. However, it does not seem to me that the fact that the claimant on the repeat claim if eventually found to actually have limited capability for work will then be awarded ESA back to the date of the repeat claim, points one way or the other on whether the adverse regulation 30(2) decision should have attracted a right of appeal in the meantime. The benefit might be awarded under regulation 30(2) and then the claimant found not to have limited capability for work. As put by Commissioner Rowland, however, ESA paid under regulation 30

takes effect irrespective of whether limited capability for work is then found under regulation 19 and Schedule 2 of the ESA Regs.

54. The Secretary of State also seeks to rely on the discussion in paragraphs 110-128 of *R(IB)2/04* about "incapacity determinations" and the definition of that phrase in regulation 7A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the DMA Regs"). As I understand the Secretary of State's argument, and translating it to the definitions of "limited capability for work determination" and "employment and support allowance decision" in the same regulation 7A, it is that the regulation 30(2) decision is not a "limited capability for work determination" but it **is** an "employment and support allowance decision": per paragraph 125 of *R(IB)2/04*. The Secretary of State then takes from this the proposition that the regulation 30(2) decision "is not, in and of itself, a determination of limited capability for work" and it is only a determination of limited capability for work under section 8 or 10 of the SSA 1998 that can be subject of an appeal under section 12 of the SSA 1998.

55. I am not sure whether this argument seeks to touch on a point I raised about regulation 3(5D) of the DMA Regs. Given the difficulties of penetrating the dense thicket of the revision and supersession rules I am even more mindful of seeking to give any concluded view in (a) a case where it does not matter, and (b) where the argument on appeal rights against an adverse regulation 30(2) decision only arose after the hearing, has only been addressed in writing by the Secretary of State and so has not been the subject of any (let alone contested) oral argument. I thus limit myself to saying the following, in addition to what I have said above.

56. First, regulation 3(5D) of the DMA Regs only deals with situation where a ESA has been **awarded** under regulation 30, but only from a date after the date of claim. It therefore does not provide a power to revise a decision not to make an award under regulation 30 (for

example, and most relevantly for present purpose, on the basis that there has not been significant worsening). On the other hand, what regulation 3(5D) would seem to indicate is that a decision made under regulation 30 of the ESA Regs is at least thought of by the Secretary of State as being a decision made under section 8(1) of the SSA 1998, as it only such decisions (or supersession of such a decision under section 10 of the SSA 1998) that can be revised under section 9 of the SSA 1998. If the decision under regulation 30(2) of the ESA Regs is not a decision at all under section 8, or at least is not one capable of being appealed under section 12 of the SSA 1998, I find it difficult to see how it can nonetheless be a decision which can be revised under section 9.

57. Second, the Secretary of State's argument does not tackle head-on the key provision on appeals, namely section 12 of the Social Security Act 1998. This provides as follows:

> "12 Appeal to First-tier Tribunal
>
> (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."

58. I can identify nothing in Schedules 2 or 3 to the SSA 1998, or prescribed in regulations made under that Act, which either excludes a right of appeal or confers such a right in respect of a decision made

under regulation 30(2) of the ESA Regs. Section 12(1)(b) does not confer a right of appeal because the regulation 30(2) decision does not come within Schedule 3 to the SSA 1998. Nor can it be a decision "made on an award" under section 12(1)(a) because by definition at the time of the regulation 30(2) adjudication no award has been made on that claim.

59. The answer therefore would seem to lie in the words "any decision…under section 8… above which is made on a claim for…a relevant benefit". The Secretary of State's argument would seem to be that the regulation 30(2) decision is not made *on* the repeat claim for ESA because (per paragraph 11 of *R(IB)1/05*) the claim cannot be (fully) decided until the regulation 19 and Schedule 2 limited capability for work decision has been made. I see the force of that argument but I am not sure it is necessarily correct. I say this because it seems to me that the regulation 30(2) decision may be said to have been made "on" the repeat claim even though that claim may not have been finally decided. Further or alternatively, such a decision may not (finally) decide the claim (per section 8(1)(a) of the SSA 1998) but it may be a decision made under or by virtue of section 8(5) of the Welfare Reform Act 2007 (per section 8(1)(c) of the SSA 1998), and thus may be a decision made "on [the repeat] claim" (per section 12(1)(a) SSA 1998), though not one which finally decides it.

Conclusion

60. For the reasons given above, however, this appeal is dismissed and the tribunal's decision of 23 August 2013, upholding the Secretary of State's decision of 10 September 2013, stands as the determinative decision on the appeal.

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

Dated 2nd September 2016