

### Question 1

Section 10(1) of the Social Security Act 1998 gives the Secretary of State powers to supercede decisions, including those made under section 8, as Mr Deed's original award was made. The Secretary of State can do this on his own initiative.

Section 10(3) of the Act provides that Regulations may be made to govern the circumstances in which a supersession can be made, and the relevant procedure which should be followed. Some of these regulations are to be found in regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

The two provisions most likely apply to Mr Deed's circumstances are 6(2)(g) and 6(2)(a)(i).

The most likely regulation that the Secretary of State will have used in Mr Deed's case is section 6(2)(g). This specifies that the DWP (acting with the power of the Secretary of State) may supersede a decision with regard to an incapacity benefit where it has received medical evidence following a medical exam, since the initial decision to award the benefit was made. In Mr Deed's case he was asked to attend a medical examination by letter on 28<sup>th</sup> January 2010 and he was examined by Dr Moggs on 2<sup>nd</sup> February. It was following this exam that Mr Deed received the letter telling him that he was no longer entitled to the benefit and the DWP expressly stated in the letter that this was because he had failed the Personal Capability Assessment and that Dr Moggs had awarded him 0 points. Consequently, the DWP is likely to argue that it had the power to supersede the initial decision to award Mr Deed incapacity benefit on the basis of the medical evidence received from Dr Moggs as a result of the medical exam on 2<sup>nd</sup> February.

The second most likely power to supersede that the DWP may argue applies to Mr Deed is section 6(2)(a)(i) of the Regulations. This states that the DWP may supersede a decision where there has been a change of circumstances relevant to that decision. In Mr Deed's case, this is that his condition has, according to the medical evidence, improved since the initial decision to award incapacity benefit was made. Again, this is based on the letter that Mr Deed received on 25<sup>th</sup> February 2010 stating that he was no longer entitled to the benefit because he had failed the Personal Capability Assessment. The DWP did not say that it believed he had never been entitled to the benefit and so this suggests that they feel there has been a relevant change of circumstances. This change of circumstances is the change in his condition as assessed by Dr Moggs.

Therefore the DWP is most likely to argue that sections 6(2)(a)(i) and 6(g) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 apply to the supersession of the initial decision to award Mr Deed incapacity benefit.

### Question 2

Regulation 25 (1) of the Social Security (Incapacity for Work) (General) Regulations 1995 provides that incapacity under the PCA will be assessed according to the criteria contained in Part I and Part II of Schedule 1. Part I of Schedule 1 relate to physical disabilities. Regulation 25(3)(a) tells us that when assessing the extent of a person's incapacity in accordance with Part I, the incapacity must arise from a specific bodily disease or disablement. Mr Deed's difficulties stem from arthritis, which is a physical disability. Therefore, Mr Deed's disability can be assessed in accordance with Part I.

Regulation 25(1)(a) states that in order to be considered incapable of work, at least 15 points must be attained in respect of the descriptors in Part I.

Regulation 26(1) provides the formula to be applied in order to calculate the score.

Regulation 26(3) specifies that within each activity, only the marks for the one descriptor that both applies to the individual and has the highest number of points can be counted. So Mr Deed can only score once in relation to each activity.

a) Mr Deed says that he cannot walk for more than 200 yards without severe discomfort. The relevant activity is Activity 1. The descriptors relating to Activity 1 refer to metres. 200 yards is approximately equivalent to 183 metres. Accordingly, the descriptor which most readily applies to him is 1(d), an inability to walk more than 200 metres scores. This is worth 7 points.

b) Mr Deed says that he cannot walk up or down a flight of 12 stairs without holding on and taking a rest. The relevant activity is Activity 2. According the descriptor which most readily applies to him is 2(c), and this would score 7 points.

Regulation 26(2) specifies that only one score from activities 1 and 2 in Part I may be used and that is to be the highest score. So Mr Deed could only score a total of 7 points in respect of walking and climbing stairs, despite his inability to do both activities.

c) He cannot stand for more than 30 minutes without needing to sit down. The relevant activity is Activity 4. His disability accords with descriptor 4(d), and again this would score 7 points.

d) He cannot pick up a coin which is 2.5 cm or less in diameter with either hand. The relevant activity is Activity 7. According to 7(c), this would score 15 points. If Mr Deed were awarded points in respect of this descriptor he would pass the test on this basis alone.

Mr Deed's score based on his self assessment is therefore  $7 + 7 + 15 = 29$

### Question 3

Section 12 of the Social Security Act 1998 applies to decisions made under section 10 of the same act (decision to supercede awards) (S.10 (1)). Section 12(2) (b) explains that the claimant has a right to appeal to an appeal tribunal. Section 12 (7) says that regulations may be made to prescribe the time and manner in which appeals have to be brought.

Regulation 31(1)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 provides that where an appeal lies to an appeal tribunal that appeal must be brought within one month of the date of notification of the decision against which the appeal is brought.

No guidance is given in the regulations as to what is meant by "notification". Notification could mean the date upon which the letter was sent to Mr. Deed (23 February 2010) or the date upon which he received the letter (25 February 2010).

As the claimant is only able to consider bringing an appeal once he is made aware of the supersession there is strong argument for the relevant date being the date the claimant receives notification. However, even on that basis the deadline for Mr. Deed's appeal would be 24 March 2010, because the regulation says that the appeal must be brought **within** one month. The 25 March 2010 would be the first day of the next month.

On the alternative basis that the period started to run from the date the letter was sent, the appeal time limit would have expired on 22 March 2010 and so the appeal would be even later.

There is also a lack of clarity as to when an appeal is "brought". If it was the date the letter was received by the DWP, he is late according to both possible scenarios.

If it is the date the letter was sent, he may have an argument that the appeal was made in time, depending on when he posted the letter. From the facts we have been given we do not know when that was.

On balance, it seems most likely that the appeal was made late, but any dispute about that would have to be settled by a legally qualified panel member in accordance with reg. 31(4).

#### Question 4

Since Mr Deed's appeal was late, he will have to apply for an extension of time beyond the one month specified in the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This is permitted by section 31(5) of these Regulations, and this section specifies that any such extension must be made in accordance with regulation 32. Therefore Mr Deed will have to argue that his case falls within regulation 32 in order to persuade a tribunal that it should allow his appeal to go ahead. Section 32(1) specifies that a number of conditions must be satisfied in order to persuade a tribunal of this.

According to section 32(4), Mr Deed will have to argue that there are reasonable prospects that his appeal will be successful and that it is in the interests of justice for the application to be granted. The regulation is unclear whether these two conditions are alternatives or are both required in order for the time limit to be extended. I shall continue on the assumption that both conditions must be fulfilled.

Consequently, Mr Deed will have to argue that there are reasonable prospects that he will succeed in his appeal and for this he will need evidence to support his assessment of his condition, which will be both his own evidence and medical evidence with regard to his condition.

Mr Deed will also have to argue that it is in the interests of justice that his application for an extension of time be granted. This is a more rigorous test. Section 32(5) specifies that it will only be in the interests of justice for an application to be granted if there are special circumstances relevant to the application that made it impracticable for the application to be made within the one month time limit. These special circumstances must be either wholly exceptional (section 32(5)(b)) or must be that the applicant or his spouse or dependent has died or suffered serious illness, or that the applicant is not resident in the UK or that normal postal services were disrupted (section 32(6)). There is nothing to suggest that regulation 32 (6) can be satisfied, so Mr Deed will have to show there were some special circumstances in

existence, which were wholly exceptional and which caused his application to be made late. There is no guidance to suggest what types of circumstances might qualify under this criteria, but from the nature of words used it does suggest that the hurdle is a high one.

Section 32(8) specifically sets out that the tribunal will not take account of the applicant misunderstanding the time limit, as Mr Deed has done. This means that Mr Deed's confusion as to the meaning of the one month time limit will not count as a special circumstance for the purposes of his application for an extension of time.