

**PIP MOBILITY ACTIVITY 1 – EFFECT OF UT DECISION  
MH V SSWP (PIP) [2016] UKUT 531(AAC)**

<b>Contents</b>	<b>Paragraphs</b>
Introduction	1
<b>The UT Decision</b>	2
Mobility Activity 1 before MH	3
RJ, GMcL and CS v SSWP [2017] UKUT 0105 (AAC)	4
What the UT decided in MH	5-6
Applying the MH decision	7
<b>Decision Making</b>	8
New Claims and Reassessments	9-11
Award Reviews	12-13
MR Requests	14
Unplanned Review request made specifically as a result of MH and/or RJ	15-16
Advance Claims	17
Appeals	18-20
Appendix – Guidance for Appeals Officers on Section 27	
Annotation	
Contacts	

**INTRODUCTION**

- 1 The purpose of this memo is to inform CMs about a decision of the UT<sup>1</sup>, MH v SSWP (PIP) [2016] UKUT 531(AAC) (“MH”), which deals with the interpretation of the descriptors under mobility activity 1.

*1 [MH v SSWP \(PIP\) \[2016\] UKUT 0531 \(AAC\)](#);*

## THE UT DECISION

- 2 The UT decision is dated 28.11.2016. DWP appealed it to the Court of Appeal and also made a change to the regulations governing mobility activity 1 which countered some aspects of the decision<sup>1</sup>. The amendments to mobility activity 1 were quashed by the High Court<sup>2</sup>. The appeal of MH to the Court of Appeal was withdrawn. Therefore the decision of MH is the leading decision on the interpretation of mobility activity 1.

*1 [Social Security \(Personal Independence Payment\) \(Amendment\) Regulations 2017 SI 2017/194](#), 2 [RF v SSWP \[2017\] EWHC 3375 \(Admin\)](#)*

## MOBILITY ACTIVITY 1 BEFORE MH

- 3 The position before MH was that descriptors 1d and 1f, which contain the phrase “follow the route” were restricted to measuring the ability of a claimant to navigate the route. Descriptor 1b and 1e, containing the phrase “overwhelming psychological distress” were the only descriptors where distress was relevant. If a person needed accompanying on routes by another person in order to avoid that overwhelming psychological distress (on the majority of days) they satisfied descriptor 1b.

## RJ, GMcL AND CS v SSWP (PIP)[2017] UKUT 105 (AAC)

- 4 Since the MH decision date there has been another UT decision which impacts directly on the application of mobility activity 1. On 09.03.2017 a decision, RJ, GMcL and CS v SSWP (PIP)[2017] UKUT 105 (AAC) (“RJ”), was handed down. The guidance prior to RJ was that when assessing whether a task could be done “safely”, any harm had to be *likely* to occur, which we said meant “more likely than not” to occur – essentially that the event which created the risk had to happen on the majority of days. In RJ the UT stated that “In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant.”<sup>1</sup> Details on the effect of RJ can be found in Memo 15/18.

*1 RJ, GMcL and CS v SSWP (PIP) [2017]UKUT 0105 (AAC), para 56*

## WHAT THE UT DECIDED IN MH

- 5 As well as explaining the significance of the MH decision for decision making it is important to note that for claim periods after the relevant determination date of RJ

(09.03.17) a decision may have to change in order to account for that. A decision which covers a claim period that begins prior to the MH determination date (28.11.16) and continues after the RJ determination date could have three different descriptors chosen – one prior to MH, one where MH is applied, and one where MH is applied in accordance with RJ.

6 In MH the UT held that:

1. **“Follow the route” (in 1d and 1f) is not restricted to navigation only; it means making one’s way along a route or going along a route safely.** Previous to MH descriptors 1d and 1f were restricted to navigation only, so problems with psychological distress were not considered. Previous to RJ the problems with following the route had to manifest on the majority of days, but post-RJ one has to apply the RJ decision of how safely is to be assessed.
2. **Adjusting to road works or navigating past other unexpected obstacles such as a traffic accident is all part of following the route.** This is the the pre-MH position.
3. **An inability to communicate effectively so as to correct oneself when lost is not relevant to following the route, as once lost a person has already ceased to follow the route.** This point was the pre-MH position.
4. **A claimant who suffers overwhelming psychological distress whilst on the journey and who needs to be accompanied to overcome the overwhelming psychological distress may satisfy descriptor 1d or 1f.** Pre-MH this person could only satisfy 1b. Previous to RJ the problems with following the route had to manifest on the majority of days, but post-RJ one has to apply the RJ decision of how safely is to be assessed.
5. **Descriptor 1b is relevant where a claimant needs prompting to overcome overwhelming psychological distress when setting off on the journey.** As someone who needs another person when travelling along a route would satisfy 1d or 1f, descriptor 1b only applies in practice in the circumstance where someone needs prompting to set off on the journey (but would not need another person whilst on the journey itself). Pre-MH someone in this position would have satisfied descriptor 1b also.
6. **Distress or anxiety short of overwhelming psychological distress is not enough to bring a claimant within descriptor 1d or 1f.** The tribunal stated that “Although regulation 4(2A) applies so that the question is whether, if unaccompanied, the claimant can follow a route safely, to an acceptable

standard, repeatedly and within a reasonable time period, the fact that a claimant suffers psychological distress that is less than overwhelming does not mean that the claimant is not following the route safely and to an acceptable standard. The threshold is a very high one. Thus, the facts that the claimant was “anxious” and “worried”...and was “emotional”...were not sufficient for those claimants to satisfy the terms of descriptors 1d or 1f because they could in fact complete journeys unaccompanied without being overwhelmed”. Although pre-MH overwhelming psychological distress is not a factor for 1d and 1f (as this is only taken into account for 1b and 1e), the high threshold definition is in line with the term ‘overwhelming’ so should be applied to the pre-MH period and onwards.

7. **Logically where descriptor 1e is satisfied on the majority of days (because the claimant needs to avoid overwhelming psychological distress by not undertaking any journey) the claimant cannot also satisfy descriptor 1f, as this must mean they *can* undertake a journey (with another person, assistance dog or orientation aid) on the majority of days.** This is the pre-MH position.
8. **Mobility activity 1 is designed to cover limitations on mobility deriving from mental health conditions and cognitive and sensory impairments, whereas mobility activity 2 is designed to cover limitations on mobility from physical restrictions.** This is the pre-MH position.

## **APPLYING THE MH DECISION**

- 7 From the above one can see that points 1, 4, 5 and 6 of the above are the main points of change that need to be considered (although all must be taken into account where relevant). Here are some examples to show how the impact of the MH determination could materially alter the decision making (and how these points themselves may alter once the RJ interpretation is factored in).

### **Examples**

**Please note that all examples are for illustrative purposes and are not exhaustive**

<p>The claimant suffers from epilepsy and has seizures without warning approximately once a week, which has resulted in injuries from falls in the past. Although they have no physical problems with walking, when they have a seizure they lose consciousness which amounts to a cognitive and sensory impairment.</p>
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That brings the problem within the ambit of mobility activity 1.

<b>PRE-MH</b>	<b>MH</b>	<b>POST-RJ</b>
<p>The CM decides that the claimant does not suffer from a navigational problem on the majority of days, and satisfies descriptor 1a.</p>	<p>The CM decides that the claimant does not have a problem with following the route on the majority of days, and therefore satisfies 1a.</p>	<p>The CM decides that claimant cannot travel on any routes (familiar or unfamiliar) safely without another person, due to the risk of injury from falls, as per the RJ rationale. The CM decides the claimant satisfies 1f.</p>

The claimant suffers from episodes of narcolepsy, once or twice a week, which causes the claimant sudden tiredness resulting in a deep sleep, with little warning beforehand. Although they have no physical problems with walking, the narcolepsy, due to resulting in a loss of consciousness, is considered a sensory and cognitive impairment. The CM therefore attributes this issue to mobility activity 1. The claimant does not fall and is able to lower themselves to the ground or a seated position without harm before falling asleep. However, once asleep they will be unconscious for a significant amount of time, will not be readily wakened, and during that period will be extremely vulnerable.

<b>PRE-MH</b>	<b>MH</b>	<b>POST-RJ</b>
<p>The CM decides that the claimant does not suffer from a navigational problem on the majority of days, and satisfies descriptor 1a.</p>	<p>The CM decides that the claimant does not have a problem with following the route on the majority of days, and therefore satisfies descriptor 1a.</p>	<p>The CM decides that claimant cannot travel on any (familiar or unfamiliar) routes safely without another person, due to the risk of harm whilst the claimant is vulnerable, as per the RJ rationale. The CM decides the claimant satisfies descriptor 1f.</p>

The claimant has PTSD. When they are outside, if there are loud noises, such as an emergency vehicle siren, they are likely to suffer an overwhelming panic attack and cannot travel further without the help of another person to help overcome that distress. The fear of these panic attacks happening has itself become so great that the claimant suffers severe anxiety at the thought of travelling alone.

<b>PRE-MH</b>	<b>MH</b>	<b>POST-RJ</b>
<p>The CM decides that the claimant's problems do amount to overwhelming psychological distress. As the claimant is able to travel routes if accompanied, the CM decides the claimant satisfies descriptor 1b.</p>	<p>The claimant needs accompaniment to travel on all routes in order to avoid the effect of overwhelming psychological distress. The CM decides to award descriptor 1f.</p>	<p>This would not have impact as descriptor 1f is already awarded.</p>

An autistic claimant is able to navigate familiar routes. They are able to navigate unfamiliar routes but only when following the exact description of the route they have to take. However, if the unfamiliar route is altered by the slightest degree, such as by the specific footpath they are following being inaccessible due to maintenance, they are unable to get themselves back onto the correct track or continue to follow the planned route.

<b>PRE-MH</b>	<b>MH</b>	<b>POST-RJ</b>
<p>As the claimant's problems are related to their ability to navigate, the CM decides to award descriptor 1d.</p>	<p>The MH reasoning would not change this approach –the CM decides 1d is the correct descriptor.</p>	<p>The RJ reasoning would not change this approach –the CM decides 1d is the correct descriptor.</p>

The claimant becomes anxious before any journey and they are only able to get out of the door if someone provides encouragement and reassurance that there are no dangers or threats as a result of going outside. However, once they are out they are able to follow a route independently without help.

<b>PRE-MH</b>	<b>MH</b>	<b>POST-RJ</b>
<p>The CM decides that, in order to overcome overwhelming psychological distress, the prompting of another person is required for the claimant to set off on a journey. The CM chooses descriptor 1b. (NB –if the help was for both setting off on the journey and whilst on the journey the claimant would still only score 1b).</p>	<p>The MH reasoning would not change this approach. As the help to overcome overwhelming psychological distress is only in order to help the claimant set off on the journey –the CM decides 1b is the correct descriptor. (NB – if the help was for <i>both</i> setting off on the journey and whilst on the journey the claimant would score 1d or 1f).</p>	<p>The RJ reasoning would not change this approach –the CM decides 1b is the correct descriptor.</p>

The claimant suffers from low mood. They state they prefer their sister to accompany them on unfamiliar journeys as they get worried and nervous when going to new places. However, on the occasions when their sister was not available and the claimant had to travel on unfamiliar routes alone, although nervous beforehand, they were able to complete these journeys.

<b>PRE-MH</b>	<b>MH</b>	<b>POST-RJ</b>
<p>The CM, examining whether descriptor 1b is satisfied or not, decides that the wish to be accompanied was a preference rather than a requirement and was not</p>	<p>The CM, examining whether descriptor 1d is satisfied or not, decides that the wish to be accompanied was a preference rather than a requirement and was not</p>	<p>The RJ reasoning would not change this approach –the CM decides 1a is the correct descriptor.</p>

<p>needed to overcome overwhelming psychological distress. Descriptor 1a is chosen. (NB –the threshold of OPD is the same throughout the pre-MH, MH and RJ periods).</p>	<p>needed to overcome overwhelming psychological distress. Descriptor 1a is chosen.</p>	
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<p>The claimant, who suffers from agoraphobia, asks for descriptor 1f to be awarded. However, they state that cannot leave the home on the majority of days to their condition, irrespective of any help they could receive.</p>		
<p><b>PRE-MH</b></p>	<p><b>MH</b></p>	<p><b>POST-RJ</b></p>
<p>The CM decides that as the claimant cannot leave the home on the majority of days due to overwhelming psychological distress (and therefore satisfies descriptor 1e) they cannot satisfy descriptor 1f.</p>	<p>The same reasoning is unchanged due to MH – the CM chooses descriptor 1e.</p>	<p>The same reasoning is unchanged due to RJ – the CM chooses descriptor 1e.</p>

<p>The claimant has periods of severe anxiety where they are unable to travel on routes they do not know unless they are accompanied (but they are always able to travel on routes familiar to them). When they are not suffering from a period of severe anxiety they are able to manage unfamiliar routes without problem. It is determined that these severe periods do occur for the majority of days in the required period, and that they do amount to overwhelming psychological distress.</p>		
<p><b>PRE-MH</b></p>	<p><b>MH</b></p>	<p><b>POST-RJ</b></p>
<p>The CM decides that as the claimant can undertake familiar journeys on the majority</p>	<p>The CM decides that the claimant satisfies descriptor 1d as on the majority of days they would</p>	<p>The same reasoning is unchanged due to RJ – the CM chooses</p>



of days they cannot satisfy descriptors 1b or 1e (which require that all journeys are affected). Descriptor 1a is chosen.	need another person in order for them to overcome OPD on unfamiliar routes.	descriptor 1d.
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## DECISION MAKING

### Relevant determination

- 8 The decisions of the UT in *MH* and *RJ* are “relevant determinations”<sup>1</sup>. The dates of the determinations are 28.11.16 (*MH*) and 9.3.17 (*RJ*). The following paragraphs set out the practical steps to take to get the effective dates of the decision correct when applying *MH* and *MH* as impacted by *RJ*.

1. *SS Act 98, s27*

### New claims and reassessments

#### Deciding claims made on or after the relevant determinations

- 9 Claims to PIP which are made on or after 28.11.16 should be decided in accordance with *MH* and claims which are made on or after 9.3.17 should be decided in accordance with *MH* and *RJ*. The 3 month qualifying period condition for PIP can be met where, applying the approach in the relevant determinations, the claimant would have been found to have limited or severely limited ability to carry out relevant activities in the 3 months prior to the relevant determination.

#### Deciding claims made before the relevant determinations

- 10 The relevant determinations should not be applied to claim periods on or before 27.11.16 and/or 8.3.17 (but see the paragraph above regarding the qualifying period condition). This is because the Secretary of State must only apply relevant determinations for periods from the date of the judgment<sup>1</sup>. This means that where, for example, claims are made before 9.3.17 the DM will have to determine the claim by consideration of the relevant descriptors in 2 ways. Firstly for the period up to and including 8.3.17 by consideration of the relevant descriptors using the approach applied in *MH*, and secondly by consideration of the relevant descriptors from and including 9.3.17, in accordance with the relevant determination in *RJ*. This may mean

that in some cases the DM decides that there is no entitlement to PIP from the date of claim to 8.3.17 but that an award can be made from 9.3.17.

1. *SS Act 98, s27*

### **Example**

A claim to PIP is made from 8.2.17. A DM is deciding the case on 3.5.18. The claimant's case is affected by *MH* and *RJ* – prior to *RJ* they satisfied the standard rate of the mobility component and following *RJ* they will score more points sufficient to give them the enhanced rate of the mobility component. The DM applies *MH* from 8.2.17; and *RJ* from and including 9.3.17 but not to the period before 9.3.17. The claimant is awarded the standard rate from 8.2.17 to 8.3.17 and the enhanced rate from 9.3.17 onwards.

### **Reassessment cases**

- 11 In accordance with ADM P5062-3, in a DLA to PIP reassessment case the DM should apply the reasoning in *MH* and *RJ* and award PIP where appropriate following the 28 day run on period<sup>1</sup>.

*1 PIP (TP) Regs, reg 17(1) & (2)*

### **Example 1**

The claimant is entitled to DLA and is invited to claim PIP on 1.3.17 (i.e. *before RJ*). The DM makes a decision on 3.4.17 (*after* the relevant determination in *RJ*) that following *RJ* she is entitled to the enhanced rate of the mobility component of PIP. In accordance with ADM P5062 – 5063, the first pay day after the determination is 5.4.17 therefore the claimant's DLA will terminate on 2.5.17 and the payment of the enhanced rate of the mobility component of PIP will commence on 3.5.17.

### **Example 2**

The claimant is entitled to DLA and is invited to claim PIP on 1.12.16 (i.e. *after MH* but *before RJ*). The DM makes a decision on 5.1.17 (again, *after* the relevant determination in *MH* but *before RJ*) that following *MH* and then *RJ* she is entitled to the standard rate of the mobility component (*MH*) and then the enhanced rate of the mobility component of PIP (*RJ*). In accordance with ADM P5062 – 5063, the first pay day after the determination is 11.1.17 therefore the claimant's DLA will terminate on 7.2.17. The payment of the standard rate of the mobility component will commence on 8.2.17 and the payment of the enhanced rate of the mobility component of PIP will commence on 9.3.17.

## **Award Reviews and the LEAP exercise**

- 12 Decisions made in the period on or after 28.11.16 and 9.3.17 to the date of this guidance being issued and all PIP awards in payment on 28.11.16 and 9.3.17 will be reviewed in an independent exercise (called a LEAP exercise). Award reviews should be decided as set out below and it is important to understand how the LEAP exercise interacts with these decisions.

### **Award Reviews**

- 13 On planned and unplanned award reviews where the claimant has not specifically asked for their award to be looked at in the light of *MH* and/or *RJ*, it may be that the claimant benefits from the relevant determination(s). However, given the planned LEAP exercise, it has been decided that a supersession decision made on review should only be effective from the date that would normally apply when superseding on the grounds raised by the review. Any increase in entitlement for a period prior to that will be captured in the LEAP exercise.

#### **Example 1 – Planned review - condition unchanged – award increased**

The claimant has an award of the daily living component only. A planned review is initiated on 1.2.18. The AR1 indicates that the claimant's condition and their ability to carry out activities has remained the same. Normally, all that would be needed would be a supersession decision to extend the period of the award. However, following *MH* the claimant has satisfied the conditions for an increase since 28.11.16. The DM takes *MH* and *RJ* into account and supersedes so as to award the increase from the date of decision<sup>1</sup> (receipt of medical evidence). The period from 28.11.16 to the day before the date of the new decision will be considered in the LEAP exercise.

1. *UC,PIP,JSA & ESA (D &A) Regs , reg 26(1)(a) & s 10(5)*

#### **Example 2 – Planned review – supersession carried out on the basis of a change of circumstances**

A planned award review is initiated on 1.2.18. The AR1 indicates that the claimant's condition has deteriorated and the DM identifies a relevant change of circumstances (such that the 3 month QP has been met by 1.2.18). The DM makes a decision to supersede the award on the grounds of a relevant change<sup>1</sup> from 1.2.18, taking into account both *MH*, *RJ* and the deterioration. The period from 28.11.16 to 31.1.18 will be considered in the LEAP exercise.

1. *UC,PIP,JSA & ESA (D &A) Regs, reg 23 & Sch 1, Part 2 para 18*

### **Example 3 – Unplanned review - supersession carried out on the basis of a change of circumstances**

The claimant notifies deterioration in their condition and increased needs on 13.2.18. The increased needs arose from 1.11.17. The DM determines that the QP was met on 1.2.18 and that the claimant applied for supersession within a month of that date. It is noted that the claimant would be affected by *MH* and *RJ* prior to the deterioration. The DM makes a decision to supersede the award from 1.2.18 as a result of the change of circumstances<sup>1</sup> taking into account *RJ*. The period from 28.11.16 to 31.1.18 will be considered in the LEAP exercise.

1. UC,PIP,JSA & ESA (D &A) Regs, reg 23 & Sch 1, Part 2 para 15

### **Example 4 – Unplanned review - supersession carried out on the basis of a change of circumstances**

The claimant (who has a daily living component award only at the standard rate) notifies a deterioration in their condition and increased needs on 4.9.17, but those increased needs date back to 4.11.16. The QP was met from 4.2.17. Although the claimant did not report the change in their condition on time, the DM decides that the time limit for notifying the change can be extended<sup>1</sup>. The new needs create an award of the mobility component at the standard rate (*MH*), but it is noted that the effect of *RJ* would be to raise the mobility component to the enhanced rate. Taking into account both the change of circumstances and the relevant determinations, the DM supersedes to award both components at the standard rate with effect from 4.2.17 on the grounds of a relevant change of circumstances<sup>2</sup>. The DM makes a further supersession decision, on the grounds of error of law<sup>3</sup>, to award the enhanced rate from 9.3.17 as a result of *RJ* (See ADM A4250 to A4252 – reinterpretation of the law). The period from 28.11.16 to 3.2.17 will be considered in the LEAP exercise.

1. UC,PIP,JSA & ESA (D &A) Regs, reg 36, 2. reg 23 & Sch 1, Part 2 para15. 3. Regs 24 & 35(5)

## **MR requests**

- 14 A claimant might apply for MR of a supersession decision where the DM has followed the guidance in paragraph 13 and left a period to be considered in the LEAP exercise. If the application:
- does not specifically ask for the earlier period to be looked at in the light of *MH* and *RJ*, the DM should only consider whether the decision is correct from the effective date calculated in accordance with paragraph 13

- specifically asks for the earlier period to be looked at in the light of *MH* and *RJ*, the DM should revise the supersession decision and give a decision according to the guidance in paragraph 15.

## **Unplanned review request made specifically as a result of *MH* and/or *RJ***

15 Some claimants may contact the Department asking for their case to be looked at again solely on the basis of the *MH* and/or *RJ*. The DM should determine whether the claimant is entitled to an award or increase in the light of *MH* and *RJ*.

- Where *MH* only applies and the decision was made before 28.11.16, the decision should be superseded<sup>1</sup> with effect from 28.11.16 (See ADM A4250 to A4252 – re-interpretation of the law).
- Where both *MH* and *RJ* apply and the decision was made before 28.11.16, the decision should be superseded with effect from 28.11.16. A further supersession should be made from 9.3.17 to take into account (*RJ*).
- Where the decision was made on or after 28.11.16 but before 9.3.17 and *MH* applies, the decision should be revised on the grounds of official error<sup>2</sup>. If *RJ* also applies, the decision as revised should be superseded from 9.3.17 (re-interpretation of the law).
- Where the decision was made on or after 9.3.17, the decision should be revised on the grounds of official error taking into account *MH* & *RJ* accordingly.

*1 UC, PIP, JSA & ESA (D&A) Regs, regs. 24 & 35(5); 2 UC, PIP, JSA & ESA (D&A) Regs, reg 9(a)*

### **Example 1 - previous decision made before 9.3.17**

A claim to PIP was made on 4.1.17. The DM decided on 1.3.17 that the claimant is not entitled to PIP. The claimant applies for MR in the light of *RJ*. The DM looks at the case again and decides that *RJ* applies. However, the original decision to disallow the claim cannot be superseded on the grounds of error of law because it predates the decision in *RJ*. Therefore, the DM should give a decision refusing to revise for official error and the claimant should be advised to make a new claim.

### **Example 2 - previous decision made on or after 9.3.17**

A claim to PIP was made on 4.1.17. The DM decided on 6.6.17 that the claimant is not entitled to PIP. The claimant applies for MR in the light of *MH* and *RJ*. The DM

looks at the case again and realises that *MH* and *RJ* ought to have been taken into account in the decision of 6.6.17, since it was made after the date on which *MH* and *RJ* were decided. The DM revises the decision of 6.6.17 on the grounds of official error and makes a decision awarding PIP from 4.1.17 taking account of *MH*, and supersedes from 9.3.17 to take account of *RJ*.

- 16 If, following a claimant's application, the DM determines that *MH* and/or *RJ*, do not affect the previous decision, they should make a decision not to supersede or refuse to revise as appropriate.

### **Advance Claims**

- 17 Fixed term awards may generate advance claims. A notification is generated 14 weeks before the end date of the award which tells the claimant that entitlement is due to end and they should submit a new claim if they want to. If a new claim is made on time and it is decided that entitlement should continue, a new award will be made from the day after the end of the current award.

#### **Example**

An award of standard rate mobility component is due to end on 1.3.18. The claimant makes an advance claim on 1.2.18. The DM decides that the enhanced rate of PIP is appropriate from 2.3.18 (*MH* and/or *RJ* applying to the case). The DM should not apply *MH* and *RJ* to the case from 28.11.16 to 1.3.18 as this will be considered in the LEAP exercise. The enhanced rate should be awarded from 2.3.18.

### **APPEALS**

**To Note** – The following paragraphs 19-21 apply to cases where the decision maker has not considered/applied *MH* and/or *RJ*.

#### **Appeals against decisions made after 9.3.17**

- 18 Where the claimant has appealed against a decision that was made after 9.3.17, the FtT must take *MH* into account when deciding it but cannot apply it to periods before 28.11.16. The FtT must also take into account *RJ* but cannot apply it to periods before 9.3.17. (See the Appendix to this Memo for an explanation of the supporting legislation and case law.) The Secretary of State's response to the FtT should ask them to take *MH* into account from 28.11.16 and *RJ* into account from 9.3.17 onwards.

## **Appeals against decisions made on or before 9.3.17 but after 28.11.16**

- 19 Where the claimant has appealed against a decision that was made on or before 9.3.17 but after 28.11.16, the FtT can apply *RJ* to the whole period covered by the decision under appeal – both before and after 9.3.17. This is because the legislation that limits the application of a relevant determination does not apply to decisions made on or before the date of the relevant determination.<sup>1</sup> (See paragraphs 7 and 8 of the Appendix to this Memo.)

The appeals officer should mention *RJ* in their response to the FtT and ask them to take the decision into account. The DM should not revise the decision in the light of *RJ* prior to the hearing and lapse the appeal because any revision decision made after 9.3.17 would only be able to take *RJ* into account from 9.3.17. It is therefore potentially more advantageous to the claimant to allow the tribunal to decide the matter.

**However** the reinterpretation in *MH* (if appropriate) cannot be applied to periods before 28.11.16 (See the Appendix to this Memo for an explanation of the supporting legislation and case law.)

*1 SS Act 98, s 27(1)(b)*

## **Appeals against decisions made on or before 28.11.16**

- 20 Where the claimant has appealed against a decision that was made on or before 28.11.16 the FtT can apply *MH* and/or *RJ* to the whole period covered by the decision under appeal – both before and after 28.11.16 and 9.3.17 (See paragraphs 7 and 8 of the Appendix to this Memo.)

The appeals officer should mention *MH* and *RJ* in their response to the FtT and ask them to take the decisions into account. The DM should not revise the decision in the light of *MH* and *RJ* prior to the hearing and lapse the appeal because any revision decision made after 28.11.16 and 9.3.17 would only be able to take *MH* into account from 28.11.16 and *RJ* into account from 9.3.17. It is therefore potentially more advantageous to the claimant to allow the tribunal to decide the matter.

## APPENDIX - GUIDANCE FOR APPEALS OFFICERS

- 1 These notes are intended as a guide to help appeals officers write submissions to the FtT where *MH* and *RJ* apply to the decision under appeal and the decision covers a period before 28.11.16 and 9.3.17.
- 2 The UT decisions in *MH v SSWP (PIP) [2016] UKUT 0531 (AAC)* and *RJ, GMcL and CS v SSWP (PIP) [2017] UKUT 0105 (AAC)* are “relevant determinations” that re-interpret the law. Their effect is that other decisions that incorporate any other interpretation of the law are wrong in law (see ADM A4250 to A4252). The dates of the relevant determinations are 28.11.16 (*MH*) and 9.3.17 (*RJ*).
- 3 Paragraph 3(a) of Section 27 of the Social Security Act 1998 says that where a decision falls to be made on a date **after** a relevant determination was made:

*“In so far as the decision relates to a person's entitlement to a benefit in respect of—*

*(a) a period before the date of the relevant determination; or*

*(b) .....,*

*it shall be made as if the adjudicating authority's decision had been found by the Upper Tribunal or court not to have been erroneous in point of law.”*

- 4 This means that when making a decision after 28.11.16, the DM cannot apply *MH* to any period before 28.11.16. When a decision is made after 9.3.17, the DM cannot apply *RJ* to any period before 9.3.17. Any award or increase that the claimant is entitled to on account of *MH* is only effective from 28.11.16 and any award or increase that the claimant is entitled to on account of *RJ* can only be effective from 9.3.17<sup>1</sup>

1. 1 UC, PIP, JSA & ESA (D&A) Regs, regs. 24 & 35(5)

- 5 When a FtT decides an appeal, they make a decision that the Secretary of State *could* have made on the date on which the decision was made. This was explained by a Tribunal of Commissioners (now Upper Tribunal Judges) who said the following in paragraph 25 in R(IB) 2/04:

*“Taking the simple case of an appeal against a decision on an initial claim, in our view the appeal tribunal has the power to consider any issue and make any decision on the claim which the decision-maker could have considered and*



*made. The appeal tribunal in effect stands in the shoes of the decision-maker for the purpose of making a decision on the claim.”*

- 6 It follows that if the DM was bound by Section 27 when making a decision, the FtT are bound by it when standing in the DM’s shoes. This was confirmed by UT Judge (then Commissioner) Jacobs in [CH/0532/06](#). In considering the equivalent provision to Section 27 for Housing Benefit, he said the following in paragraph 14:

*“As the decision-maker was bound by paragraph 18, the tribunal must be also. The same result is produced by the consideration that, were it otherwise, the effect of paragraph 18 could be avoided by the simple expedient of lodging an appeal against the local authority’s decision”.*

- 7 However, a FtT is only bound by Section 27 if the DM was bound by it on the date on which the decision was made. If Section 27 did not apply when the decision under appeal was made because it was made on or before the relevant determination date, the FtT cannot apply it when considering an appeal against that decision.
- 8 This means that if a claimant appeals against a decision made on or before 28.11.16, the FtT can apply the interpretation in *MH* to the whole of the period covered by the decision, even if some of it is before 28.11.16. If a claimant appeals against a decision made on or before 9.3.17, the FtT can apply the interpretation in *RJ* to the whole of the period covered by the decision, even if some of it is before 9.3.17.
9. In the cases above, the DM should mention *MH* and *RJ* in their response to the FtT and ask them to take them into account. The DM should not revise the decision prior to the hearing and cause the appeal to lapse because their revised decision (now being made after 28.11.16 or 9.3.17) could only take *MH* into account from 28.11.16 and/or *RJ* into account from 9.3.17. It is therefore more advantageous to the claimant to allow the FtT to decide the matter.

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 1S25, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 03/13](#) - Obtaining legal advice and guidance on the Law.

**DMA Leeds: June 2018**