

## PIP NEGATIVE DETERMINATIONS – EFFECT OF UT DECISION

<b>Contents</b>	<b>Paragraphs</b>
Introduction	1-3
The UT Decision	
Background	4
What the UT decided	5
Application of the decision	
DLA to PIP Transfer Cases	6-8
New PIP Claims	9
PIP Award Reviews	10
Effect on Appeals	
Reassessment Cases	11-12
New Claims	13
First-tier Tribunal	14-15
Relevant determination	16
Annotation	
Contacts	

### INTRODUCTION

- 1 The purpose of this memo is to inform Case Managers (“CM”) about a recent decision of the UT<sup>1</sup> (“OM”) which deals with the impact of accepting ‘good reason’ following a negative determination when a claimant fails to attend an assessment<sup>2</sup>.

*1 OM v SSWP (PIP) [2017] UKUT 458 (AAC) 2 SS (PIP) Regs, reg 9*

- 2 The decision establishes the principle that for reassessment cases (transfer from DLA to PIP) where an award of DLA has been terminated as a result of failure to attend a

PIP assessment<sup>1</sup>, once 'good reason' has been accepted the award of DLA should be reinstated.

*1 PIP (TP) Regs, reg 13*

- 3 Although OM has a focus upon failure to attend, the principles of this decision also apply in cases where there has been a negative determination as a result of a claimant having failed to comply with a request to provide further information or evidence as part of the assessment process<sup>1</sup>. This can be from such scenarios as a claimant not having returned the PIP2. Please note that this is not an exhaustive list.

*1 SS (PIP), reg 8*

## **THE UT DECISION**

### **Background**

- 4 The appeal concerned a claimant with mental health difficulties, who was in receipt of the highest rate of the care component and lower rate of the mobility component of DLA. The claimant's appointee had informed the department of the claimant's difficulties engaging with other people and advised of the complications of attending a face to face assessment. The claimant failed to attend the assessment, which resulted in a negative determination as good reason was not accepted; consequently the claimant's DLA award was terminated. The FtT was requested to consider whether alternative arrangements for the consultation should have been offered given that the claimant had mental health difficulties. The FtT found that the claimant did *not* have good reason for failing to attend the face to face assessment; accordingly it dismissed the claimant's appeal.

### **What the UT decided**

- 5 The UT decided that the FtT had erred in law and that the claimant had good reason for failing to attend the face to face assessment. It also ruled that, following a negative determination for a failure to attend the assessment, once it has been accepted that a claimant has 'good reason' for having failed to attend an assessment, then the negative determination must be set aside because the Secretary of State had no power to make it. The effect of this is that a claimant whose DLA award has been terminated as a result of the negative determination will have it reinstated<sup>1</sup>.

*1 OM Para 37*

## APPLICATION OF THE DECISION

### DLA to PIP Transfer cases

- 6 Prior to OM, the following approach applied in previous cases where 'good reason' has been accepted: the claimant's PIP claim has continued to be considered with an assessment; however the previous award of DLA has not been reinstated.
- 7 Applying the principles of OM, following acceptance of 'good reason' the CM will have to reinstate the claimant's previous award of DLA "*as the basis for the application of regulation 13(1)(a) of the Personal Independence Payment (Transitional Provisions) Regulations 2013...falls away*"<sup>1</sup>. Reinstatement will take effect from the day after the original termination, thus providing a continuous period of entitlement.

*1 OM Para 37*

- 8 As the CM will have accepted 'good reason', there can be no outstanding negative determination. This has an impact on DLA to PIP transfer cases, specifically that the negative determination is no longer in effect<sup>1</sup>. This will result in DLA being reinstated, which can run until such a time an assessment determination is made on the PIP claim<sup>2</sup>. Therefore, following a subsequent assessment determination of PIP, there will be a "28 day" run-on after the decision is made.

*1 PIP (TP) Regs, reg 13 2 reg 17*

### Example

Axel has significant mental health and learning difficulties. His mother is his appointee and has been since his DLA claim, for which it is noted that he is in receipt of the highest rate of the care component and higher rate of the mobility component. The appointee completes the PIP2, in which it is suggested that Axel has difficulties engaging with other people and with undertaking journeys. Axel is invited to attend a face to face assessment, to which his appointee contacts the assessment provider ('AP') to request an assessment at Axel's home due to his mental health difficulties. The AP advises that the assessment can take place at a centre closer to Axel's home and reschedules the assessment. However, Axel does not attend the assessment and is marked as having failed to attend, which subsequently results in a negative determination and termination of his DLA award. A request for reconsideration is received on behalf of Axel from his appointee. The CM reviews all the available information and evidence to conclude that Axel had 'good reason' for not attending his

assessment due to his significant mental health difficulties and PIP claim can be continued to be considered with an assessment. Axel's DLA award is reinstated and will run on until a PIP determination has been made with the usual 28 run-on period.

### **New PIP Claims**

- 9 For new PIP claims the general principle of the negative determination no longer being in effect applies, as noted in paragraph 8, with the difference being that there is no DLA to reinstate. Therefore once the CM has accepted the claimant to have 'good reason' there can be no outstanding negative determination<sup>1</sup>. Therefore the claimant's PIP claim will proceed to a full assessment and a decision made on entitlement, from the date of PIP claim. Whilst this makes no difference to the current decision-making process, it does have an impact on the appeals process (see paragraph 14).

*1 OM Para 37*

### **PIP Award Reviews**

- 10 The principle in OM should not affect PIP award reviews, as the current process is that once good reason is accepted then the previous PIP award is reinstated until such a time an assessment determination is made on the award review.

### **Effect on Appeals**

#### **Reassessment Cases**

- 11 Prior to OM, once the appeal writer had been satisfied and accepted that a claimant had 'good reason' for their failure to attend or failure to comply they would write to the Tribunal that 'good reason' has been accepted but not reinstate DLA. This has previously led to Tribunal's directing the DLA award to be reinstated, but leaving the appeal open for further consideration once a PIP entitlement decision has been made.
- 12 The effect OM has on appeals that arise as a result of negative determinations is essentially that once we accept that the claimant did have 'good reason' for failing to comply or attend an assessment, then DLA is reinstated and the claimant's PIP claim can be continued to be considered with an assessment. Therefore, the reason for the appeal has disappeared and it has become nugatory. In such circumstances the CM

should write to HMCTS with the relevant wording, which can be found in the Appeal Response Tool (ART).

### **New Claims**

- 13 The effect on appeals described in paragraph 12 also applies to new PIP claims, with the only difference being that there is no DLA to reinstate. Therefore, in those cases also, the appeal writer can write to the Tribunal with the relevant wording, which is different as it does not mention any DLA reinstatement. As with the appeals dealing with reassessment cases, the relevant wording can be found in the ART tool.

### **First-tier Tribunal**

- 14 For any appeals that are before a Tribunal in which good reason has not been accepted by the CM or appeal writer, the principles of OM will also apply to Tribunals, who, on finding good reason, should almost always:

- (i) set aside the negative determination;
- (ii) reinstate the previous award of DLA; and
- (iii) remit the PIP assessment decision to the Secretary of State to decide on entitlement to PIP.

- 15 However, there may be exceptional circumstances where rather than remitting the matter back to the Secretary of State the Tribunal has sufficient evidence before it to make a decision on entitlement to PIP. Should the Tribunal act in that way and make a decision on entitlement to PIP, then the OM actions as set out in paragraph 14 above will not all apply. In these circumstances the Tribunal may instead:

- (i) set aside the negative determination; and
- (ii) replace it with its own PIP decision. The PIP decision is made as if the Tribunal are in the shoes of the decision maker on the day the negative determination was originally made. As the negative determination ceases to exist and is replaced with PIP it follows that DLA is reinstated for 28 days following the date of the negative determination and the PIP award is backdated to begin on the next day (the 29<sup>th</sup> day after the date of the ND). (N.B. 14 days of DLA will have already been paid following the initial

negative determination; therefore only a further 14 days can be paid, resulting in a total of 28 days of DLA being paid.)

## **Relevant determination**

- 16 The decision of the UT in *OM* is a “relevant determination”<sup>1</sup>. The date of the relevant determination is 23.11.17.

*1 SS Act 98, s 27*

## **ANNOTATIONS**

The contents of this memo (ADM 24/18) should be annotated against ADM Chapters P2056 & P5054.

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 1S25, Quarry House, Leeds.

**DMA Leeds: December 2018**

The content of the examples in this document (including use of imagery) is for illustrative purposes only