

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/2225/2015

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal, sitting at Norwich on 27th March 2015 (tribunal ref: *SC 142/14/01013*), involved an error of law. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I set aside the Tribunal's decision and remit the appeal for re-hearing. Directions for the re-hearing are at the end of these reasons.

REASONS FOR DECISION

Background

1. Mr C had been entitled to Disability Living Allowance (DLA). His award was comprised of the higher rate of the mobility component and the lowest rate of the care component for an indefinite period.

2. On 18th March 2014, Mr C contacted the Department for Work & Pensions (DWP). There is a factual dispute as to whether this contact involved Mr C notifying a DLA-related change of circumstances. In response, the DWP invited Mr C to claim Personal Independence Payment (PIP) which he did.

3. The Secretary of State decided Mr C's PIP claim on 21st August 2014. The Secretary of State decided that Mr C was not entitled to PIP.

4. Mr C appealed to the First-tier Tribunal. The Tribunal dismissed Mr C's appeal. The Tribunal determined that Mr C scored 2 daily living points and 4 mobility points but, in both cases, those points were below the 8 point threshold for an award.

5. Mr C's representative applied to the First-tier Tribunal for permission to appeal on the following grounds:

(a) the Tribunal proceeded on the assumption that Mr C had applied for a supersession of his DLA award. That was incorrect. According to the representative, what in fact happened was that Mr C contacted the DWP with a general query about what would happen during the process for 'migrating' him from DLA to PIP, in particular whether he would need to complete a claim form. Mr C had not intended to "trigger a claim" but "once he had discussed the process the claim was started and he was told that this had to continue". The Tribunal had failed to address this argument;

(b) the Tribunal irrationally interpreted the GP evidence as showing that Mr C had “4 good days out of every 7” when in fact the GP stated that “four out of seven days are bad days when he is laid up in bed”. The GP’s evidence is also relied on to challenge other findings of fact;

(c) the Tribunal overlooked relevant evidence in finding that Mr C’s diagnosis was not clear. In fact, the evidence showed a diagnosis of “CFS/ME”;

(d) the fact that Mr C was no longer undergoing specialist intervention should not have been relied on against Mr C;

(e) the Tribunal should have directed the DWP to supply the evidence on which they previously relied to award Mr C DLA.

6. The First-tier Tribunal granted permission to appeal to the Upper Tribunal on the ground that, arguably, the DWP should have been required to supply the evidence it relied on when it awarded Mr C DLA.

7. Mr C duly appealed to the Upper Tribunal. In giving case management directions, I granted permission to appeal on additional grounds. These were the other grounds relied on before the First-tier Tribunal apart from (c) which I thought, even if made out, would not have been a material error of law.

8. In response, the Secretary of State’s representative indicated that he supported the appeal. The Secretary of State did not, however, support all the grounds of appeal. He argued the Tribunal gave a reasonable and logical explanation for not requiring sight of the DLA documentary evidence. The Secretary of State argued that any error of law in not addressing Mr C’s argument that he had never wanted to claim PIP was immaterial.

9. The grounds on which the Secretary of State supported the appeal were those in (b) and that, more generally, the Tribunal erred in law in giving inadequate reasons for preferring the healthcare professional’s evidence to that supplied by Mr C’s GP. The Secretary of State invited the Upper Tribunal to set aside the First-tier Tribunal’s decision and remit to a differently-constituted Tribunal panel for re-hearing.

10. In reply, Mr C’s representative agreed the First-tier Tribunal’s decision should be set aside. He agreed with the Secretary of State’s proposal to remit the appeal for re-hearing unless, that is, the Upper Tribunal felt able to re-decide the entitlement issues itself. I am not in a position to re-make the First-tier Tribunal’s decision because I do not have the specialist medical and disability expertise that the First-tier Tribunal has.

Whether Mr C had validly claimed PIP

11. The DWP's submission to the First-tier Tribunal stated that on 18th March 2014 Mr C notified the DWP of a change of circumstance. However, no documentary evidence of that notification was in the appeal papers. The DWP said that, in response to Mr C's notification, he was invited to claim PIP. And Mr C clearly did complete a PIP claim form, dated 28th April 2014.

12. Since Mr C had an award of DLA, he fell within the ambit of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (S.I. 2013/387), as amended ("the PIP transitional regulations").

13. Regulation 3(5) of the PIP transitional regulations applies where, after 27 October 2013, a "DLA entitled person", such as Mr C, notifies the DWP of a change of circumstances. There are certain exceptions to this but none can apply in this case. The notification triggers a duty on the Secretary of State to send a notice under regulation 3(1) inviting the person to claim PIP. For PIP transitional purposes, a change of circumstances is a "change of circumstances which a person might reasonably have been expected to know might affect the continuance of that person's entitlement to disability living allowance" (regulation 2(1)). In other words, not a PIP-related change of circumstance.

14. The regulation 3(1) notice must "state the date of the last day of the period within which the person should claim personal independence payment, that period being one of 28 days starting with the day that is the stated date of notification". If a claim is made within that period, the person becomes a "transfer claimant" for the purposes of the PIP transitional regulations. That term is defined by regulation 2(1) to include a "notified person who has claimed personal independence payment in response to a notification sent by the Secretary of State under regulation 3(1)".

15. If a transfer claimant does not claim PIP during that period of 28 days entitlement to DLA is suspended (regulation 9). However, regulation 10 of the PIP transitional regulations provides for a further opportunity to claim PIP before entitlement is terminated under regulation 11. Once the PIP transfer claim is determined, entitlement to DLA ceases automatically. Regulation 17(1)(b) provides, subject to an immaterial exception, that "the claimant's entitlement to disability living allowance shall terminate...on the last day of the period of 28 days starting with the first pay day after the making of the determination". "Pay day" means the claimant's DLA pay day (regulation 2(1)).

16. In other words, commencing the PIP transfer claim process inevitably leads, sooner or later, to DLA entitlement ceasing.

17. I also note two further features of the transitional scheme.

18. Firstly, a DLA-entitled person is not free to claim PIP as and when s/he wishes. This is because regulation 4 (“Claims by persons entitled to DLA for PIP other than by invitation”) provides:

“A DLA entitled person who has not been sent a notification under regulation 3(1) may not make a claim for personal independence payment unless—

- (a) they were aged under 65 on 8th April 2013,
- (b) the Secretary of State has specified a relevant date which applies in their case, and
- (c) they make the claim on or after that relevant date”.

19. Once the transfer claim process has begun, the individual may withdraw the claim for PIP. But, if they do, entitlement to DLA “shall terminate with effect from the last day of the period of 14 days starting with the first pay day after the day on which the Secretary of State decides that the transfer claimant has withdrawn the claim” (regulation 14).

20. What happens, though, if a person is (a) issued with a regulation 3(1) notice inviting the person to claim PIP but (b), in fact, the person did not notify a change of circumstances? Mr C argues this happened in his case.

21. It is true that, in those circumstances, the Secretary of State’s duty to issue a regulation 3(1) notice could not have arisen. It only arises in defined circumstances, such as notification by a DLA-entitled person of a change of circumstances. However, the Secretary of State also has a general power to issue a regulation 3(1) notice inviting a person to claim PIP. Regulation 3(1) provides that “at any time after 27th October 2013, the Secretary of State may by written notification invite a DLA entitled person to make a claim for personal independence payment”.

22. I do not believe it is disputed that the Secretary of State issued a regulation 3(1) notice. On Mr C’s case, the Secretary of State was not *required* to issue a regulation 3(1) notice (because Mr C says he did not notify a change of circumstances). However, the Secretary of State had the *power* to issue a regulation 3(1) notice. Once the notice was issued, Mr C became a transfer claimant and was on a legal conveyor belt towards termination of his DLA award. Even if he is right that he did not notify a DLA-related change of circumstances, he cannot succeed on his argument that he could not have been the subject of a lawful transfer decision. While the First-tier Tribunal did not address his argument, this could not have been a material error of law.

Whether the Tribunal erred in law by failing to require production of the DWP’s DLA evidence

23. The First-tier Tribunal was supplied with a detailed written submission by Mr C’s representative. While this noted Mr C’s DLA award, it did not argue that the DWP ought to have supplied the Tribunal with the evidence on which it relied in awarding Mr C DLA. In its

reasons, the Tribunal noted that it had no evidence connected to Mr C's DLA award but also stated it had sufficient evidence on which to decide Mr C's PIP appeal a benefit whose entitlement criteria, noted the Tribunal, differed to those for DLA.

24. The Secretary of State argues the Tribunal did not act unfairly by proceeding to decide the appeal without having had sight of the evidence relied on by the DWP eight years before when awarding Mr C DLA. I agree. The Tribunal had before it a detailed claim form, an extensive written submission from Mr C's representative, the report of the healthcare professional who carried out a face-to-face PIP consultation with Mr C as well as evidence from his G.P. The Tribunal was concerned with Mr C's condition in 2014 for the purposes of a benefit with different entitlement conditions than those for DLA. Given the quantity of evidence of direct relevance to Mr C's more recent difficulties, being evidence that was also directed to the PIP criteria, the Tribunal was not required to direct the DWP to disclose its DLA-related evidence, especially as it was not asked to do so by Mr C's representative. Fairness did not require this, nor was the Tribunal required to find that the DWP had failed to comply with its obligation under the First-tier Tribunal's procedure rules to supply it with all relevant documentary evidence.

Why the Tribunal erred in law

25. I agree with the Secretary of State that the Tribunal erred in law by making an irrational finding on the evidence. Relying on the GP evidence, the Tribunal found that Mr C had more good days than bad. However, the GP evidence clearly did not support that finding. It stated that "four out of seven days are bad". For this reason, I set aside the First-tier Tribunal's decision.

26. Since the appeal will be re-heard by the First-tier Tribunal, I shall not say anything about the other grounds of appeal.

Directions for re-hearing

Subject to any further direction by a salaried judge of the First-tier Tribunal:

1. I direct a re-hearing before the First-tier Tribunal of Mr C's appeal against the Secretary of State's decision of 21st August 2014.
2. Mr C is reminded that the law prevents the Tribunal from taking into account circumstances that did not exist at 21st August 2014, when the Secretary of State made his decision.
3. The First-tier Tribunal panel must not include any member of the panel of the Tribunal whose decision I have set aside.

4. If either party wishes to rely on any further documentary evidence or written submission these must be supplied to the First-tier Tribunal within one month of the date on which this decision is issued.

(Signed on the Original)

E Mitchell
**Judge of the Upper Tribunal
25th February 2016**