DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Paula Gray

DECISION

The appeal is allowed.

Permission to appeal having been given by me on 11 January 2016 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Lincoln and made on 11 August 2015under reference SC 030/14/00306. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

DIRECTIONS

1. These directions may be amended or supplemented by those of a District Tribunal Judge (DTJ) at the listing stage.
2. The DTJ will consider directing a face-to-face assessment under Schedule 2 of the Tribunal Procedure Rules (First-Tier Tribunal) (SEC) Rules 2008, the absence of such an assessment being the issue on appeal before me.
3. The case will be listed before a differently constituted panel as an oral hearing. The new panel will make its own findings and decision on all relevant matters, noting the reasons that the matter has been remitted.
4. The parties should send to the HMCTS First-tier Tribunal office as soon as possible any further relevant written medical or other evidence, if there is any. If they cannot send that evidence promptly the parties will need to contact that office to let them know that they intend to do so. This is not to suggest that any further evidence is required or expected, and it is important that the appellant understands the remit of the tribunal, which is to consider her medical difficulties and their effect on her daily life at the date of the decision under appeal, 3 September 2014. Evidence which sheds light on those circumstances may be relevant, even if it arose after that date.

REASONS

Background

5. This appeal concerned the entitlement to a Personal Independence Payment (PIP). The history is a little complicated, so I will set it out.
6. The appellant was the beneficiary of an award of Disability Living Allowance (DLA) which comprised the lower rate of the mobility

component and the highest rate of the care component. It commenced on 19/5/2011, and terminated on 30/9/2014. 3 years and 4 months is an unusual time for an award to run, so I surmise that the award was either curtailed or extended due to the PIP decision making process, the appellant having been contacted on 3/1/14 and asked to make a claim for PIP. That claim was dated 6/1/14, and expanded upon in a form (PIP 2) received on 16/1/14. The need for assistance with aspects of daily living and the extent of related mobility problems were explained.

7. What is described as "a paper-based consultation" took place on 12/3/14. This appears to have been a reading of the case papers by a health care professional (although there is no indication as to what type of health care professional) by the name of Angela Vickery. She signed a review file note to the effect that further evidence, in the form of a face-to-face consultation was required. She wrote "the information provided indicates a home-based assessment will be appropriate due to the nature of their condition."
8. No such assessment took place.
9. Further evidence was submitted on 28/5/14, including, or perhaps solely comprising, a GP report, and once again the case was looked at by a health care professional. On this occasion it was Poonam Mann, an Occupational Therapist, who looked at the file on 31/7/14, felt matters had moved on given the further medical evidence, and deemed it possible to advise on what was described as "a paper-based review" which appears to mean expressing an opinion as to potential entitlement without a face-to-face examination of the appellant.
10. Following that the matter was put before a decision maker, and at pages 85 – 94 a decision letter appears in relation to a decision made on 3/9/14 granting PIP at the standard rate for daily living but without any award of the mobility component. The appellant challenged that, requesting reconsideration as to the mobility aspects. There was no specific note in the file as to any complaint about the daily living component.
11. At page 95 an outcome of the reconsideration appears. A decision maker on 18/11/14 accepted that the appellant could move between 20 and 50 metres using an aid, and awarded the standard rate of the mobility component on that basis. That decision, in law a revision decision, was effective from the implementation date of the original decision. (Section 9(3) Social Security Act 1998.)
12. The FTT confirmed the decision under appeal as revised. The appellant sought leave to appeal, initially unsuccessfully from the FTT, and then before me.

The grant of permission

13. I granted permission to appeal, saying as follows:

> 1. There seems to me to be an arguable issue as to the lack of a face-to-face assessment, a matter which concerned the FTT. The full statement regretted this position, and commented that, unlike that in relation to decisions regarding Disability Living Allowance, the benefit replaced by PIP, the FTT could not itself direct such an assessment.

2. It seems to me at least arguable that the FTT proceeded upon the wrong premise. Under regulation 9 of the Social Security (Personal Independence Payments) Regulations 2013 the Secretary of State has power to require a claimant to attend for and participate in consultation in person or by telephone. The question arises as to whether the FTT, standing in the shoes of the Secretary of State, can direct likewise.
3. The Secretary of State's submission should deal with that question, setting out the decision making process in respect of whether or not a face-to-face (or telephone) assessment takes place, in particular whether such a decision is made directly by an employee of the Department of Work and Pensions or whether such decisions are delegated to the company providing the medical assessment services and the process for challenging such a decision, if any. If it is accepted that the FTT has the power to direct a face-to-face assessment, once again the process should be set out.

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The position of the parties

14. In fact the parties are now both in agreement that the decision of the FTT was made in error of law, the decision of the tribunal being flawed by their misunderstanding their power to direct a face-to-face assessment by a health care practitioner in circumstances where it was clear that they wanted to do just that.

The Secretary of State

15. The Secretary of State's submission was filed a little after the date provided for in my timetable, and I do formally grant the extension that his representative requests. I am grateful to Ms Pepper for the submission which has assisted me in relation to the process of PIP determination, as well as pointing me to an amended version of the Tribunal Procedure Rules (First-Tier Tribunal) (SEC) Rules 2008. I will return to those matters below.

The appellant

16. Understandably the appellant, who is represented by her husband, focuses on the general problems that she has had in relation to her PIP application. She expresses concern as to having previously had an assessment by a healthcare professional at her home for DLA, and an award apparently based upon that assessment having been reduced subsequently in the PIP determination. She explains that she is worse now than she was then, and that her local authority have registered her as disabled and recommended certain facilities including a wet room. She does not understand how two departments can come to such different views.
17. I hope it is helpful if I comment briefly on those matters, although they are not directly within my remit as an appellate tribunal considering matters of law.
18. The fresh tribunal that I am directing re-hear her appeal must look at matters as they were over the year prior to the claim, and not consider changes following the decision under appeal which was taken by the Secretary of State's decision maker on 3 September 2014. They must also, of course, apply the law as it is in relation to PIP and not the DLA criteria which were different; that may reflect the difference in award, if indeed there is in fact a financial difference; the two allowances do not directly 'match' each other.

19. It may be of some assistance for the fresh tribunal to know about what provisions are thought necessary or have been put in place by the local authority. Such details may shed light on the extent of the practical difficulties which the appellant's medical conditions caused her at that time.
20. The fact that she has been classified or treated as disabled by her local authority, however, does not automatically mean that she is entitled to a PIP award at any particular level or at all. The law that governs PIP awards may be different to the standards that are applied by local authorities. The tribunal is not concerned with those standards, but with the law as it relates to PIP. Accordingly it is possible for a local authority to take a view about somebody's disability, and put in equipment or a care plan, without the law allowing a PIP award to be made. As a matter of practicality, however, some of the things that a local authority will concern itself with are likely to be of help to somebody making a decision regarding PIP entitlement, and any care plan or assessment details, although they cannot of themselves enable an award to be made, may assist in the PIP decision making process.

The lack of face-face assessment and its impact on the decision

21. The grounds of appeal are really just an expression of disagreement with the decision and the issue is set out in my grant of permission. That is helpfully dealt with in the submission on behalf of the Secretary of State at pages 201 to 207.
22. Critical here was that the main complaint by the appellant about the decision under appeal before the FTT had been that when she was previously assessed for Disability Living Allowance there had been a face-to-face medical examination, which had not happened with PIP (as set out at paragraph 15 of the statement of reasons). The examination and report had been some 2 to 3 years previously, and it was said that the appellant had deteriorated in the meantime.
23. That was not something which the tribunal felt to be immaterial; in rehearsing the history of this case the judge observed that a previous tribunal had heard the appeal on the papers, but had been under the impression that the appellant had attended a consultation with a healthcare professional, which was not the case, and following an application to the FTT for permission to appeal the decision was set aside. In the directions for the re-listing of the appeal following that set aside, a copy of the DLA examination report was directed, but the Secretary of State failed to provide it. Pragmatically taking the view that it was unlikely to assist due to the lapse of time and the different criteria being considered under PIP the tribunal proceeded, but the judge commented at paragraph 7

"ultimately what was missing was a recent medical report from the medical professional focused on the issues before the tribunal, and the tribunal was going to have to determine the appeal with out one. An adjournment that was not likely to produce anything of use to the tribunal was not in the interests of justice."

24. Later regret was expressed, that the tribunal did not, as they thought, have the power to direct that a medical examination should take place. At paragraph 17:

"the tribunal is an inquisitorial tribunal and the tribunal can seek to obtain evidence itself. The tribunal used to be able to commission its own medical reports, but that facility is no longer available to the tribunal as the tribunal understands that the present contract between the DWP and the contractor providing medical report does not contain provision for it."

25. The misunderstanding of their authority in this regard was a material error because it is clear that had they realised that they had that power they would have exercised it in this case.

Referral for examination generally

26. In my grant of permission I adumbrated the possibility of there being a generalised power in the FTT standing in the shoes of the Secretary of State, given the Secretary of State's power to direct a telephone or face-to-face assessment.
27. As is clear from the Secretary of State's submission to me that is a power that is delegated to Assessment Providers. I had queried whether that was material in respect of appeal rights. The delegation of authority to Assessment Providers may not be without difficulty; it will be recalled that some of those difficulties are rearing their heads in the ESA context, but I need not speculate.
28. That is not now an issue which I need to determine in relation to this appeal, however it is of course the position that even if the decision not to call somebody for an assessment had been made by the Secretary of State that would not of itself be an appealable decision because it is not an outcome decision. It for the FTT to assess the quality of the available evidence on an appeal against an outcome decision, but, as is now clear to me, the FTT can itself direct a medical assessment.

The power of the FTT to direct a medical assessment

29. This appears in an amendment to schedule 2 to the Tribunal Procedure Rules (First-Tier Tribunal) (SEC) Rules 2008 (the procedural rules).
30. Schedule 2 is headed "Issues in relation to which the tribunal may refer a person for medical examination under section 20 (2) of the Social Security Act 1998."
31. Section 20 applies to any appeal brought under section 12 of the Social Security Act (the SSA) against a decision on a claim for a relevant benefit or as to a person's entitlement to such a benefit. These are appeals against any decisions of the Secretary of State in relation to benefit entitlement which are not specifically designated as unappealable decisions under schedule 2 of that Act. A relevant benefit, under section 8 (3) of that Act includes a personal independence payment.
32. Section 20 (2) SSA provides that

20(2) The First-Tier Tribunal may, if conditions prescribed by Tribunal Procedure Rules are satisfied, refer the person –
(a) in respect of whom the claim is made; or
(b) he was entitlement is at issue,
to a healthcare professional approved by the Secretary of State for such examination and reporters appears to be First-Tier Tribunal to be necessary for the purpose of providing it with information to use in determining the appeal.

33. Section 39 (1) of the same Act defines a "health care professional" widely, to include registered doctors and nurses, as well as registered occupational therapists or physiotherapists, and empowers the Secretary of State to add other registered health care professionals.
34. To return to schedule 2 of the procedural rules, the list of issues which fall with in that schedule includes whether a claimant satisfies the conditions for entitlement to either the daily living component or the mobility component of PIP (schedule 2 (a) (vi) and (vii)) and (schedule 2 (j)) and the rate at which the allowance is payable.
35. Accordingly in an appeal against a PIP decision relating to issues of entitlement the FTT has the power to direct that what is described as a medical examination and performed by a health care professional, take place.

How does this power fit into the PIP process?

36. I have not been informed as to the way in which a tribunal referral operates. I know that under the old system, prior to the contracting out to independent Assessment Providers, special arrangements were in place to carry out medical examinations directed by a FTT. That may continue to be the position under the current changed arrangements. In any event where it is directed such an examination must occur and a report of it provided to the tribunal; given that the Secretary of State accepts that the FTT has the power to commission an examination if no procedure currently exists no doubt it soon will.

Who generally decides whether a face to face assessment is necessary or appropriate?

37. It appears from the process at is has been outlined to me that the decision is for the Health Professional (HP), who is, I believe, the contracted by the Assessment Provider (AP) on an employed or self-employed basis or possibly through an agency.
38. The outcome decision, that is to say the appealable decision in each case is made by a departmental decision maker who for these purposes is referred to as a Case Manager. Case Managers are not responsible for dealing directly with the Assessment Providers; this is done by a Quality Assurance Manager who is particularly knowledgeable in relation to the PIP process. They act on behalf of the Case Manager in, amongst other things, liaising with the Health Professional for additional advice either based upon what is currently available or using further evidence, and where there is a discrepancy in descriptor choice or evidence, when they may ask them to look at the matter again. That has been put to me as "potentially requesting rework such as reconsidering evidence or requesting missing evidence." I anticipate that this person would have the power to override an initial view of a Health Professional as to the need to arrange a face-to-face assessment, or a HP decision that an assessment could be done on the telephone rather than in person.
39. I am told that a face-to-face consultation is likely to be necessary in the majority of cases. This departmental expectation is set out in their guide (the PIP Assessment Guide which is available on line) at

paragraph 2.2.4. I am not informed as to whether adherence to that guidance is reflected in any statistical evidence of the position regarding assessments so far.

40. Guidance is given as to types of cases that should not require a face-to-face consultation, although the point is made that each case will turn on its individual facts. Essentially this is either where a low level of functional disability is indicated which is consistent with the medical diagnoses and there is nothing to suggest under reporting, or where, although significant functional limitation is claimed, the health conditions mentioned are suggestive of only minimal disability and there is no other evidence may explain the claimed problems.
41. Any action taken by the Health Professional is documented, and as I have seen in this case it is recorded when a personal assessment is deemed unnecessary and a paper based review is undertaken.

Observations as to the full statement

42. I conclude by making some observations as to the full statement in this case, although it is not the quality of that which has founded the error of law but the somewhat obscure provision which gives rise to a power in the FTT to direct a medical examination.
43. Despite its overall quality I do have concerns as to the sheer length of this statement, which runs to almost 15 sides of print. The purpose of such a statement is to let the parties, and perhaps in particular the loser, understand the decision and why it was arrived at. Sometimes it is necessary to quote passages of law in order to do that, but here set out between paragraphs 8 to 15 are some 9 sides that rehearse almost all the statutory provisions which concern PIP in a general way. That can be very daunting to a reader, particularly somebody without legal experience and the reading stamina that confers. It is preferable to confine legal references to those which are necessary for the determination of the instant appeal rather than preface a statement of reasons with the law applicable to the general area which is under determination.

Concluding matters

44. The power to direct a medical examination lies within the schedule to the procedural rules that govern the First-Tier Tribunal. They are not replicated in the Upper Tribunal procedural rules. I have directed the DT J who considers this case on its return to the FTT prior to listing arrangements being made to consider making such a direction given my decision.
45. In the light of the matters which appear above I remit the appeal against the level of the PIP award for a further hearing. I must caution the appellant that her success here is not an indication of the result of that further appeal, which will be entirely for the specialist tribunal which hears the case.

Upper Tribunal Judge Gray

(Signed on the original on 26 April 2016)