

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Liverpool First-tier Tribunal dated 23 March 2016 under file reference SC068/15/04218 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 9 September 2015 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

**DIRECTIONS**

**The following directions apply to the hearing:**

- (1) The appeal should be considered at an oral hearing.
- (2) The new First-tier Tribunal should not involve the tribunal judge or members who were previously involved in considering this appeal on 23 March 2016.
- (3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely 9 September 2015).
- (4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Liverpool within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction (3) above).
- (5) The new tribunal should have before it a copy of the submission to the Upper Tribunal made by Mr W Spencer on behalf of the Secretary of State (pp.168a-170 of the Upper Tribunal bundle, along with its attachments).
- (6) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

**These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

## REASONS FOR DECISION

### What this appeal is about

1. This appeal is about the steps a First-tier Tribunal (FTT) should take when considering an appeal against a decision by the Secretary of State to withdraw a claimant's current award of personal independence payment (PIP) before its scheduled expiry date.

### The background to this appeal

2. The Appellant first claimed PIP in October 2013. He was assessed by a health care professional (HCP) on 30 June 2014. The HCP reported at the time that the Appellant "has very unstable mental health issues". His general observations included the comment that the Appellant "was very dishevelled at assessment. He was clearly struggling with personal hygiene, he was very emaciated at assessment, and claimed to weigh 7 stone, which was in line with his observed weight".

3. On 29 July 2014 a decision maker made an award of the enhanced rate of the daily living component of PIP (but no award of the mobility component). The decision maker awarded the Appellant a total of 16 daily living points, comfortably in excess of the score of 12 needed for the enhanced rate. He was awarded 4 points for descriptor 2d and 2 points each for descriptors 1d, 4c, 6c, 9b and 10b, all of which require prompting (or in some cases prompting or assistance). He was also allocated 2 points for descriptor 5b. The PIP award was made for the period from 2 October 2013 to 29 June 2016. However, the letter informing the Appellant of the award added that "We'll contact you after 29 June 2015 to make sure you're receiving the right level of Personal Independence Payment".

4. On 29 June 2015 the Department duly sent the Appellant a further letter headed "Looking at your Personal Independence Payment again." Accompanying the letter was a new PIP questionnaire, which the Appellant returned. On 3 September 2015 he was seen by a different HCP. The Appellant's presentation was certainly not as extreme as in July 2014. On this occasion the HCP noted "Does not look tired; average build; well kempt; wearing dirty clothes... coped well at interview; normal manner, not anxious, agitated or tense".

5. On 9 September 2015 a decision maker decided that the Appellant scored zero daily living points, and his PIP award was withdrawn as from that date. The decision was not changed on mandatory reconsideration. Neither the decision letter nor the mandatory reconsideration decision referred to the previous decision. The DWP submission to the FTT referred in passing to the previous decision awarding PIP but did not in terms explain why that decision had been changed. In summary, the submission to the FTT read as though it was an explanation as to why a fresh claim for benefit had been refused.

6. The Appellant attended the FTT hearing on 23 March 2016 with his representative and gave evidence. The FTT dismissed his appeal.

### The appeal to the Upper Tribunal

7. Mr Grant Bernard, the Appellant's CAB representative, advances two grounds of appeal on behalf of the Appellant in his appeal to the Upper Tribunal. Ground 1 was that the FTT had failed adequately to address the specific activities put in issue before the tribunal. Ground 2 was that the FTT had failed to explain adequately, or at all, why the decision differed from the previous award. Upper Tribunal Judge Mitchell gave permission to appeal on both grounds.

8. Mr Wayne Spencer, the Secretary of State's representative in these proceedings, supports the appeal but on what for convenience I describe as Ground 3, namely that the FTT had failed to identify the ground for supersession and the date from which it took effect.

### **The Upper Tribunal's analysis**

#### *Ground 3: the supersession point*

9. I will deal with the grounds of appeal in reverse order and start with Ground 3, not least as both parties are agreed on that point.

10. The FTT summarised the chronology of events on the Appellant's PIP claim accurately enough (statement of reasons at paragraph [2]), but without actually noting that the decision under appeal was a supersession decision. Indeed, the FTT's statement of reasons gives the clear impression throughout that the FTT thought it was dealing with a fresh claim, as evidenced by its conclusion that "As no points were awarded [the Appellant] did not reach the threshold for entitlement to personal independence payment and therefore the appeal failed". In short, the FTT got off on completely the wrong footing.

11. Mr Spencer for the Secretary of State acknowledges that the supersession decision in the present case "was evidently carried out on the initiative of the Secretary of State after a routine and predetermined re-examination of the claimant's entitlement to benefit (a process referred to in the Department as 'Planned Review')." When referring to a "predetermined re-examination", I am sure Mr Spencer means a review that was pre-determined in terms of its timing, rather than its outcome.

12. As Mr Spencer further observes, one or more of a number of possible grounds may be relied upon in making a supersession decision following a Planned Review. There are two obvious contenders as the basis for such a supersession decision in practice.

13. The first is where there has been "a relevant change of circumstances" within regulation 23(1)(a) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381; "the D & A Regulations 2013"). In such a case the effective date of the supersession depends on the operation of Part 2 of Schedule 1 to the D & A Regulations 2013 – which Mr Spencer describes, not unfairly, as containing a "somewhat bewildering series of provisions".

14. The second obvious situation is where the Secretary of State has received medical evidence from an HCP or other approved person (D & A Regulations 2013, regulation 26(1)(a)). By analogy with the position in the employment and support allowance and incapacity benefit schemes, this provision does not require a change of circumstances to be identified: *JC v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 706 (AAC) at paragraph 28. A supersession on this basis takes effect in accordance with the normal principles as stipulated by section 10(5) of the Social Security Act 1998 (presumably from the date it was carried out), there being no special modifying provision in Schedule 1 to the D & A Regulations 2013.

15. As Mr Spencer rightly further submits, a tribunal is required to make findings as to (i) the ground upon which the supersession decision was made and (ii) the date from which it properly took effect. In the present case, although the FTT's decision notice confirmed the Secretary of State's decision of 9 September 2015, neither of

these two issues was addressed head-on (either in the decision notice or in the statement of reasons). The FTT's comprehensive failure to do so amounts to a material error of law which means I should set aside its decision and remit the case for re-hearing.

16. The informed but impatient reader might consider this approach to be the epitome of Upper Tribunal persnickiness. Not so. It is true, of course, that the decision maker in the present case acted upon the second HCP report. So to the informed reader the case may appear to have regulation 26(1)(a) written all over it. However, the existence of new HCP medical evidence does not, of itself, preclude supersession on the alternative ground of a relevant change of circumstances. As Mr Spencer very fairly observes, a subsequent HCP report may support an *increase* in the claimant's PIP award due to further needs which had already been previously and promptly notified by the claimant under regulation 23(1)(a). Unthinking and automatic resort to the new HCP report under regulation 26 in such a case would result in the claimant potentially losing out as regards arrears of benefit. Although I have not had full argument on the point, it seems to me in principle that Mr Spencer is correct in arguing that (with emphasis as in the original):

“regulation 26 should be understood as allowing supersession to be carried out where a relevant change of circumstances *cannot* be identified. Whether there is an identifiable change of circumstances should thus be considered *first*, however briefly. Regulation 26 should be considered next *if and only if* no change of circumstances (or other alternative ground of supersession) has been identified. In effect, regulation 26 is a provision of last resort for cases where no other ground of supersession is made out.”

*Ground 2; the adequacy of reasons point*

17. Ground 2 is that the FTT had failed to explain adequately, or at all, why the decision differed from the previous award. Mr Bernard argued that where there was such a gross disparity between the two decision makers' PIP decisions then it was incumbent on the tribunal to explain why the outcome was different on the second occasion. In particular, he suggested, the tribunal needed to explain whether the initial award had been too generous and/or whether there had been a significant change in circumstances affecting the Appellant's functional abilities. In this respect Mr Bernard relied upon Social Security Commissioner Howell QC's decision in R(M) 1/96. The passage that Mr Bernard doubtless has in mind is this:

“15. It does however, seem to me to follow from what is said by the Court of Appeal in *Evans, Kitchen & Others*, that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an

apparent variation in the treatment of similar **relevant** facts appears from the record of their decision.

16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance) then in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant “not virtually unable to walk” without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal’s record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law.”

18. Mr Spencer disagreed. His submission was that if a tribunal finds that a previous award was properly superseded under regulation 26, then it was not necessary for the tribunal to explain why its decision was different from the original superseded decision. The effect of regulation 26, he argues, is that where it applies then a claimant’s needs fall to be determined afresh on all the evidence available at that stage (see by analogy *JB v Secretary of State for Work and Pensions* [2010] UKUT 246 (AAC) at paragraph 16 per Judge Lane). It is sufficient that the claimant can see why the issue of entitlement was re-opened and how, along with the conclusions drawn and the reasons for those findings.

19. I prefer Mr Bernard’s submissions on this point. In my view an unduly narrow focus on the jurisdictional niceties of reliance upon regulation 26 loses sight of the fundamental and much wider principle of justice, namely that a party (and, in particular, a losing party) is entitled to adequate reasons for the tribunal’s decision. It is important to bear in mind the Appellant’s perspective. In July 2014 he was awarded the enhanced rate of the daily living component of PIP on the basis of a score of 16 points, such award to run for a further 2 years. However, a little over a year later, applying precisely the same rules, he scored 0 points and his PIP award was terminated. In those circumstances it is entirely understandable that the Appellant may well be bemused.

20. There is ample authority for the proposition that the system should avoid a situation in which decision makers give “contrary decisions which the general public, and particularly those afflicted by disabling conditions and those associated with them and who care for them, do not understand, and is apt to produce a feeling of injustice” (Commissioner’s decision R(A) 2/83 at paragraph 5). Thus consistency in decision making is an obvious public law good (see *R (Viggers) v Pension Appeal Tribunal* [2009] EWCA Civ 1321; [2010] AACR 19 at paragraph 22 per Ward LJ). This is not to say that apparently inconsistent decisions on successive claims/awards

cannot be rationalised (see *Viggers v Secretary of State for Defence* [2015] UKUT 119 (AAC)).

21. Standing back a moment, there is a further very good reason why the guidance in R(M) 1/96 should apply in the circumstances of this appeal. In the present case, assume for a moment that the Appellant's existing PIP award had run its course and expired in the normal way in July 2017, and a nil award been made on renewal, followed by an unsuccessful appeal. There can be no serious doubt in such a scenario "either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair" (R(M) 1/96 at paragraph 15). In the present case, however, the Appellant's extent PIP award had been terminated *ahead of* its expected expiry date as a result of the supersession prompted by the Planned Review. It is hard to see why the standard of adequacy for reasons should be set any lower in such circumstances.

22. Thus the principles and guidance set out by Mr Commissioner Howell QC in R(M) 1/96 are not rendered redundant by the simple fact that the Secretary of State has instigated a Planned Review, obtained a fresh HCP report and concluded that there is now no longer any ongoing entitlement to PIP, making a supersession decision to that effect. The extent to which reasons have to be given in such a case will obviously be context-dependent. However, in a case such as the present, where there was such a stark contrast between the two decisions, the FTT could not simply pretend that the award the previous year was simply a matter of ancient history and of no current potential relevance. It was incumbent on the FTT at least to express a view e.g. that there had been a significant improvement in the Appellant's condition and functioning in the intervening 15 months. That may well have been the situation in the present case, but the FTT did not say so and certainly did not make the necessary findings of fact to support such a conclusion. I therefore allow the appeal on this ground too.

*Ground 1: the adequacy of fact-finding point*

23. Ground 1 is that the FTT failed adequately to address the specific activities put in issue before the tribunal. I agree with Mr Spencer that in the circumstances I do not need to resolve this particular issue. I simply observe that in several places in its statement of reasons the FTT relied upon the Appellant's presentation at the tribunal hearing. However, the hearing was in March 2016 whereas the decision under appeal had been made in September 2015, over 6 months earlier. On the face of it the FTT may have overlooked section 12(8)(b) of the Social Security Act 1998, i.e. the bar on considering circumstances that did not obtain at the time of the decision under appeal. It is certainly questionable whether the FTT adequately addressed its mind to the differences (if any) in the Appellant's ability to function as at the time of the two HCP examinations and at the time of the hearing.

**What happens next: the new First-tier Tribunal**

24. As I have allowed the appeal and set aside the FTT decision, there will need to be a fresh hearing of the appeal before a new tribunal. Although I am setting aside the tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant is entitled to PIP (and, if so, which components and at what rate(s)). That is all a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact.

**Conclusion**

25. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Signed on the original  
on 28 October 2016**

**Nicholas Wikeley  
Judge of the Upper Tribunal**