KB v Secretary of State for Work and Pensions (PIP) [2016] UKUT 0537(AAC)
CPIP/1623/2016

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Preston First-tier Tribunal dated 11 March 2016 involved an error on a point of law and is set aside. The case is remitted to a differently constituted tribunal within the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the directions given in paragraph 30 below and any further procedural directions that may be given by a First-tier Tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

REASONS FOR DECISION

1. The claimant appeals against the decision of the tribunal of 11 March 2016 with the permission of Upper Tribunal Judge Wright given on 22 July 2016 after an oral hearing. The representative of the Secretary of State (Mr Spencer) in the written submission dated 6 September 2016 supports the appeal to the Upper Tribunal and submits that the decision of the tribunal of 11 March 2016 should be set aside and the case remitted to a new tribunal for rehearing. In her reply dated 5 October 2016 the claimant understandably did not really engage with the rather technical issues of law raised in Mr Spencer's submission, but concentrated on her current situation. That is not something that the new tribunal will be able to consider directly, as it will be prohibited by section 12(8)(b) of the Social Security Act 1998, just as the tribunal of 11 March 2016 was, from considering circumstances obtaining only after the date of the decision under appeal (22 July 2015).

2. The claimant had claimed personal independence payment (PIP) in 2013. She completed a PIP2 (how your disability affects you) form that she signed on 3 July 2013 and attended a consultation with an occupational therapist on 4 November 2013. At that point she had diagnoses of bi-polar mood disorder, anxiety disorder and irritable bowel syndrome. The occupational therapist accepted that the claimant qualified for the following points-scoring daily living descriptors: needs prompting to be able to either prepare or cook a simple meal (1(d)); needs prompting to be able to take nutrition (2)(d); needs supervision or prompting to be able to wash or bathe (4(c)); needs either prompting to be able to dress or undress or prompting to be able to select appropriate clothing (6(c)); and needs prompting to be able to engage with other people (9)(b)). She also accepted that the claimant qualified for mobility descriptor 1(b) for needing prompting to be able to undertake any journey to avoid overwhelming psychological distress. She suggested a review after two years because the claimant had long-term conditions requiring a long-term management plan.

3. The award of the daily living component of PIP at the enhanced rate, but no mobility component, was made for the period from 14 June 2013 to 13 June 2016, but the notification letter dated 27 November 2013 stated that the claimant would be contacted after 13 June 2015 to make sure she was receiving the right level of PIP.

4. The claimant was evidently contacted about that time because she completed another PIP2 form and signed it on 22 June 2015. On the PIP2 she described her conditions as general anxiety

disorder (that had initially been thought to be bi-polar disorder) and irritable bowel syndrome and mentioned the study she was undertaking, her volunteering work in a charity shop and her hope to go to university in the autumn on a mental health nursing course, although with continuing problems of anxiety. She enclosed a number of medical letters. She attended another consultation, this time with a nurse, on 14 July 2015. No points-scoring descriptors were accepted at all. The overall impression of the report was that the claimant had made a lot of improvement and that, although she still had bad days, for the majority of the time she did not have any needs coming within such descriptors. On 22 July 2015 the decision was made that the claimant was no longer entitled to PIP from that date. The decision-maker's reasoning as set out in the notification letter of the same date was as follows:

> "Taking account of the further consultation with the medical assessor, I have changed the descriptors previously awarded on the grounds of medical evidence received and the decision is effective from today. I have changed the decision from today as you could not be expected to know the evidence received shows you are no longer entitled.
> I made my decision using information about your illnesses and disabilities including details of any treatment, medication, test results and symptoms. I consider this information is the most suitable available and enough to decide how much help you need."

There then followed a brief statement of the areas where the claimant had not indicated any needs in the PIP2 form of 22 June 2015 and an adoption of the nurse's opinion on the areas where the claimant had indicated needs.

5. The claimant put in a request for mandatory reconsideration with a letter dated 14 August 2015 from her GP saying that she was struggling with general anxiety disorder and evidence on 19 August 2015 of referral to Mindsmatter Preston for cognitive behavioural therapy. Reconsideration was refused and the claimant appealed, saying among other things that she was still suffering the same way as when she was awarded PIP initially. The Secretary of State's written submission simply supported the decision that the claimant was not entitled to PIP from 22 July 2015, as if it had been a decision on a new claim, without even referring to any particular descriptors or any specific evidence apart from the nurse's report of 14 July 2015, let alone any grounds of supersession. Section 1 of the document gave the date of claim as 13 June 2015. Although there was a reference to the previous award on the score of 14 points for daily living descriptors, there was no reference to the period covered by that award.

6. The claimant attended the tribunal hearing on 11 March 2016 on her own and gave reasonably detailed evidence. The tribunal disallowed the appeal. In what was no doubt a slip it stated in its decision notice that the Secretary of State's decision being confirmed was dated 27 July 2015 and that the claimant was not entitled to the daily living component or the mobility component of PIP (scoring no points) from that date. The statement of reasons used the date 27 May 2015 in two places, but I am satisfied that throughout the intention was to refer to 22 July 2015. Paragraph 6 of the statement of reasons recognised the existence of the initial award of PIP, stating the period it covered, but then talked about the completion of another claim form. The statement then went through the evidence and set out why, by reference the most recent PIP2 form and consultation report, plus the claimant's oral evidence and its evaluation of how effectively she

had been able to communicate and engage with the tribunal at the hearing, it concluded that she did not score any points on any descriptors. The final paragraph of the statement was as follows:

> "20. Unlike an award of Disability Living Allowance there is no requirement to identify a change of circumstances when reviewing an existing award of Personal Independence Payment and in view of the evidence before us we consider that the decision of the Secretary of State made on [22]/07/2015 is correct."

7. When giving the claimant permission to appeal after the oral hearing on 20 July 2016, Judge Wright said that it was arguable (a) that what the tribunal said in paragraph 20 of its statement of reasons about review was wrong in law and that the onus was on the Secretary of State to demonstrate a change in fact sufficient to remove the award and (b) that the principles underlying Commissioner's decision R(M) 1/96 might be applicable. He also asked what was the legislative basis for a new PIP2 form being issued and needing to be completed.

8. A decision on the substance on many of the issues arising in the present case has very recently (after the completion of the written submissions to the Upper Tribunal) been given by Judge Wikeley in *SF v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 481 (AAC). I am issuing a decision on the same date as the present one, in *DS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0538 (AAC), in which I adopt and follow what Judge Wikeley said with one small qualification. The Secretary of State will already have copies of those decisions as a party to the proceedings. I am instructing that copies of both decisions be added to the papers and sent to the claimant with the present decision. The new tribunal that carries out the rehearing will therefore also have those decisions. I apologise for the complication of asking the claimant to look at two decisions concerning other claimants as well as her own decision here, but it is in the interest of avoiding unnecessary repetition. Reference to those decisions is enough to show that the tribunal of 11 March 2016 went wrong in law. However, before I come to those matters it is necessary to address what the tribunal said in paragraph 20 of its statement of reasons.

No requirement to identify change of circumstances when superseding an existing award of PIP?

9. The tribunal could have been referring to one or other or both of two provisions in regulations when saying that there was no requirement to identify a change of circumstances when reviewing an existing award of PIP. The first is regulation 26 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (the 2013 Decisions and Appeals Regulations) under paragraph (1)(a) of which a PIP decision may be superseded where, since the decision was made, the Secretary of State has:

> "received medical evidence from a healthcare professional or other person approved by the Secretary of State".

Under regulation 26(2) a decision awarding PIP may be superseded "where there has been a negative determination". There is no equivalent of either of those provisions in the Social Security and Child Support (Decisions and Appeals) Regulations 1999 applying to disability living allowance

(DLA). Under regulation 23(1)(a) of the 2013 Decisions and Appeals Regulations there can be supersession where there has been a relevant change of circumstances since a decision took effect, as there is for DLA in regulation 6(2)(a) of the 1999 Regulations. There are differences in the date from which any superseding decision can be effective according to the power used and the circumstances. These are mentioned in my decision in *DS*.

10. The second provision is regulation 11 of the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations):

> "Where it has been determined that C has limited ability or severely limited ability to carry out either or both daily living activities or mobility activities, the Secretary of State may, for any reason and at any time, determine afresh in accordance with regulation 4 whether C continues to have such limited ability or severely limited ability."

Regulation 4 sets out some general rules for the making of the assessment resulting in a determination whether a claimant has limited or severely limited ability to carry out daily living and/or mobility activities, which under regulations 5(3) and 6(3) is to be made by reference to the points scored under Schedule 1.

11. There are considerable difficulties in working out the effect and interaction of those provisions. Because Mr Spencer in his submission of 6 September 2016 for the Secretary of State dealt only with some of those difficulties and I have not thought it right to delay the remission of the claimant's case to a new tribunal for rehearing while further submissions were sought, what follows in this section of the decision must be regarded as provisional. I hope that it will be helpful to the new tribunal in the present case and in other cases, but below I have directed the new tribunal to follow what is said subject to any submissions to the contrary that might be put forward before or at the rehearing.

12. The effect of regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations taken on its own is relatively uncontroversial. A similar power of supersession has existed for some time for incapacity benefit (IB) and employment and support allowance (ESA) in the 1999 Decisions and Appeals Regulations. In relation to those powers, a three-judge panel of the Upper Tribunal said this in *FN v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 670 (AAC), now reported as [2016] AACR 24:

> "70. We accept this analysis [of how the pre-existing case law fitted together] and although we were not asked to consider the practical application of regulation 6(2)(g) or 6(2)(r)(i) [of the 1999 Decisions and Appeals Regulations], we re-emphasise that the purpose of both provisions is to provide that the obtaining of a medical report or medical evidence following an examination is in itself a ground of supersession and that, accordingly, there is no longer a requirement to identify a regulation 6(2)(a)(i) change of circumstances in order to supersede an IB or ESA decision. More importantly, however, we accept and endorse what was said by Mr Commissioner Jacobs in paragraph 10 of CIB/1509/2004. What both provisions do is to authorise a supersession procedure but do not determine the outcome. What determines the outcome is a decision by the decision-maker (initially) or the First-tier

> Tribunal (on appeal), after an assessment of all the relevant evidence, as to whether the substantive tests (incapacity for work or limited capability for work) are satisfied."

Paragraph 10 of CIB/1509/2004 was as follows:

> "10. On either approach, regulation 6(2)(g) merely authorises a supersession procedure. It does not determine the outcome. It merely recognises that evidence has been produced that may, or may not, show that the operative decision should be replaced. The outcome is determined by the conditions of entitlement for an award."

13. In my judgment, those statements of principle apply just as much to the operation of regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations in relation to PIP. Thus the tribunal of 11 March 2016 was correct in paragraph 20 of its statement of reasons in so far as it was referring to regulation 26(1)(a), but subject to the important proviso that, although it is not necessary to identify a change of circumstances in order to authorise a supersession, it may be necessary to consider the circumstances obtaining when the existing award was made and during the period of the award as part of "all the relevant evidence" and as part of an adequate explanation of the outcome if it is less favourable than the existing award that is being replaced on supersession. Although the tribunal here did plainly consider whether the substantive test for entitlement to PIP was met as from 22 July 2015, I conclude in paragraphs 27 and 28 below that there was an error of law in the inadequacy of reasons.

14. Thus, it appears that paragraph 20 of the tribunal's statement of reasons was incorrect if and in so far as it suggested that the existence of a change of circumstances was irrelevant to the whole process of supersession, not just to the identification of a ground to authorise supersession. Is that conclusion altered by virtue of regulation 11 of the PIP Regulations and any other parts of regulation 26 of the 2013 Decisions and Appeals Regulations?

15. In his submission of 6 September 2016 Mr Spencer stated that the routine and pre-determined (as to date) re-examination of a PIP claimant's entitlement to benefit, a process known within the Department as "planned review", is conducted pursuant to regulation 11, with any demand that the claimant complete a new PIP2 form (with the penalty of removal of benefit for failure without good reason to comply) authorised by regulation 8. I am not sure that any statutory authority is necessary to begin such a process, in that there is nothing to stop the Secretary of State at any time during the running of an award just having a look at any case and in the course of that asking a claimant for information, documents or other evidence. What does of course need statutory authorisation is the imposition of any penalty for a failure to comply with the request/requirement. That is provided by regulation 8 and by regulation 9 in relation to a requirement to attend a consultation with a person approved by the Secretary of State (usually called a health professional) or participate in a telephone consultation. Regulation 8 applies to information or evidence "required to determine whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities". Regulation 9 applies where "it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities". Those conditions will plainly be satisfied when a claim for PIP has been made and not yet determined. Regulation 11 then supplies the context within which those

conditions can be satisfied after an award has been made on a claim. By providing that where an award has been made the Secretary of State can for any reason and at any time determine afresh whether the claimant continues to have limited or severely limited ability to carry out daily living and/or mobility activities, the context is created in which it can be said, as soon as the Secretary of State decides to take a look at a case (whether planned or not), evidence and information can be required to make a regulation 11 determination and the question under regulation 11 falls to be determined.

16. Does regulation 11 go further than that provision of context? The notes to regulation 11 in the 2016/17 edition of Volume I of *Social Security Legislation (Non Means Tested Benefits and Employment and Support Allowance)* start by suggesting that it appears to mean that a decision awarding PIP can be reviewed and superseded by the Secretary of State at any time and for any reason, although they go on to suggest that that is not the case. However, some may have interpreted regulation 11 in the first sense and it is possible that the tribunal of 11 March 2016 had such a meaning in mind in paragraph 20 of its statement of reasons. If so, it would have been wrong.

17. The precise terms of regulation 11 have to be looked at carefully. They only allow the Secretary of State to make a *determination* on the question of whether the claimant continues to have limited or severely limited ability to carry out daily living and/or mobility activities, not an overall *decision* on entitlement or otherwise to PIP. It may be that too much significance should not be placed on the use of those particular words, but examination of the provisions of the Welfare Reform Act 2012 on PIP shows many references (see in particular sections 80 and 81) to the determination of various questions (including the question just mentioned) in accordance with regulations, in contrast to provisions as to entitlement or non-entitlement, under which entitlement follows from positive determinations on a number of questions.. A positive answer to each necessary question is one element (in the past sometime described as one building block) that goes towards an eventual decision on entitlement. Thus, regulation 11 does not directly allow a supersession of a decision making an award whenever the Secretary of State feels like it. To put it another way, the mere existence of a subsequent determination on one question, that the claimant does not have limited or severely limited ability to carry out daily living and/or mobility activities, cannot if itself take away the authority entitling the claimant to payment of benefit under the decision awarding entitlement. That authority can only be removed by the Secretary of State under his powers of revision and supersession in the 2013 Decisions and Appeals Regulations.

18. How do those supersession provisions (revision not being in issue in the present case) apply when there has been a regulation 11 determination against the claimant? The most straightforward ground will often be under regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations and receipt of medical evidence, where the claimant has been required to attend a new consultation. Although that does not appear to be a compulsory part of the regulation 11 process (indeed it seems that the Secretary of State could simply look at the existing evidence and conclude that the award in place was too generous) it will no doubt be a very common feature. But, in accordance with paragraphs 12 and 13 above, that merely authorises a supersession procedure and does not determine the outcome. The outcome depends on a decision, on consideration of all the relevant evidence, whether all the relevant conditions of entitlement are or are not met.

19. The other straightforward ground would be relevant change of circumstances under regulation 23(1)(a). That must require an identification of an actual change in the claimant's circumstances in the normal way. Could it be argued that the making of the regulation 11 determination by the Secretary of State in itself amounts to a relevant change in circumstances, with the result that on any appeal a First-tier Tribunal would not be allowed to go behind that determination and could not make its own evaluation of whether the claimant continued to satisfy the conditions of entitlement? Such a conclusion is unsupportable. It is contrary to the principle that identification of a ground of supersession merely authorises the procedure and does not determine the outcome. It is also seems contrary to the approach of the then Chief Commissioner Micklethwait in decision R(I) 1/71 (one of the foundation stones of learning on review) in a case where decision-making on industrial injuries benefits was still divided between the medical authorities and the so-called statutory authorities, i.e. what was then the insurance officer. The Chief Commissioner held that the opinion of a medical board that the claimant's incapacity for his regular occupation no longer resulted from the relevant loss of faculty did not in itself constitute a relevant change of circumstances in the context of the insurance officer's exercise of a power of review on that ground of the decision entitling the claimant to special hardship allowance. The insurance officer had to show a change in the facts, of which the medical board's opinion could be evidence. And perhaps most persuasively, to accept the conclusion suggested would allow the Secretary of State to be the judge in his own cause if his making of the regulation 11 determination was then conclusive in any appeal against the removal of entitlement on supersession. That would be inconsistent with the principles of natural justice and the right to a fair trial and cannot be accepted.

20. I have ruled on some of the arguments made in Mr Spencer's submission of 6 September 2016 about the relationship between the grounds of supersession in regulations 23(1)(a) and 26(1)(a) in my decision in *DS* and will not repeat those rulings here. I also deal there with some questions about the effective date of superseding decisions.

21. There remains the ground of supersession in regulation 26(2) of the 2013 Decisions and Appeals Regulations, that there has been a "negative determination". That phrase is not defined in the Regulations. Its meaning is on its face rather mysterious. Could it apply to a regulation 11 determination that the claimant does not continue to have limited or severely limited ability to carry out daily living and/or mobility activities? In my provisional view the answer is no.

22. To work out what regulation 26(2) definitely applies to one has to trace a route back through regulations 8 and 9 (see paragraph 15 above) to the Welfare Reform Act 2012. The penalty, in regulations 8(3) and 9(2) respectively, for failure without good reason to provide requested information or evidence or attend or participate in a consultation is that "a negative determination must be made". The power to make regulations in such terms (or something like them) is in section 80(5)(a) of the Welfare Reform Act 2012, which provides that regulations under subsection (4) (about requiring the provision of information or evidence and participation in consultations) may include provision for "a negative determination to be treated as made if a person fails without a good reason to comply with a requirement imposed under subsection (4)". Then subsection (6) provides:

> "(6) In subsection (5)(a) a "negative determination" means a determination that a person does not meet the requirements of—
> (a) section 78(1)(a) and (b) or (2)(a) and (b) (daily living component);
> (b) section 79(1)(a) to (c) or (2)(a) to (c) (mobility component)."

Section 78(1)(a) and (b) contains the basic conditions of entitlement for the standard rate of the daily living component in terms of the claimant's ability to carry out daily living activities being limited by their physical or mental condition and of the claimant meeting the required period condition. Section 78(2)(a) and (b) does the same for the enhanced rate. Section 79(1)(a) to (c) contains the basic conditions of entitlement for the standard rate of the mobility component in terms of the claimant's ability to carry out mobility activities being limited by their physical or mental condition, of the claimant meeting the required period condition and of the claimant being over the prescribed age. Section 79(2)(a) to (b) does the same for the enhanced rate.

23. Although section 80(5)(a) allows regulations to provide that a negative determination is to be treated as made and regulations 8 and 9 provide that one must be made when there is a failure to comply, which is not quite the same thing, the compulsory making of a negative determination is probably close enough to deeming one to have been made for the disparity not to be a problem. But the legislation recognises that the making of that determination on those questions is not enough to remove the authority for continuing payment under the claimant's existing award. There must be a supersession of the decision awarding entitlement. That is provided for in regulation 26(2) of the 2013 Decisions and Appeals Regulations. In those circumstances the identification of that ground of supersession must lead inevitably to a superseding decision removing entitlement to the appropriate component or components from the date on which the superseding decision is made (Social Security Act 1998, section 10(5), there being no specific rules on effective date in the Regulations). I note in passing that the structure adopted and my analysis above in relation to regulation 11 of the PIP Regulations are consistent.

24. That seems to me a self-contained and effective structure of provisions dealing with a particular question and producing a fairly automatic outcome through a proper understanding of the supersession process. It should not be interpreted as applying in any other context unless the term "negative determination" is expressly used or the necessary implication of some provision plainly intended to affect continuing entitlement to PIP would otherwise have no means of implementation through the supersession provisions in the 2013 Decisions and Appeals Regulations. Although a determination under regulation 11 of the PIP Regulations that a claimant does not continue to have limited or severely limited ability to carry out daily living and/or mobility activities could in the ordinary course of language be described as a negative determination, that phrase is not used. Of course it is possible that a regulation 11 determination might be to the claimant's advantage by recognising satisfaction of the conditions for an additional component or the enhanced rate instead of the standard rate. But if the draftsman had intended to bring a determination not to the claimant's advantage within the ambit of regulation 26(2) of the 2013 Decisions and Appeals Regulations, that could easily have been done. The absence of an express provision, in a regulation so close to regulations 8 and 9, is striking. Further, as has already been demonstrated, there are already straightforward ways in which a regulation 11 determination may

be given effect through regulations 23(1)(a) and 26(1)(a). My provisional view is therefore that regulation 26(2) cannot be applied to a regulation 11 determination.

25. Returning at last to paragraph 20 of the tribunal's statement of reasons, the upshot of paragraphs 15 to 24 above is that in my provisional view there is nothing in the existence and operation of regulation 11 of the PIP Regulations to undermine or alter the conclusion in paragraph 14 above that tribunal's statement that there is no requirement to identify a changing of circumstances "when reviewing" an existing PIP award is incorrect if and in so far as that was intended to apply to the whole supersession process rather than merely the identification of a ground authorising the use of the supersession procedure.

Errors of law involved in the tribunal's decision

26. Although I have concluded that the tribunal of 11 March 2016 was incorrect in what it said in paragraph 20 of its statement of reasons, or I suspect simply expressed itself in too compressed a way, it is far from clear how that led it astray in what it did in substance. It would have been better if it had expressly identified the ground of supersession being relied on, but it is clear enough that regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations is being referred to. It had just, in paragraph 19, been talking about the contents of the report of the consultation of 14 July 2015. And the terms of the letter of notification of 22 July 2015 (paragraph 4 above) show that the decision-maker was applying regulation 26(1)(a) and had indeed considered whether regulation 23 was applicable. The tribunal had gone on from its implicit identification of a ground of supersession in the mere receipt of the medical evidence, as was proper, to a consideration of whether the claimant in fact continued to have limited or severely limited ability to carry out daily living activities in terms of the descriptors. If this had been a new claim, although the claimant does not accept the tribunal's conclusions, I do not think that they could be said to be outside the range of reasonable judgment in the evaluation of evidence and the findings of fact that is allowed to tribunals. In addition, I have in the decision in *DS* rejected Mr Spencer's argument (repeated in his submission in the present case) that regulation 26(1)(a) should be considered only as a provision of last resort for cases where no other ground of supersession is made out.

27. There are, however, two linked errors. The first stems from the general requirement in all cases that a tribunal should consider, and show in its statement of reasons that it has considered, all the relevant evidence that is before it. That general requirement was given a more specific application by the three-judge panel of the Upper Tribunal in *FN* in the particular context of supersession on the ground of receipt of medical evidence (see paragraph 12 above). In the present case, the tribunal in its statement of reasons, while acknowledging the existence of the earlier award, concentrated entirely on the evidence put forward from the PIP2 form of 22 June 2015 onwards. Just as in *FN* where it was said in the case of ESA and IB that there is no rule of law that earlier healthcare professional reports always have to be considered by the tribunal, there is no rule of law in PIP cases such as this that the evidence that led to the award that is being removed must always be considered. Relevance depends on the circumstances of the particular case. Here, the claimant had said in her appeal that she was still suffering in the same way as when the initial award was made. She was thus raising the issue of the potential relevance of how her condition affected her in 2013 and of the evidence that led to the making of the award of PIP, in particular the report of the occupational therapist of 4 November 2013. In those circumstances, I consider that the

tribunal was required at the least to say whether or not it considered the earlier evidence relevant and, if not, why not, and to say what it made of the claimant's contention that she was still affected in the same way as when the award was made.

28. The need to have dealt expressly with those points is emphasised by the application of the principles laid down in paragraphs 15 and 16 of R(M) 1/96. It was said there, in the context of a less favourable decision than previously on a renewal claim for mobility allowance (the predecessor of the mobility component of DLA), that unless the reason for the difference in result between the previous award and the new decision was reasonably obvious from the findings of fact supporting the new decision, in order to avoid a feeling of injustice on the part of the claimant (especially where his case was that his condition had not improved or had worsened) a tribunal would need to give some short explanation of why there was a difference in result. Examples might be that the tribunal considered that the previous award had been mistaken on the evidence available when it was made or that there had been some new source of evidence available that was more persuasive than that originally available or some change of circumstances in the meantime sufficient to explain the difference. In *DS* I agreed with the reasons given by Judge Wikeley in *SF* for applying those principles in circumstances like those of the present case as well as to decisions on renewal claims and rejected the argument to the contrary of Mr Spencer for the Secretary of State. I reject the argument about the applicability of R(M) 1/96 in Mr Spencer's submission in the present case. I think that, reading between the lines, the tribunal considered that the claimant's condition had improved considerably since 2013, although she might not have realised the extent. However, in my opinion the claimant was entitled to have that spelled out, if it was the tribunal's view, and not to have that view left to be inferred. On balance this is not a case where the reason for the difference in result was obvious enough that no further explanation was required.

29. For those reasons, the decision of the tribunal of 11 March 2016 must be set aside as involving an error of law.

Conclusion and directions

30. The decision of the tribunal of 11 March 2016 is set aside. The claimant's appeal against the Secretary of State's decision of 22 July 2015, as suggested on behalf of the Secretary of State, though not for the same reasons, is remitted to a First-tier Tribunal in accordance with the following directions. No-one who was member of the tribunal of 11 March 2016 is to be a member of the new tribunal. There must be a complete rehearing of the appeal on the evidence produced and submissions made to the new tribunal, which will not be bound in any way by any findings made or conclusions expressed by the tribunal of 11 March 2016. The approach of law set out above and in my decision in *DS v SSWP (PIP)* [2016] UKUT 0538 (AAC) is to be applied. That is subject to the qualification in relation to paragraphs 12 to 25 of the present decision (and in particular paragraphs 15 to 25) that, as what is said there is provisional, the new tribunal need not apply those views in so far as it is satisfied, either by submissions from either party or by its own consideration after giving the parties an opportunity to comment, that they are not correct. It might be an advantage for the Secretary of State to produce a fresh written submission before the rehearing dealing properly with the issues of supersession. The salaried First-tier Tribunal judge who considers the arrangements for the rehearing is to consider whether to direct such a submission and, if so, within what time limit, and is to ensure that copies of the decisions in *DS* and

in *SF v SSWP (PIP)* [2016] UKUT 481 (AAC) are in the papers for the rehearing. The evaluation of all the evidence will be entirely a matter for the judgment of the new tribunal. The decision on the facts in this case is still open.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 2 December 2016