IN THE UPPER TRIBUNAL **Case No.** CPIP/2292/2016
ADMINISTRATIVE APPEALS CHAMBER

Before **M R Hemingway: Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal (made on 1 March 2016 at Bolton under reference SC122/15/00941) involved the making of an error in point of law, it is set aside under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is remitted to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment but, in doing so, must not take account of circumstances that were not obtaining at the date of decision (21 September 2015): see section 12(8)(b) of the Social Security Act 1998.

REASONS FOR DECISION

The issues raised by this appeal

1. The appeal concerns the claimant's entitlement to a personal independence payment (PIP) and, in addition to matters relating to supersession and to the adequacy of the tribunal's reasons, raises an unusual question as to whether a relatively slow pace of walking which nevertheless amounts to walking "within a reasonable time period" as defined in Regulation 4(4)(c) of the Social Security (Personal Independence Payment) Regulations 2013, can be taken into account as one of a range of factors in considering whether a claimant is able to stand and then move "to an acceptable standard" (see Regulation 4(2A)(b)).

The background

2. By way of brief background, the claimant was accepted by the tribunal, as suffering from a number of health difficulties including fibromyalgia, arthritis and depression. She had first been awarded personal independence payment (PIP) on 17 March 2015. That was an award of the standard rate of the daily living component only from 5 January 2015 to 8 March 2017. It was made in light of conclusions contained in a report prepared by a health professional. It does not appear that she sought to challenge that decision. However, she subsequently completed and submitted a new form PIP2 because she considered a greater award to be appropriate. That led to her attending a second "face-to-face consultation" with a different health professional on 13 August 2015 and, thereafter, to a decision of 21 September 2015 to the effect that whilst she remained entitled to the daily living component of the standard rate only, the period of the award was now to run from 21 September 2015 to 12 August 2019. So that was clearly, although this was unstated, a decision made by way of supersession. The Secretary of State described it as an "unplanned award review decision".

The claimant, though, was dissatisfied and after an unsuccessful application for a mandatory reconsideration she appealed to the First-tier Tribunal (the tribunal).

The appeal to the tribunal and its decision

3. The claimant had initially requested an oral hearing. However, she wrote to the tribunal shortly prior to the scheduled hearing date stating that she now wanted her appeal to be decided on the papers. So, a papers consideration took place. The tribunal confirmed the respondent's decision of 21 September 2015 and so dismissed the appeal. It found, that she was entitled to 8 points under the activities and descriptors relating to the daily living component and 4 points under the activities and descriptors relating to the mobility component. Whilst only awarding 4 points in relation to mobility it did recognise that she had some difficulties in that regard. It said that she "may mobilise in a restricted manner and does have some physical limitations", but it thought that the walking she did manage precluded a higher scoring descriptor than mobility descriptor 2(b).

The proceedings before the Upper Tribunal

4. I granted the claimant permission to appeal to the Upper Tribunal and the Secretary of State has supported the appeal on the basis that the tribunal did not properly explain why it thought the claimant was able to move beyond 50 metres safely, to an acceptable standard, repeatedly and within a reasonable time period.

Analysis

5. By way of reminder, regulation 4 concerns the assessment of an ability to carry out activities and the salient parts, for the purposes of this appeal, are as follows;

> "**4. –** (1)…
>
> (2)…
>
> (2A) where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so –
> a) safely;
> b) to an acceptable standard;
> c) repeatedly;
> d) within a reasonable time period;
>
> (3)…
>
> (4) in this regulation –
> a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
> (b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed;
> (c) "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition

> which limits that person's ability to carry out the activity in question would normally take to complete that activity."

6. I accept that the tribunal did err in failing to apply the regulation 4(2A) criteria or, at least, in failing to demonstrate that it had. It did, in general terms, indicate that it understood that when considering whether a descriptor did or did not apply it had to consider that criteria (see paragraph 5 of its statement of reasons for decision). However, the claimant had indicated in her initial PIP2 form which she had completed on 16 February 2015 that she would experience pain and breathlessness when walking. She would use a walking stick. She had mentioned having fallen in the past (see page 52 of the appeal bundle). In her second PIP2 form completed on 22 June 2015 she had suggested, as I read it, that she would be in pain when walking any distance. She referred to her having been using a walking stick, crutches, a walking trolley and a motorised electric scooter. In a report prepared by a health professional on 10 March 2015 it was said that she had indicated restricted walking due to pain and the view was expressed that that was "consistent with her current pain medication and referrals". It was observed that she would be "likely to be restricted to walking at a slow pace for 3-4 minutes for the majority of the time". The health professional who had examined her on 13 August 2015 had expressed the view that due to pain in her legs, knees and back "she would struggle to move further than 200 metres, to complete task repeatedly and reliably". So there was evidence of a number of difficulties the claimant would experience when walking and which the tribunal did not seem to reject. In those circumstances, and Ms Blatchford for the Secretary of State agrees, I have decided that the tribunal was required to say more than it did concerning the question of whether the claimant was able to achieve relevant walking distances when taking into account the regulation 4(2A) criteria. It did not, for example, make any finding as to her speed of walking and it did not make any clear finding with respect to pain she would experience when walking which is relevant to her ability to stand and then move to an acceptable standard (see *PS v SSWP* [2016] UKUT 0326 (AAC). Accordingly, the tribunal did err in law in this regard.

7. The question whether a slow speed pace of walking can be taken into account with respect to the "acceptable standard" requirement is only of potential relevance where a claimant walks slowly but still within the "reasonable time period" as defined. The tribunal, since it did not make a finding as to speed of walking, did not address this issue. Nevertheless, since there is evidence which if accepted (and of course it might ultimately not be) suggests a slow pace of walking, the issue might arise on any remittal. Ms Blatchford, for the Secretary of State, argues that any walking which is slow but nevertheless within a "reasonable time period" is to be ignored when considering the ability to walk to an acceptable standard. She says that matters such as pain, fatigue and breathlessness would be considered but suggests that slowness is catered for solely within regulation 4(4)(c).

8. I suppose there are two ways of looking at it. One might be to say that the "acceptable standard" criteria, and of course there is no definition of "to an acceptable standard", is to be regarded as a form of "catch-all" provision such that any physical failings or restrictions with respect to the function of standing and then moving are potentially relevant if not encompassed within the "safety", "repeatedly" and "within a reasonable time period" definitions. If that approach is correct then a slower than normal pace of walking, albeit not so slow as to lead to the walking not being accomplished "within a reasonable time period" as defined could be taken into account as one of a number of factors which will inform as to the "acceptable

standard" criteria. Another way of looking at it would be to say that since regulation 4 (I have in mind the specific definition in 4(4)(c)), indicates that spending no more than twice as long as a person without limiting physical conditions when walking a particular distance means that such is accomplished within a "reasonable time period" then that degree of slowness is deemed under the PIP scheme to be acceptable. As such, it might be thought inconsistent to then say that that degree of slowness could be a contributory factor to the scoring of points at all. Having considered matters I prefer the latter view. It seems to me that the intention is only to take slowness of walking into account in the event of that slowness fulfilling the relevant 4(4)(c) definition. It would, accordingly, result in inconsistency if a lesser degree of slowness was then to be taken into account elsewhere. So, if a tribunal finds a claimant does walk at a slower than normal pace but is nevertheless able to cover relevant distances within the "reasonable time period" criteria, it will not be able to take that slowness into account when considering the "acceptable standard" criteria. I should stress, though, I have only received argument as to this concerning mobility activity 2 and would not dismiss the possibility that, for whatever reason, a different approach might be appropriate with respect to other activities and descriptors.

9. I now turn to the supersession issue. Neither party has said anything about this in their submissions and that is not surprising because I did not raise the matter when granting permission. Nevertheless, it does not seem to me that there is any need for further submissions on the point because the position on the facts appears relatively straightforward. Supersession in the context of PIP was recently and very fully considered by the Upper Tribunal in *SF v SSWP (PIP)* [2016] UKUT 0481 (AAC) albeit in a slightly different context. That case was concerned with what the Secretary of State described as a "planned review" and which had resulted in an original award of PIP being extinguished prior to the originally anticipated expiry date. In some respects that is quite similar to the position obtaining here though this was "unplanned" in the sense that the award was looked at again as a result of action taken by the claimant herself rather than action anticipated and then initiated by the Secretary of State. Nevertheless, although as I have said it was not described as such, there is no doubt that the decision of 21 September 2015 was a supersession decision and that the terms of the award were altered, albeit, that the only alteration of significance was the lengthening of the period of entitlement.

10. It does not appear that the actual decision maker acting on behalf of the Secretary of State had appreciated it might be necessary to indicate that the decision was a supersession (indeed there seems to have been a view amongst some within the relevant Department that a PIP decision can be changed at any time without recourse to the rules governing supersession) and so no grounds for the supersession were identified. No grounds were offered in the Secretary of State's written submission to the tribunal. However, it will be necessary in situations such as this for a tribunal to consider whether there are grounds for supersession (something which seems to be accepted by the Secretary of State in this case at least by implication) and, if so, what those grounds are and when, assuming an award is to be altered or extinguished, that is to take effect from. Here, though, the question would seem to be more one of which ground for supersession applies rather than whether one applies at all. That is because a new medical report prepared by a health professional was produced on 13 August 2015 so it would seem that if there are no other grounds for supersession, the ground appearing at regulation 26(1)(a) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 would apply. Although it is not right to criticise the tribunal for failing to

address this, since the matter had not been brought to its attention at all, it is right to say that it did not identify any grounds for supersession. Technically that does amount to another error of law.

11. It does follow from the above that the decision of the tribunal will have to be set aside. I do not consider this to be an appropriate case for me to go on to remake the decision myself. There are further facts to be found (some of which will relate to the difficulties with respect to walking as set out above) and in those circumstances it is right that matters should be considered by the First-tier Tribunal which, of course, is an expert fact-finding body and will have available to it a range of expertise as a result of the composition of its panel. The case is, therefore, remitted.

What happens next?

12. There will, then, be a complete re-hearing of the appeal. The new tribunal will not be bound in any way by the findings and conclusions of the first tribunal. It will reach its own findings and its own conclusions on the basis of the material before it which will include any further written or oral evidence it might receive. The new tribunal should seek to make clear findings regarding all matters but may wish to have careful regard to the possible applicability of the descriptors linked to mobility activity 2. It must apply the regulation 4(2A) criteria. Finally, the claimant will see that I have directed an oral hearing. As noted above, she had initially asked for such a hearing but had then changed her mind. She went on, aided by her representatives, to make an unsuccessful application to have the tribunal's decision set aside asserting, in effect, that there should have been a hearing. Perhaps that was an optimistic application. Nevertheless, it does now appear that she is, once again, willing to attend an oral hearing and doing so will, of course, give her the opportunity of explaining to the new tribunal, on a face-to-face basis, the nature and extent of the difficulties she feels she has in consequence of her various medical conditions.

Conclusion

13. The claimant's appeal to the Upper Tribunal is allowed. The tribunal's decision of 1 March 2016 is set aside. The case is remitted for a complete rehearing before a new and entirely differently constituted tribunal.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **2 December 2016**