IN THE UPPER TRIBUNAL **Case No.** CE/2314/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made on 6 May 2016 at Southampton under reference SC203/16/00021) 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, by way of an oral hearing, 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 whether, as at 9 November 2015 (the date of the original decision under appeal) the claimant had limited capability for work and, if so, whether she also had limited capability for work-related activity.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998.

D. The Secretary of State must provide to the tribunal, at least 14 days prior to the date which is fixed for the oral hearing of this appeal, a copy of the report of a health professional which was relied upon when the decision to award the claimant personal independence payment (as communicated by letter of 22 February 2016) was taken. Alternatively, if the Secretary of State is for some reason unable to provide a copy of that report, that must be indicated to the tribunal within the same time scale together with an explanation. In such event, the tribunal may wish to consider seeking a full copy from the claimant (assuming she still has one).

E. Either party may send to the tribunal, at least 14 days prior to the date which is fixed for the hearing, any further written material (other than that referred to at direction above) that party wishes to rely upon.

REASONS FOR DECISION

1. This appeal, to the Upper Tribunal, is brought by the claimant and concerns her entitlement to employment and support allowance (ESA). She had been awarded ESA from and including 23 May 2015. However, on 9 November 2015, having received a medical report prepared by a health care professional and which addressed entitlement to that benefit, the Secretary of State superseded that decision and decided that, from 9 November 2015, there was no entitlement. The claimant had also made an application for a personal independence payment (PIP). She was examined for PIP purposes, by a health professional, on

19 January 2016. On 22 February 2016 the Secretary of State wrote to her confirming that she had been awarded the enhanced rate of the daily living component and the standard rate of the mobility component of PIP.

2. The claimant, having unsuccessfully sought mandatory reconsideration of the ESA decision, appealed to a tribunal. Her appeal was successful but not to the extent that she thought it should have been. The tribunal, after an oral hearing, decided that she did have limited capability for work (it awarded her a total of 15 points under Schedule 2 to the Employment and Support Allowance Regulations 2008 being 9 points under descriptor 1c and 6 points under descriptor 4c) but that she did not have limited capability for work-related activity either on the basis that she satisfied a Schedule 3 descriptor or that she met the requirements of regulation 35, with the consequence that, although she was entitled to ESA, she was required to undertake work-related activity and could not be placed within the "support group".

3. The claimant, in seeking permission to appeal to the Upper Tribunal, raised a number of issues. In summary, she suggested that the tribunal had erred because what it had decided with respect to ESA was inconsistent with her award of PIP and hence perverse, (her particular concern seems to have been that the basis for the award of the mobility component of PIP suggested she should have been awarded 15 points under descriptor 1a within Schedule 2 and consequently 15 points under activity 1 within Schedule 3); had erred in failing to take into account her concerns regarding the conducting of the examination for the purposes of ESA by the health care professional; had erred in considering dated rather than recent evidence regarding her ability to mobilise; had erred in thinking a clinical specialist physiotherapist who had expressed a written view as to her walking ability had not carried out a walking test whereas, in fact, she had; had erred in thinking she had exaggerated her symptoms and had erred in misunderstanding some of the evidence regarding the distance she could walk.

4. A district judge of the First-tier Tribunal granted permission to appeal and in so doing said this:

> " 4. I have certain reservations about granting permission to appeal in this matter. On my reading of the statement the tribunal has properly explained why it came to the decision it did. It considered the appellant's difficulties and explains adequately why it came to its conclusion. In short, although the appeal was allowed, it is apparent that the tribunal did not accept elements of the appellant's evidence.
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> 5. The appellant states that the tribunal's finding was perverse because it is contrary to the award of personal independence payment (PIP) she has been given. I do not agree that the two follow. The rules for PIP are different to the rules for employment and support allowance. The tribunal was aware that the appellant had been awarded PIP. It was nonetheless entitled to reach its own decision on the facts and it was not bound by the PIP decision.
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> 6. I do however accept that this is an issue the appellant may want the Upper Tribunal to consider. The tribunal does not directly appear to address the PIP award. The Upper Tribunal may also wish to consider the statement of reasons more generally, particularly in relation to regulation 35 and consider, if only to dismiss, whether the tribunal has sufficiently addressed the issues."

5. Having issued case management directions I received written submissions from the parties. It was contended by Mr M Hampton, now acting on behalf of the Secretary of State, that the tribunal had not erred in law. With an eye to what had been said in the grant of permission, he pointed out that the statutory tests for PIP and ESA differ but did accept that evidence upon which an award of one had been based might be relevant as to eligibility to the other. However, whilst there was case law to suggest that an adjournment to consider such evidence might sometimes be appropriate, that would not always be the case. In that context he referred me to two decisions of the Upper Tribunal being *ML v Secretary of State for Work and Pensions* [2013] UKUT 0174 (AAC) and *GC v Secretary of State (ESA)* [2014] UKUT 0117 (AAC). Here, there had been no requirement to adjourn because there had been an abundance of evidence before the tribunal and some of that did relate to the PIP claim (albeit that the report of the health professionals was not included). Further, whilst there might be inconsistency between the ESA decision and the PIP decision that did not mean it should be assumed that the ESA decision was incorrect. The tribunal had been entitled to reach the decision it had and had not been bound by the PIP decision. As to the possible applicability of regulation 35, Mr Hampton thought there might be an argument that the tribunal had erred in failing to specifically refer to its finding that the claimant had limited mobility (and of course it had also found that she was unable to transfer a light but bulky object insofar as that might be relevant) but pointed out that, on the tribunal's findings, she did have some walking ability and was also able to drive so she should be able to make her way to work-related activity venues. As to the various other matters raised in the grounds, Mr Hampton contended that they amounted to mere re-argument.

6. The claimant provided a reply of most unusual length. It amounted to 48 written pages of argument together with copies of some post-decision documentation. Of course, a tribunal cannot be criticised for failing to take into account material not provided to it.

7. The various points made in the reply, whilst lengthy, did not seem to me to raise new issues such that fairness would require me to afford the Secretary of State an opportunity to comment. In my judgment the majority of what was said was either re-argument as to fact or expansion of points originally made, albeit more briefly, in the original grounds. There was what appeared to be a new point to the effect that the tribunal should, after the hearing but before it had finalised its decision, have told her what it was minded to decide and given her an opportunity to make further representations. However, there is clearly no basis to conclude the tribunal had any such obligation. There was a contention that the tribunal had been contention, which had not been made in the initial grounds, that the tribunal had been biased. However, I can find nothing in the record of proceedings nor the tribunal's statement of reasons for decision nor in any other documentation before me to suggest that that was so or to indicate why the tribunal might have been biased. Finally, there was a contention, which had not been explicitly made in the grounds, to the effect that the tribunal ought to have adjourned to obtain the PIP evidence (I think in particular the health professional's report) but the Secretary of State had already fully addressed that matter.

8. Neither party requested an oral hearing of the appeal before the Upper Tribunal. Neither party expressed a view as to whether, if I was satisfied the tribunal had erred in law in a material manner, I should remit to a new tribunal or remake the decision myself though it is possible to infer, from what the claimant had to say in her detailed reply, that she felt the evidence in its current state was sufficient for me to remake the decision and that the only way to do so would be in her favour on the "support group" point.

9. I have decided not to hold a hearing of the appeal before the Upper Tribunal. I have noted, in this context, that neither party has requested such a hearing and that the claimant has positively indicated that she does not want one. In any event, it does not seem to me that a hearing would advance matters given that the parties have set out their respective positions, very fully, in writing.

10. I turn then to the grant of permission to appeal. The first basis of the grant related to the matter of the award of the mobility component of PIP and the possible inconsistency between that award and the failure in this case to award 15 points under descriptor 1(a) within Schedule 2 and its equivalent provision at activity 1 of Schedule 3.

11. Since the PIP award letter of 22 February 2016 (an incomplete copy appearing from page 270-272 of the appeal bundle) indicates that an award of 10 points had been made under the descriptors linked to the activity of "Moving around", the claimant must have been awarded those 10 points under descriptor 2d to be found within Part 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. The descriptor reads as follows:

> "d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres."

12. A decision maker is required, when considering whether PIP descriptors are satisfied, to consider whether a claimant is able to carry out an activity safely, to an acceptable standard, repeatedly and within a reasonable time period (see regulation 4(2A) of the PIP Regulations). There are further definitions for three of those criteria to be found at regulation 4(4).

13. Activity 1 and descriptor 1(a) within Schedule 2 to the ESA Regulations read as follows:

Activity 1	Descriptors	Points
Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally, or could reasonably be, worn or used.	1(a) Cannot unaided by another person either: (i) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (ii) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion."	15

14. Given that activity 1 within Schedule 3 uses the same wording, I have not found it necessary to set that out. Such would amount to mere repetition.

15. By way of reminder, the claimant's original submission in this area had been to the effect that the tribunal had reached a perverse decision because of the "clear inconsistency between my PIP award and my ESA award". At a later point she appeared to modify the argument, somewhat, so that it became a contention that the tribunal had erred in failing to have regard to the PIP award and in failing to address the inconsistency between the two.

16. In my judgment the tribunal was not bound, in any sense, by the award of the standard rate of the mobility component of PIP. There is simply no basis to think that, as a matter of law, it was. There are some obvious similarities between the tests contained in the descriptors I have set out above but those tests are not the same and tribunals will often have evidence before it in either written or oral form, or both, (as here) which was not before the relevant decision maker or tribunal when an earlier decision concerning a different benefit had been made. The tribunal's task was to decide, for itself, and on the material before it (subject to any adjournment considerations) whether any of the Schedule 2 or Schedule 3 descriptors were satisfied irrespective of the fact of the award of PIP.

17. That said, it is the case that evidence underlying a PIP decision might be relevant to an ESA decision. Mr Hampton recognises that in saying about the PIP award "the evidence on which that award was based may be of importance and is therefore of potential relevance to an ESA claim". In my judgment he is right to say that. That then does raise the question of whether the tribunal ought to have at least considered adjourning for the evidence underlying the PIP award to be provided.

18. It is notable that the tribunal did not make any reference to the PIP award in its statement of reasons for decision. It did indicate, in general terms that it had considered all of the documentary evidence before it, which included the PIP award letter, but it then said nothing further about the award. I note that the copy of the award letter had been submitted to the tribunal by the claimant with a covering letter in which she had specifically made mention of the award of PIP (see pages 266 and 267 of the appeal bundle). That said, she did not actually produce a copy of the health professional's report concerning PIP for the benefit of the tribunal. I am not sure why she did not do so because when she applied for permission to appeal she attached two pages of that report (it is a 28 page report) to her grounds.

19. It is possible to note from the two pages provided that the health professional had taken the view that there had been deterioration in the claimant's condition since she had completed a PIP questionnaire on 18 May 2015, that there were problems relevant to her ability to mobilise in relation to difficulties with her hips and her legs and that the level of difficulty she had claimed was consistent with specialist input she had been receiving. The health professional had expressed the view that she would be able to stand and move more than 20 metres but no more than 50 metres repeatedly and in a timely manner. That material though, as I say, was not before the tribunal.

20. Mr Hampton urges me to conclude that, on the facts of this case, the tribunal did not err in law by failing to deal with the PIP award. I have summarised his view as to that above. In looking at what he has to say, I would accept that there was "an abundance of evidence available" to the tribunal and, indeed, there was extensive medical evidence concerning the claimant's previous treatment from a number of different medical practitioners. As to PIP there was, apart from the award letter, some limited documentary evidence concerning the

application but that was only in the form of supporting letters from the claimant's family members rather than medical evidence.

21. There is certainly force in what Mr Hampton says but, on the other hand, if the tribunal had given thought to the PIP material it did have (and as I say there was no specific mention of it at all) it would have been aware of the fact of the award and of its being a recent one so that any evidence underpinning it was not likely to be stale. What it had was capable of suggesting that there might well be a health professional's report (since these are prepared in many PIP cases) suggesting that the claimant's ability to move, after standing, was limited to 50 metres or less. In light of that and notwithstanding the existence of other medical evidence, I conclude that the tribunal was, on the facts and in the circumstances, obliged to at least consider whether to adjourn in order to obtain the evidence underlying the PIP award. Put another way, the information which was before it was, in this context, of sufficient substance to trigger an obligation upon it to undertake that consideration.

22. Had it properly addressed the matter and concluded, perhaps given the difference between the statutory tests and the extensive amount of medical evidence before it coupled with the oral evidence, that the situation did not call for an adjournment then that might well been a different matter because it would have been clear, in such circumstances, that it had turned its mind to the question of adjourning and had reached a view upon it. As it is, though, the impression is given that it simply overlooked the award of PIP and the possibility of there being relevant and current additional evidence which might assist it. I cannot say that if it had asked itself whether it should adjourn for the PIP evidence it would inevitably have decided not to and I cannot say that had it obtained the evidence it could not possibly have impacted upon the outcome.

23. The only remaining question, then, is whether the tribunal was relieved of its obligation to consider adjourning in light of the claimant's failure to send to it a copy of the report herself. That is a matter which I have hesitated about. Had the claimant been competently representative I would have, in fact unhesitatingly, concluded that the tribunal was so relieved because it would have been reasonable to assume, in those circumstances, that the hypothetical competent representative had decided not to rely upon it. However, the jurisdiction is an inquisitorial one and, broadly speaking, different considerations should apply with respect to most unrepresented claimants. It is undoubtedly the case that this particular claimant was aware she could and should send to the tribunal documentary evidence upon which she wanted to rely. She sent plenty of it. Nevertheless, whilst tribunals are not required to cast around for possible sources of potentially relevant evidence I do think, notwithstanding the claimant's own failure in this regard, that the matter had been squarely raised before it. I do conclude, therefore, that the tribunal, in the particular circumstances of this case, did err in law, that the error was material and that its decision must, therefore, be set aside.

24. Strictly speaking, in light of the above, it is not necessary for me to say any more about the various other points which the claimant has raised because whatever view I reach as to those will not now affect the outcome of this appeal to the Upper Tribunal. On the other hand, though, it is clear to me that the claimant has gone to a considerable amount of time and trouble in setting out her case, in particular, in her reply. However, since I have decided to remit there may be some risk that if I am to closely assess and reach a view as to the various other points I might say something which may unwittingly influence the new tribunal's

consideration of matters upon remittal. So, I shall say nothing further as to the remaining grounds.

25. As to the decision to remit, I did consider remaking the decision myself. There is a large body of documentary evidence which would assist. However, the tribunal did not have the health professional's report concerning PIP and I have only two pages of what is a 28 page report. I appreciate that the claimant has sent to the Upper Tribunal the pages which she considers to be relevant. However, it seems to me that if any weight is to be given to that report it is necessary to see and to be able to read and evaluate the whole of it. So, if I was to remake the decision myself there would be some further delay, in any event, whilst I directed the production of that report and, possibly, afforded the parties a further opportunity to comment upon it. In the circumstances it seems to me that I must just as well remit bearing in mind that such will enable the matter to be resolved by an expert fact-finding body which will have both legal and medical expertise available to it.

26. So, there will be a fresh hearing before a new and entirely differently constituted tribunal. The new tribunal will not be bound in any way by the findings and conclusions of the previous tribunal. It will reach its own findings and conclusions on the basis of the evidence before it which will hopefully include a copy of the PIP report as well as any other new evidence the parties may wish to submit and may include further oral evidence given that I have directed an oral hearing. I would, however, stress to the claimant that if she does wish to submit further evidence that should be done at a point significantly prior to the hearing (see the directions above) rather than simply by way of bringing new documentation on the morning of the hearing. The provision of documentary evidence in advance is of assistance to all concerned because it affords the tribunal an opportunity to unhurriedly consider it prior to the hearing taking place. I would also point out to her that the new tribunal, like the previous tribunal, will not be able to take into account circumstances not obtaining as at the date of the original decision of the Secretary of State under appeal (9 November 2015). So, any such evidence should relate to circumstances as they were down to that date. The new tribunal will not be able to take into account post-decision changes whether those changes represent deterioration or improvement.

27. Finally, I should add that my setting aside the decision of the tribunal does, for the moment at least, effectively restore the decision of the Secretary of State to the effect that the claimant does not have limited capability for work. That then will represent the new tribunal's starting point though, of course, not necessarily its end point. It will have to consider whether the claimant has limited capability for work and, if it resolves that matter in her favour, whether she has limited capability for work-related activity. I express no view as to what I think the outcome should be. All of that will be for the good judgment of the new tribunal.

28. The appeal, then, is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **12 January 2017**