

IN THE UPPER TRIBUNAL

Appeal No: CPIP/2533/2016

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Birmingham on 12 April 2016 under reference SC024/16/00176 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

- (1) The new hearing will be at an oral hearing
- (2) The appellant is reminded that the tribunal can only deal with his situation as it was down to 29 December 2015 and not any changes after that date.
- (3) If the appellant has any further evidence that he wishes to put before the tribunal that is relevant to his health conditions and their effects on his functioning in December 2015, this should be sent to the First-tier Tribunal's office in Birmingham within one month of the date this decision is issued.
- (4) The Secretary of State must file a fresh appeal response with the First-tier Tribunal in accordance with paragraph 17 of the reasons set out below within one month of the date of issue of this decision.

- (5) The First-tier Tribunal should have regard to the points made below.
- (6) If the appellant has made or makes an appeal against the renewal claim decision of 18 November 2015 (not to renew his previous ward of PIP), as not changed on 'mandatory reconsideration' on 12 January 2017, then it would seem sensible for both appeals to be heard together by the First-tier Tribunal.

REASONS FOR DECISION

1. This is yet another case in which the removal of an award of the Personal Independence Payment (PIP) was not dealt with in any sense adequately either by the Secretary of State in his appeal response to the First-tier Tribunal or by that tribunal in deciding the appeal. It is to be hoped that this decision and the other decisions of the Upper Tribunal referred to below will help instigate a change in approach and remind both the Secretary of State and the First-tier Tribunal of some fairly fundamental aspects of the law concerning revision and supersession.
2. Both parties to the appeal agree that it should be allowed and the First-tier Tribunal's decision of 12 April 2016 ("the tribunal") set aside for material error of law and the appeal remitted to an entirely freshly constituted First-tier Tribunal to be re-decided. I agree.
3. In giving permission to appeal, I said this:

"I do not give permission to appeal on either of the grounds advanced on behalf of [the appellant] as neither in my judgment have a realistic prospect of showing the First-tier Tribunal erred materially in law. There is no arguable case of a breach of natural justice by not holding another face-to-face assessment. This is just an issue of evidence and the proper weight that could be attached to the last face-to-face assessment. Further, a confusion as to the sequencing of dates in and of itself does not evidence an error of law if the decision arrived at is sound.

Where the confusion as to dates does identify an arguable error of law, however, is in the arguable failure of the First-tier Tribunal to correctly identify the decision under appeal to it and the consequences which arguably flow from that error.

The appeal papers show that [the appellant] had been awarded the enhanced rate of the mobility component of PIP from 2 January 2014 to 1 January 2016 by the First-tier Tribunal on 5 January 2015 (page 173). This appeal decision overturned the Secretary of State's decision on the claim dated 12 August 2014. Given this award was due to expire on 1 January 2016, a renewal claim form for PIP was completed by [the appellant] on 8 October 2015 (page 42), pursuant, it would seem, to regulation 33(2) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013. This led to the 'paper-based assessment' on 15 October 2015 (pages 68-76).

The paper-based assessment then led the Secretary of State to make not one but two decisions. The first was dated 18 November 2015 (page 237) and was to the effect that, on the renewal claim, there was no entitlement to PIP from 2 January 2016. The second decision was dated 20 November 2015 (242) and removed the award of PIP made by the First-tier Tribunal with effect from 20 November 2015. Was this a supersession decision made under section 10 of the Social Security Act 1998, even though no grounds for supersession were given? Or was it instead a revision on any grounds of the 18 November 2015 decision removing entitlement from 20 November 2015? And in either event, on what basis did a decision effective from 20 November 2015 mean that [the appellant] had been paid "too much money" (bottom of page 244)?

On the face of it, it was only this second decision that [the appellant] asked to be mandatorily reconsidered (i.e. revised) (see page 247); though on a fair reading of the contents of his letter of 10 December 2015 it is well arguable that he was also challenging the decision about his continuing to be entitled to PIP in the future. That then led to the Secretary of State's decision on mandatory reconsideration dated 29 December 2015 (page 249). On the face of it, this was the only decision before the First-tier Tribunal on the appeal to it: see regulation 7(2) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013. That decision, however, was to the effect that [the appellant] was not entitled to PIP from 12 August 2014. It refers to a telephone call having been made by [the appellant] on 25 November 2015 (page 250), but the record of that call is not evidenced (as it ought to have been if it was recorded— see rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules) 2008); and this narrative does not account for the 10 December 2015 letter, which is in the appeal papers.

Even though it is not apparent from the body of the 29 December 2015 letter, the new date of disentitlement of 12 August 2014 means that this decision must have revised the decision of 20 November 2015 and replaced it with a decision superseding the First-tier Tribunal's awarding decision with effect from 12 August 2014. Again, the ground and basis for such a supersession are nowhere explained in the 29 December 2015 decision.

If the above narrative is correct, it is at the very least arguable that the First-tier Tribunal erred in law in considering that the decision before it on appeal was the one dated 20 November 2015 and that that decision had not been revised on mandatory reconsideration (see paragraph 2 of statement of reasons on page 273). It is also arguable that it erred in law in not addressing the basis for superseding the previous First-tier Tribunal's decision. Furthermore, even on its own (arguably wrong view) that what was before it was the 20 November 2015 decision as not revised, that decision was still, at least arguably, a supersession decision removing entitlement from 20 November 2015, and the tribunal of 12 April 2016 failed to address the basis for supersession at all in its decision.

Indeed it is arguable the tribunal erred in law in either (a) considering that there was an appeal before it against the 18 November 2015 decision refusing the renewal claim with effect from 2 January 2016 (or not explaining why such an appeal was also before it), or (b) proceeding on the basis that the 20 November 2015 decision was (only) concerned with entitlement to PIP from 2 January 2016.

I should add that, unfortunately, the Secretary of State's appeal response to the First-tier Tribunal was singularly unhelpful (indeed silent) in explaining the narrative of decision-making arising from the renewal claim, the decisions made and the basis for the supersession decision which was under appeal to the First-tier Tribunal.

All of the above issues need to be addressed. I also invite submissions on what [the appellant] may now be able to do about the unappealed 18 November 2015 decision, if the above narrative is correct."

4. The Secretary of State through Frances Gigg provided a submission on the appeal which agreed with the narrative I suggested when giving permission to appeal and supported the appeal being allowed. In her view, the tribunal had erred in law by failing to consider the decision making history of the case properly, and by failing to identify the decision(s) under appeal and therefore the scope of its jurisdiction. I agree.
5. Matters, however, go further than this. In my judgment the tribunal was in fundamental error in considering that the decision of 20 November 2015 had decided that the appellant was not entitled to PIP from 2 January 2016 when that was not what that decision had decided. The 20 November 2015 decision as revised on mandatory reconsideration had superseded the previous awarding decision and removed entitlement to PIP on that award from 12 August 2014. It was

the 18 November 2015 decision which was the one that decided there was no entitlement to PIP on the renewal claim with effect from 2 January 2016, but for the reasons given above and below that decision was not under appeal to the tribunal.

6. What was before the tribunal, and was only before it, was whether the previous PIP award the First-tier Tribunal had made should on the facts and on the law be removed from 12 August 2014. The tribunal wholly failed to address that issue. I concede entirely that it was not helped in identifying what that issue was, and what the content of the decision was that was under appeal to it, by the wholly, indeed I would say woefully, inadequate appeal response put before it by the Secretary of State's decision maker, but that cannot excuse the tribunal's failure as the superior fact-finding body (R(IB)2/04) to identify what was properly in issue before it. Indeed the very inadequacy of the respondent's appeal response ought to have been the catalyst for the tribunal investigating what was before it.
7. I should make some more comment here about the inadequacy of the Secretary of State's appeal response. Ms Gigg limits herself to agreeing with my observation when giving permission to appeal that the response was silent on important matters and was unhelpful. One of the key aspects of such a response is that it must set out the grounds for opposition to the appeal if those grounds have not been set out elsewhere in documents before the tribunal: rule 24(2)(e) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. To gauge whether adequate grounds of opposition to the appellant's case on the appeal were contained in the appeal response, it is necessary to look at what the appellant's case was and the scope of decision under appeal. Taking the latter first, the decision under appeal was the 20 November 2015 decision, as revised on mandatory reconsideration, removing the appellant's award of PIP from 12 August 2014. As for the former, it is accepted (rightly) that the appellant in his grounds of appeal was asking for his past award of PIP to continue. In

other words, his case was that the award should not be removed from 12 August 2014. It is common ground that no other documents in the appeal bundle explained why (per rule 24(2)(e)) the PIP award had been removed from 12 August 2014. (The mandatory reconsideration letter of 29 December 2015 simply stated that the appellant scored no points under either component for PIP and he was not entitled to PIP from 12 August 2014, but says nothing about why the award takes effect from that date.)

8. The appeal response therefore had to explain why the PIP award was being removed 12 August 2014. It did no such thing. It was not even internally consistent as to the date of appealed decision; giving it as 20 November 2015 in Section 1 but 18 November 2015 in Section 3 of the response. The description of the decision in Section 3 only set out that the appellant scored 0 points for the daily living and mobility components of PIP but did not give the date when that scoring was effective from. And the appeal response's reference to the applicable law consisted solely of a website page link, which if followed only takes the reader to the *draft* form of the Social Security (Personal Independence Regulations) 2013 (which most notably do not include regulation 4(2A) of those regulations), and does not take the reader (be it appellant, First-tier Tribunal or someone else) to the legislation governing revision and supersession for PIP¹ at all. Hence my description of the PIP appeal response as woeful and wholly inadequate.
9. Notwithstanding these omissions, in upholding the Secretary of State's decision of 20 November 2015 (as revised), the tribunal needed to satisfy itself as to the applicable supersession ground and why it was made out on the evidence. In a sense this is a somewhat synthetic criticism of the tribunal given its failure to identify that there was even a supersession decision before it, but as the appeal has to be remitted to

¹ The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013.

a freshly constituted First-tier Tribunal for decision it may assist to remind the First-tier Tribunal of its obligations in such cases. This has been addressed recently by Upper Tribunal Judge Wikeley in *SF –v- SSWP* (PIP) [2016] UKUT 0481 (AAC), where he said (at paragraph 15):

“As Mr Spencer [for the Secretary of State] 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.”

Judge Wikeley went on in *SF* in the next paragraph to say:

“The informed but impatient reader might consider this approach to be the epitome of Upper Tribunal persnickiteness. 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.”

10. As the issue *may*² arise on the remitted appeal, in my judgement the (tentative) reasoning in paragraph 16 of *SF* as to an implied limit on the application of regulation 26(1)(a) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013 cannot stand in the light of the subsequent decisions of Upper Tribunal Judge Mesher in *KB –v- SSWP* (PIP) [2016] UKUT 537 (AAC) and *DS –v- SSWP* (PIP) [2016] UKUT 538 (AAC), and I direct the new First-tier Tribunal to follow the decisions of Judge Mesher on this particular issue if it arises. (It should be assisted in identifying whether it does arise by the further appeal response I am directing the Secretary of State to make on this appeal.)
11. However, this does not mean that where regulation 26(1)(a) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013 applies as the ground of supersession, arguments about “change of circumstances” are irrelevant. Judge Mesher recognised this in paragraphs 12-13 of the *KB* case referred to above, where he said:

“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

² I say “may” because, for the reasons given below, the 20 November 2015 decision as revised on mandatory reconsideration was *not* a supersession decisions under regulation 26(1)(a) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013.

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.”

12. Judge Mesher further said, in paragraphs 27 and 28 of *KB*:

“27.....The first [error of law] 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."

13. Judge Wikeley said the following about the applicability of the principles in R(M)1/96 in PIP supersession cases in paragraphs 19-22 of *SF*:

"19.....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 extant 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.”

14. Finally, in paragraphs 17-18 of *DS –v- SSWP* (PIP) [2016] UKUT 538 (AAC), Judge Mesher said the following in another PIP supersession case:

17.....although the tribunal acknowledged the existence of the previous award in its statement of reasons, it failed to grapple with the issue of supersession at all. It needed to do so to have the power to make any decision at all about the period from 10 June 2015, let alone from 8 September 2014. That was a further error of law.

18. If one were to assume that the tribunal had relied on receipt of medical evidence as a ground of supersession under regulation 26(1) of the 2013 Decisions and Appeals Regulations, although identification of that ground does not require the identification of any change of circumstances, there could, by analogy with paragraph 70 of *FN v Secretary of State for Work and Pensions* (ESA) [2015] UKUT 670, now reported as [2016] AACR 24, not have been a supersession unless it was found, on consideration of all the relevant evidence, that the conditions of entitlement were not satisfied from 10 June 2015. The tribunal did not show that it has approached the case on that basis. 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 on supersession must always be considered. Relevance depends on the circumstances of the particular case. Here, the claimant's representatives had expressly said in the appeal to the First-tier Tribunal that his condition was the same as when the initial award was made or possibly worse. He was thus raising the issue of the potential relevance of how his condition affected him in 2013 and of the evidence that led to the making of the award of PIP, in particular the report of the nurse of 9 August 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 his condition had not improved or had worsened.

19. Finally, there was a failure to give reasons that came up to the standard required under 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. I agree 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.”

15. The same reasoning and conclusions as just quoted from *KB*, *SF* and *DS* could, and should, have applied in this appeal if the decision of 20 November 2015 had remained as it was originally decided. The 20 November 2015 decision before it was revised on mandatory reconsideration removed the appellant’s PIP award with effect from the date of the decision: 20 November 2015. On the face of it, that may well have been a decision under regulation 26(1)(a) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013, with the medical evidence received consisting of the HCP’s report of 15 October 2015 (pages 70-76). No effective date is provided for such a regulation 26(1)(a) supersession in the same regulations so such a supersession could only take effect from the date of the superseding decision: per section 10(5) of the Social Security Act 1998. This of course is subject to what is said in *KB*, *DS* and *SF* about all the evidence establishing that the conditions of entitlement were not satisfied from 20 October 2015 and the need to explain why the prior award was no longer merited.

16. However, the 20 November 2015 was, it is accepted by Ms Gigg, revised on mandatory consideration to remove the appellant’s award of the enhanced rate of the mobility component of PIP from 12 August 2014. No explanation has so far been given by the Secretary of State for the legal or factual basis for that revised decision. Ms Gigg suggests, it seems to me correctly, that in all likelihood the basis for the revised decision was that the prior awarding decision (made by a First-tier Tribunal on 5 January 2015) stood to be superseded from 12 August 2014 on the basis of a relevant change of circumstances on 12 August 2014 which the appellant could reasonably have been expected to know should have been notified to an appropriate office: per regulations 23(1)(a) and 35(1) and paragraphs 12 and 13 of Schedule 1 to the

Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decision and Appeals) Regulations 2013. Indeed, it is difficult to identify under those regulations what other ground of supersession would be available to supersede the 5 January 2015 First-tier Tribunal's decision from a date after the date it made the award from but before the date of expiry of that award. Quite why 12 August 2014 is the critical date is, however, nowhere explained.

17. I have had assurances in similar PIP supersession cases that in an appeal such as this one the Secretary of State's appeal response to the First-tier Tribunal should from now on identify the relevant supersession law and explain the reason for the supersession and the date from which it takes effect. **I direct that the Secretary of State must supply the new First-tier Tribunal with such a response on this appeal within one month of the date of issue of this decision in respect of the 20 November 2015 decision as revised by the 29 December 2015 decision.**
18. For the reasons given above the tribunal's decision dated 12 April 2016 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal (Social Entitlement Chamber) at an oral hearing. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

The 18 November 2015 decision

19. I should not leave this decision without addressing the unappealed 18 November 2015 decision. Its not being appealed by the appellant is I suspect a consequence of the introduction of the mandatory

consideration stage into the process of challenging a decision before it can be appealed.

20. I made further directions on this appeal addressing this issue in particular on 2 December 2016. In those directions I said this:

“...I make these directions, however, to address a related matter, but one which I do not consider has been satisfactorily addressed in the submissions to date. This concerns the unappealed 18 November 2015 decision. That decision was to the effect that, on the renewal claim, there was no entitlement to PIP from 2 January 2016.

The second decision was dated 20 November 2015 and removed the award of PIP made by the First-tier Tribunal with effect from 20 November 2015. I suggested when giving permission to appeal that on one analysis this might have been a decision revising the 18 November 2015 decision and changing it to a decision removing [the appellant’s] entitlement to PIP from 20 November 2015. If this was the case, however, the PIP renewal claim would still stand to be decided because this decision (on this analysis) was not deciding that claim.

However I do not consider this can be the correct construction of the decision letters because the 20 November 2015 decision letter refers to looking at [the appellant’s] award of PIP, but the 18 November 2015 decision letter did not make [the appellant] any award of PIP, and furthermore that 18 November 2015 letter referred to a “claim” for PIP which must mean the renewal claim as the earlier claim that had led to the earlier award had long since ceased as a matter of law. All of this leads me to conclude that the 20 November 2015 decision has to be an entirely separate decision from the 18 November 2015 decision.

As I explained previously, it was only the 20 November 2015 that [the appellant] asked to be mandatorily reconsidered (see page 247). It may be on a fair reading of the contents of his letter of 10 December 2015 that, despite its referring only to the 20 November 2015 decision, [the appellant] was also challenging the decision about his continuing to be entitled to PIP in the future, (that is, the 18 November 2015 decision). **(But all that may mean is that 18 November 2015 decision still stands to be mandatorily reconsidered by the Secretary of State. If that is the case then he could now do so as a matter of urgency, [the appellant] could appeal the decision if not changed on mandatory reconsideration, and both decisions could then be listed to be heard together before the First-tier Tribunal to which this appeal is to be remitted.)**

It is not disputed that the Secretary of State then made a decision on mandatory reconsideration of the 20 November 2015 decision. This was dated 29 December 2015 (page 249). It is also not disputed that it was this decision, which had revised to [the appellant’s] disadvantage the 20 November 2015 decision, that was under appeal to the First-tier Tribunal.

However, despite the argument of the Secretary of State in his submissions of 17 November 2016, I am still not clear on what lawful basis the separate (see above) 18 November 2015 renewal claim decision was before the First-tier Tribunal. The problem in a nutshell, as it seems to me, is that that decision could *only* be appealed if it had been mandatorily reconsidered, but it had not. That was the point I was seeking to make by referring to regulation 7(2) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013. That regulation is quite explicit in setting out that the right of appeal under section 12 of the Social Security Act 1998 can arise only if the Secretary of State has considered an application to revise the decision. On my understanding of the history, no application for revision has ever been made, or more importantly considered by the Secretary of State, in respect of the 18 November 2015 decision. This is not intended in any way as a criticism of [the appellant], who no doubt sensibly may have thought the last decision he received, the 20 November 2015 decision, was the only one he needed to challenge.

What, however, is the remedy (if any) to enable [the appellant] to get the 18 November 2015 decision also before a First-tier Tribunal? I have suggested one in paragraph 5 above (in bold). Another might be an argument that on the appeal against the supersession decision [the appellant] could argue that not only was removing his award from an earlier date wrong but that it ought to have continued beyond 1 January 2016. This approach may, however, be problematic given the need to identify who was making the application for supersession and when it then may be effective from (see R(IB)2/04).

Another possibility is that I have misunderstood the narrative and [the appellant] did in fact seek a mandatory reconsideration of the 18 November 2015 decision and the Secretary of State made a decision on that application. A further possibility is that I am wrong on the law (though I do not think I am, at least at the moment, given the mandatory terms of regulation 7(2)).

In all the circumstances I consider both parties need to address me (again) on how the 18 November 2015 decision (or its effects) may get before the First-tier Tribunal."

21. Before parties have filed further responses in reply to those directions. No one disputes that the 18 November 2015 decision stood on its own and was not subsumed in the 20 November 2015 decision. I am quite satisfied that that is so. It is accepted in the further submissions made on behalf of the appellant that he only sought mandatory reconsideration of the 20 November 2015 decision. The Secretary of State, however, accepts that it was implicit in the appellant's letter of 10 December 2015 seeking mandatory reconsideration that he *also* wished

to challenge the 18 November 2015. The Secretary of State's decision maker has now, therefore, considered that as a mandatory reconsideration request made by the appellant against the 18 November 2015 decision and refused it, in a *Mandatory Reconsideration Notice* dated 12 January 2017. That helpfully, and in my view sensibly, clears the way for the appellant to also appeal against the renewal refusal decision of 18 November 2015.

22. If such an appeal is, or has already been, made then it would obviously be sensible for it to be heard at the same as the appeal I am remitting under this decision.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

Dated 26th January 2017