IN THE UPPER TRIBUNAL **Case No.** CPIP/3480/2016
ADMINISTRATIVE APPEALS CHAMBER

Before E A L BANO

Decision: My decision is that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and in the exercise of my powers under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I substitute for that decision my own decision that the claimant was entitled to the daily living component of personal independence payment at the enhanced rate from 5 August 2015 to 8 March 2018.

REASONS FOR DECISION

1. The claimant is a man now aged 45 with Meniere's Disease, depression, diabetes, peripheral neuropathy and claustrophobia who was in receipt of the enhanced rate of the daily living component of PIP. On 5 August 2015 he made a renewal claim and after a face-to-face assessment carried out at his home on 13 September 2015 he was assessed as scoring 2 points in respect of each of daily living activities 1(b), 2(b), 4(b), 5(b), 6(b) and 7(b), but no points in respect of any mobility descriptors. On the basis of that assessment, a decision was made on 21 September 2015 awarding the claimant the daily living component of personal independence payment at the enhanced rate from 5 August 2015 to 8 March 2018.

2. On 5 October 2015 the claimant made an application for a reconsideration of the award, accompanied by copious medical evidence, on the grounds that the Healthcare Professional who carried out the assessment had underestimated the extent of both his daily living and mobility needs. That reconsideration led to a revised decision on 18 November 2015 maintaining the award of daily living component, but awarding the claimant 4 points in respect of mobility descriptor 2(b). Since that was not enough to qualify the claimant for an award of mobility component of PIP, his benefit entitlement remained unchanged by the reconsideration decision. However, unwisely as it turned out, the claimant appealed against the awarding decision on 25 November 2015, challenging his points score in respect of both the daily living component and mobility components of PIP, despite the fact that his award of the daily living component was at the highest possible rate and he therefore had nothing to gain from appealing against it.

3. The claimant did not attend the first hearing of the appeal, which took place in Birmingham on 10 March 2016. Understandably, in view of the volume of evidence submitted by the claimant, the tribunal considered that it could not determine the appeal on the papers and that an oral hearing was appropriate. The adjournment notice contained the following direction:

> "When this appeal is heard the tribunal's powers will include leaving the existing award as it is, improving the award, reducing or removing the existing award. These decisions can only be taken when all the evidence has been considered including any oral evidence from the Appellant. The appellant may wish to take advice from one of the advice agencies and then decide

> whether he wishes to take advice from one of the advice agencies and then decide whether he wishes to continue with his appeal or wishes to withdraw his appeal bearing in mind the tribunal's powers. The appellant is directed to confirm in writing within 21 days that he wishes to continue with his appeal or whether he wishes to withdraw the appeal."

4. On 4 April 2016 the claimant telephoned the tribunal, stating that he would not be attending the hearing of the appeal and asking for it to be heard in his absence. At the adjourned hearing, which took place in Nottingham on 6 May 2016, the tribunal decided to proceed in the claimant's absence, saying:

> ""…The Tribunal considered Rules 2 and 27 and determined, particularly in light of the documentation provided and in consideration of the appellant's indication that he would not be attending, that it was fair and just to decide the matter in his absence."

5. The tribunal also decided to consider whether the award which was under appeal was in fact over-generous, for the reasons which they gave in Paragraph 34 of the statement of reasons:

> "The Tribunal had concerns over the extent of the appellant's current award for daily Living based upon the available medical evidence and so as the appellant had received a clear advisory in the adjournment Notice about the powers of the Tribunal and about seeking advice on the matter before deciding whether or not to proceed then it found it was fair and just to consider the whole award and not just the Mobility component."

Having considered the documentary evidence, the tribunal removed the 2 points awarded by the decision-maker in respect of each of descriptors 2(b), 5(b), 7(b), resulting in a score of 6 points for daily living activities and 4 points for mobility activities. As a result of his appeal, the claimant therefore lost his entitlement not just to the enhanced rate, but also to the standard rate, of the daily living component of PIP.

6. On 18 October 2016 the claimant applied for the tribunal's decision to be set aside and also to withdraw his appeal, stating:

> "I have discussed the subject with my local CAB advisor, who has carefully explained the appeals process and has now made me aware of not only the tribunal's potential to review and improve my claim, but that it can even reduce or even take away my current award…my understanding of what is at stake was not clear-and I am requesting the decision is set aside, as it has now been made clear to me that appealing would be a potentially ruinous course of action for me, as my potential gain on my existing DWP award would at best be nominal."

The letter also contains a further complaint which I do not quite understand about a hearing in the claimant's absence taking place in Nottingham (which is where the claimant lives), although it may be that the claimant is saying that he had not

appreciated that the hearing would take place closer to his home when he asked for the appeal to proceed in his absence.

7. On 12 September 2016 a First-tier Tribunal judge refused the application to set aside the tribunal's decision, but gave permission to appeal for the following reasons:

> The First-tier Tribunal has dealt with a matter not in dispute between the parties, namely the award of the daily living component at the enhanced rate. The Tribunal does not appear to have considered the decision in *BTC v SSWP* [2015] UKUT 0155 (AAC) which discusses some of the problems that can ensure when following such a course of action. It is appropriate that the Upper Tribunal considers whether the First-tier Tribunal has given an adequate explanation of the reasons for dealing with a matter not in dispute between the parties.

In my observations on the appeal of 25 November 2016, I stated that it would not be necessary for the Secretary of State to address the numerous other grounds of appeal if the appeal was supported for the reason given by the tribunal judge.

8. In a written submission dated 1 February 2017, the Secretary of State's representative has however opposed the appeal. The representative has submitted that the claimant was advised in clear terms about what might happen if he did not attend the hearing of the appeal, or seek advice about withdrawing it, and, having done nothing to heed the tribunal's warnings he cannot now be heard to complain about the outcome of the appeal.

9. In giving permission to appeal, the tribunal judge no doubt had in mind section 12(8)(a) of the Social Security Act 1998, which provides that a tribunal "need not consider any issue not raised by the appeal". In *R(IB) 2/04* a Tribunal of Commissioners held that a tribunal must consciously consider whether to exercise the discretion conferred by section 12(8)(a) and explain why the discretion was exercised in the manner it was if a statement of reasons is requested.

10. Since it was the claimant himself who was challenging an award in his favour, I am prepared to assume in the unusual circumstances of this case that the correctness of the descriptors on which the award of the daily living component of PIP was based was an issue raised by the appeal, so that the tribunal was not formally exercising its discretion under section 12(8)(a) of the 1998 Act. However, as I pointed out in *CSPIP/33/2005*, it was also held in *R(IB) 2/04* that claimants must be given sufficient notice to enable them to prepare their case on a new issue raised by the tribunal. It is worth recalling exactly what the Tribunal of Commissioners said:

> "In exercising the discretion [under section 12(8)(a), the appeal tribunal must of course have in mind, two factors. First, it must bear in mind the need to comply with Article 6 of the Convention and the rules of natural justice. This will involve, at the very least, ensuring that the claimant has had sufficient notice of the tribunal's intention to consider superseding adversely to him to enable him properly to prepare his case. The fact that the claimant is entitled

> to withdraw his appeal at any time before the appeal tribunal's decision may also be material to what Article 6 and the rules of natural justice demand. Second, the appeal tribunal may consider it more appropriate to leave the question whether the original decision should be superseded adversely to the claimant to be decided subsequently by the Secretary of State. This might be so if, for example, deciding that question would involve factual issues which do not overlap those raised by the appeal, or if it would necessitate an adjournment of the hearing. [94]"

11. Although the observations of the Tribunal of Commissioners were made in the context of cases which did involve the exercise of the discretion under section 12(8)(a), and also a tribunal's powers of supersession and revision, their observations are not in my judgment limited to such cases. The need for a tribunal to comply with the requirements of Article 6 of the European Convention on Human Rights and with the requirements of natural justice may arise in any situation where a tribunal has on its own initiative taken a point which may have an adverse effect on an appellant's case. The way in which a tribunal complies with its duty to act fairly in such situations will depend on all the circumstances of the case, and may involve the exercise of one or more of the tribunal's case management powers.

12. In *R(IB) 2/04*, the Tribunal of Commissioners referred to the need for a claimant to have sufficient notice of a tribunal's intention to consider superseding adversely to him to enable him to prepare his case. The requirement for a claimant to have notice of a tribunal's intentions may be the same where supersession is not an issue, but where a tribunal has it in mind to make an award which is less generous than a decision which has been made on a new claim. The directions given by the tribunal on 10 March 2016 may have been sufficient to notify the claimant of the tribunal's general powers and of his right to withdraw the appeal, but at no point was the claimant made aware of the specific concerns of the tribunal on 6 May so as to enable him to prepare his case or to consider whether to withdraw the appeal in response to the matters which caused the tribunal to doubt the correctness of the award which the claimant was appealing..

13. The tribunal would have been able to explain its concerns to the claimant if he had attended the hearing on 6 May, although in those circumstances it might nevertheless have been necessary to offer the claimant an adjournment to get advice on whether he should withdraw his appeal, or alternatively to prepare his case in response to the matters raised by the tribunal. In the claimant's absence, the practical difficulties of taking that course might perhaps have in itself been a reason for heeding the suggestion of the Tribunal of Commissioners in *R(IB) 2/04* that it should be left to the Secretary of State to decide whether, in the light of the tribunal's concerns, the awarding decision should be superseded. Assuming however that the tribunal's doubts about the correctness of the award of the daily living component of PIP began to emerge during the course of their discussion of the appeal, in my judgment it became necessary to give fresh consideration to the question of whether the hearing should proceed in the claimant's absence in the light of the tribunal's views of the case as they emerged during their deliberations.

14. Since the record of proceedings indicates that the claimant had received notice of the hearing when he telephoned on 6 April to say that he would not be attending the appeal and wanted it to proceed as a 'paper hearing', the power to proceed in the claimant's absence was that conferred by rule 31 of the Tribunal procedure (First-tier Tribunal) (SEC) Rules 2008, rather than as provided for by rule 27. The tribunal did not expressly refer to that power, but assuming that they nevertheless exercised it validly at the commencement of the proceedings, in my judgment they continued to be under a duty to keep the matter under review. In *KO v SSWP* [*(ESA)* [2013] UKUT 554 (AAC) Judge Gray held:

> "The duty to consider an oral hearing cannot be confined to a pre-case discussion; there is a continuing obligation on the tribunal to consider whether or not it is fair to proceed in the absence of the appellant throughout the case. That does not mean, of course, that a case cannot be decided against an absent appellant, but where there are issues which attain considerable importance in relation to the decision the panel are likely to make whilst the panel are deliberating there may be a reason to revise the original decision to hear the case in the appellant's absence."

15. It is of course true that the claimant had declined to attend the hearing of the appeal on two occasions, even in the face of the clear indication given on 10 March 2016 that he should attend. On the other hand, it would have been clear to the tribunal that the claimant's sole reason for bringing the appeal was because he considered that the daily living descriptors which the decision-maker had applied did not fully reflect the nature and seriousness of his various medical conditions, despite the fact that they had resulted in an award of the daily living component of PIP at the enhanced rate. Once it became clear to the tribunal that, on their view of the evidence, the result of the claimant's wholly misconceived appeal against the award of the daily living component of PIP was that he was at risk of losing his award altogether, in my view they came under a renewed duty to consider whether the hearing should be adjourned so that a full explanation could be given to the claimant of the risks which he faced if he continued with the appeal. In my judgment, the tribunal's failure to re-consider whether to adjourn the appeal for the claimant to attend was an error of law.

16. The tribunal removed the award of two points for descriptor 2(b) because they considered that the claim that the claimant needed to use adapted cutlery "was not credible when taking all of the evidence in the round, as he is able to use aids to assist him with bathing and other activities of daily living, indicating he has sufficient grip." However, the Healthcare Professional who examined the claimant accepted that the claimant needed to use a plastic cup and specially adapted cutlery because of numbness caused by neuropathy after carrying out a physical examination of the claimant's hands, involving testing the claimant's pinch grip and verifying that the middle finger on his left hand locked. They removed the award of two points for descriptor 5(b) awarded by the Healthcare Professional on the basis of poor balance because the claimant had only had two or three attacks since December 2014 and had been observed by his doctor to have a normal gait. However, the tribunal did not refer to Meniere's disease, which the Healthcare Professional took into account as a factor affecting the claimant's balance. In relation to Activity 7, the tribunal

removed the award of 2 points for descriptor 7(b) because on the basis of the audiogram tests the tribunal did not consider that the claimant needed to use hearing aids. However, they made no finding with regard to the periods of time during which the claimant's hearing was affected by tinnitus or hearing loss resulting from attacks of Meniere's disease. For my part, I can see no reason to prefer the assessment of the tribunal to that of the Healthcare Professional, who seems to me to have carried out a very through examination and given cogent reasons for applying the descriptors which formed the basis of the decision under appeal. In allowing the appeal, I therefore propose to adopt those descriptors and restore the decision based on the Healthcare Professional's assessment.

E A L BANO
28 March 2017