DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the Bradford First-tier Tribunal dated July 27, 2016 under file reference SC240/13/07935 does not involve any error of law. The decision of the First-tier Tribunal stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. On one level this is an entirely straightforward case. The Appellant claimed Attendance Allowance (AA). The Secretary of State's decision-maker refused the claim, concluding the Appellant did not meet the criteria for an award of AA. The Appellant lodged an appeal. The First-tier Tribunal ("the Tribunal") agreed with the Secretary of State's decision-maker and dismissed the appeal. The Appellant appealed to the Upper Tribunal. I conclude that the Tribunal's decision involved no error of law as regards the AA decision and so the further appeal is also dismissed.

2. On another level, this is anything but a straightforward case. For example, the Appellant's CAB representative has not actually sought to persuade me that the Tribunal's decision on his client's potential entitlement to AA was wrong in law. The first paragraph of the Tribunal's statement of reasons gives some inkling of the possibly unique nature of this appeal:

> "1. This is an unusual appeal with some rather unusual facts. It has been ongoing now for some years and may well continue for a few more years; however, for the reasons given below, [the Appellant] is not entitled to attendance allowance from the date of his claim in 2013. The complicating factor is that he had previously made a claim to disability living allowance [DLA] in 1997 but never, in fact, received a payment. Everything will become clear later on in this statement of reasons."

3. I make four brief comments on that passage. First, the previous DLA claim related solely to the higher rate mobility component and not to the care component of that benefit. Second, the reference to 1997 appears to be a typographical error for 1995 (although nothing turns on this). Third, there was in fact evidence before the Tribunal that (at least for a period in 1995 and 1996) the Appellant had indeed received payments of DLA. Fourth, and with all due respect to the District Tribunal Judge who prepared that statement of reasons, the final sentence in that opening paragraph may have been an unduly bold or overly optimistic assertion.

4. The line taken by the Appellant's CAB representative has been consistent in these proceedings. He has argued that the DLA award has been alive (if mostly dormant) throughout. In a final written submission to the Tribunal below, he argued that the Department had not provided "any evidence that the DLA award from 1995 had ever been superseded". Similarly, the basis of the Appellant's appeal to the Upper Tribunal was that the Secretary of State and the Tribunal below had erred in law by failing to treat the AA claim as a request to supersede the earlier and still extant DLA award.

5. The one thing that is clear in this case is that the Tribunal's decision that the Appellant did not qualify for AA as from the date of claim in 2013 is unimpeachable. As noted, the Appellant's representative has not sought to persuade me otherwise. Accordingly, that aspect of the appeal will receive no further detailed treatment.

6. Entirely separately from this appeal, the issue of the Appellant's entitlement to DLA is being revisited by the relevant decision-making team at Blackpool. I hope this process will not, as the Tribunal pessimistically anticipated, "continue for a few more years", given how long it has taken to get where we are today.

The proceedings in the Upper Tribunal

7. The District Tribunal Judge who presided at the Tribunal gave permission to appeal to the Upper Tribunal on that basis that "it would be interesting to have the definitive answer" to whether the Tribunal had correctly identified the decision before it and over which it had appellate jurisdiction.

8. Frances Gigg, for the Secretary of State, has provided an exceptionally helpful written submission which I refer to further below. She resists the Appellant's appeal so far as the issue of the AA claim is concerned, but highlights a number of difficulties with the history of the DLA award. She has offered to write to the Department's DLA office in Blackpool to request them to revisit the question of DLA entitlement. However, on the basis of the correspondence since received from the Appellant's representative it appears this process is already under way.

The Upper Tribunal's analysis

The starting point for the short answer

9. The starting point for resolving the present appeal must be to look at the decision which was under appeal to the Tribunal. The Appellant, then aged 66, had made a claim for AA on May 2, 2013. The Department sent him a letter on October 9, 2013, refusing that claim. On October 23, 2013 – and so before the mandatory reconsideration requirement came into force – the Appellant lodged a notice of appeal against that decision, referring to his problems with mobility.

10. In jurisdictional terms the Secretary of State had made a decision under section 8(1) of the Social Security Act 1998 ("the 1998 Act") to refuse the AA claim. That clearly fell within the terms of section 12(1)(a) of the 1998 Act. The Appellant was accordingly exercising his right of appeal under section 12(2) of the 1998 Act against that section 8(1) decision on his AA claim. Whether or not the Tribunal had correctly identified all the twists and turns of the Appellant's earlier DLA award, the Tribunal was undoubtedly right to conclude that "the issue of the non-payment of disability living allowance is not something before us upon which we should adjudicate".

11. Given that the Tribunal had (i) correctly identified the decision under appeal and then (ii) correctly applied the rules governing entitlement to AA, it follows that there was no material error of law in the Tribunal's decision. The Appellant's appeal to the Upper Tribunal is accordingly dismissed.

The starting point for the long answer

12. The starting point is that AA and DLA are different benefits. However, they are not, as is commonly but mistakenly thought, wholly mutually exclusive benefits. As Frances Gigg points out, section 64(1A)(b) of the Social Security Contributions and Benefits Act 1992 precludes a person from being entitled to AA if they are entitled to "the care component of a disability living allowance". Logically it follows that if claimants have an award of the mobility component of DLA (but not the care component) then they can also be entitled to AA (which, of course, has no parallel to

the mobility component of DLA). Ms Gigg confirms that the DWP's operational guidance contains instructions for dealing with such cases.

13. On that basis the Secretary of State's decision maker in the AA Unit at Blackpool was perfectly entitled to decide the new claim for AA – there being no suggestion that the Appellant had ever had an award of the care component of DLA. Likewise, the Tribunal, for the reason identified in the short answer above, was properly seized of the appeal against the refusal of that new AA claim.

14. At this juncture I summarise what is known about the Appellant's DLA award.

15. On his AA claim form in May 2013, the Appellant explained the difficulties he had with walking. He added:

> "In the year 1997 I was awarded DLA but I turned it down due to having to return to work due to financial difficulties but I have always struggled."

In saying as much, the Appellant seemed have made the common (but wrong) assumption that being in work was necessarily incompatible with receiving DLA. I also attach no particular significance to his reference to 1997, given the passage of time.

16. Having received the Department's response to his AA appeal, the Appellant sent the Tribunal a copy of a recent letter he had received from the DLA Unit in Blackpool. Dated February 8, 2013, and described on its face as 'proof of entitlement to your benefit' (and by the Department elsewhere as the annual up-rating letter), the letter stated that he was entitled to the higher rate of the mobility component of DLA. But he certainly was not receiving DLA at that time, and had not received it for many years.

17. There followed a series of adjournments and directions notices as the Tribunal struggled to obtain meaningful information from the Department in order to identify whether it was dealing with an AA appeal or a DLA appeal – or possibly both.

18. For present purposes the following summary will suffice. The original paperwork relating to the Appellant's DLA award seems to have been destroyed, and so much of the history has had to be reconstituted from computer records. The Appellant was awarded the higher rate of the mobility component of DLA as from February 14, 1995 (with no award of the care component). According to the Department, the Appellant's whereabouts in January 1996 could not be established, and so DLA payments were stopped (or, technically, suspended). A mailshot in June 1996 was sent to the Appellant but returned as undelivered. It was also said that in April 2003 the Appellant advised the Department he was working and no longer wished to receive DLA – and so he was treated as having 'voluntarily relinquished' his claim to benefit. During this entire period payments of DLA were suspended, although his claim was nominally live, which explained why he had been sent the letter of February 8, 2013.

19. On June 27, 2013 the DLA computer system recorded an entry as follows: "P32 code from 28/6/95 amended to T04 to force closure". A submission to the Tribunal translated this rubric as follows – "P32 (this is a system code to prevent payment following voluntary relinquishment of the mobility component) code from 28/06/95 amended to T04 (this is a system code terminating benefit following failure to comply with an information request)". The writer of the Department's further response conceded that no actual decision had been made to terminate the Appellant's

underlying entitlement to DLA until June 27, 2013, but argued that the Appellant had taken no steps over a number of years to query his entitlement to DLA.

20. So what were the consequences of all that for the present appeal? When giving directions on the appeal, I made a number of other observations on the argument by the Appellant's representative that the AA claim should have been treated as an application for a supersession of the earlier DLA award. Although the issues are not essential for reaching a decision on this appeal, it may be helpful to set out my conclusions and reasons here.

21. First, there are no formalities for a DLA supersession application. Section 10(3) of the 1998 Act provides for regulations to "prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this section". However, no such regulations have been made in terms of the format or formalities required for a supersession application. Ms Gigg therefore concedes that in appropriate cases the Secretary of State might accept the contents of an AA claim as an application for a supersession of a DLA award.

22. Second, this was not a case in which the Appellant could take advantage of the interchange rules under regulation 9(1) of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968). This regulation permits, in the circumstances set out in Schedule 1 to the Regulations, a claim for one benefit to be treated as a claim to another benefit. Thus Part 1 of Schedule 1 allows an AA claim to be treated as a claim for DLA (and vice versa). However, regulation 9(1) is premised on the assumption that there is no current entitlement to *either* benefit, unless there is express provision otherwise – so, for example, an AA claim may also be treated as a claim for an *increase* in industrial disablement benefit where constant attendance is needed. Schedule 1 does not in terms provide for a claim for AA to be treated as a claim for an increase in DLA. So the interchange route was closed to the Appellant.

23. Third, and given what the Appellant had said on his AA claim form about his mobility, it was arguable the AA decision-maker should have checked the position as regards any DLA entitlement that the Appellant might have had. Had that been done, it would have been established that the last actually effective decision since the DLA award in 1995 was a decision suspending payment of DLA made on January 9, 1996 (when the Appellant's whereabouts were unknown). However, a decision to suspend payment of benefit (taken under regulation 16 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991); "the D & A Regulations 1999") is not an appealable decision – see paragraph 24 of Schedule 2 to those Regulations. The suspension decision remained in force until the action was taken "to force closure" of the DLA award on June 27, 2013.

24. Fourth, what then was the status of the action or decision of June 27, 2013? The position in principle is tolerably clear. As Ms Gigg explains, a suspension decision is usually followed by a formal request for information under regulation 17 of the D & A Regulations 1999. That in turn is followed by a decision either removing the suspension and restoring payments or terminating the award under regulation 18 of the D & A Regulations 1999. Such a termination decision is a form of supersession decision under section 10 of the 1998 Act which gives rise to a right of appeal (by analogy with R(H) 4/08 at paragraphs [28]-[33], *per* Mr Commissioner (now Judge) Jacobs). But in the context of the present case, these are undoubtedly murky waters. As Ms Gigg says, "I cannot pretend to understand the significance of all the pages of the computer record print out at pages 121 to 260, much of which is repetitive and unhelpful". If the Secretary of State's representative, well versed in the internal

workings of the Department, admits to such difficulty, what chance do the rest of us have?

25. Most probably the action taken on June 27, 2013 was an attempt to 'backfill' the DLA decision-making history on the Appellant's award. According to the translation of the codes used, it apparently purported to terminate entitlement with effect from June 28, 1995 because of a failure to comply with an information request and following voluntary relinquishment of the higher rate mobility component of DLA. One obvious difficulty with this is that there is no evidence of the Department making any information request of the Appellant in 1995. The computer records only reveal an entry for June 26, 1996, translated as meaning "mailshot returned undelivered; case control cleared; no action on payment". Putting to one side the difference over the dates of 1995 and 1996, Ms Gigg in any event expresses her doubts as to whether the 'decision' of June 27, 2013 was in compliance with the law and so of legal effect. The reasons for those doubts are essentially three-fold:

(i) the Department's finding that the Appellant had truly relinquished entitlement to DLA in 2003, so warranting a supersession decision, was at best questionable, as there was no evidence that the Department had complied with its own detailed operational guidance on the steps to be taken in such cases (see CJSA/3979/1999 and DWP's *Advice for Decision Makers* paras. A4120-A4131);

(ii) the Department's action in June 2013 did not appear to comply with regulation 17 of the D & A Regulations 1999 as regards the Appellant's award of DLA – as Ms Gigg puts it, "rather than simply terminating it on the basis of the claimant's *past* failure to supply information, the decision maker was first obliged under regulation 17 to issue a fresh notification of the requirement to provide information and the date by which it must be provided", i.e. to establish whether the Appellant had in fact satisfied the conditions of entitlement to the higher rate of the DLA mobility component for any period since June 28, 1995 (and so to establish whether or not he was entitled to arrears of that benefit);

(iii) there was in any event no evidence that the 'decision' of June 27, 2013 with an effective date some 18 years earlier (of June 28, 1995) was ever actually notified to the Appellant. If anything, the evidence points the other way – so e.g. the Data Protection Act record print leaves the "date notification issued" blank for the 'decision' of June 27, 2013 – and it is axiomatic that a decision has no legal effect until so notified (see *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604).

26. Not for want of trying, the Tribunal did not get to the bottom of the decision-making history of the Appellant's DLA claim and award. However, the only issue before it was the appeal against the refusal of the 2013 AA claim, and the Tribunal's decision on that issue discloses no material error of law. The matter of the Appellant's possible entitlement to arrears of the higher rate mobility component of DLA is another issue to be resolved through other channels.

Conclusion

27. For these reasons, I conclude the decision of the First-tier Tribunal does not involve any material error of law. I must therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 3 May 2017

Nicholas Wikeley
Judge of the Upper Tribunal