

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Before UPPER TRIBUNAL JUDGE FARBEY QC**

**DECISION**

The appeal is allowed.

The decision of the First-tier Tribunal sitting at Wakefield on 10 August 2016 under reference SC246/16/00966 involved the making of an error on a point of law and is set aside.

The Upper Tribunal is not able to re-make the decision under appeal. The case is remitted to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out below.

**REASONS FOR DECISION**

**Summary of what the appeal is about**

1. This appeal concerns the claimant's entitlement to personal independence payment (PIP). The First-tier Tribunal upheld the Secretary of State's decision that he is entitled to the mobility component at the standard rate only and that he is not entitled to any daily living component. In his appeal to the Upper Tribunal the claimant challenges both aspects of the tribunal's decision with the permission of Upper Tribunal Judge Rowley.
2. The grounds of appeal raise a question about the interpretation of the PIP (Transitional Provisions) Regulations 2013, which I shall refer to as the transitional regulations. In particular, the effect of regulation 23(1) is in issue. Regulation 23(1) concerns the circumstances in which a person who seeks to transfer from disability living allowance (DLA) to PIP is to be deemed to meet part of the 'required period condition' for PIP.
3. The claimant submits that, on a proper interpretation, he falls within regulation 23(1). The Secretary of State disagrees. My conclusion is that the Secretary of State's interpretation is correct and that regulation 23 does not benefit the claimant. However, the Secretary of State has conceded that the tribunal failed to consider whether the claimant may qualify for an advance award of PIP under regulation 33 of the Universal Credit, PIP, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013. I allow the appeal on that basis.

**Background to the appeal**

4. The claimant had previously been awarded DLA, receiving the mobility component at the higher rate. On 12 November 2015, he was invited by the Secretary of State to make a claim for personal independence payment (PIP). He duly did so by telephone on the same day. In his written application form, he listed a number of medical problems including an enlarged prostate and incontinence; a damaged right leg and partially fused hip; emphysema; high blood pressure; hernias; depression; and memory problems. The Secretary of State decided that the claimant was entitled to the standard rate of the mobility component. Other elements of the PIP claim were rejected. The claimant appealed to the First-tier Tribunal. By a decision notice dated 10 August 2016, the tribunal dismissed the appeal and upheld the Secretary of State's decision. A statement of reasons (SOR) was produced on 26 October 2016.
5. The SOR shows that, among other documents, the tribunal considered a letter from the claimant's consultant urologist who reported on prostate surgery in March 2016. The letter confirmed that the claimant's pre-existing urinary incontinence had been exacerbated following the surgery. The exact date of the surgery is not set out in the letter. The date of the decision under appeal was 20 March 2016, which was the same month as the surgery. The tribunal made no finding of fact about the exact date of the surgery or whether it pre-dated or post-dated the Secretary of State's decision. The date of the surgery was plainly material to the appeal: the tribunal was under a duty not to take into account any circumstances not obtaining at the time when the Secretary of State's decision was made (Social Security Act 1998, section 12(8)(b)).
6. The tribunal's reasoning in relation to the date of the surgery is somewhat elliptical. It seems to have held (in effect) that either the surgery pre-dated the Secretary of State's decision, in which case it did not fall for consideration by virtue of section 12(8)(b); or, if the surgery post-dated the decision, its effects could not in any event meet the three month retrospective period for PIP (see paragraphs 31-33 of the SOR). On this analysis, the tribunal seems to have taken the view that, irrespective of whether the surgery pre-dated or post-dated the decision, it could not assist the claimant.
7. Both parties agree that the tribunal's reasoning was inadequate. It is not in dispute that the surgery and its effects were legally relevant to the question whether the claimant was able to qualify for the daily living component of PIP. However, each party suggests a different route as to how the surgery comes into consideration. The claimant submits that, on the plain and ordinary meaning of the words of regulation 23, he should be deemed to meet the three month retrospective period even if the effects of the surgery had not actually subsisted for three months at the date of the Secretary of State's decision. The Secretary of State emphasises that regulation 23 relates to claimants transferring from DLA to PIP. Any new medical condition which could not have founded a DLA award cannot found a transfer from DLA to PIP and so cannot engage regulation 23. The Secretary of State criticises the tribunal on an alternative basis, which is that the surgery and its effects were relevant to the consideration of an advance award of PIP under regulation 33 of the Social Security (PIP) Regulations 2013. Before

I turn to the competing submissions, I shall set out the legal framework in more detail.

### **Legal framework**

#### *Welfare Reform Act 2012*

8. Provision for the award of PIP is made by Part 4 of the Welfare Reform Act 2012 (WRA). In *DO v Secretary of State for Work and Pensions* [2017] UKUT 0115 (AAC) at paragraph 20, Upper Tribunal Judge Mitchell analysed the WRA as laying down two core entitlement criteria.
9. The first core criterion is concerned with an individual's ability to carry out either daily living or mobility activities. A person may be entitled to the daily living component or the mobility component or both components (WRA, section 77). A component will be paid at the standard rate if a person's ability to carry out relevant activities is limited by his or her physical or mental condition. Payment will be at the enhanced rate if the limitation is severe (WRA, sections 78-80). The question whether a person is or is not able to carry out relevant activities must (save in prescribed circumstances) be carried out in accordance with an assessment of the person (WRA, section 80(3)).
10. The second core entitlement criterion is that a person meets the 'required period condition' (WRA, section 80(2)). Under section 81(1), the required period condition must be determined by reference to two distinct periods from a date prescribed by regulations, namely:
  - (a) whether, as respects every time in the previous 3 months, it is likely that if the relevant ability had been assessed at that time that ability would have been determined to be limited or (as the case may be) severely limited by the person's physical or mental condition; and
  - (b) whether, as respects every time in the next 9 months, it is likely that if the relevant ability were to be assessed at that time that ability would be determined to be limited or (as the case may be) severely limited by the person's physical or mental condition.

The first part is retrospective: it relates to a claimant's abilities in the past. The second part is prospective: it relates to a claimant's abilities in the future. The prospective part is not relevant to this appeal.

#### *PIP Regulations 2013*

11. Under section 80(2) of the WRA, the question whether a person meets the required period condition is governed by regulations. The present regulations are the Social Security (PIP) Regulations 2013. Regulations 12 and 13 respectively define the required period condition for the daily living component and the mobility component. Their effect is that a claimant should have had limited ability (or seriously limited ability for the enhanced rate of PIP) to carry out either

daily living activities or mobility activities for a period of three months prior to the date of the PIP claim. The three month period has been described as the retrospective part of the required period condition (*AH v Secretary of State for Work and Pensions* [2016] UKUT 541 (AAC) paragraph 8). I shall adopt that terminology for convenience, though it is not a statutory term. In summary, an award of PIP must be founded on disability which has subsisted for three months at the date of the claim.

12. Regulations 12 and 13 of the PIP Regulations also deal with a second, prospective part of the required period condition which looks forward in time for nine months after the date of the determination of the PIP claim. As I have already indicated, the second part is not relevant to regulation 23(1) of the transitional regulations which lays down the conditions in which a person shall be deemed to satisfy the retrospective period only.

*PIP (Transitional Provisions) Regulations 2013*

13. I turn to the transitional regulations which govern the transfer of adult DLA recipients who, under changes to the law which I need not set out here, must transfer from DLA to the newer PIP scheme. In my view, the key point is that the relevant transitional regulations apply to a 'DLA entitled person' which means a person aged 16 or over who is entitled to either or both components of DLA (transitional regulation 2(1)).
14. Under transitional regulation 3(1), the Secretary of State may by written notification invite a DLA entitled person to make a claim for PIP. A DLA entitled person who has been sent such a notification becomes a 'notified person' (transitional regulation 2(1)). A notified person who has claimed PIP in response to the notification becomes a 'transfer claimant' (transitional regulation 2(1)). That is a long way round for saying that a person entitled to DLA who is invited by the Secretary of State to claim PIP is called a transfer claimant. On the facts of this case, the claimant was a transfer claimant.

15. Regulation 23(1) provides:

In applying the required period condition under Part 3 (required period condition) of the PIP Regulations [2013] to a claim by a transfer claimant or by a person to whom paragraph (2) or (3) applies, the claimant shall be regarded as meeting such of the conditions contained in the following provisions of Part 3 (which relate to a claimant's abilities in the past) as are relevant to the claim regardless of whether those conditions have been met—

- (a) in regulation 12 (required period condition: daily living component), paragraph (1)(a) or (2)(a),
- (b) in regulation 13 (required period condition: mobility component), paragraph (1)(a) or (2)(a).

16. In my view, regulation 23 is part of the transitional legal framework that enables the Secretary of State to carry over DLA recipients from the former statutory scheme for DLA to the new statutory scheme for PIP. In *Britnell v Secretary of State for Social Security* [1991] 1 W.L.R. 198 at 202A, the House of Lords observed:

The purpose of a transitional provision being to facilitate the change from one statutory regime to another, it could not properly be regarded as authorising innovation by widening the ambit of the substantive legislation.

17. A transitional provision makes special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force (*Britnell* at 202B-C). It follows that:

One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage (*Britnell* at 202C-D).

### Analysis

18. The claimant submits that regulation 23 applies to his case: the effects of his surgery need not actually have subsisted for the three month retrospective period but should be deemed to have done so. The Secretary of State submits that the deeming provision applies only in respect of disability existing at the time of the DLA award. Given that the surgery and its effects have happened after the award of DLA, they could not have founded the DLA award and do not found any rights or benefits under regulation 23.
19. In my view the Secretary of State is correct. By their nature, transitional provisions govern the change from one statutory scheme to another. The purpose of the transitional regulations for PIP is to deal with existing DLA cases and to carry them across to the new PIP regime. The regulations seek to convert a pre-existing state of affairs to a new regime. They are not designed to deal with new cases or new circumstances: disability which was not in existence under the DLA regime must be decided under the new PIP regime.
20. Given that the transitional regulations seek to convert a pre-existing state of affairs to a new regime, a person cannot be a 'DLA entitled person' under the transitional regulations by reference to disability which did not exist at the date of his or her DLA award. A person's DLA entitlement must be assessed as at the date of the decision on his or her DLA claim in accordance with the legislative provisions governing DLA at the time. Any condition which was absent at the time or irrelevant under those provisions falls outside the scope of DLA entitlement within the transitional provisions.
21. In short, the definition of a DLA entitled person as being a person 'who is entitled to' DLA must refer only to entitlement that founded the DLA decision. Disability

which falls outside the grounds of the award of DLA falls to be excluded from DLA entitlement. It follows that fresh disability cannot contribute to a person's status as a transfer claimant - which depends on notification as a DLA entitled person. In so far as regulation 23(1) applies only to transfer claimants, it does not apply to new medical conditions.

22. Regulation 23(1) tells the Secretary of State how to assess the claims of existing recipients of DLA in relation to the retrospective period. It does not enable a claimant with a new disability to argue that the disability should be treated as three months old even if it is not. If regulation 23 bestowed a benefit in relation to a new condition, it would no longer be converting an existing situation to a new regime but would be innovating and allowing a waiver of the retrospective period that the primary legislation does not permit. That is not the function of transitional provisions, as I have set out above.
23. There are sound policy reasons for permitting the Secretary of State to deem the retrospective period as satisfied only in relation to conditions which founded a person's DLA entitlement. Otherwise, as the First-tier Tribunal Judge observed when refusing permission to appeal, existing DLA claimants would gain an unfair advantage over new PIP claimants. In my view, the regulations could not have intended such unfairness.
24. The claimant's interpretation would also have the undesirable consequence that a person's ability to invoke regulation 23 would depend on the purely administrative process of when the Secretary of State sent the notification. If the Secretary of State had in this case invited the claimant to apply for PIP earlier than 12 November 2015, the deterioration in the claimant's incontinence may not have been on the horizon. It has arisen for consideration in this appeal only because of the proximity of the Secretary of State's invitation and the date of the surgery. That proximity is fortuitous and any advantage bestowed on the claimant would be fortuitous.
25. In addition, the statutory criteria for DLA included a three month retrospective period (sections 72(2) and 73(9) of the Social Security Contributions and Benefits Act 1992). It would therefore be an unnecessary use of resources for the Secretary of State to reassess the retrospective period in relation to medical conditions for which a claimant has already received DLA. It would also impose an additional and unnecessary burden on DLA recipients when transferring to PIP. The same cannot be said about new medical conditions which have never been assessed under the criteria for DLA.
26. Applying this analysis to the present case, the claimant's award of DLA did not flow from his prostate surgery in March 2016 irrespective of the exact date of the surgery. The Secretary of State notified him as a DLA entitled person but the notification was and could not have been given on the basis of the surgery. The surgery played no part in the claimant becoming a DLA entitled person. When the PIP legislation came into force, there was no transition for the claimant to make from DLA to PIP in relation to the surgery but only in relation to other disability. He does not therefore receive the benefit of regulation 23 and this ground of appeal does not succeed.

27. However, I need also to deal with a ground of challenge to the tribunal's decision that is not raised by the claimant but which is raised and conceded by the Secretary of State.

**Regulation 33 of the Universal Credit, PIP, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013**

28. The Secretary of State is right to concede that the tribunal failed to deal with regulation 33 which enables the Secretary of State to make an advance award of PIP. Under regulation 33, a person may qualify for an advance award by scoring points for the three month period after the date on which the Secretary of State's decision was made. The letter of 26 May 2016 relates to a clinic appointment on 9 May 2016. It is plain from the letter that the adverse effects of the March surgery had started by the date of the clinic appointment which was on any view of the chronology less than three months after the date of the decision. The tribunal should therefore have considered whether the claimant scored sufficient points for PIP to have qualified under regulation 33.
29. The tribunal's error of law was material to its decision. The claimant had already scored 6 points for daily living activities. Any additional points for managing toilet needs or incontinence (daily living activity 5) would have brought the claimant to the threshold of 8 points needed for an award of the daily living component. The tribunal would have had to consider whether the claimant met the nine-month prospective period. However, the urology letter confirmed that 'it could take many months until his incontinence settled completely' and there was a 'small chance that it may not do so.' That is the sort of evidence that the tribunal ought to have considered in determining whether the prospective period was met.
30. Therefore, I set aside the tribunal's decision because it is inadequately reasoned and contains inadequate findings of fact in relation to regulation 33. There are other grounds of appeal but, as I am setting aside the tribunal's decision on this ground, I do not need to deal with any other error on a point of law that the tribunal may have made.
31. The Secretary of State has agreed to a rehearing and I agree that a further hearing is required for the new tribunal to make proper findings of fact. It may be asked why I have needed in this decision to consider technical arguments about regulation 23 when I have allowed the appeal on another ground. The reason is that it matters to the claimant. If the claimant were able to succeed under regulation 23, he would be entitled to the daily living component of PIP from the day after the termination of his DLA award which in turn would be 28 days after the determination of the PIP claim (regulation 17(1)-(2) of the transitional regulations). On the other hand, if the claimant succeeds under regulation 33, any entitlement to the daily living component would begin on a day up to three months after the decision on the PIP claim (see regulation 33(1)). It follows that the claimant may have stood to receive more money under regulation 23. My view of regulation 23 is not therefore academic.

32. The fact that this appeal has succeeded on a point of law carries no implication as to the likely outcome of the rehearing, which is entirely a matter for the tribunal to which this case is remitted.

**DIRECTIONS**

33. The tribunal must conduct a complete rehearing 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. While the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to those issues but must consider all aspects of the case, both fact and law, entirely afresh.
34. The tribunal must not take into account any circumstances that were not obtaining at the date of the decision under appeal – see section 12(8)(b) of the Social Security Act 1998. The tribunal may take into account evidence that came into existence after the decision was made and evidence of events after the decision was made, insofar as it is relevant to the circumstances obtaining at the date of decision: R(DLA)2/01 and 3/01.

**(Signed on the original)**

**JUDITH FARBEY QC**  
**Judge of the Upper Tribunal**  
**16 June 2017**