

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

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

The decision of the Leicester First-tier Tribunal dated August 26, 2016 under file reference SC309/16/00871 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated April 13, 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the hearing:

- (1) The appeal should be considered at an oral hearing.
- (2) The new First-tier Tribunal should not involve the tribunal judge previously involved in considering this appeal on August 26, 2016.
- (3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as they were at the date of the missed PIP assessment appointment and no later than the original decision by the Secretary of State under appeal (namely April 13, 2016).
- (4) The Secretary of State should prepare a supplementary response to the appeal which actually engages with the Appellant's grounds of appeal to the First-tier Tribunal; this supplementary response should be sent to the regional tribunal office in Birmingham within one month of the issue of this decision.
- (5) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Birmingham within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the missed PIP assessment appointment and no later than the date of the original decision of the Secretary of State under appeal (see Direction (3) above).
- (6) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary

1. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal involves an error on a point of law. For that reason I set aside the tribunal's decision. I give brief reasons for the benefit of the First-tier Tribunal. The case now needs to be reheard by a new First-tier Tribunal (or "FTT"). I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new FTT will succeed *on the facts*.

The background to this appeal to the Upper Tribunal

2. The Appellant is a gentleman now aged 51 who suffers from epilepsy and obsessive compulsive disorder. He works for the Department for Work and Pensions (DWP) in Job Centre Plus. He was previously in receipt of the lowest rate of the care component of disability living allowance. He was then invited to apply for personal independence payment (PIP).

3. The Appellant was then invited to a PIP assessment. There was a long history of difficulties in arranging such appointments which I need not detail here. In summary the Appellant said he could attend a PIP assessment in his home city in the Midlands but not in other cities in the East or West Midlands. He was asked to attend a PIP assessment in another city and did not attend. As a result his PIP claim was refused on the basis of his non-attendance.

The First-tier Tribunal proceedings

4. The DWP's written response to the appeal was shockingly inadequate. It included the standard case details and a contents list for the appeal bundle. However, the entirety of the substance of the DWP's response as set out at p.D of the appeal bundle comprised these short paragraphs:

"Section 4: Claimant's reasons for appeal

[The Appellant] was invited to attend an assessment on 23/02/2016 (page 111), and did not attend. [The Appellant] can't be considered for PIP unless he provides a good reason for not attending.

As within the Regulations, [the Appellant's] appointment letter was issued to the correct address and more than 6 days prior to the appointment.

There is no indication within his claim pack that [the Appellant] requires additional support.

The specific legislation for this area under dispute is:

The Social Security (Personal Independence Payment) Regulations 2013, regulations 9 and 10

Conclusion

I oppose this appeal and ask the Tribunal to dismiss the appeal and confirm the Secretary of State's decision.

The law for PIP can be found at:

**www.legislation.gov.uk/ukdsi/2013/9780111532072/comcontents and
www.dwp.gov.uk/publications/specialist-guides/law-volumes/"**

5. And that was, in a word, it. There was simply no attempt to engage with the Appellant's reasons for non-attendance.
6. On August 26, 2016 the FTT dismissed the Appellant's appeal. The Tribunal's decision notice declared that the Appellant "did not have a good reason for failing to attend a medical consultation. In accordance with Regulation 9 of the Social Security (PIP) Regulations 2013, he is not entitled to Personal Independence Payment in such circumstances". The Appellant requested a statement of reasons and then appealed to the Upper Tribunal.

The proceedings before the Upper Tribunal

7. I subsequently gave the Appellant permission to appeal, in these terms:

"1. The application to the Upper Tribunal was made late. I extend the time for making the application for permission to appeal and admit the application as it is fair to do so. I must confess, however, my first inclination was to refuse permission to appeal, as the First-tier Tribunal (FTT)'s statement of appeals appears to be comprehensive and detailed. On further consideration, however, I have taken the view it is right to give permission to appeal, essentially for two quite separate reasons.

2. The first reason is – paraphrasing or rephrasing the Appellant's case in legal terms – it may be arguable (despite the comment above) the FTT did not find sufficient facts or give adequate reasons for its decision. Has the FTT indeed done enough to explain why it did not accept the Appellant's explanation? Furthermore, the DWP's reasons for resisting the original appeal were brief in the extreme (see p.D). Should the FTT have adjourned, or considered adjourning, if it was going to review the whole history of the various appointments, as it may not have been apparent to the Appellant that this history was going to be considered as relevant?

3. The second reason is a point not identified by the Appellant. Was the FTT actually properly constituted? According to the FTT office GAPS 2 computer records system, which I have checked, the case was listed for a paper hearing on August 26, 2016 on an "03 list", i.e. before a judge, disability member (DQPM) and medical member. Further, GAPS 2 shows it listed for the morning of August 26, 2016 before [a named Judge, DQPM and medical member]. It was not allocated a time, so was a 'paper hearing'. However, (i) the FTT's decision notice refers to the case being before [the named Judge alone], with no wing members mentioned. This could simply have been an oversight, but the statement of reasons states clearly (at para 3) "I decided....". All that rather suggests that despite the listing instructions the Judge sitting alone dealt with this appeal.

4. Article 2(1) of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835) states that:

"The number of members of the tribunal who are to decide any matter that falls to be decided by the First-tier Tribunal must be determined by the Senior President of Tribunals."

5. In doing so, the Senior President of Tribunals is required to have regard to certain matters, including "the need for members of tribunals to have particular expertise, skills or knowledge" (Article 2(2)(b)).

6. The Senior President has issued a Practice Statement on the *Composition of Tribunals in social security and child support cases in the Social Entitlement Chamber of the Upper Tribunal on or after August 1, 2013*. This states that DLA and PIP appeals “must” be heard by a tribunal comprising “a Tribunal Judge, a Tribunal Member who is a registered medical practitioner and a Tribunal Member who has a disability qualification”. That provision is subject to various exceptions (paras 8-13), but none would appear to apply here. The position would therefore seem to be different to ESA appeals involving a failure to attend a medical examination, which are certainly heard by a Judge sitting alone: *CH v SSWP (ESA)* [2016] UKUT 6 (AAC).

7. So did the Tribunal sit as a one-person Tribunal contrary to the Practice Statement and so the composition Order?”

8. Miss Teresa Tosta, who now acts for the Secretary of State in these proceedings, agrees with both the errors of law identified above. As to the first ground, she notes that the FTT make no reference to the Appellant’s symptoms or the medical evidence provided, focussing instead on the previous history of difficulties with appointments. As to the second ground, she agrees that all the evidence points to the conclusion that the Judge decided the case alone, which is contrary to the Practice Statement.

9. I have to say it is entirely unclear to me as a matter of logic, policy or principle why the Practice Statement stipulates that an appeal against a failure to attend a PIP assessment is heard by a three-person FTT panel as with any other PIP appeal (and as should have happened in this case) whereas a failure to attend an ESA assessment is heard by a Judge sitting alone (as correctly took place in *CH v SSWP (ESA)*).

10. In any event I am satisfied that the FTT erred in law for the two reasons set out above. I therefore allow the appeal, set aside the FTT’s decision and remit (or sent back) the original appeal for re-hearing to a new tribunal. I formally find that the FTT’s decision involves an error of law on the grounds as outlined above.

What happens next: the new First-tier Tribunal

11. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT’s decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant had good cause for not attending the PIP assessment. That is a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact. The new FTT will bear in mind that the decision by the Secretary of State which was appealed against to the FTT was taken on April 13, 2016 and concerned a missed appointment on February 23, 2016.

12. The Secretary of State needs to prepare a fresh response to the Appellant’s appeal which actually engages with his reasons for not attending the medical assessment in question.

Conclusion

13. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Signed on the original
on 10 August 2017**

**Nicholas Wikeley
Judge of the Upper Tribunal**