

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CPIP/973/2017

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 28 October 2016 under number SC947/16/01171 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

- 1. This case is remitted to the First-tier Tribunal for reconsideration.**
- 2. The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**
- 3. The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely. This should include the medical evidence held by the Secretary of State relating to the Appellant's DLA award or an explanation for its non-availability, and an explanation as to how the Secretary of State's practice and policy (paragraph 5 of the Reasons below) was applied in the Appellant's case.**
- 4. The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is the 25 May 2016. Any further evidence, to be relevant, should shed light on the position at that time.**
- 5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion 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

- 1. The Appellant had been in receipt of the middle rate of the care component and the higher rate of the mobility component of DLA. Pursuant to the Personal**

Independence Payment (Transitional Provisions) Regulations 2013, she was invited to claim Personal Independence Payment (PIP) and she made a claim accordingly. She was assessed by a health care professional (HCP) and, on 25 May 2016 she was notified that she was awarded both the daily living and mobility components of PIP at the standard rate. She unsuccessfully appealed against that decision to the First-tier Tribunal (FTT), and appealed to the Upper Tribunal against the decision of the FTT.

2. I gave the Appellant permission to appeal. I noted that the criteria for DLA and PIP are different but that in some cases the basis on which the mobility component of DLA is awarded might indicate an award of PIP at the enhanced rate. The Appellant had disputed the HCP's assessment prepared for her PIP claim, there was no other evidence as to her mobility difficulties but there was no suggestion that the Appellant's condition had improved since the last DLA award. Although not conclusive as to PIP entitlement because it did not address the same issues or the same conditions of entitlement, the evidence relating to the DLA award may have enabled the tribunal to scrutinise the HCP assessment prepared for PIP purposes. I noted the decision in FN v SSWP [2015] UKUT 670 (AAC), [2016] AACR 24 and suggested that in this case it may have been obvious to the FTT that there would have been relevant documentation relating to the award of DLA. Moreover, the factors which the Panel took into account at paragraphs 98 – 111 of FN did not necessarily apply in the present case. I concluded that it was arguable that the First-tier Tribunal should at least have considered whether to request the DLA information from the Secretary of State and, in the circumstances of this case, it may have been an error not to request it.

3. I asked the following questions of the Secretary of State:

- a. Where a claimant's award of DLA is terminated following a determination of PIP entitlement, are the papers relating to the DLA award retained and if so for how long?
- b. Is there a Departmental policy or practice relating to retention/destruction of DLA papers or is it a matter for each office?
- c. If DLA papers are destroyed, when does this occur?
- d. In what circumstances does the DWP disclose papers relating to an award of DLA to the First-tier Tribunal?

4. In his written response the Secretary of State supports the appeal. He has referred to the guidance in AP v SSWP (PIP) [2016] UKUT 0416 (AAC) and submits that in the circumstances of this case the FTT was in error for failing to consider whether there was other evidence which may have assisted or to consider the relevance of the previous DLA award.

5. The Secretary of State has also provided the following answers to my questions:

"a. PIP Reassessment Claimants are asked at outset if they want the DWP to include their DLA medical evidence when considering the PIP claim. Where DLA medical evidence is used, then that evidence will be attached to the claimants PIP file and marked as supporting that PIP decision. This will be kept for at least 2 years if the PIP decision was a disallowance. Or longer if the decision was an award. If there has been no request from the claimant to use their DLA medical evidence for their PIP claim then the old DLA evidence will be destroyed 14

months after the DLA decision has terminated. The PIP retention period is 24 months if the evidence is no longer classified as supporting. Once the DLA evidence has been included as part of the PIP claim it will have the same retention as any other PIP supporting document.

b. There is a departmental policy regarding document and data retention. However, benefits decide what fits their circumstances as documents can be retained for longer/shorter if there is a valid business need e.g. DLA is roughly 14 months for documents but PIP is 24 months due to the potential linking provision of Regulation 15 of the Social Security (Personal Independence Payment) Regulations 2013, but is consistent within each benefit.

c. Please refer to answer a. Normally the DLA File is destroyed 14 months after it ceases to support an existing award. This period starts from 7 months after termination of award. The computer record will keep for 7 months and then close. The paper file will then be destroyed 14 months after that. However if any of that DLA evidence has been considered within the PIP claim then that evidence will support the PIP decision and it will be kept for as long as the PIP decision is current and 2 years after the PIP is no longer current.

d. If the DLA medical evidence has been used to consider the PIP claim then this will be include in the evidence bundle sent to the tribunal.”

6. It is unfortunate that the Secretary of State’s submission does not explain what DLA evidence was or is in fact available in this case, nor how the above practice and policy was, could or would be applied in the Appellant’s case. There is nothing in the bundle to indicate that the Appellant was asked if she wanted the DLA medical evidence to be included. The claim form does not include any such question and, if it was asked in any other document, one would expect it to have been included with the Secretary of State’s response (Rule 24(4) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008). I do not know if the absence of the DLA evidence in the bundle means that she was given the option but did not ask for the evidence to be included, or that she was not given the option, or that the relevant documentation has simply been omitted.

7. I have considered whether to ask for further information from the Secretary of State regarding the above, before determining the appeal. However, I do not need further information from the Secretary of State in order to determine the appeal and I have decided that further delay in these proceedings would be unfair to the Appellant. She has explained that the proceedings are causing her significant stress and distress, and she wants a decision on her appeal as soon as possible. The Secretary of State supports the appeal and requests that the matter is remitted to another FTT for fresh determination. Moreover neither party has requested an oral hearing of the appeal. I am able to determine the appeal on the information and submissions that I have. The questions which I identify at paragraph 6 above can be addressed by way of submission to the next FTT and I have made provision for this in my directions.

8. In the light of the positions of the parties, it is sufficient to explain that I am allowing the appeal for the reasons given by me when I gave permission to appeal and in the Secretary of State’s submissions. For the avoidance of doubt, this does not mean that the FTT was bound to obtain the evidence relating to the previous award of DLA. If it made a reasonable decision, exercising its discretion judicially, not to obtain the evidence, then that would not be challengeable. In this case, however, given the course of these proceedings to date and in order to avoid further

delay, I have directed the Secretary of State to provide the FTT with the medical evidence relating to the DLA award if it is available.

9. Although I appreciate that the Appellant would like a decision as soon as possible, there will need to be a fresh hearing before a new FTT. The FTT is in a better position to assess the medical evidence and make findings of fact relating to the Appellant's difficulties, taking into account further medical evidence if any is provided. I encourage the Appellant to attend the next hearing so that she can explain her difficulties to the tribunal.

10. Finally, the Appellant comments (page 198) that the Secretary of State's submission has included an incorrect date of birth for her and she is confused by the submission. It may assist her to point out that the page she refers to (page 191) is part of an Upper Tribunal decision relating to a different claimant (this is the case of AP to which I refer above) and which the Secretary of State has attached to his submission because it gives useful guidance as to the correct approach in this case.

**Signed on the original
on 17 October 2017**

**Kate Markus QC
Judge of the Upper Tribunal**