IN THE UPPER TRIBUNAL **Case No.** CPIP/2418/2016
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 remit the case for hearing before a differently constituted tribunal.

REASONS FOR DECISION

1. The claimant is a man now aged 58 who worked as a kitchen porter until he became incapable of work about sixteen years ago. He has depression, and in 2010 he was diagnosed as having piriformis syndrome, which is a condition in which the piriformis muscle goes into spasm, often leading to pain, numbness and tingling of the back of the leg and foot as a result of irritation of the sciatic nerve. The symptoms of the condition can be relieved very effectively by cortisone injections, but the effects of the injections generally wear off gradually after a few months.

2. On 25 June the claimant was awarded the standard rate of personal independence payment (PIP) for a period from 31 October 2013 to 26 May 2018, but he was assessed as scoring only 4 points for mobility descriptors, so that his claim for the mobility component was refused. On 11 May 2015 he notified the DWP by telephone that his condition had deteriorated, and on 29 June he completed a new claim form, accompanied by evidence supporting his claim for an award of the mobility component. The claimant attended a face-to-face consultation on 30 July 2015. On the basis of the healthcare professional's report a decision was made on 11 September that the claimant was entitled to his existing award of PIP, but not to either rate of the mobility component. For some reason the period of the existing award was changed from 6 April 2015 to 29 July 2019. The decision of 11 September was maintained on reconsideration, and the claimant appealed against it on 29 December 2015.

3. At the hearing of the appeal on 28 April 2016, at which the claimant was represented, he stated that when he contacted the DWP in May 2015 his condition had deteriorated. His painkillers were affecting his stomach and he was between cortisone injections. He used to be able to telephone the hospital and arrange an injection every six months, but the system had changed after January 2015 and his GP now had to refer him to the hospital on each occasion. As a result, he did not receive his next injection until December 2015.

4. The tribunal upheld the decision under appeal. It held:

> "In deciding the appeal, we have had regard to the factors which are prescribed by regulation 4(2A) of the [PIP] Regulations. We have also had regard to regulation 7 and in particular the definition of 'required period' in paragraph (3). If [the claimant] is to be awarded any rate of the mobility component of PIP with effect from11th May 2015 (the date when he applied for supersession of the decision of 25th June 2014), descriptors which carry

> the requisite number of points have to be satisfied on over 50% of the days of a period running for twelve months from 11th February 2015."

The tribunal referred to evidence that the claimant undertook journeys by foot of between half and one mile or more and, although accepting that he could not have undertaken so strenuous a walk on the majority of days, concluded that "the fact that he was able to undertake it regularly, even when his cortisone injection was overdue, suggests that he could have walked 50 metres much more often.". The tribunal also held that it did not follow from the length of time taken by the claimant to make such journeys that he would be walking at so slow a pace if he had to cover only between 50 and 200 metres, or that he could not walk more than 50 metres repeatedly.

5. The tribunal dealt with the issue of the 'required period' (i.e. the period three months before and nine months after the 'prescribed date') as follows:

> "[The claimant] described the effect of the injection which he had eventually received in December 2015 as "like winning the lottery". This was after the date of the decision under appeal. However, it was always probable that he would at some point during the required period receive an injection which would improve his walking ability at some time for some time. For that matter, when that period began in February 2015, he was still receiving some benefit from the injection which he had in January. Around 6 months before the date of the hearing, he was transferred from the ESA work-related activity group into the support group. We do not know whether this was on the basis of difficulty in mobilising, although this is the most probable reason, but that decision was made at a time when the injection was badly overdue. ESA decisions do not have to take account of a twelve-month required period."

The tribunal reached the following conclusions:

> "Taking all these factors together, whilst we accept that there will have been days when he could not stand and then walk for more than 50 metres (there may have been days when he could not even exceed 20 metres), we find that for the majority of days in the required period he could stand and then move for more than 50 metres but no more than 200 metres and that he could do so safely, to an acceptable standard, in no more than twice the period taken by a person without a limiting condition and as often as the activity was reasonably required to be completed. We conclude that he has been scored correctly for this activity and is not entitled to any rate of the mobility component."

6. In their grounds of appeal against the tribunal's decision, the claimant's representatives specifically accepted that the tribunal had correctly identified the 'relevant period', but submitted that the tribunal erred in law in taking into account the possible beneficial effects of future cortisone injections. On the basis of the amount of time during which the claimant was struggling to walk at all or was actually bedridden, the representatives submitted that the tribunal applied the wrong mobility descriptor.

7. Judge Levenson gave permission to appeal on 19 August 2016, but in a written submission dated 12 October 2016 the Secretary of State opposed the appeal. The Secretary of State submitted that the tribunal's findings were supported by the evidence and in fact related to a period when the claimant was receiving the least benefit from his cortisone injections. Judge Levenson accepted the Secretary of State's submission and dismissed the appeal in a decision dated 17 January 2017.

8. Unfortunately, the claimant's representatives did not receive the Secretary of State's submission and were therefore unable to reply. The representatives applied to set aside Judge Levenson's decision under rule 43 of the Upper Tribunal Rules of Procedure, and he granted that application on 2 June 2017.

9. When the appeal was referred to me for determination, I drew attention to regulation 14(b) of the Social Security (Personal Independence Payment) Regulations 2013. Regulation 14 provides:

> "14. Except where paragraph (2) or (3) of regulation 15 applies, the prescribed date is–
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> (a) where C has made a claim for personal independence payment which has not been determined, the date of that claim or, if later, the earliest date in relation to which, if C had been assessed in relation to C's ability to carry out daily living activities or, as the case may be, mobility activities, at every time in the previous 3 months, it is likely that the Secretary of State would have determined at that time that C had limited ability or, as the case may be, severely limited ability to carry out those activities; and
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> (b) where C has an award of either or both components, each day of that award."

Because that regulation had not been previously considered in this case, I directed the Secretary of State to make a further submission on the following issues:

> a. Since the claimant was already in receipt of PIP, should the tribunal have determined the 'relevant date' in accordance with regulation 14 (b) of the Social Security (Personal Independence Payment) Regulations 2013? Does that provision mean that the claimant would have to show that he would satisfy the conditions of entitlement to the mobility component of PIP for a period of 9 months after the expiry of his award i.e. until 26 January 2019? If so, how is that provision to be applied in the case of an indefinite award?
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> b. How should regulation 7(1) be applied in a case governed by regulation 14(b)?
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> c. In applying regulation 14(b), what account should be taken of future medical or surgical treatment which can be expected to lead to a significant improvement in the claimant's condition? Would it disentitle a claimant to an award even if the treatment was not expected to take place until more than 9 months after the date of the decision under appeal?

10. By virtue of sections 78(1)(b) and 79(1)(b) of the Welfare Reform Act 2012, a claimant for either the daily living or the mobility component of PIP must satisfy the 'required period' condition in order to qualify for an award of either component. Section 80(2) provides that regulations must make provision for determining whether a person meets the condition. Section 81 provides:

> "(1) Regulations under section 80(2) must provide for the question of whether a person meets "the required period condition" for the purposes of section 78(1) or (2) or 79(1) or (2) to be determined by reference to--
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> (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
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> (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."
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> (2) In subsection (1) "the relevant ability" means—
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> (a) in relation to section 78(1) or (2), the person's ability to carry out daily living activities;
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> (b) in relation to section 79(1) or (2), the person's ability to carry out mobility activities.
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> (3) In subsection (1)—
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> (a) "assessed" means assessed in accordance with regulations under section 80;
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> (b) "the previous 3 months" means the 3 months ending with the prescribed date;
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> (c) "the next 9 months" means the 9 months beginning with the day after that date.
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> (4) Regulations under section 80(2) may provide that in prescribed cases the question of whether a person meets "the required period condition" for the purposes of section 78(1) or (2) or 79(1) or (2)—
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> (a) is not to be determined in accordance with the provision made by virtue of subsections (1) to (3) above;

(b) Is to be determined in accordance with provision made in relation to those cases by the regulations."

The relevant regulations are in Part 3 of the Social Security (Personal Independence Payment) Regulations 2013. Regulations 12 and 13 provide:

"12.—(1) C meets the required period condition for the purposes of section 78(1) of the Act (daily living component at standard rate) where —

(a) if C had been assessed at every time in the period of 3 months ending with the prescribed date, it is likely that the Secretary of State would have determined at that time that C had limited ability to carry out daily living activities; and

(b) if C were to be assessed at every time in the period of 9 months beginning with the day after the prescribed date, it is likely that the Secretary of State would determine at that time that C had limited ability to carry out daily living activities.

(2) C meets the required period condition for the purposes of section 78(2) of the Act (daily living component at enhanced rate) where —

(a) if C had been assessed at every time in the period of 3 months ending with the prescribed date, it is likely that the Secretary of State would have determined at that time that C had severely limited ability to carry out daily living activities; and

(b) if C were to be assessed at every time in the period of 9 months beginning with the day after the prescribed date, it is likely that the Secretary of State would determine at that time that C had severely limited ability to carry out daily living activities.

13.—(1) C meets the required period condition for the purposes of section 79(1) of the Act (mobility component at standard rate) where —

(a) if C had been assessed at every time in the period of 3 months ending with the prescribed date, it is likely that the Secretary of State would have determined at that time that C had limited ability to carry out mobility activities; and

(b) if C were to be assessed at every time in the period of 9 months beginning with the day after the prescribed date, it is likely that the Secretary of State would determine at that time that C had limited ability to carry out mobility activities.

(2) C meets the required period condition for the purposes of section 79(2) of the Act (mobility component at enhanced rate) where —

(a) if C had been assessed at every time in the period of 3 months ending with the prescribed date, it is likely that the Secretary of State would have determined at that time that C had severely limited ability to carry out mobility activities; and

(b) if C were to be assessed at every time in the period of 9 months beginning with the day after the prescribed date, it is likely that the Secretary of State would determine at that time that C had severely limited ability to carry out mobility activities.

10. In a very helpful further written submission dated 18 August 2017, the Secretary of State's representative has referred to *DO v SSW P (PIP)* [2017] UKUT 0115, in which Judge Mitchell considered the relationship between the 'required' period' condition of entitlement to PIP in sections 80 and 81 of the Welfare Reform Act 2012 and Part 3 of the Social Security (Personal Independence Payment) Regulations 2013, and regulation 7 of the PIP 2013 Regulations, which requires a descriptor to be satisfied on more than 50% of the days of the 'required period' in order for the descriptor to apply. Judge Mitchell held:

"46. Interpreting the required period condition provisions is not straightforward. They operate by reference to the Part 2 assessment rules but without taking account of the descriptor scoring rules, in particular the 50% rule in regulation 7. These rules determine whether a person is assessed as having limited or severely limited ability to perform daily living or mobility activities.

47. If the required period condition is satisfied simply because descriptors totalling at least eight points are satisfied for more than 50% of the required period, in accordance with regulation 7, what is the point of the required period condition? A claimant would be entitled if he scored at least 8 points for over one and a half months of the historical part of the required period and over four and a half months of the prospective period. The required period condition would make no difference to the outcome of a claim.

48. It cannot be right that applying the required period condition at "every time" during the 12 month window of analysis (that is asking whether the PIP assessment rules would result in a finding of limited or severely limited ability) involves determining whether, by reference to every time during those 12 months, the three month historical and nine month prospective criteria were met. This would have the effect of elongating the required period. For example, if a decision maker is considering the position in month eight of the prospective period, this would extend the required period condition for a further nine months. This cannot have been intended because it would conflict with the spirit of section 81 of the 2012 Act.

49. However, the legislative language is apt to confuse. Applying the required period condition requires a notional Part 2 assessment to be carried out "at every time" during the 12 month window of analysis but the required period conditions provisions do not expressly recognise that such an assessment

has a fixed reference point, namely the prescribed date. Conceptually, this is challenging. How does a decision maker determine "at every time during the 12 months that a finding of limited or severely limited would be made when that finding – since it involves applying the Part 2 assessment rules – can only be made from the standpoint of the prescribed date?

50. A further question, and the key question on this appeal, is whether the required period condition is satisfied simply because the PIP assessment rules in Part 2 of the Regulations result in a determination that sufficient points are scored over the required period (that is on over 50% of the days of the required period). That is one possible reading of the provisions since the required period condition involves applying the Part 2 assessment rules. However, I am persuaded by the Secretary of State that this does not reflect the legislation intention and is not the legal meaning of the required period condition.

51. If a positive Part 2 finding of limited or severely limited ability resulted in automatic satisfaction of the required period condition, the required period condition provisions would add nothing. The intention must have been for them to add something since the 2012 Act clearly enacts two broad entitlement conditions. One is a determination of limited or severely limited ability. The other is the required period condition. The Act did not envisage that satisfaction of the first broad entitlement condition would necessarily result in satisfaction of the other.

52. …

53. …

54. I decide that the required period condition provisions are to be applied without taking account of the 50% scoring rule in regulation 7 of the PIP Regulations. Otherwise, they would not make any difference to the outcome of a claim. Leaving regulation 7 out of account also makes sense of the requirement to carry out a notional assessment "at every time" during the 12 month window of analysis. Throughout this period, I decide that the individual must fairly be said to have had, or to be likely to have, limited or severely limited ability to carry out daily living or mobility activities, as assessed in accordance with the PIP assessment rules in Part 2 of the Regulations apart from the 50% rule in regulation 7.

55. This approach must be applied sensibly in the case of conditions with fluctuating symptoms. The legislative intention, which in fact finds expression in regulation 7, is that individuals with such conditions should not be denied entitlement if their symptoms are severe enough to result in limited or severely limited ability most of the time. The question to be asked, in applying the required period condition "at every time" in the 12 months, is whether it can fairly be said that the individual's physical or mental condition would, at the time of the analysis, generate symptoms that would most of the time result

> in limited or severely limited ability to carry out the prescribed daily living or mobility activities.
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> 56. If, however, the individual's health or disability is likely to alter during the nine months following the prescribed date, so that his or her physical or mental condition would no longer generate symptoms resulting in limited or severely limited ability, the required period condition would not be met. The individual would not be entitled to PIP."

11. As is clear from paragraph 48 of *DO*, section 81 of the 2013 Act can only be sensibly applied if the assessment provisions of the 2013 PIP Regulations are applied to a given twelve month period of three months before and nine months after the 'prescribed date', determined in accordance with regulation 14 of the Regulations. As Judge Mitchell pointed out, the effect of asking whether a claimant meets the required period condition at every time during a twelve month period would have the effect of elongating the period (and so, by an iterative process, of extending it infinitely). In determining whether the 'required period' condition of entitlement is satisfied, the assessment provisions of Part 2 of the 2013 Regulations must be applied during the 'required period', but not the 'required period' provisions themselves.

12. In the case of a new claim, regulation 14(a) of the 2013 PIP Regulations permits a date after the date of claim to be taken as the 'prescribed date' if a claimant has not satisfied the assessment requirements for three months at the date of claim, but has done so throughout a three month period at the date when the claim is determined. Regulation 14(b) applies to a claim for the supersession of an existing award, and provides that the prescribed date is "each day of that award" (i.e. the award being superseded). If that provision is read literally, the 'qualifying period' for a claimant who already has an award of PIP would be determined by the length of the existing award, and each day of that period would be the 'prescribed date'.

13. I agree with the Secretary of State's representative that such a construction of regulation 14(b) of the PIP Regulations cannot have been intended. Section 80(3) of the 2012 Act makes specific provision for cases to be prescribed which are not subject to the 'qualifying period' condition of entitlement, and regulation 15 of the 2013 PIP Regulations exempts certain claimants with intermittent conditions from having to satisfy the assessment conditions of entitlement for any period prior to the date of claim. There is no indication in section 81 of the 2012 Act that a qualifying period of other than 12 months is to apply in any cases other than those specifically provided for under section 80(3). As Judge Mitchell pointed out in *DO*, the qualifying period would be elongated if section 81(1)(b) of the 2012 Act were read as requiring the 'required period' condition itself to be satisfied during that period, and the same result would ensue if regulation 14(b) required every day of any existing award of PIP to be treated as the 'prescribed date'. Section 81 of the 2012 Act and the provisions in Part 3 of the 2013 PIP Regulations can in my view only be sensibly and meaningfully applied if the 'prescribed date' is taken to be a single date for any claim (whether or not the date is actually determined), and not every day in the period of an existing award.

14. I therefore accept the Secretary of State's submission that regulation 14(b) of the 2013 Regulations must be read as allowing *any* day within the period of an existing award to be taken as the 'prescribed date' in order to decide whether the requirements of sections 81(a) and (b) of the 2012 Act are satisfied, although a tribunal applying the provision will be prevented by section 12(8)(b) of the Social Security Act 1998 from taking into account any circumstances not obtaining at the time when the decision under appeal was made, and the effective date of any supersession decision will be governed by the provisions of regulation 35 of and Schedule 1 to the Universal Credit etc. (Decisions and Appeals) Regulations 2013. So read, regulation 14(b) of the 2013 PIP Regulations allows greater flexibility in fixing the 'relevant date' in the case of a supersession application than in the case of a new claim, because the date chosen can be a date when the claimant satisfies not only the requirements of section 81(1)(a) of the 2012 Act, but also the requirements of section 81(1)(b).

15. Both the decision-maker in this case and the tribunal took as the prescribed date in this case the date when the claimant telephoned to report a deterioration in his condition, which was treated as a supersession application. That was a date which was permitted by regulation 14(b) of the 2013 PIP Regulations. The tribunal was not asked to exercise the power conferred by the regulation to take some other date within the period of the existing award as the prescribed date, so that in my judgment the question of whether that power should be invoked was not an issue raised by the appeal-see section 12(8)(a) of the Social Security Act 1998. I have therefore concluded that the tribunal did not make any error of law with regard to the 'prescribed date' of the supersession application.

16. Since all the issues in the appeal are at large before me, it is necessary to deal with the other grounds of appeal. I have had the benefit of reading the claimant's representatives' submission of 11 October 2017 replying to the Secretary of State's original submission of 12 October 2016 opposing the appeal. While I agree with the Secretary of State's submission that the tribunal did not err by taking into account the effects of future medical treatment, I have been persuaded by the latest submission on behalf of the claimant that the tribunal did err in deciding that mobility descriptor 2(b), rather than 2(c), applied to the claimant during the relevant period.

17. The supersession application dated 29 June 2015 asserted that for 9 of the previous 12 months the claimant's pain was so great that he was unable to walk more than 20 metres for the majority of the time and that, in addition, for 7 to 10 days each month he had flare ups which incapacitated him completely. The tribunal referred to the evidence of the health care professional that the spasms in the claimant's back were so bad that he was bedridden for varying periods, averaging seven days per month, but directed themselves (paragraph 9 of the statement of reasons) that they had to consider his walking ability on days when he was not bedridden. I can see no reason why limitations in the claimant's walking ability when his pain was so severe that he was confined to bed should not have been taken into account when determining which mobility descriptor applied to the claimant for the majority of the time. Accordingly, I consider that the tribunal erred in law in excluding such periods from their consideration.

18. The tribunal relied on the evidence of the walking which the claimant was able to undertake on good days and the observations of the claimant walking by the healthcare professional to support their conclusion that on the majority of days the claimant could stand and then move between 50 and 200 metres. However, there is no indication in the statement of reasons that the tribunal specifically considered limitations in the claimant's walking ability at those times when he was most incapacitated, even though not actually bedridden. The healthcare professional recorded the claimant as stating that for about 34 days of the previous 90 day period the claimant had been struggling at home, using an ironing board on which to put food so as to avoid sitting down. The claimant's walking ability on 'good' days was clearly relevant , but the limitations in the claimant's walking ability at times when he was most badly affected by muscular spasms clearly also had to be taken into account in deciding which mobility descriptor applied to the claimant for the majority of the time. The conclusion which I have reached is that the tribunal did not deal adequately with the limitations in the claimant's walking ability on days when he was most severely incapacitated when determining which mobility descriptor applied to him for the majority of the time.

18. For those reasons, I consider that the tribunal's decision involved the making of an error on a point of law and give the decision set out above.

E A L BANO
12 December 2017