UPPER TRIBUNAL CASE NO: CPIP/1055/2018

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 16 January 2018 at Teesside under reference SC225/14/00468) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration 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.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 15 November 2013 and refused on 24 June 2014.

D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

A. The claim

1. The claimant made a claim for a personal independence payment on 15 November 2013. The Secretary of State refused the claim on 24 June 2014. The claimant had scored two points for needing an aid to manage her toilet needs, but that was not sufficient to allow an award.

B. The first hearing before the First-tier Tribunal

2. On 1 October 2015, the First-tier Tribunal added one point for needing supervision or assistance with managing her medication. That additional point was insufficient to allow an award, so the tribunal confirmed the Secretary of State's decision. Upper Tribunal Judge Turnbull gave the claimant permission to appeal to the Upper Tribunal. I set the First-tier Tribunal's decision aside under reference *CPIP/0156/2016* on the ground that, with the benefit of hindsight, the tribunal had not dealt with the mobility component in accordance with the decision of the three-judge panel in *MH v Secretary of State for Work and Pensions* [2016] UKUT 531 (AAC).

C. The second hearing before the First-tier Tribunal

3. The claimant's appeal was reheard by the First-tier Tribunal on 16 January 2018, when the tribunal came to the same conclusion as the 2015 tribunal. The claimant's representative applied to that tribunal for permission to appeal to the Upper Tribunal. In summary, her grounds for appeal were:

- The tribunal had not shown whether it considered Activity 3(c), which arose in view of the claimant's history of self-harm.
- The tribunal failed to mention the evidence from the documentation relating to an employment and support allowance appeal.
- The tribunal had not dealt with the claimant's ability to plan and follow a journey.

D. The First-tier Tribunal's refusal of permission to appeal

4. Tribunal Judge Moss refused permission. These are his reasons:

> The tribunal has provided sufficient reasons to explain why [it] came to the conclusions it did.
>
> Entitlement to personal independence payment is based upon somebody meeting the PIP criteria. An assessment is carried out in accordance with the PIP descriptors. Entitlement to ESA is based upon the ESA criteria. An assessment is carried out in accordance with the ESA descriptors. They are not the same. They are differently worded. There is a fundamental difference between the two. The point was reaffirmed in the case of *LS v SSWP (PIP)* [2016] UKUT 573 (AAC).
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> "It appears to me that a FTT has to assess whether the claimant meets any of the criteria set out in the different descriptors under Activity 9 and that they did not have to consider the criteria under the ESA descriptors of coping with social engagement which are differently worded to the PIP ones." Para 25.
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> There is no legal reason why this principle should not apply to all the PIP criteria.
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> The application for permission to appeal is based upon the ESA criteria. This is a fundamental error of law. The decision concerns entitlement to PIP based on the PIP criteria and not the ESA criteria or law.
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> Parliament has created two completely separate assessment criteria. That is a matter for Parliament. It is not a matter for the courts to undermine that.
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> Further, although the ESA decision may be legally binding any facts or evidence upon which it was based do not and cannot bind the tribunal. The tribunal is legally obliged to consider the evidence to make its own findings of fact. It is perfectly entitled to come to conclusions which are fundamentally inconsistent with those found by the Secretary of State to award ESA. As appears to be the case here.

> It is perfectly clear from the statement of reasons the tribunal has reached a fundamentally different view of the appellant's limitations. There is clearly a conflict between the approach taken by the Secretary of State on ESA and PIP. By requiring the tribunal to consider ESA evidence on a PIP appeal (and vice versa) it puts at risk that award.
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> Evidence used to award an award is not superior to or more credible [than] evidence used to refused it.
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> If the ESA evidence has any relevance to the PIP criteria then equally the PIP evidence would have relevance to making or continuing with the ESA award.
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> The tribunal quire correctly made its decision upon PIP criteria.
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> Consequently permission to appeal is refused.

Judge Moss had not presided at the hearing of the appeal. His comments were not, and were not presented as, the tribunal's reasons; there is nothing to suggest that the tribunal agreed with them. I will, though, deal with them in order to prevent his reasoning taking hold among the judges of the First-tier Tribunal.

E. The appeal in the Upper Tribunal

5. The Secretary of State's representative has supported the appeal on the ground that the tribunal did not explain what it made of the evidence relating to the claimant's entitlement to an employment and support allowance. I accept that argument.

6. The claimant's representative had provided a decision notice from a First-tier Tribunal sitting on 5 November 2013, allowing an appeal against an employment and support allowance decision made on 14 September 2012. The tribunal had found that the claimant had limited capability for work on the basis of Activities 15c (unable to get a an unfamiliar place alone), 16c (cannot engage socially for the majority of the time) and 17c (occasional uncontrollable episodes of aggressive or disinhibited behaviour). As usual with a decision notice, it did not contain any detailed findings of fact or reasons.

7. The representative had also provided a healthcare professional's employment and support allowance report from 19 August 2016. It contained a record of what the claimant had told the nurse, together with the nurse's clinical findings and observations. The nurse's opinion was that the claimant had limited capacity for both work and work-related activity.

8. This evidence was supported by a submission from the representative that cited what Upper Tribunal Judge Hemingway said in *LC v Secretary of State for Work and Pensions* [2015] UKUT 32 (AAC). That was a disability living allowance case; another tribunal had heard an employment and support allowance appeal and its decision had been put in evidence. The decisions under appeal had both been made on the same day. This is the judge's analysis:

> 32. Mr Whitaker [the Secretary of State's representative], in his submission to the Upper Tribunal, acknowledges that 'The ESA decision

certainly points towards conditions which could give rise to an award of the lower rate mobility component, and would also indicate that perhaps the ESA report was to be treated with some caution'. However, he goes on to argue that the F-tT did not err in law because this was a situation of two separate tribunals conducting two separate hearings with different evidence presented to them. He says the fact that two tribunals came to very different conclusions does not mean that either has erred in any way.

33. I have given careful consideration to Mr Whitaker's careful submission. Certainly I would accept that the F-tT hearing the disability living allowance appeal was not bound in any way by the decision of the ESA tribunal. I accept that entitlement to different benefits based on different statutory tests was in issue. I accept that there was no obligation upon the F-tT to follow any of the ESA tribunal's reasoning and, indeed, there was very little evidence contained within the decision notice about what the ESA tribunal's reasoning was. In this context it is perhaps unlikely that the ESA tribunal produced a statement of reasons for decision unless that was requested by the respondent and there is no indication that it was. Even if it had been then, of course, it would not have been produced within sufficient time for it to have been available to this F-tT.

34. Having said all of the above, the decision notice issued by the ESA tribunal was, at the least, an indication that that tribunal had found, after consideration of the appeal and whatever evidence was before it, that the appellant was, as at the same date this F-tT was concerned with, unable to get to a specified place with which she is familiar without being accompanied. Whilst it does not necessarily follow that such a conclusion would lead to satisfaction of the statutory test for lower rate mobility I would take the view that it certainly suggests it might be. There is, it seems to me, a considerable interrelationship between the two statutory tests. So, potentially, the award made by the ESA tribunal was a matter of some significance. It merited the paying of some attention to it by the F-tT. Had the F-tT not effectively overlooked the award, which is what it appears to have done given the absence of any mention of it at all, it might have (I do not say it would have) taken a different view regarding her credibility. It might have asked her some questions about the ESA tribunal's decision and, in particular, whether she had attended an oral hearing and had given oral evidence to that tribunal. It might have enquired as to whether there was some documentary evidence before the ESA tribunal which was not before it. It might have considered adjourning in order to ascertain what documentary evidence had been before the ESA tribunal in case it impacted upon the issues it had to decide with respect to lower rate mobility. It might have been more cautious about rejecting the entirety of the claims made by the appellant given the knowledge that the ESA tribunal had resolved at least some matters of significance, in the context of that particular benefit, in her favour.

35. In light of all the above and, in particular, in light of the relationship between the sorts of factors that might give entitlement to lower rate

> mobility and the sorts of factors that might give entitlement to 9 points under descriptor 15(b) I conclude that the F-tT was obliged to consider the decision of the ESA tribunal as recorded in the decision notice and address it in some way. It would have been open to it to have gone on to make the decision it did make so long as it properly took that decision into account. However, it did not appear to take it into account at all. That does, to my mind, constitute an error of law. This is because the F-tT has failed to consider a relevant matter. I cannot say that the error is immaterial in the sense that the F-tT would inevitably have reached the same conclusion had it taken account of the ESA tribunal's decision. It might have adjusted its approach in the various ways I have suggested above and that might, though I do not by any means say it would, have led to a different outcome. In light of the above, therefore, I conclude that the F-tT's decision although in many respects an admirably straightforward one, must be set aside.

9. For completeness, this is what Judge Green wrote in *LS v Secretary of State for Work and Pensions* [2016] UKUT 573 (AAC), the personal independence payment case which Judge Moss cited:

> 25. … It appears to me that a FTT has to assess whether the claimant meets any of the criteria set out in the different descriptors under Activity 9 and that they did not have to consider the criteria under the ESA descriptors of coping with social engagement which are differently worded to the PIP ones.

That remark was made in rebuttal of an argument that the interpretation of some of the personal independence payment descriptors should be aligned with that of similar employment and support allowance descriptors. So the issue was the proper interpretation of the legislation and the use of language from employment and support allowance in support of an argument for a particular reading of the personal independence payment language.

10. It is important to distinguish (a) precedent, (b) evidence, (c) argument, (d) the proper role of the First-tier Tribunal, and (e) the tribunal's written reasons. Unfortunately, Judge Moss has rather muddled those aspects of decision-making. I will take them in turn.

11. I begin with *precedent*. Personal independence payment and employment and support allowance are separate benefits with different conditions of entitlement. There is no question of decisions on one benefit binding a First-tier Tribunal in respect of the other benefit. Nor is there is any question of findings of fact on one benefit binding a First-tier Tribunal in respect of the other benefit, even if the evidence is identical. But that does not mean that *evidence* given in respect of one benefit may not be relevant to another. The fact that the benefits are separate and the conditions of entitlement different does not permit a tribunal to refuse to consider evidence that has been gathered in the context of the other benefit. Nor is there anything to prevent a claimant or representative presenting an *argument* on one benefit based on an analysis of an award of the other, as Judge Hemingway explained. If they do, the tribunal cannot simply ignore the argument; it has to assess it for what it is worth. The *proper role for*

tribunals is to assess the evidence presented to them and analyse the arguments that are based on that evidence. There is no short cut to performing those tasks properly.

12. I come now to the tribunal's *written reasons*. The employment and support allowance evidence was but part of the evidence before the tribunal. The bundle before the First-tier Tribunal ran to 417 pages. Not all of the documents were evidence, but they contained a considerable amount of evidence from a variety of sources. The tribunal had to assess the evidence as a whole. Having done so, the tribunal does not have to refer to every piece of evidence. There was, as I have said, a lot of evidence in the papers and the tribunal did not have to show how it dealt with each and every thing that was said in that evidence that might be potentially relevant. It is a matter of judgment how much of that evidence needs to be covered in the First-tier Tribunal's reasons and no doubt the judges who write those reasons resent the Upper Tribunal second guessing them on what should be included. But it is safe to say this: the tribunal should deal with evidence if the claimant or a representative has specifically relied on it, especially when (as here) the representative had relied on and adopted the carefully expressed approach of Judge Hemingway. For that reason, I accept the Secretary of State's support for the appeal.

13. There is another aspect to the employment and support allowance evidence. The tribunal's reasons refer repeatedly to the claimant's oral evidence of what she was and was not able to do; they also rely on the results of the physical and mental examinations undertaken by the health professional. Relying on the claimant's evidence of her current abilities was potentially dangerous given that the hearing was taking place more than four years after the date of claim. If nothing else, the employment and support allowance evidence suggested that the claimant's condition, in so far as it was relevant to that benefit, had varied over time, suggesting that the tribunal should have been alert to the possibility that the claimant's current abilities and disabilities might not be the same as at the time of her claim. No doubt, the tribunal warned the claimant in its introduction that it was concerned with that time and, even if it did not, she had the benefit of an experienced representative to advise her. But it is still easy to slip into the present and the tribunal needed to show that the evidence it relied on did relate to the time of the claim.

14. I do not need to deal with any other error in point of law that the tribunal may have made. Any that were made will be subsumed by the rehearing.

15. For completeness, I need to deal with Judge Green's remark. She was not dealing with any of the matters I set out in paragraph 10. She was dealing with the different matter of legal interpretation, which does not arise here.

Signed on original
on 28 June 2018

Edward Jacobs
Upper Tribunal Judge