IN THE UPPER TRIBUNAL **Appeal No. CSE/66/2018**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge A I Poole QC

The decision of the Upper Tribunal **is to refuse the appeal**. The decision of the First-tier Tribunal made on 13 November 2017 under number SC101/17/01470 was not made in error of law.

REASONS FOR DECISION

Background

1. This appeal is brought against a decision of the First-tier Tribunal ("**the tribunal**") which upheld a decision of the Secretary of State for Work and Pensions ("**SSWP**") that the appellant (the "**claimant**") did not qualify for employment and support allowance ("**ESA**").
2. The claimant had been entitled to income support and incapacity benefit ("**IB**") credits since 15 November 2002. As part of a conversion process, the claimant completed a claim form for ESA, and attended for a medical examination on 10 April 2017. On 10 May 2017 the SSWP decided that the claimant did not have limited capability for work, on the basis that she scored 0 points under Schedule 2 to the Employment and Support Allowance Regulations 2008 (the "**ESA Regulations**") and did not otherwise qualify. The SSWP therefore decided that her existing awards did not qualify for conversion to ESA.
3. The claimant appealed to the tribunal against the SSWP's decision. On 13 November 2017, the tribunal refused the appeal and confirmed the SSWP's decision. Although the tribunal differed from the SSWP, in that it found the claimant entitled to 9 points under activity 1 in Schedule 2 to the ESA Regulations, the tribunal nevertheless found that the claimant did not score sufficient points for an award of ESA, and that Regulation 29 did not apply. The claimant did not therefore qualify for ESA.
4. The claimant appealed to the Upper Tribunal. Permission to appeal was granted by the tribunal judge on the basis that it was arguable there was an error of law in relation to the claimant's personal independence payment ("**PIP**"). The PIP award was not mentioned directly in the tribunal's statement of reasons, nor was any consideration of adjournment to obtain further evidence used to make the PIP award. It is not in dispute that in the bundle of papers before the tribunal there was a letter dated 3 July 2017 from the SSWP which confirmed that the claimant was entitled to both components of PIP at the enhanced rate. The letter set out the points scored in relation to each PIP daily living and mobility activity. The papers before the tribunal did not include the evidence upon which the PIP award was based.
5. The SSWP does not support the appeal. In a written submission, she argues that if there was any error in law in not addressing the PIP award, it was not material. First, the tribunal made clear findings adverse to the claimant's credibility. More evidence from the PIP award would have made no difference to the decision, as

the tribunal would more than likely have taken the same view irrespective of the evidence from the PIP award. Second, the tribunal's decision was based on a submission on the claimant's behalf that she could walk between 50m and 100m, and its own observations that she could walk 50m at a normal pace. In these circumstances, the PIP papers were of no relevance to the decision and there was no material error of law in the tribunal not addressing them.

6. Neither party has requested an oral hearing. I am satisfied that I can fairly determine this appeal on consideration of the papers.

Discussion

7. I consider that the grounds of appeal and submission for the SSWP raise 4 issues:
   7.1 Did the tribunal act in error of law by failing to adjourn or to record its reasons for not adjourning?
   7.2 Did the tribunal act in error of law in determining the ESA appeal without having before it the evidence upon which the claimant's PIP award was based?
   7.3 Did the tribunal act in error of law in failing directly to address the claimant's PIP award in its statement of reasons?
   7.4 If there was any error of law by the tribunal, was it material?

   I address these issues in turn below.

Adjournment

8. In *AG v SSWP* (ESA) [2017] UKUT 413 (AAC) it was recognised that, in some ESA cases, a tribunal may have to adjourn to obtain evidence on which a PIP award was made. But at paragraph 7 the Upper Tribunal Judge said:

> "I see no reason why, generally speaking, a tribunal ought not to be able to rely upon the absence of an adjournment request in order for further evidence to be obtained where a claimant has an experienced representative in the field of welfare benefits law".

9. I agree. Adjournments are granted pursuant to powers in Rule 5(3)(h) of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the "**Tribunal Rules**"). Rule 2(3) requires the tribunal to seek to give effect to the overriding objective in Rule 2(1) when exercising this power, so that the Tribunal Rules are operated to enable the tribunal to deal with the case before it fairly and justly. But the Rules make it clear that 'fairly and justly' involves a number of different facets. Rule 2(2) provides that:

> "(2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues".

The overriding objective therefore includes matters of proportionality, avoiding delay so far as compatible with proper consideration of the issues, and using the specialist expertise of the tribunal effectively. Adjournment for recovery of further evidence leading to the award of a different benefit may not be in keeping with proportionality and proper avoidance of delay, particularly where a tribunal already has medical evidence before it, and is sitting with a medical member. It will all depend on the circumstances.

10. Rule 2(4) of the Tribunal Rules places obligations on parties to:

> "(a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally".

Claimants are therefore under an obligation to help the tribunal in its quest to determine their case fairly and justly, and to co-operate with the tribunal. Accordingly, if a claimant's representative considers further evidence is needed, and the tribunal's assistance is necessary to obtain it, ideally a written application for an appropriate direction would be made well in advance of any listed hearing under Rule 6(2). If that is not possible, the duty to co-operate with the tribunal suggests that if adjournment is sought to obtain that further evidence, a request should be made to the tribunal. A claimant represented by an experienced representative is unlikely to be co-operating with the tribunal, and helping it to achieve the overriding objective, if there is silence about adjournment before the tribunal, and then the matter is raised for the first time on appeal. This is why I agree with the Upper Tribunal judge in *AG v SSWP* that, generally speaking, a tribunal ought to be able to rely on the absence of a request for adjournment for further evidence where there is a representative experienced in welfare rights law.

11. In the present case, the claimant was represented by the Welfare Rights Team of North Lanarkshire Council. The record of proceedings records that a representative was present with the claimant at the hearing. The representative had also prepared a written submission on her behalf which stated among other things: "Evidential matters. It may be helpful to the tribunal to have sight of the PIP assessment before considering this appeal". I find that the claimant was represented by an experienced representative in the field of welfare benefits law, and the contents of the written submission demonstrates that the representative was fully aware that further evidence relating to the claimant's PIP award might be available. But no adjournment request was made by the representative at the hearing before the tribunal to enable any PIP assessment to be obtained (and nor was any direction requested prior to the hearing of the appeal). The grounds of appeal do not suggest any adjournment request was made on the claimant's behalf for recovery of further evidence at the hearing. In the grant of permission to appeal, the tribunal judge set out her assumption that if the tribunal had been asked to adjourn, this would have been raised in the permission to appeal. The claimant was given a further opportunity to make observations on the appeal after the grant of permission, and did so on 10 May 2018. She did not contradict the assumption made by the tribunal judge granting permission that there had been no request to adjourn. I have also listened to the recording of the hearing, which confirms the absence of an adjournment request, despite the claimant's representative being given an opportunity to make representations at the

beginning and end of the hearing. I note that the tribunal expressly raised the issue of the PIP award (at approximately 1.58 minutes into the recording) before asking representatives if they had anything to say, and no adjournment request was made to obtain further evidence relating to that award. In the absence of a request for an adjournment by the claimant's experienced representative, I do not consider that it was an error of law for the tribunal to continue with the hearing, and for its statement of reasons not to deal expressly with the issue of adjournment.

Absence of the evidence upon which the claimant's PIP award was based

12. The next issue in this appeal to the Upper Tribunal is one of sufficiency of evidence. The claimant's representative had suggested as an evidential matter that it might be helpful to the tribunal to have sight of the PIP assessment before considering the appeal. The tribunal nevertheless went on to determine the appeal on the other evidence before it, without directing that the PIP assessment be recovered and adjourning of its own volition to enable that to be done. Was it an error of law for the tribunal to determine the case in the absence of the evidence on which the PIP award was based?

13. I find that evidence upon which the PIP award proceeded might have had some relevance in the ESA appeal, in relation to activities 1, 9 and 16 in Schedule 2. The issues raised before the tribunal by the claimant's representative in the ESA appeal were whether points should have been scored under activities 1 and 2 (mobilising and standing and sitting), 9 (absence or loss of control while conscious leading to extensive evacuation of the bowel and/or bladder, despite the wearing and use of aids or adaptations which are normally, or could reasonably, be used), 16 (coping with social engagement due to cognitive impairment or mental disorder) in Schedule 2 of the ESA Regulations, or whether the claimant qualified for an award under Regulation 29. The letter confirming the PIP award which was before the tribunal showed that the claimant had been awarded points for the purposes of PIP in respect of (among others) the activities of moving around, managing toilet needs, and mixing with other people. There are some similarities between these activities and the ESA activities that were in issue, and so it is possible that evidence on which the PIP award proceeded was relevant.

14. But the fact that further evidence may be relevant does not mean a tribunal is unable to decide a case lawfully and fairly without obtaining it. Take the example of the claimant's GP records. In most ESA cases, these would be relevant evidence. Yet many ESA cases are fairly, justly and lawfully determined without GP records being before the tribunal. It is neither necessary nor proportionate for the claimant's GP records always to be available to the tribunal, having regard to the overriding objective in Rule 2 of the Tribunal Rules set out in paragraph 9 above. The standard of proof before the tribunal is the balance of probabilities. The tribunal has to decide, for itself and on the material before it, whether the criteria for an award of ESA are satisfied. In some cases, a tribunal may consider that it has insufficient evidence before it to be able to determine the case lawfully and fairly. In those cases, it may adjourn and issue directions for the recovery of further evidence. But in other cases, a tribunal may already have evidence before

it upon which it is satisfied that it can properly make findings in fact and reach a decision about entitlement to a benefit on the balance of probabilities, without having to adjourn to obtain further evidence.

15. Evidence on which a PIP award is based is, like a claimant's GP records, just one type of further evidence that could potentially be relevant in an ESA appeal before a tribunal. Evidence on which a different benefit has been awarded does not have to be obtained in all cases for a tribunal to be able to determine a case fairly and justly. I agree with the observation of the Upper Tribunal Judge in *JB v SSWP* [2017] UKUT 20 (AAC) that a tribunal deciding an ESA case is not bound in any sense by an award of PIP in another case. In *JB* it was said that:

> "There are some obvious similarities between the tests contained in [some of the PIP and ESA activities] but those tests are not the same and tribunals will often have evidence before it in either written or oral form, or both (as here), which was not before the relevant decision maker or tribunal when an earlier decision concerning a different benefit had been made. The tribunal's task was to decide, for itself, and on the material before it (subject to any adjournment considerations) whether any of the Schedule 2 or Schedule 3 descriptors were satisfied irrespective of the fact of the award of PIP".

I recognise that there may be some cases where a tribunal decides that it cannot fairly or lawfully determine an appeal without recovering further evidence relating to a PIP award. But it all depends on the circumstances. There is no general rule that medical reports relating to PIP must be before the tribunal in an ESA appeal.

16. In this particular case, even without the evidence upon which the PIP award was based, there was a significant amount of medical and other evidence before the tribunal. There were four previous IB85 medical reports from 2006, 2007, 2008 and 2010, two of which followed examination, and two of which were prepared on scrutiny. The reports disclosed that the IB awards had been made on the basis of depression and alcohol misuse, rather than physical disabilities. Next, there was a report on form ESA 113 from the claimant's GP dated 16 February 2017. This confirmed that the claimant suffered, among other things, from cervical spondylosis, peripheral vascular disease, stress/urge incontinence and depression, but did not mention alcohol misuse. The GP was invited to tick boxes to indicate if their patient had problems with a list of activities, roughly corresponding with the activities in Schedule 2 of the ESA Regulations. In that list, the GP mentioned the claimant was in pain when walking and had been referred to the continence clinic, but put 'nil documented' in relation to other descriptors including coping with social engagement. The tribunal also had before it a report by a healthcare professional ("**HCP**") following an examination on 10 April 2017 for the purposes of ESA. The HCP report showed that the appellant's alcohol misuse problem had improved, since she had last drunk alcohol a number of months before, attended AA and had no liver problems. Among other things, the HCP report recorded that the claimant had been observed at assessment walking for 50m at a normal pace using 1 walking stick (p47). The report considered continence issues (p44), performed a mental state examination which disclosed no abnormal findings (p56, 58, 60), and considered social engagement. There was also other evidence before the tribunal, including the claimant's oral evidence, claim form and the submission on her behalf by her representative. The submission set out the claimant's position in relation to activities in issue, and

in relation to mobilising stated that the claimant "cannot walk more than 100 metres without stopping 9 points".

17. On the basis of the evidence before it, the tribunal made a number of findings in fact and on credibility. Those matters were for the tribunal. In my view, there was already sufficient evidence before the tribunal to support the facts it found and the conclusions it reached. The law of reasons does not impose a duty on the tribunal to identify all other potentially relevant evidence which is not before it, and explain in all cases why the tribunal has not adjourned to obtain it. In my opinion, the true question is whether there was a sufficiency of evidence before the tribunal on which it could lawfully and fairly make the findings it did on the balance of probabilities. In the present case, I find that it was not an error of law for the tribunal to determine the appeal on the basis of the significant amount of evidence already before it, without first obtaining further evidence on which the PIP award was based.

Failure to address the PIP award in the statement of reasons

18. The tribunal in this case did not refer to the PIP award when giving its reasons why it found the claimant did not qualify for ESA. Did this amount to an error of law? Was it a failure by the tribunal to provide proper and adequate reasons for its decision?

19. The answers to these questions depend on applying the law governing reasons to the circumstances which were before this particular tribunal. Tribunals do not have to consider every issue raised by the parties, or deal with every piece of material in evidence, for statements of reasons to be proper and adequate (*Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122 per Griffiths LJ; *AJ (Cameroon) v Secretary of State for the Home Department* [2007] EWCA Civ 373 at para 15 per Laws LJ). However, circumstances may arise in which reasons should explain inconsistency to be adequate (*YM v SSWP* (PIP) [2018] UKUT 16 (AAC) at paragraph 10). In the context of an absence of reference to a PIP award in an ESA case, like the judge in *YM*, I have found some of the observations in *R(M)* 1/96 to be of assistance. It was stated:

> "…either it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or …some brief explanation must be given for what the claimant will otherwise perceive as unfair….if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied…then in my judgement it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account ….".

R(M) 1/96 concerns non-renewal of a previous award of benefit, whereas this appeal is about an entirely different benefit. Nevertheless, I extrapolate the principle that it is not necessary to refer expressly to a PIP award in statements of

reasons in an ESA appeal, provided that the basis on which any apparently different conclusions have been reached are clear.

20. Applying that principle, I find it is clear from the tribunal's decision why it reached the conclusions it did about ESA notwithstanding the claimant's PIP award, and it was not necessary for the tribunal to refer expressly to the PIP award.

21. The starting point for the explanation of the differences was the tribunal's adverse finding on the claimant's credibility. At paragraph 11 the tribunal found the claimant to be evasive, negative and defensive. It did not find her an 'altogether persuasive witness'. It expressly found that it was only able to accept her evidence insofar as reflected in the findings in fact it made. It further found at paragraph 14 that her evidence about mobility was evasive and contradictory. The PIP assessment process involves a degree of input from the claimant. It is clear from the tribunal's credibility findings that it was not prepared to take what the claimant said at face value.

22. The tribunal's adverse finding as to the claimant's credibility underpins its more detailed reasons in relation to potentially overlapping activities between ESA and PIP. As set out in paragraph 13 above, I accept that there are some similarities between activities 1, 9 and 16 in Schedule 2 of the ESA Regulations which were in issue in this case, and mobility activity 2, daily living activity 5, and daily living activity 9 for the purposes of PIP. The claimant scored points under these PIP activities, but not the ESA activities which had some similarities (with the exception of activity 1). However, I find that the apparent differences are clearly explained either by the findings made by the tribunal, or by the differences in the statutory wording in the PIP and ESA Regulations.

23. In relation to mobilising for ESA, and moving around for PIP (activities 1 and mobility activity 2 respectively), the PIP award contained a finding the claimant scored 12 points, on the basis that she could stand and then move more than 1 metre but no more than 20 metres either aided or unaided. But the tribunal made findings in the ESA appeal before it which clearly were adverse to any suggestion that the claimant could walk no more than 20m for the purposes of activity 1 in Schedule 2 of the ESA Regulations. There were the adverse findings on credibility referred to above, which included explicit findings in paragraph 14 that the claimant's evidence relating to mobility was contradictory. There were also express factual findings which made it clear the tribunal did not accept the claimant could only walk between 1 and 20m. The background to the tribunal's findings in relation to activity 1 in Schedule 2 of the ESA Regulations is that there were a number of contradictory contentions and views before the tribunal. The tribunal had the PIP award before it, which showed the opinion of one medical professional based on what was before them that the claimant could stand and move only 1-20m safely, to an acceptable standard, repeatedly and in a reasonable time. It then had two further different positions for the claimant in the ESA appeal before it. In her claim form she said she could move 50m safely and repeatedly on level ground without needing to stop. In the written submission on her behalf, produced for the tribunal along with the letter confirming her PIP award, it was stated that the claimant:

> "believes that she should have been awarded points from her WCA in the following areas. Mobilising: She cannot walk more than 100 metres without stopping".

The tribunal further had the HCP report, which included the view of a different medical professional that, despite her medical conditions, the claimant was able to mobilise more than 200m on level ground without stopping in order to avoid significant discomfort and exhaustion, and was able repeatedly to mobilise 200m within a reasonable timescale without significant discomfort and exhaustion. In these circumstances, what the tribunal had to do was make its own findings in fact about how far the claimant could walk in accordance with the various descriptors in ESA activity 1. It then had to decide between the contradictory positions before it on the basis of the findings of fact it made. The factual findings it made (which were for it) were that that the claimant would go to the supermarket with her niece and walk around holding onto the trolley for 20 minutes (paragraph 14). That finding had initially been reported in the HCP report (p45), and was not challenged in the written submission on the claimant's behalf. The tribunal also accepted as fact that the claimant had been observed at the assessment walking 50m at a normal pace (paragraph 14). The tribunal found as fact, on the basis of this evidence, that the claimant was not able to mobilise more than 100m without stopping to avoid significant discomfort (paragraph 6). The tribunal cannot be faulted for accepting the submission on the claimant's behalf that 9 points for ESA activity 1 was appropriate, given the existence of facts found by it which were consistent with that position. It is obvious from the tribunal's statement of reasons why the tribunal made the findings it did in relation to mobilising, notwithstanding the PIP award, and in these circumstances it was not necessary for it to deal with the PIP award expressly in its decision.

24. In relation to continence issues, the PIP award included 2 points for managing toilet needs, on the basis that the claimant needed an aid or appliance to manage her toilet needs or incontinence. The tribunal's findings in relation to continence for the purposes of ESA were entirely consistent with this, because the tribunal accepted that the claimant wore continence pads. The point is really that the statutory tests are different: for PIP points are scored if an aid such as pads are needed, but for ESA, if pads are used and contain leakage so that the need for cleaning and a change of clothing are avoided, points are unlikely to be scored. The tribunal found as fact that, while the claimant suffered urinary dampness and leakage for which she required to wear pads, she did not suffer extensive evacuation or loss of control of the bladder (paragraph 9). It accepted that she suffered some difficulties with continence, but found it amounted to occasional leakage which could be contained by a pad, and she did not suffer from complete loss of bladder control leading to extensive evacuation. There was, on the facts of this case, no inconsistency between the findings in relation to PIP and ESA which required further explanation by the tribunal.

25. Finally, in relation to social engagement, the claimant had been awarded 2 points for the purposes of PIP for mixing with other people, on the basis that she needed to be prompted by another person to engage with other people. I find that, when the tribunal's findings on activity 16 in Schedule 2 of the ESA Regulations are looked at, there is no apparent inconsistency with the PIP award that required any

further explanation or express reference to the PIP award. The tribunal found that the claimant did not have particular difficulty dealing with family, shopkeepers, the doctor and others she met whilst out and about, and was able to cope with social engagement if she had to. It found she was able to cope with extended family, some friends and other people she met when out (paragraph 8). It further found (paragraph 17) that the claimant demonstrated no particular difficulty at the hearing or at the assessment. She did not describe instances of having particular difficulty in dealing with others. She could pass the time of day with a shopkeeper, could make and attend her own appointments, and deal with extended family and friends. Her concerns appeared to lie around her physical difficulties. The ESA Regulations specifically provide in Regulation 19(5) that in respect of any descriptors listed in Part 2 of Schedule 2 (where activity 16 is found), any inability must arise from a specific mental illness or disablement for points to be scored. A disinclination to engage socially for physical reasons will not result in a claimant qualifying for points. The tribunal expressly found that the claimant's concerns lay round her physical difficulties, and it follows from Regulation 19(5) that she would not thereby qualify for points under activity 16 in Schedule 2 of the ESA Regulations. There was no need for the tribunal to address prompting, because that is not part of the test in activity 16 of the ESA Regulations, even though it is part of the statutory test for daily living activity 9 for PIP. In these circumstances, the tribunal did not need to refer expressly to the PIP award, because the reasons for its findings in relation to social engagement were clear.

26. In my view, when the statement of reasons is read as a whole, having regard to the statutory wording governing relevant activities, it is abundantly clear why the tribunal reached the conclusions it did notwithstanding the PIP award. There was therefore no need for the tribunal to deal with the PIP award expressly in its statement of reasons. While it is desirable for tribunals to provide a short explanation of how a PIP award has been taken into account by them, in the circumstances of this case, it was not an error of law for the tribunal to fail to do so.

If there was an error in law, was it material?

27. The SSWP argued that if there was an error of law, it was not material. For the reasons set out above, I find that there was no error of law by the tribunal. It is not strictly necessary to address the issue of materiality in order to determine this appeal. Nevertheless, if I were to be wrong and the tribunal had erred in law, it follows from what I have said in paragraphs 21 to 25 above that I would have accepted the SSWP's submission on materiality.

Conclusion

28. The tribunal did not err in law in relation to the claimant's PIP award, when determining the ESA appeal before it. I therefore refuse the appeal.

Signed on the original
on 31 May 2018

A I Poole QC
Judge of the Upper Tribunal