

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/1057/2018

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made on 16 January 2018 at Wolverhampton under reference SC290/17/00416) involved the making of an error of law it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted tribunal panel.

DIRECTIONS FOR THE REHEARING

- A. The tribunal must (by way of an oral hearing) 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. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: R(DLA) 2 and 3/01.

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (the tribunal) which it made on 16 January 2016. The tribunal decided that the claimant was entitled to a personal independence payment (PIP) comprising the standard rate of the daily living component only, from 28 July 2017 to 15 June 2020. But she says she should have the mobility component too.

2. The claimant asserts that she suffers from a range of physical and mental health problems. In a report of 16 June 2017 prepared by a health professional it is stated that those conditions include arthritis; depression; fibromyalgia; ulcerative colitis; bladder incontinence; unspecified difficulties with her cervical spine; and a history of her having had a knee replacement.

3. The claimant was previously in receipt of disability living allowance (DLA) though I have not been able to detect, from the paperwork in front of me, the precise terms of that award. That should really have been set out in the Secretary of State's written submission to the tribunal. But anyway, in consequence of DLA being replaced by PIP, it became necessary for her to apply for PIP. She did so on 21 October 2014. On 22 January 2015 she was sent a letter informing her that a decision-maker acting on behalf of the Secretary of State had decided that her DLA would end on 17 February 2015 and that she would then be entitled to the standard rate of the daily living component of PIP only from 18 February 2015 for "an ongoing period". Pausing there, section 88 of the Welfare Reform Act 2012 says that an award of PIP is to be for a fixed term except where the person making the award considers that a fixed term award would be inappropriate. Although the letter notifying the claimant of the award did not expressly say so and indeed did not contain anything addressing the reasoning behind the length of the award, it can be concluded that the relevant decision-maker

must have considered a fixed term award to be inappropriate. As to points, it was decided that the claimant was entitled to a total of 8 points under the activities and descriptors relevant to the daily living component of PIP, being 2 points each for the activities of preparing food, washing and bathing, managing toilet needs or incontinence and dressing and undressing. No points were awarded with respect to the mobility component. The claimant asked for a mandatory reconsideration but that did not result in any alteration to any of the terms of the decision. It does not appear she then sought to mount any further challenge to that decision. But in April 2017 she submitted a completed PIP claim form and asserted, in effect, that her condition had deteriorated such that she ought to be in receipt of a greater award of PIP. It was that application which led to the health professional's report of 20 June 2017 mentioned above. An earlier report of 22 December 2014 had been prepared with respect to the claimant's initial claim for PIP.

4. On 28 July 2017 the claimant was informed, by letter, that a decision-maker acting on behalf of the Secretary of State had decided that she remained entitled to the standard rate of the daily living component of PIP but not to any award with respect to the mobility component. The terms of that decision, however, were not identical to the terms of the earlier one although the outcome with respect to the level of entitlement was the same. The first difference was that, on this occasion, the claimant was considered to be entitled to 4 points under the descriptors linked to mobility activity 2. But that did not enable her to reach the necessary 8 point threshold to establish entitlement to even the standard rate of that component. The second difference was that the current award was stated to run from 28 July 2017 to 15 June 2020. So, unlike previously, it had been decided to make a fixed term award. The claimant, once again, asked for a mandatory reconsideration. The Secretary of State's decision-maker, once again, maintained all aspects of the decision. So, the claimant appealed to the tribunal. In doing so she ticked a box to indicate that she did not want an oral hearing of her appeal.

5. The tribunal had regard to both rule 2 and rule 27 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 and resolved to decide the appeal on the documents in front of it and without a hearing. In the circumstances, and for the concise reasons it gave at paragraph 6 of its statement of reasons for decision of 14 March 2018 (which I need not set out) it was entitled to do that. Having so decided, it then went on to explain why it thought the claimant was entitled to all of the points last awarded by the Secretary of State's decision-maker but to no more points. It did not, in its statement of reasons, address the question of the period of the award. Nor, indeed, had the Secretary of State's decision-maker either in the letter of 28 July 2017 other than to simply say the award had been time limited because the claimant's needs "may change". In its decision notice the tribunal simply said that the claimant remained entitled to "the daily living component at the standard rate from 28/07/2017 to 15/06/2020". The claimant, remaining dissatisfied, asked for permission to appeal to the Upper Tribunal. Her single ground of appeal was that the tribunal had erred through not realising that she has difficulty in walking. The claimant asked the Upper Tribunal to hold a hearing of her application for permission to appeal for the stated reason that she was "not satisfied with decision". The Upper Tribunal exercised discretion in favour of the claimant and decided to hold an oral hearing of her appeal. The matter was listed for a hearing at Birmingham on 24 September 2018. The claimant did not attend and does not appear to have ever offered any explanation as to why not.

6. Despite the claimant's unexplained non-attendance I decided to grant permission to appeal whilst limiting that grant to a single ground which I had, pursuant to the Upper Tribunal's inquisitorial function, identified myself from a perusal of the documents. I explained that, in my view, the tribunal had fully appreciated the fact that the claimant was asserting she had problems walking but that it had reached a conclusion sustainable on the evidence, and adequately explained, that such difficulties were not sufficient to enable her to score more than the 4 points under the mobility component which had been awarded. As to the reason why I was, nonetheless, granting permission on limited grounds, I said this:

“ 6. To explain, the claimant previously had an award of a personal independence payment, again comprising the standard rate of the daily living component only, for an ongoing period. That award had been notified to her by letter of 22 January 2015 (see page 65 of the appeal bundle). There then followed what is sometimes referred to as ‘an unplanned review’ which led to a further decision of the Secretary of State, notified on 28 July 2017, to the effect that she remained entitled to the standard rate of the daily living component but for a fixed term to expire on 15 June 2020. There was only a very cursory explanation in the letter of notification as to why it had been decided, on this occasion, to make a fixed term award rather than an ongoing one. Whilst the claimant herself did not raise this particular point in her appeal, it might be that the F-tT was required to offer a short explanation as to why it was time-limiting the award, particularly bearing in mind the terms of the original decision to the effect that the award was an ongoing one. As it is, the F-tT does not appear to have turned its mind to the question of the period of the award at all. Perhaps what was said by the Upper Tribunal in *RS v SSWP* [2016] UKUT 0085 (AAC) may have relevance. Permission to appeal is granted solely on that basis.”

7. I directed written submissions from the parties in the usual way. The Secretary of State's representative has indicated that the appeal is supported on the basis that the tribunal did err in the manner in which I had suggested it might have done when granting permission. The Secretary of State accepts that the decision as to the term or period forms part of the overall decision on entitlement to PIP. She accepts, at least by implication, that a decision as to the term of an award is itself appealable. She observes (rightly) that the decision under appeal was a supersession decision and suggests that any such decision has to be accompanied by full reasons. She accepts that, against that background, the tribunal was obliged to adequately explain why it was departing from the terms of the initial award with respect to the period of the award. She invites me to remit to the tribunal for rehearing or to remake the decision myself with respect to the limited question of the term of the award. The claimant, having considered the Secretary of State's submission, has indicated that she does not wish to make any further comment. Neither party has asked the Upper Tribunal to hold a hearing of the appeal.

8. The fact that there is agreement between the parties that the tribunal has erred in law makes my task easier and makes this decision shorter. But there are a few points I would, nevertheless, wish to make.

9. As was explained eloquently and in detail by the Upper Tribunal in *RS v SSWP* [2016] UKUT 0085 (AAC), section 88(2) of the Welfare Reform Act 2012 provides that an award of PIP is to be for a fixed term except where the relevant decision-maker considers a fixed term award to be inappropriate. The section does not set out the legal consequences of a decision that a fixed term award is inappropriate but the necessary implication is that, if it is inappropriate, then an indefinite award is to be made so long as the conditions of entitlement are satisfied. The section also, impliedly, confers a function of determining the duration of a fixed term award. The question of whether a fixed term award is not appropriate and the related question of whether, if it is appropriate, what the term of should be, are aspects of the

overall decision with respect to PIP and may, in principle, be considered and determined by the tribunal on an appeal to it.

10. The claimant, in this case, did not express any concern, when appealing to the tribunal, about the imposition of a fixed term for the award. Rather, her focus was solely upon the question of entitlement to the mobility component. So, perhaps it might be argued (although it has not been) that the question of the term of the award was not a matter raised by the appeal (see section 12(8)(a) of the Social Security Act 1998). But the question whether an issue is “raised by the appeal” is to be determined by reference to the substance of the appeal and not merely by the wording of the letter of appeal. On a commonsense basis that must be right. The second decision-maker had only departed from the terms of the decision issued by the first decision-maker with respect to the imposition of a fixed term. That made the decision which was subject to appeal before the tribunal, a supersession decision because the second decision interfered with the terms of the first award. In light of that I would conclude that the question of the term of the award was one clearly raised by the appeal. It was, therefore, something which the tribunal was required to have regard to and to deal with. But even if I am wrong about that I would conclude, for the same reasons, that since a tribunal has discretion to deal with a matter not raised by the appeal (see section 12(8)(a) of the Social Security Act 1998 again), it was required to ask itself, in any event, whether it should exercise discretion to entertain that aspect of the appeal and, if not doing given the prominence of that aspect, it was required to explain why not.

11. One consequence if this does need to be made clear and explicit, in what I have said above and more importantly in what was said in *RS*, is that a claimant may bring an appeal to a tribunal even if that claimant is only challenging the decision to fix a term or is only challenging the length of an award.

12. Moving on, it would appear that the basis for the Secretary of State’s supersession decision under appeal was that, having regard to the more recent health professional’s report, the requirements contained in regulation 26 of the Universal Credit, Etc (Decision and Appeals) Regulations 2013 permitting supersession on the basis of receipt of medical evidence from a health care professional, had been met. That was what was said by the Secretary of State’s decision maker in her submission to the tribunal. I would observe, though, that the basis for supersession relied upon was not specified in the letter of 28 July 2017 setting out and otherwise explaining the decision. The tribunal did not remind itself or recognise that it was dealing with a supersession decision and did not identify grounds for supersession itself.

13. In the above circumstances I have concluded that the tribunal erred in law through failing, for itself, to identify any ground for supersession even though it might be thought that the applicability of the regulation 26 ground is obvious. Additionally, and more importantly it seems to me in the context of this case, the tribunal erred in failing to explain why, given the previous award of PIP for an ongoing period, it was upholding the Secretary of State’s largely unexplained decision to make a fixed term award. What the tribunal should have done was show that it appreciated (though in fact it might have inadvertently overlooked it) that there had been such an alteration in the terms of the decision and should have considered, for itself, whether a fixed term was or was not appropriate assuming it had accepted (as I think it certainly would have done had it turned its mind to it) that there were grounds for supersession given the existence of the more recent health professional’s report. As to how it

should go about making the decision with respect to the fixing of a term or not, valuable guidance is afforded in *RS* which I have already cited (see in particular what is said from paragraphs 54-63 of that decision). Since the tribunal has erred in law I have concluded (as is accepted by the Secretary of State) that its decision must be set aside.

14. I have considered whether I should remit or whether I should remake the decision myself. There is certainly an argument, in this case, for my remaking the decision given the narrowness of the issues consequent upon my granting permission on a limited basis only. But the question of the appropriateness or otherwise of a fixed term award raises questions with respect to the stability or otherwise of the claimant's medical conditions. She suffers from a number of them and, it seems to me, the matter is not clear cut. Further, the question of whether a fixed term award or an ongoing award is to be made is not, despite its not cropping up very often in appeals, a peripheral matter. It is a matter, it seems to me, of some importance to the parties and perhaps in particular to the claimant. If I were to attempt to remake the decision myself I would be doing so without the range of expertise which the tribunal will have available to it through the composition of its panel. In those circumstances, therefore, I have decided the appropriate course is to remit to the tribunal for a rehearing.

15. One upshot of my decision to remit rather than to remake, is that the claimant will have a further opportunity, if she wants to take it, to argue the point regarding claimed entitlement to the mobility component of PIP. That is because the rehearing will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of all of the evidence before it, including any further written or oral evidence it may receive.

16. The tribunal will, it seems to me, first of all have to decide whether there are grounds for supersession. Perhaps that might be relatively straightforward in light of what I have already said above. But it will then have to decide upon entitlement in relation to the components and rates of PIP and it will also have to decide whether or not making a fixed term award is inappropriate. If it decides that it is not inappropriate it will have to fix the term. If it decides a fixed term award is inappropriate, it will have to make an ongoing award. Whatever it decides about all of that it should be prepared to give reasons if called upon to do so by way of a request for a statement of reasons for decision.

17. The claimant will note that I have directed an oral hearing. She has not previously shown a fondness for requesting or attending hearings. But I can find nothing in the documentation before me which suggests that she might not be fit to attend a hearing or that, while she does have health difficulties, it would be unreasonable to expect her to do so. Perhaps if she thinks such is unreasonable she might care to contact the tribunal (though if she is doing so she should do so promptly) and no doubt, if she does, the tribunal will make of what she has to say what it will. But otherwise, whilst of course she does not have to, she should think very seriously about attending the hearing. That is because doing so will give her an opportunity of explaining to the tribunal, on a face-to-face basis, how she feels her health difficulties impact upon her. Further, I should also point out for the benefit of the claimant, that she should not assume that the mere fact I have set aside this decision means I think she should ultimately succeed in her appeal. All of that will now be for the good judgment of the tribunal panel which rehears the appeal.

18. The tribunal which previously decided the appeal will not, I hope, regard the fact that I have set aside its decision as constituting any implied criticism of it. It does appear to have overlooked the fixed term aspect but, to a considerable extent, it is right to say that it was led into it by the Secretary of State's decision maker not highlighting the issue of the term of any award either in its decision letters or in its submission to the tribunal for the purposes of the appeal.

19. Finally, I have decided to have this decision placed on the Upper Tribunal's website. But that is not because I regard myself as having decided anything new. All the heavy lifting with respect to the sorts of issues raised by this appeal has been done by the tribunal in *RS*. But it may be important to stress that appeals can be pursued, albeit it seems to me that this seems to happen only rarely, even when the sole issue of challenge is the question of the appropriateness of a fixed term award or the length of a fixed term award.

20. This appeal to the Upper Tribunal then succeeds on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated

23 January 2019