

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Luton First-tier Tribunal dated 26 April 2018 under file reference SC134/17/01226 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's original decision dated 11 September 2017 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

- (1) The appeal should be considered at an oral hearing.
- (2) The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 26 April 2018.
- (3) The claimant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 11 September 2017).
- (4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the HMCTS regional tribunal office in Birmingham within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (see Direction (3) above).
- (5) The Secretary of State's representative is directed to prepare a supplementary submission for the new Tribunal, detailing the full history of the Appellant's claims for, and awards of, PIP since November 2014 (see paragraph 12 below). It should include the relevant supporting documentation. This supplementary submission should be sent to the HMCTS regional tribunal office in Birmingham within one month of the issue of this decision.
- (6) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds; but there will need to be a completely fresh hearing of the original PIP appeal before a new First-tier Tribunal.

The Upper Tribunal's decision in summary and what happens next

2. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal involves a legal error on two counts. First, the Tribunal did not adequately explain why it proceeded with the case as a 'paper appeal'. Second, the Tribunal failed properly to investigate the prior adjudication history (in part owing to the Department's failure to produce all the relevant documentation). For those reasons, I set aside the Tribunal's decision.

3. The case now needs to be reheard by a new First-tier Tribunal. I cannot predict what will be the outcome of the re-hearing. So, the new tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes when applying the correct and relevant law.

The background to this appeal to the Upper Tribunal

4. On 11 September 2017 the Department's decision maker decided that the Appellant, who lives in Ipswich, was not entitled to either the daily living or the mobility component of personal independence payment (PIP). The Appellant appealed.

5. On 8 January 2018 the appeal was listed as a paper case before the First-tier Tribunal in Southend. That tribunal adjourned the appeal for various reasons, one being that the case should be listed as an oral hearing and the Appellant was encouraged to attend.

6. On 26 April 2018 the case was listed again as a paper case, this time before the First-tier Tribunal in Luton. The tribunal dismissed the appeal. The Appellant appealed to the Upper Tribunal.

The proceedings before the Upper Tribunal

7. The Appellant's representative set out three broad grounds of appeal. The first was that the tribunal on 26 April 2018 had failed to observe the overriding objective in deciding to proceed with the case as a paper appeal. The second was that the tribunal had failed properly to interrogate and take account of all the evidence. The third was that the Department had failed to produce all relevant papers relating to the appeal. I gave the Appellant permission to appeal.

8. Mrs G Lancaster, the Secretary of State's representative in these proceedings, supports the appeal to the Upper Tribunal. She does so solely on the basis of the first ground of appeal. She argues that the tribunal failed adequately to explain its decision by reference to rules 2 and 27 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; 'the 2008 Rules'). It now seems clear that in fact the Appellant had telephoned the tribunal office on 19 March 2018 and had asked for the case to be dealt with on the papers. The Appellant's representative was not aware of this request. Be that as it may, the tribunal's omission adequately to explain its decision to proceed was deficient.

9. Mrs Lancaster does not express a view on the other two grounds of appeal. I do not consider it necessary for me to explore the second ground of appeal, as those

are ultimately evidential matters for the new tribunal. However, I do need to comment on the third ground of appeal.

10. The tribunal that dealt with the appeal on 26 April 2018 can be forgiven for thinking, based on a quick skim of the appeal bundle, that this was a straightforward appeal against a refusal to award PIP on a fresh claim. In a sense it was. But it was also more complex than that. The Department's written response to the appeal included the following note of a conversation between the Appellant's representative and a DWP employee:

“... she [the Appellant's representative] stated that as far as she was aware there was new legislation that stated a tribunal's decision could not be overturned unless there is significant evidence of material change. I explained that this decision was a new claim decision and that there had been no tribunal action on this particular decision.”

11. Even if a somewhat garbled account, this should have alerted the tribunal to the fact that (i) there had been an earlier claim; and (ii) that earlier claim had gone on appeal to the First-tier Tribunal. But there was no other reference in the appeal bundle to any such earlier claim(s) and appeal(s), let alone any copies of the relevant documentation.

12. It so happens that the Appellant's first PIP claim was made in November 2014 and had led to a nil award. The Appellant appealed against that refusal to the First-tier Tribunal, which on 1 June 2016 had allowed his appeal and made an award of PIP (for the period 10 November 2014 to 18 November 2017). The Secretary of State then appealed to the Upper Tribunal, but subsequently withdrew that appeal, as confirmed by the Upper Tribunal on 18 May 2017 (under case reference CPIP/2853/2016, which was part of the block of appeals turning on the test case in *MH v Secretary of State for Work and Pensions (PIP) [2016] UKUT 531 (AAC); [2018] AACR 12*). However, the Secretary of State then conducted an 'in-award' review of the Appellant's PIP entitlement, leading to a further nil decision, so terminating the tribunal award early (a supersession decision confirmed on mandatory reconsideration in May 2017). The Appellant then made a fresh claim for PIP, in the hope that this might be a less protracted process than lodging a further appeal.

13. Rule 24 of the 2008 Rules requires a decision maker, upon receipt of a copy of a notice of appeal sent by the tribunal, to deliver a response to the appeal to the tribunal. In particular, according to rule 24(4)(b), the decision maker must provide with the response “copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise”. On a (very) narrow reading of the rule, it only requires the decision maker to produce copies of documents “relevant to the case”, i.e. generated by that particular claim. However, that cannot be the intended meaning. Case law shows that the previous adjudication history may, or may not, be relevant to the case under consideration (see *FN v Secretary of State for Work and Pensions (ESA) [2015] UKUT 670 (AAC); [2016] AACR 24* and *CH and KN v Secretary of State for Work and Pensions (PIP) [2018] UKUT 330 (AAC)*). As Upper Tribunal Judge Hemingway observed in *AH v Secretary of State for Work and Pensions (DLA) [2016] UKUT 558 (AAC)* (at paragraph 16), “it might be thought that the word ‘relevant’ as used here should be interpreted as meaning something like potentially relevant since the actual relevance or otherwise of a specific item of evidence might only be established after a full consideration of the issues such as will take place during the appeal process”. So “relevant to the case” should be read generously.

14. Given what happened in the present appeal, I can only echo the observations of Judge Hemingway in another case on not too dissimilar facts (*BB v Secretary of State for Work and Pensions (PIP) [2017] UKUT 596 (AAC)* at paragraph 5:

“It is very hard to view these various omissions as not constituting failures to provide ‘copies of all documents relevant to the case in the decision makers possession’ as is required by rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (‘the Rules’). The requirement to provide such documents is mandatory not optional. I have to say that the quality of the appeal submission, given that it lacked any hint of the previous adjudication history, was in this case unacceptable. As indeed was the unexplained failure to provide the above documents. It seems to me that information and material of that sort, when there is an appeal relating to a decision concerning entitlement for a period which follows on from the end date of a previous award, should routinely be provided. Mistakes do occur. But the failure to properly inform tribunals obviously carries some risk of causing or contributing to injustice.”

15. In the present case there was a “hint of the previous adjudication history” but it was rather hidden away. In this case the date of claim was 17 May 2017, falling within the period of the previous tribunal’s award of PIP, which had in turn subsequently been superseded by the action of the Secretary of State, notwithstanding the withdrawal of the Department’s earlier appeal to the Upper Tribunal. This was a case that cried out for a full account of the history of the Appellant’s PIP ‘journey’ with full supporting documentation.

16. The First-tier Tribunal erred in law by failing to pick up on the clue provided in the DWP’s written response to the Appellant’s appeal. The Secretary of State was plainly in breach of the requirement placed on her by rule 24(4)(b). Taken together that amounts to a breach of natural justice. I therefore uphold the third ground of appeal.

17. Accordingly, I am satisfied that the First-tier Tribunal erred in law for the two reasons set out above. I therefore allow the Appellant’s appeal to the Upper Tribunal, set aside the Tribunal’s decision and remit (or send back) the original appeal for re-hearing to a new tribunal, which must make a fresh decision. I formally find that the Tribunal’s decision involves an error of law on the grounds as outlined above.

What happens next: the new First-tier Tribunal

18. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal’s decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the claimant is entitled to PIP (and, if so, which component(s) and at what rate(s) and for what period). That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

19. In doing so, however, unfortunately the new Tribunal will have to focus on the claimant’s circumstances as they were as long ago as September 2017, and not the position as at the date of the new hearing, which will obviously be 18 months or so later. This is because the new Tribunal must have regard to the rule that a tribunal “**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made” (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The original decision by the Secretary of State which was appealed was taken on 11 September 2017.

20. The Secretary of State's representative should prepare a supplementary submission for the new Tribunal, detailing the full history of the Appellant's claims for, and awards of, PIP since November 2014 (see paragraph 12 above). It should include the relevant supporting documentation. The supplementary submission should be sent to the HMCTS regional tribunal office in Birmingham within one month of the issue of this decision.

Conclusion

21. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Signed on the original
on 22 January 2019**

**Nicholas Wikeley
Judge of the Upper Tribunal**