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 Hull First-tier Tribunal dated 12 December 2017 under file reference SC246/17/00028 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 23 September 2016 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; the new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 12 December 2017.

(2) The claimant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 23 September 2016).

(3) If the Appellant has any further written evidence to put before the tribunal and, in particular, further medical evidence, this should be sent to the HMCTS regional tribunal office in Leeds within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> of the Secretary of State under appeal (see Direction (2) above).

(4) The Appellant is directed to inform the HMCTS regional tribunal office in Leeds within one month which of the following options she would prefer:

- (i) An oral hearing of the remitted appeal which she attends;
- (ii) An oral hearing which she does not attend but e.g. her mother and/or partner attend in her stead;
- (iii) A telephone hearing (but note the practical logistics of this may mean it is not available);
- (iv) A paper hearing.

(5) The Secretary of State is directed to send the HMCTS regional tribunal office in Leeds within one month a supplementary submission on the Appellant's appeal setting out which descriptors (scoring or non-scoring) the Secretary of State considers applied to the Appellant as at the date of the original decision under appeal. It should also include details of any subsequent PIP claim.

(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

The issue in this appeal to the Upper Tribunal

1. This appeal considers the appropriate way forward where a personal independence payment (PIP) claim is refused for failure to attend a PIP assessment by a health care professional (HCP) and the claimant appeals, but is subsequently 'put back on the PIP journey' and attends such an assessment. The Secretary of State's decision-maker does not then make a fresh decision based on the HCP report but simply forwards that report to the First-tier Tribunal (FTT) for its consideration on the claimant's original appeal. If the FTT's decision on the substantive PIP descriptors involves an error of law, should the case be remitted to the FTT or sent back to the Secretary of State's decision-maker? I conclude that in the circumstances of this appeal, and most likely in the great majority of cases, remittal to a new FTT is the appropriate course of action.

This appeal to the Upper Tribunal: the practical result in a nutshell

2. The Appellant's appeal to the Upper Tribunal succeeds and the FTT's decision is set aside; there will need to be a completely fresh hearing of the Appellant's PIP appeal before a new FTT.

3. 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 FTT. It all depends on the findings of fact that the new tribunal makes when applying the relevant law.

The background to this appeal to the Upper Tribunal

4. The chronology of this appeal runs as follows:

10.08.2015:	Appellant makes claim for PIP
29.12.2015:	Appellant fails to attend HCP assessment
23.09.2016:	Decision-maker decides Appellant is not entitled to PIP having not shown good reason for non-attendance at HCP assessment
24.11.2016:	Decision-maker refuses Appellant's Mandatory Reconsideration
23.12.2016:	Appellant lodges appeal with FTT
13.01.2017:	DWP notify FTT they have accepted Appellant had good reason for non-attendance and inform FTT that 'she has been put back on the PIP journey'
27.03.2017:	Appellant attends HCP assessment and HCP report prepared (no formal decision on the PIP descriptors followed, but if the HCP's findings and opinions were accepted then the Appellant would have scored nil points for both daily living and mobility)
11.07.2017:	FTT adjourn for production of Appellant's GP records
12.12.2017:	FTT award Appellant 5 daily living points and 0 mobility points, conclude that she is not entitled to either component of PIP and confirm Secretary of State's decision of 23.09.2016

The proceedings before the Upper Tribunal

5. The Appellant's grounds of appeal were essentially two-fold. First, she argued that the FTT was wrong to rely on the HCP report of 24 March 2017 when it was required to consider the position as at the date of the DWP decision (23 September 2016). Second, she took issue with several of the findings of the HCP.

6. Ms T Tosta, the Secretary of State's representative, has made two submissions in these proceedings. The first submission, developing a point raised by Upper Tribunal Judge Mitchell when granting permission to appeal, was to the effect that the FTT had erred in law by considering an appeal that had lapsed. On that basis she proposed that the FTT's decision should be set aside and the matter remitted to the decision-maker for a decision based on the HCP report, a decision which would then carry fresh appeal rights.

7. I then stayed the Appellant's appeal to await the outcome of the separate appeal in CPIP/2646/2018, which raised similar issues, a decision now available on the Upper Tribunal (AAC) decisions website under the name *AI v Secretary of State for Work and Pensions [SSWP] (PIP)* [2019] UKUT 103 (AAC). In summary, I decided in that case that in circumstances such as this an Appellant's PIP appeal did not lapse when they were 'put back on the PIP journey' (see *AI v SSWP (PIP)* at paragraphs 48-62) and nor did the Appellant need to produce a second mandatory reconsideration notice (see *AI v SSWP (PIP)* at paragraphs 63-66).

8. In the light of that development, Ms Tosta then filed a second submission recording the Secretary of State's agreement with relevant aspects of the decision in *AI v SSWP (PIP)*. She acknowledged that the first submission had been in error in arguing that the Appellant's appeal had lapsed. She proposed that there two possible ways forward in resolving the Upper Tribunal appeal in the present case.

9. The first option, if the Upper Tribunal was satisfied the HCP report applied to the relevant period and had been correctly applied by the FTT, was to dismiss the Appellant's appeal and so leave the FTT decision in place.

10. The second option, if the Upper Tribunal found the HCP report did not pertain to the relevant period, and so had been erroneously applied by the FTT, was to allow the appeal and set aside the FTT decision. In that eventuality, Ms Testa suggested that the Upper Tribunal could either decide the underlying appeal itself (if it had sufficient evidence) or remit the claim to the Secretary of State's decision-maker.

11. In reply, the Appellant understandably expresses her lack of understanding of the legalese used in the submission by the Secretary of State's representative. However, as the claimant in *AI v SSWP (PIP)* had succeeded, the Appellant said she had rather assumed that her appeal to the Upper Tribunal would also succeed.

Discussion

12. The first question to consider is whether the FTT's decision involves any error of law.

13. I am not persuaded by the Appellant's first ground of appeal. It is true that the FTT must have regard to the statutory requirement 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). It is also the case that the HCP report was prepared some 6 months after the decision under appeal. However, later evidence may shed light on how matters stood

at an earlier date (see Social Security Commissioners' decisions *R(DLA) 2/01*, *R(DLA) 3/01* and *BMcD v DSD (DLA)* [2011] NICom 175; [2013] AACR 29). In the light of the evidence on file (e.g. the GP notes, recording repeat prescriptions but little else of note over this period), the FTT was probably entitled to take the view that the effects of the Appellant's medical conditions were probably little different as between the two dates.

14. The Appellant's second ground of appeal has more force, although I would put the point in a rather different way. It is not entirely clear whether the FTT fully understood the chronology of the appeal. For example, the FTT described the decision-maker's decision of 23 September 2016 as preferring the assessment in the HCP report to the Appellant's self-assessment, when of course it did nothing of the sort, being confined to the failure to attend issue. More seriously, however, I have reached the conclusion that the FTT failed to make sufficient findings of fact and to give adequate reasons for its decision on the descriptors. I acknowledge that the FTT was at some disadvantage in that the decision-maker had not filed any response to the appeal addressing the various PIP descriptors. All that said, the FTT's findings and reasons were not good enough. To take just one illustration: the FTT relied on the letters put in evidence from the Appellant's mother and partner for finding that descriptor 9(b) applied, but made no reference to their evidence about the Appellant's difficulties with mobilising – or indeed to the Appellant's own evidence about her difficulties with both planning and following journeys and moving around. The FTT's decision therefore involves an error of law.

15. I therefore allow the Appellant's appeal to the Upper Tribunal and set aside (or cancel) the First-tier Tribunal's decision.

16. The second question to consider is how to dispose of the appeal, the FTT's decision having been set aside.

17. It will be recalled that if the FTT's decision is set aside Ms Testa suggested that the Upper Tribunal could either decide the underlying appeal itself or remit the claim to the Secretary of State's decision-maker.

18. I do not consider that it is appropriate for me to re-decide the Appellant's substantive PIP appeal, as further findings of fact need to be made and these are best made by a first-instance tribunal.

19. Nor do I consider it appropriate to remit the claim to the Secretary of State's decision-maker. It is true that s/he has at no stage made a formal decision in the course of this appeal as to which PIP descriptors apply in the Appellant's case. However, there are several reasons why I do not adopt this course of action.

20. The first is that the Appellant made her claim for PIP on 10 August 2015, which is now over four years ago. Remittal to the Secretary of State's decision-maker will simply add to the extreme delay which the Appellant has already had to endure and is disproportionate.

21. The second is that although the Secretary of State's decision-maker has not made a formal decision on the applicability of PIP descriptors, s/he has had ample opportunity to do so. There were almost nine months between the HCP report and the final FTT decision. At any time during that period the decision-maker could have revised the disallowance decision and made an award of PIP, which would have had the effect of lapsing the appeal. The fact that no such revision was undertaken, and

that the HCP's assessment was that no scoring descriptors applied, suggests that a remittal to the decision-maker will only have one outcome.

22. The third reason is that the FTT is better placed to make a fair decision on which PIP descriptors apply. The FTT panel has a range of professional and practical expertise as well as more extensive powers (e.g. as regard case management) than the decision-maker.

23. I therefore remit the original appeal for re-hearing to a new First-tier Tribunal, which must make a fresh decision. The new tribunal need not concern itself with the issue of why the Appellant did not attend the original HCP assessment as the decision-maker has accepted she had good reason. There has also been a valid mandatory reconsideration on the decision that there is no entitlement to PIP (albeit that related solely to the good reason issue). The PIP caravan has since moved on – the decision-maker can now be safely assumed to be resisting the substantive PIP appeal based on the findings in the HCP report. However, subject to any questions of natural justice, the Secretary of State has always been able to shift the ground on which she opposes an appeal. For example, this is in principle no different from an overpayment decision being originally based on a misrepresentation but, by the time the case reaches the FTT, being grounded instead on a failure to disclose.

What happens next: the new First-tier Tribunal

24. 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 FTT'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 which period). That is a matter for the good judgement of the new FTT. That new tribunal must review all the relevant evidence and make its own findings of fact.

25. In doing so, of course, the new tribunal will have to focus on the claimant's circumstances as they were as long ago as at September 2016, and not the position as at the date of the new hearing, which will obviously (and regrettably) be more than three years later (see section 12(8)(b) of the Social Security Act 1998, referred to above). The original decision by the Secretary of State refusing entitlement to PIP was taken on 23 September 2016.

26. I make two further and more specific directions for the re-hearing of this appeal, directed respectively to the Appellant and to the Secretary of State.

27. I note the GP's evidence that the Appellant suffers from agoraphobia and would not be able to attend a tribunal hearing. The FTT appeal had therefore understandably proceeded as a paper hearing. There may, however, be other options for hearing the appeal. The Appellant is asked to inform the HMCTS regional tribunal office within one month which of the following options she would prefer:

(v) An oral hearing which she attends;
(vi) An oral hearing which she does not attend but e.g. her mother and/or partner attend in her stead;
(vii) A telephone hearing (but note the practical logistics of this may mean it is not available);
(viii) A paper hearing.

28. The Secretary of State is directed to send the HMCTS regional tribunal office within one month a supplementary submission on the Appellant's appeal setting out which descriptors (scoring or non-scoring) the Secretary of State considers applied to

the Appellant as at the date of the original decision under appeal. If the Secretary of State considers that an award of PIP is merited, then of course this gives her the opportunity to make such a revision decision and notify the Appellant and the FTT accordingly. The Secretary of State's submission should also provide details of any subsequent PIP claim made by the Appellant

Conclusion

29. 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 13 September 2019

Nicholas Wikeley
Judge of the Upper Tribunal