IN THE UPPER TRIBUNAL **Case No.** CPIP/2948/2018
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made at Newcastle-upon-Tyne on 10 September 2018 under reference SC230/17/00269) involved the making of an error of law, it is set aside. Further, the case is remitted for rehearing before a differently constituted panel of the First-tier Tribunal.

DIRECTIONS FOR THE REHEARING

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 tribunal shall contact the claimant to ask him if he would prefer a conventional face-to-face oral hearing of his appeal; if he would wish it to consider holding a telephone hearing of the appeal; or if he would like his appeal to be decided on the papers. He should be given at least 21 days to respond. If he chooses the first option then, of course, it follows that a conventional oral hearing will be held. If he chooses the second option then it will be for the tribunal to decide, in its discretion, whether to hold a telephone hearing or not. If he chooses the third option then the tribunal may but need not decide the appeal on the papers. If he does not respond or does so but does not express any preference, the tribunal shall hold a conventional oral hearing. He will then have the option of attending if wished.

C. The tribunal, in deciding the appeal, 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 & 3/01*.

D. These directions may be amended or supplemented at any time by a Judge of the First-tier Tribunal in the Social Entitlement Chamber.

REASONS FOR DECISION

1. There is something of a history which I shall briefly set out. On 11 November 2016 the claimant made a claim for a personal independence payment (PIP). On 15 January 2018 the First-tier Tribunal (F-tT) decided that the claimant was not entitled to PIP. The claimant challenged that decision and on 26 June 2018 I set aside the F-tT's decision and remitted for a rehearing. That rehearing took place on 10 September 2018. The F-tT, once again, dismissed the claimant's appeal and decided there was no entitlement to PIP. On 8 January 2019 I granted the claimant permission to appeal the decision of 10 September 2018 to the Upper Tribunal. In doing so I suggested, amongst other things, that it might have erred in law through failing to adequately explain its conclusion that the claimant did not experience overwhelming psychological distress when journeying out of doors.

2. Permission having been granted, I issued directions facilitating written submissions from the parties. The Secretary of State's representative has expressed the view that the F-tT did not adequately explain its conclusion with respect to overwhelming psychological distress and has urged me to set aside its decision and to remit for what will be the second time. The Secretary of State's representative has also told the Upper Tribunal that the claimant made a telephone claim for PIP on 16 January 2018 (a fresh claim) which was subsequently refused by letter of 25 February 2018, on the basis that he did not complete and return a claimant questionnaire which had been sent to him. The relevance of that is that, according to the Secretary of State, the F-tT rehearing the appeal will, if it finds there is entitlement, be limited to making an award up to and including 15 January 2018 only.

3. The claimant, in replying to the Secretary of State, takes issue with the contention that the period over which the F-tT will have jurisdiction in consequence of any remittal there might be, is limited. He says, in effect, that he did make a telephone call to the Department for Work and Pensions "to launch a claim" but that he subsequently decided that he was "in too much of a distressed state" to deal with it. He acknowledges receiving what is referred to as a "negative determination" (that is the letter of 25 February 2018 telling him his claim had been refused because he had not supplied information sought from him) but seems to suggest that since he did not properly follow through with his claim (that is to say he did not return a claimant questionnaire which had been sent to him for completion and return) he should not be treated as having claimed at all and so, therefore, the F-tT's jurisdiction should not be limited. The claimant then points out that he had provided the F-tT with evidence regarding mental health difficulties, the implication being that he feels the F-tT did not adequately consider such evidence. He then makes some assertions regarding what he feels to be "unfair weighting" against those with mental health difficulties in the PIP entitlement conditions. I appreciate the claimant feels strongly about the latter aspect but the points he makes as to that do not fall within the scope of this appeal. The claimant does not express a view as to the appropriateness of remittal but says he does not want a hearing of his appeal (at least before the Upper Tribunal but I assume before an F-tT too) because he cannot face one.

4. I was concerned as to the issue regarding the period over which the tribunal has jurisdiction and directed further submissions as to that specific issue. The Secretary of State's representative, as to that, argues that, in the circumstances described, the claimant did make a telephone claim for PIP (a telephone claim being permitted by relevant regulations) and that the claim was then determined. Since a final decision as to that claim was then made the tribunal if I were to remit in this case (as of course the Secretary of State has invited me to do) would be precluded from giving a decision as to entitlement for the period covered by the more recent decision. The Secretary of State relies in part, for that proposition upon what was said by Social Security Commissioner Parker in *CSDLA/237/03*. The claimant, in response to the Secretary of State's second submission, once again argues he had not actually made a fresh claim for PIP (his argument in large measure being that such a claim is not complete until at least a claimant questionnaire has been completed and submitted and possibly not until there has been a face-to-face assessment conducted by a health professional). But he agrees (unsurprisingly) with the Secretary of State's view that the tribunal had not adequately considered the evidence regarding his mental health and how it impacted upon his ability "to leave the house without suffering severe anxiety, personal safety concerns, social phobia and exhausting emotional distress".

5. I have asked myself whether I should hold an oral hearing of this appeal. However, nobody has asked for such a hearing. Both parties have had two opportunities, which they have taken, to set out their respective arguments in writing. In these circumstances I am satisfied a hearing is not required and that I can justly decide the appeal without one.

6. There is, as is apparent from what I have already said, agreement between the parties that the tribunal erred in its consideration of the possible applicability of the descriptors linked to mobility activity 1 (Planning and following journeys). In granting permission to appeal I had expressed three concerns regarding the tribunal's treatment of that issue. One of those (the only one I need to mention) was as follows:

> "4. As to the above, it may not have been open to F-tT 2 to say and to proceed on the basis that there was "no evidence of psychological distress let alone overwhelming psychological distress". Perhaps that term had not been used but there was documentary evidence indicative of mental health difficulties as well as a history of treatment for such difficulties. There was also the claimant's own evidence, as recorded at paragraph 78 of the statement of reasons, to the effect that "sometimes he was unable to go out because of severe anxiety or distress". Perhaps F-tT 2 did not believe him but what he had to say about the matter would appear to constitute evidence".

7. As the Secretary of State's representative pointed out in the first submission to the Upper Tribunal, there was documentary evidence in the form of letters written by one Dr Chaddock, a Clinical Psychologist, an assessment summary by a Ms Newby, a Community Psychiatric Nurse, and a letter written by the claimant's GP to a Consulting Psychiatrist, all of which contained indications of mental health concerns. There was, of course, the claimant's own oral evidence too. Whilst I would acknowledge that certain of that evidence was generalised in nature it was indicative of mental health concerns including anxiety related issues and a letter written by the Community Psychiatric Nurse did refer to the claimant being "unable to go out". Of course, a tribunal is not required to refer to each and every item of evidence before it when giving its reasons. But in my judgment, as agreed by the Secretary of State's representative, the tribunal was in the circumstances of this case required to undertake some consideration of the supportive, if primarily only so in general terms, medical evidence regarding anxiety and related mental health difficulties prior to deciding, in particular, the claimant's ability or otherwise to follow the route of a familiar or an unfamiliar journey. It was required to do that as a component of its general duty to give adequate reasons for its decision. Finally, as to this issue, I note there was some evidence to the effect that the claimant would take his dogs out though I am not clear whether he would do so alone or in the company of his wife. But even if he were able to do that alone, that might have only been in the context of familiar journeys so would not have precluded possible entitlement to 10 mobility points under mobility descriptor 1d. Accordingly, I have concluded effectively by consent, that the tribunal did err in law. Since had it not made the error the outcome of the appeal might (I do not say would) have been different, that error was material. It is therefore appropriate for me to set aside the tribunal's decision which I do.

8. The next thing I am called upon to decide, then, is whether I should remake the decision myself or whether I should remit for that purpose. I have borne in mind the claimant's apparent reluctance to attend another hearing of any sort. I have also borne in mind the fact that the decision under appeal was now made some considerable time ago. Those are factors which point to my attempting to remake the decision myself. But even if the claimant does not wish to have a hearing (and he should carefully read and consider

the directions I have set out above as to that) it seems to me there will be benefit in the matter being considered by the tribunal given the range of expertise which will be available to it through the composition of its panel. Remittal will also give the claimant the opportunity, if he wishes to reconsider, to attend another hearing and to give oral evidence which might prove to be valuable to the tribunal in the exercise of its fact-finding function. I have decided, therefore, that remittal is the proper course.

9. There will, therefore, be a rehearing of the appeal before a differently constituted tribunal. 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.

10. My having decided to remit it is now necessary for me to consider the issue surrounding the period over which it will have jurisdiction. I have found investigating this matter to be interesting and informative and I am grateful to the representative for the Secretary of State and to the claimant himself for their views.

11. Section 1(1) of the Social Security Administration Act 1992 sets out the general rule that a person will not be entitled to any benefit unless, in addition to satisfying relevant qualifying conditions, he/she makes a claim for it in the manner prescribed by regulations. Section 5 of the same Act authorises the making of such regulations. Regulation 11 of the Universal Credit, Personal Independence Payment, Jobseekers Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 and which I shall now, less cumbersomely call "the PIP C and P Regs 2013", relevantly provides;

> 11. – (1) A claim for personal independence payment must be made –
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> (a) in writing on a form authorised by the Secretary of State for that purpose and completed in accordance with the instructions on the form;
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> (b) by telephone call to the telephone number specified by the Secretary of State; or
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> (c) by receipt by the claimant of a telephone call from the Secretary of State made for the purpose of enabling a claim for personal independence payment to be made,
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> unless in any case or class of case the Secretary of State decides only to accept a claim made in one of the ways specified in paragraph (a), (b) or (c)….
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> (4) A claim made by telephone in accordance with paragraph (1) is properly completed if the Secretary of State is provided during that call with all the information required to determine the claim and the claim is defective if not so completed.

12. Provisions then follow concerning what will constitute a defective claim and how the commencement date for entitlement with respect to an initially defective though ultimately successful claim is to be decided.

13. Regulation 8 of the Social Security (Personal Independence Payment) Regulations 2013 mandates the Secretary of State to make "a negative determination" on a claim for

PIP in circumstances where, without good reason, a claimant has failed to provide information or evidence within one month of the date of its request or within such longer period as the Secretary of State may consider reasonable in the circumstances of the particular case. Further, section 80(5) of the Welfare Reform Act 2012 permits regulations to be made providing for a negative determination in such circumstances. The above clearly covers cases where a claimant questionnaire has been sent, after the making of a telephone call, but has not been completed and returned within the appropriate timescale. The Secretary of State says that is what has happened here and the claimant does not say he did not receive the questionnaire. He simply indicates, in effect, that he did not complete and return it, that being because he had decided not to pursue matters.

14. Section 12(8)(b) of the Social Security Act 1998 provides that a tribunal deciding an appeal shall not take into account circumstances not obtaining at the time when the decision appealed against was made. Section 17(1) of the same Act provides as follows:

> **Finality of decisions**
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> **17.** – (1) Subject to the provisions of this Chapter and to any provision made by or under Chapter 2 of Part 1 of the Tribunals, Courts and Enforcement Act 2007, any decision made in accordance with the foregoing provisions of this Chapter shall be final; and subject to the provisions of any regulations under section 11 above, any decision made in accordance with those regulations shall be final.

15. The effect of section 17(1), as explained in *CSDLA/237/03* (though the wording was slightly different at the date of the Commissioner's decision) is that decisions on claims are final, subject to appeals, revisions, supersession or judicial review. As was also explained by the Social Security Commissioner, section 12(8)(b) has to be applied in conformity with section 17(1) and with the basic rule that there cannot be overlapping decisions in respect of the same benefit. As was pointed out, if that were not the case the situation "could be chaotic". So, as the Commissioner went on to explain, a F-tT must decide the period over which it has jurisdiction to make an award. This will usually be open ended. But where a decision has already been made on a later period section 17(1) along with the common-sense principle that there cannot be two or more overlapping decisions concerning the same period, operates to limit the period over which a decision-making body has jurisdiction.

16. So, it follows that where the F-tT is adjudicating upon an earlier decision concerning a claim for benefit and the Secretary of State has made a later decision on a later claim for the same benefit (as here), then, perhaps absent something wholly exceptional, the period over which the F-tT has jurisdiction is only up to the date immediately prior to the second decision.

17. In this case, whatever the claimant has to say about the question of whether he feels he had actually completed making a fresh claim for PIP (and I will say something about that below) a decision had been made. It had been made not on a whim or absent anything emanating from the claimant. It had been made in response to his telephone call. It is apparent from the DWP website (www.gov.uk/pip/how-to-claim) that it is envisaged most new claims will be made by way of a telephone call or made online though written claims will still be accepted. It appears that a telephone claim will be accepted if what might be termed the "lay" conditions for entitlement have been shown to be satisfied. Those relate to matters such as residence and presence (see regulations 16-23 of the

Social Security Personal Independence Payment) Regulations 2013). It is on that basis that a claimant questionnaire is then sent out so that more information about the claimant's condition and the way in which he/she is impaired may be obtained. It seems clear that that is what must have occurred in this case. Anyway, since the decision was made in response to the claimant having made a claim, or as he sees it indicating he wanted to claim, it attracted the finality provisions contained within section 17(1) of the 2008 Act. The existence of that decision, then, does act to curtail the period of jurisdiction available to the tribunal in this case as a consequence of this remittal.

18. The Secretary of State's representative, however, in the second submission to the Upper Tribunal, although I may well have misunderstood him, seemed (on one reading) to allude to the possibility that in a case where in such circumstances the second of two decisions is a negative decision with respect to entitlement made on a second claim, a tribunal considering an appeal against a first decision on a first claim, will have jurisdiction up to the date immediately before the making of the second decision and may then, absent an appeal against the second decision, have jurisdiction from the date immediately after the date of the second decision. The rationale for that suggestion (if that is what it was) seemed to be that it had been indicated in *R(S) 14/81* and *R(SB) 4/85* that a negative decision on entitlement only applies on the date it was made. If I am understanding the submission correctly (and again I stress I may not be) I cannot agree with it in the context of the sorts of circumstances arising in this case. The decisions relied upon were anyway clearly made prior to the coming into force of section 17(1) of the Social Security Act 1998. That provision clearly does provide for finality of decisions. The negative determination decision communicated by letter of 25 February 2018 has never been appealed. It would be itself a recipe for confusion and would be artificial if a tribunal was required or able to adjudicate upon the two periods. It would also seem to be inconsistent with the outcome in *CSDLA/237/03*.

19. The arguments touching upon whether or not it can be said in the circumstances described above that the claimant had made a claim for PIP were certainly interesting though strictly speaking given the conclusions I have already reached, not now relevant to the outcome of this appeal to the Upper Tribunal. But while, speaking generally, the claim system set out in the above legislation appears coherent, it is odd, as the claimant picks up on, that regulation 11 of the PIP C and P Regs 2013 states that a claim made by telephone is properly completed if the Secretary of State is provided during that call with all the information required to determine the claim and that, otherwise, the claim is defective. But it is really very difficult to envisage a telephone conversation in which all of the information which might conceivably be required before a fair and informed decision can be made might be provided. That would certainly mean, in effect, the person receiving the call going through each and every question with the claimant which would be asked on the claimant questionnaire. Even then, very probably, there would need to be further medical information and opinion obtained from a health professional via a paper based report or (I think much more commonly) a face-to-face assessment with a report following that. That medical input cannot, of course, be obtained by way of a telephone conversation between the claimant and the call handler. Further, the contention put forward by the claimant would mean, in effect, that a claim had not been properly completed until the point at which it was ready to be actually determined. The better way of looking at it, it seems to me, is to say, as the Secretary of State's representative suggests, that notwithstanding the rather loose, misleading or unclear wording of regulation 11(4), the claim if made by telephone is actually made once the various questions concerning the "lay conditions"

have been answered to the satisfaction of the Secretary of State such that she accepts the claim as having been made and as not being defective. What then follows is really the gathering of evidence relevant to the question of whether the claim, as made, should be allowed and if so on what terms. The phrase "all the information required to determine the claim" is not to be taken to mean all the information a diligent decision-maker might wish to have before making a fully informed decision but, rather, enough information to enable the making of a coherent decision on the claim in light of whatever evidence might or might not then be obtained in the process of considering that claim. There might though be some merit in consideration being given to rewording the regulation in order to aid clarity of understanding.

20. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above. The F-tT rehearing the appeal should take into account the various points I have made when deciding the period over which it has jurisdiction.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated **16 October 2019**