[2021] UKUT 119 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CDLA/812/2020**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

SM

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 4 February 2021
Decided on consideration of the papers

Representation
Appellant: CAB Cornwall (with the assistance of CPAG)
Respondent DWP Decision-Making and Appeals, Leeds

DECISION

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Truro on 25 September 2019 under reference SC200/18/00562 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

I draw the claimant's attention to the fact that those directions are addressed to him as well as to the new tribunal and that Direction 5 below includes a time limit.

DIRECTIONS

To the First-tier Tribunal

1 The First-tier Tribunal must hold a hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

2 I recommend—but do not direct—that the judge who presides over that hearing should be a salaried judge, or a former salaried judge.

3 Whether or not that recommendation is accepted, the members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge, medical member, or disability-qualified member who made the decision I have set aside.

To the claimant

4 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 25 September 2019 made a legal mistake, not because it has been accepted that you are entitled to PIP. Whether or not you are entitled will now be decided by the new tribunal.

5 If there is any further written evidence that you would like the new tribunal to consider you must now send it to HM Courts and Tribunals Service at Sutton, quoting the reference, SC200/18/00562, so that it is *received* no later than **one month** from the date on which this decision is *sent* to the parties.

REASONS

Introduction and procedural history

1. As I am remitting the cases to the First-tier Tribunal ("FTT"), I will say as little as possible about the facts. Only the procedural history is relevant to what I have decided and it is as follows.

2. Before the events that led to this appeal, the claimant had been awarded the higher rate of the mobility component and the highest rate of the care component of disability living allowance ("DLA") from and including 11 October 2008.

3. On 16 March 2018, however, the Secretary of State superseded the decision making that award following a fraud investigation. The terms of the superseding decision were that, following a change in his circumstances, the claimant had not been entitled to any rate of either component of DLA from and including 9 September 2012, a year after the claimant had undergone a major operation to treat the condition from which he suffered.

4. Then, on 19 March 2018, the Secretary of State decided that the claimant had been overpaid £33,773.85 as DLA for the period from 12 September 2012 to 30 May 2017 (both dates included) and that that overpayment was recoverable from him.

5. On 15 May 2018, a different decision maker confirmed those two decisions on what is known colloquially as mandatory reconsideration.

6. The claimant then appealed to the First-tier Tribunal on 4 June 2018. The Tribunal held two hearings on 8 July and 24 September 2019.

7. On 25 September 2019, the Tribunal refused the appeals and confirmed both decisions.

8. The claimant's application for permission to appeal to the Upper Tribunal was refused by District Tribunal Judge O'Hara on 24 February 2020. I granted his renewed application on 30 July 2020.

Reasons for setting aside the First-tier Tribunal's decision

9. It is clear that the Tribunal took great pains with this case. Unfortunately, it appears to have allowed its attention to detail to cause it to lose sight of the overall legal framework in which it was operating.

10. In particular, what the Tribunal (as is common usage) calls the "entitlement decision", was in fact a superseding decision. That meant that both grounds for supersession and the effective date of the superseding decision had to be identified.

11. That is particularly important in a DLA case because there are special rules, which—as I said in the analogous context of revision in *RH v Secretary of State for Work and Pensions (DLA)* [2015] UKUT 453 (AAC) at [3]—have the effect that "the law does not allow the Secretary of State to change an award of DLA retrospectively (i.e., so as to create an overpayment) without observing certain safeguards for the claimant." In my judgment, it was necessary for the Tribunal to address those rules expressly in its written statement of reasons, but it did not do so.

12. As a general rule, where:

(a) a DLA decision is superseded on the basis that there has been a relevant change of circumstances since the original decision had effect (*i.e.*, under regulation 6(2)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) ("the 1999 Regulations"); and

(b) the superseding decision is not advantageous to the claimant; and

(c) the change in circumstances relates to one of the disability conditions,

the effective date is the date the superseding decision is made (i.e., under section 10(5) of the Social Security Act 1998).

13. In plain—or, at least, plainer—English, that means that, if general rule applies, the superseding decision in this case takes effect from 16 March 2018, the date of the "entitlement" decision, rather than 9 September 2012, and there is therefore no overpayment.

14. There is an exception to that rule. If the Tribunal considered that the exception applied, it had power to set an effective date before 16 March 2018. However, to do so it was necessary for the written statement of reasons to address the point expressly and to set out the findings of fact and reasoning that supported its decision that the case fell within the exception.

15. The exception is set out in regulation 7(1)(b) and (2)(c)(ii) of the 1999 Regulations. Regulation 7(1)(b) explains that the regulation as a whole "contains exceptions to the provisions of section 10(5) as to the date from which a decision under section 10 which supersedes an earlier decision is to take effect". Regulation 7(2)(c)(ii), reads as follows:

> "(c) where the decision is not advantageous to the claimant—
>
> …
>
> (ii) in the case of a disability benefit decision, … (whether before or after the decision), where the Secretary of State is satisfied that in relation to a disability determination embodied in or necessary to the disability benefit decision, … the claimant or payee failed to notify an appropriate office of a change of circumstances which regulations under the Administration Act required him to notify, and the claimant or payee, as the case may be, knew or could reasonably have been expected to know that the change of circumstances should have been notified,
>
> (aa) from the date on which the claimant or payee, as the case may be, ought to have notified the change of circumstances, or
>
> (bb) if more than one change has taken place between the date from which the decision to be superseded took effect and the date of the superseding decision, from the date on which the first change ought to have been notified; …"

16. The written statement of reasons does find (at paragraph 26) that the claimant was aware that there had been "some improvement" in his abilities, and that he was aware that he had an obligation to inform the Secretary of State of that improvement. However, because the statement does not address the issues that arise under regulation 7(2)(c)(ii), those findings are not detailed enough to support the Tribunal's decision.

17. First, it is not enough that the claimant may have been under an obligation to notify the Secretary of State of a change in his circumstances. To fall within regulation 7(2)(c)(ii), the source of the obligation has to be "regulations under the [Social Security] Administration Act [1992]". The relevant regulation is not identified in the statement; it is regulation 32 of the Social Security (Claims and Payments) Regulations 1987 ("the 1987 Regulations").

18. Second, because the regulation is not identified, the statement is inevitably silent as to the criteria the Tribunal applied when deciding "the date on which the claimant … ought to have notified the change of circumstances" and as to why that date should be exactly one year after the claimant's operation.

19. Third, it is necessary that "the claimant knew or could reasonably have been expected to know that the change of circumstances should have been notified". In the context of regulation 7(2)(c)(ii) as a whole, the word "should" in that passage means "should because regulations made under the Administration Act required it". In other words, the decision awarding the claimant DLA could only be superseded with retrospective effect it the claimant actually knew—or ought reasonably to have known—that he was under a *legal* obligation to notify the Secretary of State of the change.

20. Unless the claimant had read and understood the 1987 Regulations (which does not seem probable), knowledge of his legal obligations can only have arisen from what he had been told by others, in particular, the Secretary of State. However, the written statement of reasons contains no findings as to what information had been given to the claimant and no analysis of what he could reasonably have been expected to have known as a result of that.

21. I have considered whether the above errors were material. Had the Tribunal turned its mind to the issue, there was sufficient evidence on which it could have concluded that this case fell within regulation 7(2)(c)(ii). However, the Tribunal did not turn its mind to that issue and, in my judgment, it cannot be said that the decision would inevitably have been the same had it done so.

22. In reaching that conclusion, I have attached weight to the fact that special rules about the effective date of certain superseding decisions in DLA cases are there to provide safeguards for claimants and it would not normally be right for the Upper Tribunal to diminish the protection of those safeguards by upholding the decision of a tribunal that had ignored them.

23. Further, the reason that safeguards are necessary is that issues around whether a claimant's condition has improved often involve matters of judgment or opinion rather than matters of primary fact.

24. Improvements following surgery are often gradual and may be imperceptible to the patient. For that reason, it is preferable that findings of fact about a claimant's improvement should be detailed and tied closely to the observable facts of the case. For example—and it is an example that is deliberately far from the facts of the present case—a finding of fact that:

> "For some time after the operation to insert a stoma, Mr X needed attention from his wife in order to empty and change the bag. However, by Christmas 2019, he was able to perform both those tasks unaided."

is preferable to a more general statement that there had been some improvement in Mr X's abilities. It is only the more detailed type of finding that will allow a decision maker to

apply regulation 32 of the Claims and Payments Regulations and regulation 7(2)(c)(ii) of the 1999 Regulations correctly.

25. I have therefore set the First-tier Tribunal's decision aside.

26. For the sake of completeness, I should say that the decision on the overpayment issue cannot stand once the decision on the supersession issue has gone. In the absence of a valid supersession there is no overpayment.

Reasons for remitting the appeal

27. Having set the decision aside, I must next decide whether to re-make the decision myself or to remit the matter to the First-tier Tribunal with directions.

28. I have chosen to take the latter course. Further findings of fact need to be made and it is expedient that they should be made by a tribunal that includes a doctor and a disability-qualified member at a venue that is closer to the claimant's home than one of the regional venues at which the Upper Tribunal holds hearings.

Coda

29. As I am setting the Tribunal's decision aside for the above reasons, I do not also need to decide whether it also made the legal errors set out in the grounds of appeal and in the Secretary of State's response. Any errors that may have occurred will now be subsumed in the re-hearing I have directed.

30. I should, however, say that I regard the submissions made by both parties as having considerable force. I recommend that the members of the new Tribunal consider carefully what both representatives have said to the Upper Tribunal when they carry out their own evaluation of the case.

Signed (on the original) Richard Poynter
on 4 February 2021 Judge of the Upper Tribunal