



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2021-000810-PIP

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

Between:

FW

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 15 November 2022

Decided on consideration of the papers

Representation:

Appellant: Blackbird Solicitors Ltd

Respondent: Mr James Hall, Trainee Lawyer, GLD on behalf of DWP

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 22 January 2021 under file number **SC316/20/00332** was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set aside that decision and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in hearing this appeal on 22 January 2021.**
- 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 19 March 2020).**

4. 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 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 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 disposal issue in this appeal to the Upper Tribunal

1. Both the Appellant (the claimant) and the Secretary of State (the Respondent) agree that the First-tier Tribunal (the FTT) made at least one error of law. However, they do not agree on the next steps. The Respondent is content for the FTT's decision simply to be set aside with no further ado and for the matter to be remitted to a fresh FTT for re-hearing. The Appellant, who has the benefit before the Upper Tribunal of representation by a firm of solicitors under legal aid, which will not be available for a re-hearing at any new FTT, requests that the Upper Tribunal determine all his grounds of appeal (and, by implication at least, re-decide the underlying appeal itself). However, I explain later why I am remitting to a fresh FTT.

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

2. The Appellant's appeal to the Upper Tribunal succeeds but there will need to be a completely fresh hearing of his original personal independence payment (PIP) appeal before a new FTT.

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

3. There has been no application for an Upper Tribunal oral hearing and I am satisfied it is fair and just to determine this appeal on the papers. I allow the Appellant's appeal to the Upper Tribunal. The decision of the FTT involves a legal error in terms of its inadequate reasoning. On that basis, I set aside the Tribunal's decision.
4. For the reasons I explain later, the case now needs to be reheard by a new and different FTT. 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.

The background to this appeal to the Upper Tribunal

5. On 19 March 2018 a previous FTT found that the Appellant had scored 8 points for daily living activities (and 0 points for mobility). The 8 daily living points were for descriptors 1c (preparing food, 2 points), 9c (engaging with other people face to face, 4 points) and 10b (making budgetary decisions, 2 points). Accordingly, that FTT made an award of the standard rate of the PIP daily living component from 4 October 2017 to 3 October 2019 (but no award of the mobility component).
6. In October 2019 the Appellant made a further claim for PIP. On 19 March 2020 the Secretary of State's decision-maker decided that the Appellant scored zero points for both daily living and mobility activities and so made no further award of PIP with effect from 21 October 2019. The Appellant appealed again to the FTT.
7. In the FTT decision now under appeal, dated 22 January 2021, the Appellant scored 4 daily living points and 0 mobility points. The 4 daily living points were for descriptors 9b (engaging with others, 2 points, rather than the 4 point descriptor awarded previously) and 10b (budgeting, 2 points). That was still plainly not enough to qualify for any rate of either component of PIP. The Appellant applied to the FTT for permission to appeal to the Upper Tribunal.

The grant of permission to appeal to the Upper Tribunal

8. The District Tribunal Judge gave the Appellant permission to appeal in the following terms (appropriately anonymised):

4. Mr W had been in receipt of an award of Personal Independence Payment for the period from 4 October 2017 to 3 October 2019. That award was made by a Tribunal on 19 March 2018. It is referred to in the statement of reasons but without further comment. I think that more is required if Mr W is to understand why he was made an award on one occasion but not on another. Has something happened in the meantime; or was the earlier decision unsound; or was it sound but one that could reasonably be departed from? A further difficulty here is with the chronology. The award made by the Tribunal expired a couple of weeks before the effective date of the decision under appeal. That is not acknowledged. I would expect the effective date of the decision under appeal to be 4 October 2019 unless Mr W had delayed returning his claim form for the new, or renewal, period. He does not seem to have done.

5. I do not set the decision aside, notwithstanding my observations, because a Judge of the Upper Tribunal could take the view that whilst the decision contains errors of law, when the statement of reasons is considered as a whole, they are not material.

9. I interpose here that the issue over the chronology is probably more apparent than real. It appears in fact from the file that the Appellant made what was technically a new claim on 21 October 2019, shortly after the expiry of his previous tribunal award.

The proceedings before the Upper Tribunal

10. The Appellant's notice of appeal as lodged with the Upper Tribunal set out its detailed submissions for the following four grounds of appeal:

Ground 1: Tribunal failed to give adequate reason why it departed from the earlier FTT decision.

Ground 2: The FTT trial is flawed due to its failure to consider the Appellant, who suffers from PTSD and ADHD, a vulnerable adult. See the Practice Direction '*First Tier and Upper Tribunal – child, vulnerable adult and sensitive witnesses*'. The definition of 'vulnerable adult' in paragraph 1(b) of the PD remains that set out in section 59 of the Safeguarding Vulnerable Groups Act 2006 as worded on 30 October 2008.

Ground 3: Preparing food – The Tribunal failed in its conclusion to apply the relevant DL descriptor.

Ground 4: Engaging with other people – The Tribunal failed to adequately apply the relevant legislation/regulations needed for Descriptor 9. No reasons were given in the Statement.

11. I then gave directions on the Appellant's appeal, commenting as follows:

"The District Tribunal Judge has already permission to appeal. ... I am making abbreviated case management directions, for the reasons that follow. It seems to me the reasons given by the District Tribunal Judge for giving permission to appeal provide ample reason for allowing this appeal. This impression is only confirmed by the further grounds of appeal filed by the Appellant's representative. Accordingly, the abbreviated case management directions that follow explain what happens next. I should explain for the Appellant's benefit that it is not usual for the Upper Tribunal to re-decide appeals on their facts. This is in part because the First-tier Tribunal (FTT) sits at more convenient locations for claimants and in part because the FTT is a 3-person tribunal with a range of expertise."

12. In the accompanying case management directions I proposed, if the parties consented, not to issue a fully reasoned decision but rather simply to set aside the FTT's decision and to remit the case for re-hearing before a fresh FTT. The Upper Tribunal office accordingly sent the parties a Consent Form under rule 40(3)(a) (of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) for them to indicate their consent (or not, as the case might be).

13. The Secretary of State's representative returned the Consent Form with the "consent box" duly ticked, merely adding for information that the Appellant had not made any further claims for PIP.

14. The Appellant's representative returned the Consent Form with the "no consent box" marked with an 'X'. The following explanation was given (paragraph numbers have been added for ease of reference):

1. The Appellant requests that the Upper Tribunal consider the entire grounds of appeal in its merit and not only limited to the Upper Tribunal Judge Wikeley's observation. The Appellant requests that the Upper Tribunal allows him to advance the other grounds mentioned in the grounds of appeal.

2. The appeal brings an opportunity to the Upper Tribunal to provide a guidance on cases where disabled applicant/claimant whose subsequent

application for PIP is refused where there has been no change to their disability vis-à-vis its impact on their day-to-day life.

3. The Appellant was on additional dosage of Sertraline for depression at the First Tier Tribunal trial time date.

4. Part of the Appellant's difficulties in his claim was that there is no agency assisting him with his claim or with his appeal before the First Tier Tribunal. The lack of assistance was highlighted in the grounds of appeal.

5. The Appellant currently has benefit of legal aid for this appeal. Unfortunately, legal aid is not available for appeal before the First Tier Tribunal.

6. We humbly request that the Upper Tribunal allows this appeal to trial to advance his grounds of appeal.

The Upper Tribunal's analysis

Introduction

15. This appeal succeeds for the primary reason identified by the District Tribunal Judge when granting permission to appeal, as also encapsulated in Ground 1 on the notice of appeal.

Ground 1 and adequacy of reasoning

16. As noted above, a previous FTT had made an award of the standard rate of the PIP daily living component. The present FTT's explanation as to why the outcomes were different was rudimentary at best with clues scattered around the decision notice and statement of reasons. In its decision notice, there is a sentence to the effect that "Since his last award for DL [daily living] PIP, Mr W has clearly improved regarding preparing a meal and mixing with other people." The statement of reasons records the fact of the previous award (at paragraph [6]), but otherwise there is little if any further explanation. There is a single comment in paragraph [14] to the effect that "He is now better as regards DL1 [preparing food] which he safely manages compared to his earlier PIP award of 1c". The statement of reasons records that descriptors 9b and 10b apply, but without any further explanation as to why that is so. In particular, there is no clear nor indeed any explanation in the statement of reasons or the decision notice as to why descriptor 9c (4 points) applied previously but only descriptor 9b (2 points) now.

17. Assuming for the present that the Appellant's claim for PIP was a new claim, made shortly after the expiry of the previous award, rather than a renewal claim, the principle set out in *R(M) 1/96* still applies (see e.g. *AB v SSWP (DLA)* [2015] UKUT 89 (AAC) at paragraph 29). In essence the point in *R(M) 1/96* is that a claimant should understand, from the reasons given, why an appeal has failed and, as a part of that, is entitled to know why a tribunal is departing from a previous award.

18. Whether reasons are adequate in the light of the guidance set out in *R(M) 1/96* is ultimately a judgement call. I am inclined to agree with the District Tribunal Judge in this case "that more is required if Mr W is to understand why he was made an award on one occasion but not on another." As noted above, there are clues buried in the FTT's decision notice and the statement of reasons, but no explicit explanation of why the outcome differed from the previous tribunal award. The District Tribunal Judge was evidently at a bit of a loss. After comparing the decision notice and the

statement of reasons I was able to work out that it was the absence of any points for preparing food this time around that was the decisive factor. However, the test for adequacy of reasons does not benchmark against the informed judicial reader. It is a test directed at the parties and whether they reasonably understand why they have won or lost, as the case may be. In the circumstances of this case a short explanatory paragraph towards the end of the statement of reasons would probably have sufficed. As it was, the adequacy of reasons threshold was not met and so the appeal succeeds.

The remaining grounds of appeal

19. Having found that the FTT's decision involves an error of law on the basis of Ground 1 and the renewal point, it is not necessary to address the Appellant's remaining three grounds of appeal. Whether they are made out or not will make no difference to the outcome of the appeal, which succeeds in any event. As Lord Roskill once observed, albeit in a rather different judicial context:

“The Court of Appeal appear to have taken the view that the plaintiffs were entitled of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues” (*Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446 at 448G-H).

20. The relevant issue in this case is whether the FTT's decision involves a material error of law, Having decided that it does, the remaining three grounds of appeal do not need to be determined. In addition, I make the following observations on the Appellant's points made by way of reply under rule 40 (see paragraph 14 above).
21. As regards point (1), it would be disproportionate and not in keeping with the overriding objective to devote further scarce judicial resource to deciding the remaining grounds of appeal for the reasons explained above.
22. Point (2) is that the case is said to bring “an opportunity to the Upper Tribunal to provide a guidance on cases where disabled applicant/claimant whose subsequent application for PIP is refused where there has been no change to their disability vis-à-vis its impact on their day-to-day life”. As is evident from the discussion above, there is no need for further such guidance at this level.
23. With reference to point (3), the change in medication, this was a development which post-dated the decision under appeal and so had to be disregarded, unless it cast light on the position as at the date of the DWP's original decision (see Social Security Act 1998, section 12(8)(b) and Social Security Commissioner's reported decisions *R(DLA) 2/01* and *R(DLA) 3/01*). This is a classic issue of fact for the FTT to resolve.

24. Points (4) and (5) concern the lack of assistance experienced by the Appellant at FTT level and the fact that legal aid is not available at the FTT. There are two responses that may be made. First, the FTT's inquisitorial ethos goes some way to ameliorating the lack of representation encountered before that tribunal. Second, and given where the Appellant lives, representation may in fact be available to assist both before and potentially at the FTT re-hearing (e.g. from Citizens Advice or Bristol Law Centre).
25. In conclusion, I am therefore satisfied that the First-tier Tribunal erred in law for the reason set out above. I accordingly allow the Appellant's appeal to the Upper Tribunal, set aside (or cancel) the Tribunal's decision and remit (or send back) the original appeal for re-hearing to a new FTT, which must make a fresh decision. I formally find that the FTT's decision involves an error of law as outlined above.

What happens next: the new First-tier Tribunal

26. 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)). 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.
27. In doing so, however, unfortunately the new Tribunal will have to focus on the claimant's circumstances as they were as long ago as at March 2020, and not the position as at the date of the new hearing, which will obviously and regrettably be more than 2½ years 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 to the FTT, was taken on 19 March 2020.

Conclusion

28. 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.

**Nicholas Wikeley
Judge of the Upper Tribunal**

Authorised for issue on 15 November 2022