



CW v SSWP (PIP)
[2023] UKUT 297 (AAC)

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2023-000775-PIP

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

Between:

C.W.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 5 December 2023
Decided on consideration of the papers

Representation:

Appellant: In person

Respondent: Ms Emma Fernandes, Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 24 January 2023 under number SC944/22/00486 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and re-make the decision originally under appeal as follows:

The Appellant's appeal (SC9444/22/00486) to the First-tier Tribunal is allowed.

Decision 1 affecting the award period 29/01/2015 to 17/01/2017

The decision made by the SSWP on 09/04/2015 is superseded with effect from 06/04/2016. The Appellant is entitled to the PIP daily living component

at the enhanced rate from 06/04/2016 to 30/09/2017. This is because she scores a total of 13 points for daily living descriptors 1d, 3b, 4b, 6b, 9c and 10b. This is no change in substance to the FTT's decision. However, given the period covered by Decision 2, the period covered by Decision 1 should presumably have been from 06/04/2016 to 17/01/2017.

Decision 2 affecting the award period 18/01/2017 to 14/01/2019

The decision made by the SSWP on 18/01/2017 is set aside. The Appellant is entitled to the PIP daily living component at the enhanced rate from 18/01/2017 to 14/01/2019. This is because she scores a total of 13 points for daily living descriptors 1d, 3b, 4b, 6b, 9c and 10b. This is a material change to the FTT's decision.

Decision 3 affecting the award period 15/01/2019 to 24/05/2021

The decision made by the SSWP on 13/03/2019 is set aside. The Appellant is entitled to the PIP daily living component at the enhanced rate from 15/01/2019 to 24/05/2021. This is because she scores a total of 15 points for daily living descriptors 1d, 3b, 4b, 5b, 6b, 9c and 10b. This is no material change to the FTT's decision.

REASONS FOR DECISION

Introduction

1. On one level, this is a straightforward case. The First-tier Tribunal made an award of Personal Independence Payment (PIP) covering three periods. For the first period the Tribunal awarded the enhanced rate of the daily living component of PIP. For the second period the Tribunal awarded the standard rate of the daily living component of PIP. For the third period the Tribunal again awarded the enhanced rate of the daily living component of PIP. However, the Appellant's case is that her health conditions and their effects had not materially changed over the whole period in issue.
2. On another level, this is anything but a straightforward case. It concerns the way that the processes for benefits decisions and appeals interact with the LEAP arrangements. LEAP is an acronym standing for Legal Entitlements and Administrative Practices. It refers to the review process instigated by the Department for Work and Pensions (DWP) to identify cases in which a person may have been wrongly denied entitlement to a social security benefit. Typically, the Department will conduct a LEAP exercise where the DWP's previous approach to decision-making is shown to have been mistaken in the light of subsequent case law.

The LEAP exercises relevant to this appeal

3. The complete and complex decision-making history of this case involves four separate LEAP exercises. However, in practice the appeal itself only concerns two of these various LEAP exercises. The first relates to daily living activity 9 (engaging with others) and the decision in *MM v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 191 (AAC); [2019] AACR 26. The second concerns daily living activity 3 (managing therapy, etc) and the decision in *Secretary of State for Work and Pensions v LB (PIP)* [2016] UKUT 530 (AAC).
4. The other two LEAP exercises, which form part of the background to the case chronology, but do not arise directly for consideration in this appeal, concern *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12 (mobility activity 1) and *RJ v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 105; [2017] AACR 32 (regulation 4).
5. For convenience in this decision these LEAP cases are simply referred to as *MM*, *LB*, *MH* and *RJ*.

The narrow issue on this appeal to the Upper Tribunal

6. The narrow issue (in outline) on this appeal therefore concerned the Appellant's entitlement to PIP during the second period ('Period 2') from 18 January 2017 to 14 January 2019. The decision of the First-tier Tribunal ('the FTT') on 24 January 2023, again in outline, was as follows.
7. For the first period (stated to be 06.04.2016 to 30.09.2017, or 'Period 1') the FTT found the following daily living descriptors to apply: 1d (2 points), 3b (1 point), 4b (2 points), 6b (2 points), 9c (4 points) and 10b (2 points), totalling 13 points. Accordingly, the FTT made an award of the enhanced rate of the PIP daily living component for Period 1. However, given the period covered by Decision 2, the

period covered by Decision 1 should presumably have been from 06.04.2016 to 17.01.2017.

8. For Period 2 (18.01.2017 to 14.01.2019) the FTT found the following daily living descriptors to apply: 1d (2 points), 3b (1 point), 4b (2 points), 6b (2 points) and 9c (4 points), totalling 11 points. Descriptor 10b (2 points) was found by the DWP not to apply for Period 2 and this was not reviewed by the FTT. Accordingly, the FTT made an award of the standard rate of the PIP daily living component for Period 2.
9. For the third period (15.01.2019 to date unknown, possibly 24.05.2021, or 'Period 3') the FTT found the following daily living descriptors to apply: 1d (2 points), 4b (2 points), 5b (2 points), 6b (2 points) and 9c (4 points), totalling 12 points. Descriptor 10b was still absent but descriptor 5b had now been found to apply. Accordingly, the FTT made an award of the enhanced rate of the PIP daily living component for Period 3.

The Upper Tribunal's decision on the narrow issue in summary

10. I allow the Appellant's appeal to the Upper Tribunal, which is supported by the Secretary of State. The decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision.
11. I can re-decide the underlying appeal that was before the First-tier Tribunal. There is therefore no need for the appeal to go back to be reheard by a new First-tier Tribunal. Accordingly, I substitute my decision for that of the First-tier Tribunal dated 24 January 2023.
12. My decision, in summary, is that the Appellant is also entitled to the enhanced rate of the PIP daily living component for the period from 18 January 2017 to 14 January 2019 (i.e. Period 2) as well as for Periods 1 and 3.
13. For completeness I should add that there is no issue arising on this appeal as to the Appellant's entitlement or non-entitlement (depending on the precise period in question) to the mobility component of PIP.

The background to the appeal to the First-tier Tribunal

14. The Appellant, who is now aged 65, suffers from a number of mental health conditions including extreme anxiety and OCD.
15. The decision-making history of her PIP claim is somewhat complicated and is best taken step by step.
16. The Appellant made a new claim for PIP on 29 January 2015. Following receipt of an HCP report, on 9 April 2015 a decision-maker made an award of the standard rate of the daily living component (11 points, including 2 points for making budgeting decisions, descriptor 10b). The PIP award was for the fixed period from 29 January 2015 to 30 September 2017. The decision of 9 April 2015 was reconsidered but confirmed on 6 May 2015.
17. On 18 January 2017 a decision-maker carried out a review of the Appellant's PIP award, having considered a questionnaire from the Appellant and a new HCP report. He decided that she remained entitled to the standard rate of the daily

living component, but on the basis of only 9 points, this time excluding the 2 points previously awarded for 10b, making budgeting decisions. However, although the decision on the rate of PIP was not superseded, as the new score made no difference to the outcome, the decision on the length of the award was superseded. The decision-maker extended the duration of the Appellant's PIP award from 18 January 2017 to 21 June 2019.

18. Following a further questionnaire and a further HCP report and another review, on 15 January 2019 another decision-maker superseded the existing award, concluding that the Appellant had no entitlement to PIP with effect from that date, as she now scored just 4 daily living points (for descriptors 2b and 6b).
19. However, on 13 March 2019 the Appellant was issued with what can only be described as a thoroughly confusing mandatory reconsideration notice ('MRN'). This notice recorded that the Appellant was awarded 2 daily living points each for descriptors 1b, 4b, 5b and 6b. The MRN went on to explain that "Your total score for the daily living part of PIP is 8 points. This means I can't award you PIP for help with your daily living needs." This purported explanation is utter nonsense. If the Appellant achieved 8 points, then by definition she qualified for the standard rate of the daily living component. The DWP's response to the Appellant's later LEAP appeal recorded that she did indeed qualify for that component at that rate for the period from and including 15 January 2019.
20. Certainly, the next development suggested that someone in the DWP had appreciated the inherent contradiction on the face of the MRN dated 13 March 2019 and resolved it in favour of the Appellant, even if the relevant supporting documentation is not in the present appeal bundle. This is because on 24 June 2019 a LEAP decision was made on the Appellant's case, based on the Upper Tribunal's decisions in *RJ* and *MH*. The decision stated that the Appellant's daily living score was "still" 9 points, being the total for descriptors 1d, 3b, 4b, 6b and 9b. This was said to be for the period from 18 January 2017 to 14 January 2019 (i.e. Period 2), meaning that the award of the standard rate of the daily living component for that period was "still correct". The 2 points for making budgeting decisions was still missing from the composition of the Appellant's PIP award.
21. On 18 November 2020 the Appellant was sent a COVID-19 extension letter, explaining that PIP entitlement reviews had been put on hold and that her existing award had been extended to 29 July 2022.
22. On 8 January 2022 the COVID-19 extended decision was superseded on review, following a further questionnaire and HCP report. This review decision awarded the Appellant the enhanced rate of both PIP components, scoring 14 points for both components, for the period from 25 May 2021 to 14 December 2024. The daily living score now again included 2 points for descriptor 10b for making budgeting decisions.
23. The Appellant was then sent two further LEAP outcome decision letters relating to the *LB* and *MM* cases.
24. The first LEAP decision letter, sent on 2 June 2022, was in relation to the Upper Tribunal's decision in *LB* and stated that her PIP award was unaffected. The subsequent MRN, dated 20 June 2022, stated that the Appellant was entitled to

the standard rate of the PIP daily living component from 18 January 2017 to 15 January 2019. It added that the PIP award from 25 May 2021 was “not affected”.

25. The second LEAP decision letter, sent on 15 June 2022, was in relation to the Upper Tribunal’s decision in *MM*. This LEAP decision stated both that “your PIP award before 25 May 2021 ... is not affected” and “Your PIP award from 25 May 2021 is correct”. In other words, there was no change to the Appellant’s entitlement to PIP as compared with the outcome of the 8 January 2022 letter. This notification letter was followed by a MRN dated 28 June 2022, confirming that the Appellant was entitled to the standard rate of the PIP daily living component from 18 January 2017 to 15 January 2019. It also added that the decisions of 15 January 2019 and 25 May 2021 “have already considered the changes in the law and remain the same”.
26. The Appellant then lodged appeals with the First-tier Tribunal against both of the latest two LEAP decisions.
27. The appeal against the first LEAP decision letter and the MRN dated 20 June 2022 (relating to *LB*) was made on 27 June 2022 (digital case number 1656329057482760). Under the heading “Reasons for appealing” and in response to the question “What you disagree with” the Appellant responded: “All of it”. The DWP response to this first appeal recorded the date of claim as being 29 January 2015 and the decision’s effective date as being 18 January 2017.
28. The appeal against the second LEAP decision letter and the MRN dated 28 June 2022 (relating to *MM*) was made on 4 July 2022 (1656938728814647). Under the heading “Reasons for appealing” and in response to the question “What you disagree with” the Appellant responded “Everything”, and she went on to describe in some detail the impact of her acute anxiety. The DWP response to the second appeal recorded the date of claim and the decision’s effective date as both being 29 January 2015.
29. Both appeals were therefore comfortably in time as regards the respective LEAP decisions being challenged.

The First-tier Tribunal’s decision

30. In essence, the FTT allowed the Appellant’s appeal against the *MM* LEAP decision, awarding her 2 additional points under daily living activity 9, raising it from descriptor 9b to 9c, but refused the appeal against the *LB* LEAP decision. It confined its consideration to the PIP daily living activities 3 and 9 and ruled that it could not consider other PIP activities on the LEAP appeals. The overall effect of the FTT’s decision is summarised above. The FTT issued a detailed Decision Notice setting out its findings for the three time periods in question.
31. In what it described as Decision 1, relating to Period 1, the FTT was concerned with the period from 29 January 2015 to 30 September 2017. The FTT allowed the Appellant’s appeal to the extent of making an award of the enhanced rate of the daily living component from 6 April 2016 to 30 September 2017. It found that she scored 13 daily living points for this period, being the total for descriptors 1d, 3b, 4b, 6b, 9c and 10b. The significance of 6 April 2016 as the start date for the award was that this was the date *MM* was decided by the Upper Tribunal. In effect, therefore, the FTT superseded the award made on 9 April 2015 but with

effect from 6 April 2016. As already noted, the end date for the award should presumably have been 17 January 2017 given the scope of Decision 2.

32. In Decision 2 the FTT was concerned with Period 2, the period from 18 January 2017 to 14 January 2019. Here, the FTT refused the Appellant's appeal and confirmed the Secretary of State's decision of 18 January 2017. As a result, the FTT found that the Appellant was entitled only to the standard rate of the daily living component for the period in question. This was on the basis that she scored 11 points, being the total for descriptors 1d, 3b, 4b, 6b and 9c. As a result of the decision in *MM*, the points score for engaging with others increased from 9b (2 points) to 9c (4 points). However, there was no points score allocated for making budgeting decisions, with the result that the Appellant fell 1 point short of the 12-point threshold required for an award of the enhanced rate of the daily living component.
33. In Decision 3 the FTT was concerned with Period 3, the period from 15 January 2019 to what it described as "to date unknown, possibly 24/05/2021". The FTT allowed the Appellant's appeal, setting aside the DWP decision dated 13 March 2019. The FTT found that the Appellant was entitled to the enhanced rate of the daily living component from 15 January 2019 to 24 May 2021, scoring 13 points for daily living descriptors 1d, 4b, 5b, 6b and 9c. Again, no points score was allocated for making budgeting decisions but it made no difference as two new points were awarded for 5b.
34. In short, therefore, the Appellant's principal concern was that the FTT Decision Notice stated that the appeal in relation to Period 2 was refused and the Secretary of State's decision of 18 January 2017 was confirmed.
35. In its subsequent Statement of Reasons, the FTT explained its approach to Period 2 as follows (emphasis as in the original):

It should be noted that the 2 points for Activity 10 (budgeting), which had been awarded in the previous period had been removed in this period. There was no evidence before the Tribunal that these points were later reinstated at Mandatory Reconsideration or Appeal. So [the Appellant] remained entitled to the standard rate of the daily living component but with fewer points ... After the LEAP exercise, the tribunal awarded [the Appellant] 9c (4 points), in place of 9b (2 points) which increased her point score to 11 points. This was not enough to push her into the enhanced rate of the daily living component. The tribunal also had to consider the effect of *LB* in this award period and did not award any further points for activity 3, so [the Appellant's] award was not pushed into the enhanced level by this route either. **So the fact that [the Appellant] won her Appeal in relation to *MM* did not make a difference to her level of award because her background level of points was less (9 not 11) than for the first award period above.**

The grant of permission to appeal

36. The District Tribunal Judge gave the Appellant permission to appeal, making the following observations:

4. The grounds for the permission to appeal are effectively that the appellant's condition has not changed throughout the time periods in question and so she considers it must be an error that she does not have the budgeting points during the period 18/01/2017 to 14/01/2019, given that she had been awarded them in the period directly beforehand.

5. I consider that in effect, the appellant is contending that the Tribunal ought to have considered remaking the entirety of the decision covering that period, which was subject to the LEAP review, once it had been established that there had been an error in the original decision. I consider that the statement of reasons does not set out fully why the Tribunal considered that it was unable to do so, and as such there is a potentially arguable error of law.

6. I do not however set this aside for hearing afresh by the FtT, as I consider that given the issue is potentially one of wider importance, it merits consideration by the Upper Tribunal.

37. Ms Fernandes, the Secretary of State's representative in these proceedings, supports the Appellant's appeal to the Upper Tribunal in her detailed and helpful submission.

Analysis

38. The nub of the problem from the Appellant's perspective is that, whereas she was awarded 2 points for making budgeting decisions (descriptor 10b) in the original award dated 9 April 2015 (effective from 29 January 2015), this descriptor was removed by the superseding decision (which was a supersession decision at least as regards the period of the award) dated 18 January 2017. The question then is whether there is any effective route of challenge to that latter decision.
39. The FTT's view was that there was nothing it could do about the budgeting determination given as part of the decision of 18 January 2017. The FTT would have been correct if it was superseding that decision for error of law, or revising it for official error, simply on the basis that the decision-maker's view of the law was inconsistent with *MM*. In those circumstances, the FTT's revision or supersession could do no more than correct the decision-maker's misapplication of activity 9. To alter the decision-maker's finding in relation to activity 10, a separate ground of supersession or revision would have to be shown specifically in relation to activity 10. This much was confirmed by the decision of the Tribunal of Social Security Commissioners in *R(IB) 2/04* (at paragraph 10(4)), where it was accepted that the Court of Appeal's decision in *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (reported as *R(DLA) 1/03*) was authority for the following two propositions, namely:
- (a) there can be no supersession under section 10 unless one of the grounds for supersession specified in regulation 6 is actually found to exist, and
 - (b) the ground which is found to exist must form the basis of the supersession in the sense that the original decision can only be altered in a way which follows from that ground.

40. However, that is not the end of the matter. Ms Fernandes submits as follows (DM stands for decision-maker):

17. However, if the *MM* LEAP decision given on 15 June 2022 could properly be construed as a decision given on a non-hopeless application for an any-time official error revision of the decision of 18 January 2017, then the DM's refusal of this would satisfy the mandatory reconsideration in regulation 7 of the Decisions and Appeals Regulations 2013 (*per PH v SSWP (DLA)* [2018] UKUT 404 (AAC)) in relation to the decision of 18 January 2017. On appeal, the FtT would then be standing in the shoes of the DM on 18 January 2017 and rehearing the whole question of whether and how the initial award of PIP, as made on 9 April 2015, should be superseded. In this way, the question of whether the claimant should have been awarded points for budgeting for the period from 18 January 2017 to 14 January 2019 would have been before the FTT.

41. I am conscious that there is some uncertainty in the case law authorities on the scope of issues in a LEAP appeal before the FTT where the decision is being revised for error of law. One view is that it is only issues that flow from the identified error of law that are capable of being considered. The other view is that in effect the decision is being retaken in its entirety, and so potentially all aspects are open to reconsideration. This is not the case to resolve those difficulties, not least as this is a supported appeal and the point has not been fully argued.

42. Suffice to say in this case that Ms Fernandes for the Secretary of State argues that (1) the Appellant here did ask for the decision concerning her entitlement from 18 January 2017 to 14 January 2019 to be revised; (2) that application was in no way hopeless, not least given the *MM* decision was given before the decision of 18 January 2017 in the Appellant's case; (3) the LEAP decision can properly be understood to include a refusal to revise the decision of 18 January 2017 (and any subsequent extending decisions); and (4) the Appellant had a right of appeal against the decision of 18 January 2017.

43. Ms Fernandes therefore contends that in the circumstances of this case the FTT erred in law by failing to remake the entirety of the decision covered by Period 2, which was subject to the LEAP review. Thus, the FTT had erred by holding that it was confined to a consideration of the two activities associated with *MM* and *LB* and "it could not make or change the award in relation to any of the other activities in any of the periods" (statement of reasons at para [6]).

The Upper Tribunal remakes the original decision under appeal

44. I conclude that the First-tier Tribunal erred in law for the reason summarised above. I accordingly allow the Appellant's appeal to the Upper Tribunal. I also set aside the First-tier Tribunal's decision.

45. So far as further disposal is concerned, Ms Fernandes invites the Upper Tribunal to re-make the decision under appeal itself, or failing that to remit the appeal for rehearing by a new FTT. This appeal to the Upper Tribunal has turned solely on issues of law; there has been no dispute as to the underlying facts. It is therefore fair, just and indeed proportionate for the Upper Tribunal to remake the decision that the FTT should have made.

46. The Appellant's case is that there has been no significant improvement in her health conditions and their effects over the period in question. However, the 2 points accorded for budgeting issues were removed by the decision of 18 January 2017. This removal of points was based on the HCP report dated 22 December 2016, which advised that the Appellant could manage complex budgeting decisions unaided. The justification given for this descriptor was that "her husband deals with all household bills as she panics about paying bills and dealing with money. This would indicate that she is able to make budgeting decisions." I am not at all sure the conclusion follows from the stated premise. However, the previous HCP report (dated 2 April 2015) recorded that budgeting "takes her a long time and causes distress ... This is consistent with her condition of anxiety, her medication and MSE. Cognitive tests showed some cognitive dysfunction. Therefore it is likely that she requires prompting to manage complex budgeting decisions reliably and repeatedly." Likewise, a later HCP report (dated 15 December 2021) found that the evidence suggested "she would not be able to reliably make complex budgeting decisions independently on the majority of days". On the balance of probabilities, and bearing in mind the Appellant's own account of no real change, I conclude that these two reports represent a more accurate reflection of her functioning with regard to this activity over the whole of the period in question.
47. It follows that descriptor 10b also applies for Period 2.
48. In summary, I therefore adopt the decision of the FTT in terms of its substantive effect as regards Periods 1 and 3 and remake the decision of the FTT as regards Period 2.
49. I therefore re-make the decision in the following terms and in three parts:

The Appellant's appeal (SC9444/22/00486) to the First-tier Tribunal is allowed.

Decision 1 affecting the award period 29/01/2015 to 17/01/2017

The decision made by the SSWP on 09/04/2015 is superseded with effect from 06/04/2016. The Appellant is entitled to the PIP daily living component at the enhanced rate from 06/04/2016 to 30/09/2017. This is because she scores a total of 13 points for daily living descriptors 1d, 3b, 4b, 6b, 9c and 10b. This is no change in substance to the FTT's decision. However, given the period covered by Decision 2, the period covered by Decision 1 should presumably have been from 06/04/2016 to 17/01/2017.

Decision 2 affecting the award period 18/01/2017 to 14/01/2019

The decision made by the SSWP on 18/01/2017 is set aside. The Appellant is entitled to the PIP daily living component at the enhanced rate from 18/01/2017 to 14/01/2019. This is because she scores a total of 13 points for daily living descriptors 1d, 3b, 4b, 6b, 9c and 10b. This is a material change to the FTT's decision.

Decision 3 affecting the award period 15/01/2019 to 24/05/2021

The decision made by the SSWP on 13/03/2019 is set aside. The Appellant is entitled to the PIP daily living component at the enhanced rate from

15/01/2019 to 24/05/2021. This is because she scores a total of 15 points for daily living descriptors 1d, 3b, 4b, 5b, 6b, 9c and 10b. This is no material change to the FTT's decision.

50. The net result of this substituted FTT decision is that the Appellant is entitled to the enhanced rate of the PIP daily living component for the entirety of the period from 6 April 2016 to 24 May 2021. The decision of 8 January 2022, which is not under appeal, then made an award of the enhanced rate of both the daily living and the mobility component with effect from 25 May 2021 to 14 December 2024. That subsequent award is subject to any revision or supersession decisions that have taken place but are not apparent from this appeal file. Obviously, as a result of this Upper Tribunal decision, there will now be some arrears of the PIP daily living component due to be paid to the Appellant.
51. I formally find that the First-tier Tribunal's decision involves an error of law on the grounds as outlined above.

Conclusion

52. 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 decision is re-made as above (section 12(2)(b)(ii)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Signed on the original on 5 December 2023