



Neutral Citation Number: [2025] UKUT 020 (AAC)

Appeal No. UA-2023-001342-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

I.S.

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Rupert Jones

Hearing date(s): 20 December 2024

Mode of hearing: Video (CVP)

Representation:

Appellant: In person

Respondent: Denis Edwards, counsel instructed by the Government Legal Department

On appeal from:

Tribunal: The First-Tier Tribunal (Social Entitlement Chamber) ('FTT')

Tribunal Case No: SC304/22/00874

Tribunal Venue: Watford

Decision Date: 13 March 2023 (Statement of Reasons 3 July 2023)

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.

SUMMARY OF DECISION

Personal independence payment – general - 41

The FTT did not err materially in deciding that the Appellant had made a second claim to Personal Independence Payment (“PIP”) on 29 July 2022 which had then been refused by the Respondent with the result that the period for the earlier award of PIP, based upon a first claim made in April 2021, was limited to 28 July 2022, the day before the second claim to PIP was made and from which time entitlement had been refused. The appeal to the UT was dismissed on the basis that fresh evidence was admitted in relation to events between October 2023 and May 2024 which occurred after the hearing before the FTT in March 2023. This established beyond doubt that the Appellant’s second claim to PIP, whether or not it had been validly made and properly completed by telephone on 29 July 2022, had been refused by the Respondent as from 29 July 2022. Therefore, the principle on avoiding overlapping benefit entitlement decisions applied as explained in *GG v SSWP (PIP) [2019] UKUT 318 (AAC)* and there was no material error of law in the FTT’s decision. The correct interpretation of Regulation 11(4) of the Universal Credit, Personal Independence Payment... (Claims and Payments) Regulations 2013 as to when a telephone claim to PIP is validly made or properly completed as opposed to being defective is reserved to an appeal where this is determinative of the outcome.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal did not involve a material error of law.

REASONS FOR DECISION

Introduction

1. The Appellant appeals the decision of the First-tier Tribunal (“the FTT”) dated 13 March 2023. The issue in the appeal is whether the FTT erred in deciding that the Appellant had made a second valid claim to Personal Independence Payment (“PIP”) which had been refused with the result that the period for the earlier award of PIP was limited to the period ending when the second claim to PIP was made and from which time entitlement had been refused.
2. The structure of this decision is as follows:-

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Factual background

Procedural History

3. The Appellant made his first claim to PIP on 12 April 2021. In a decision dated 7 November 2021, the Secretary of State for Work and Pensions (“the Respondent”, “SSWP” or “DWP”) refused to award the Appellant either component of PIP. The Appellant appealed to the FTT.
4. In its decision dated 13 March 2023 the FTT allowed the Appellant’s appeal against the decision of the Respondent. The FTT awarded the Appellant 8 points

for daily living activities but 0 points for mobility activities. This was sufficient for the award of the standard rate of the daily living component which requires eight points but insufficient for the award of the mobility component which also requires eight points.

5. Most relevantly, the FTT found that the Appellant had made a second claim to PIP on 29 July 2022 which had been subject to a negative determination on 25 September 2022. It therefore awarded the Appellant the standard rate of the daily living component of PIP from 12 April 2021 (the date of the Appellant's first claim to PIP) to 28 July 2022 (the day before the second claim to PIP).
6. The FTT provided a statement of reasons for decision ("SOR") dated 3 July 2023.
7. The Appellant sought permission to appeal the FTT decision to the Upper Tribunal. The District Tribunal Judge sitting in the FTT refused permission to appeal to the Upper Tribunal ('UT') on 21 August 2023.
8. I held an oral hearing of the application for permission to appeal by video on 22 May 2024. I granted the Appellant permission to appeal to the UT in a decision dated 28 May 2024 in respect of two grounds of appeal which are set out below. I refused permission to appeal in respect of the other grounds of appeal pursued by the Appellant.
9. I held an oral hearing of the Appellant's appeal by video (CVP) on 20 December 2024. The Appellant appeared in person and Mr Edwards of counsel appeared for the Respondent. I am very grateful to them both for the quality of the submissions they made.

Legal framework

10. Section 1(1) of the Social Security Administration Act 1992 provides that the general rule is that a person will not be entitled to any benefit unless, in addition to satisfying relevant qualifying conditions, they make a claim for it in the manner prescribed by regulations. Section 5 of the same Act authorises the making of such regulations.
11. Regulation 11 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 relevantly provides that claims for PIP must be made in in the manner prescribed therein.

12. Regulations 11(1)-(6) provide as follows:

Making a claim for personal independence payment

11.—(1) A claim for personal independence payment must be made—

(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;

(b) by telephone call to the telephone number specified by the Secretary of State; or

(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,

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).

(2) In the case of a claim made in writing the claim must be sent to or received at the appropriate office.

(3) A claim for personal independence payment made in writing is defective if it is not completed in accordance with any instructions of the Secretary of State.

(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.

(5) If a claim for personal independence payment is defective the Secretary of State must inform the claimant of the defect and of the relevant provisions of regulation 12 relating to the date of claim.

(6) The Secretary of State must treat the claim as properly made in the first instance if a claim completed in accordance with any instructions of the Secretary of State is received within one month, or such longer period as the Secretary of State may consider reasonable, from the date on which the claimant is first informed of the defect.

[emphasis added]

13. Regulation 11(1) confirms that a PIP claim can be made in writing or by telephone unless the Secretary of State decides only to accept one method. Reg 11(1)(b) and (4) are clear that a telephone claim is completed rather than defective, and must be treated as such, so long as the information required to determine the claim is provided during the call, but if it is not, then further information must be provided as requested by the Respondent in order for the claim to be completed. Regulation 11(4) therefore makes the distinction between properly completed telephone claims (which I also refer to as “valid”) and defective claims.

14. Judge Hemingway sitting in the UT made obiter observations in *GG v SSWP (PIP)* [2019] UKUT 318 (AAC) (CPIP/ 2948/2018) (“GG”) at [19] as to how Regulation 11(4) might be interpreted broadly:

“...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."

15. Regulation 12(1)(b) defines the date of a PIP claim made by telephone as the date on which the claim is properly completed:

Date of claim for personal independence payment

12.—(1) Subject to paragraph (4), where a claim for personal independence payment is made in accordance with regulation 11 the date on which the claim is made is—

(a) in the case of a claim in writing made by means of an electronic communication in accordance with the provisions set out in Schedule 2, the date on which the claim is received at the appropriate office;

(b) in the case of a claim made by telephone, the date on which a claim made by telephone is properly completed; or

(c) where a person first notifies an intention to make a claim and provided that a claim made in writing produced other than by means of an electronic communication is properly completed and received at the appropriate office designated by the Secretary of State in that claimant's case within one month or such longer period as the Secretary of State considers reasonable of the date of first notification, the date of first notification,

or the first day in respect of which the claim is made if later than the above.

...

[emphasis added]

16. 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.
17. Section 8(2)(b) of the Social Security Act 1998 provides that a claimant will not be entitled to the benefit on the basis of the circumstances not obtaining at the time the claim is decided by the Secretary of State:
- (2) Where at any time a claim for a relevant benefit is decided by the Secretary of State—
- (a) the claim shall not be regarded as subsisting after that time; and
- (b) the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.

18. 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.

19. Section 17(1) of the same Act provides as follows:

Finality of decisions

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.

20. In *GG* the UT considered the finality of decisions and FTT’s jurisdiction at [15] and [16]:

“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.”

[emphasis added]

The First-tier Tribunal’s decision

21. At [44] of the SOR the FTT found and decided:

‘However the tribunal jurisdiction ended on 29/7/22 due to [the Appellant] making a further PIP claim on that date. A negative determination was made in respect of that further claim on 25/9/22 because he failed without good reason to comply with the request for information to determine entitlement to PIP and as a matter of law the tribunal has no jurisdiction over that decision from the effective date of that decision, which is 29/7/22 and thus the tribunal could not make an award of PIP beyond that date.’

The grounds of appeal and the parties’ submissions

Ground 1

22. The first ground of appeal on which I granted permission to appeal was as follows:

“The FTT failed to give adequate reasons and that there was no evidence to support the findings at para 44 of the SOR that the Applicant: a) had made a second claim to PIP in a telephone call on 29 July 2022; and b) that the SSWP had made a formal decision refusing any PIP claim (that such a decision was in existence).”

23. The Appellant adopted the observations set out in my decision granting permission to appeal. He submitted that when making its decision and giving its reasons at [44] of the SOR for finding that the award of PIP should cease on 28 July 2022, the only material that was before the FTT was a written submission in the Respondent’s documents which stated:

‘Since [the Appellant] submitted his appeal, he’s claimed PIP on 29 July 2022. This claim was disallowed on 25/09/2022 as [he] failed to return his PIP2 questionnaire.’

24. The Appellant argued that there was no or insufficient evidence before the FTT that an actual claim to PIP was made by him and that the Respondent had actually made any decision refusing the claim. He submitted that there was no evidence which was before the FTT as to what he told DWP on that telephone call on 29 July 2022. For example, there was no evidence as to whether he said he was not proceeding with a second PIP claim and there might be a question about: (a) what he told them – whether he wanted the PIP2 questionnaire in case he decided to make a claim or whether he said he wanted to make a new claim; and (b) whether he contacted the DWP about not proceeding with this second claim (so effectively withdrew his claim so far as it is concerned).

25. He relied on my observation in granting permission that it might be expected that the DWP follows up any failure to return a PIP2 questionnaire before making a negative determination that a person is not entitled to the relevant component (see reg 8(3) of the 2013 PIP regulations for the negative determination requirement). There is no evidence as to whether the Appellant might have received a chasing letter about his new claim to PIP, or he might have simply received a determination that he was not entitled.
26. He also relied on my observation that it may be expected that the Respondent could and should have provided to the FTT the correspondence it sent after it said the second PIP claim was made, to see what happened. Of course, it may not make much difference if the Appellant did make a valid claim by telephone and the Respondent made a valid negative determination under Regulation 8(3) of the Social Security (Personal Independent Payment) Regulations 2013. If DWP did not notify the Appellant of the outcome of his second PIP claim, then there might also be an argument about whether his time to appeal against it started – see reg 51 of the Universal Credit etc (Decisions & Appeals) regs 2013. However, there was no evidence before the FTT as to whether a valid claim was made and valid negative determination also made.
27. The Appellant submitted that there was no documentary or other evidence before the FTT on any of the relevant matters relating to the second claim and its determination and it erred in relying on the two sentences contained in the Respondent's written submission.

Ground 2

28. The second ground of appeal on which I granted permission to appeal was as follows:
- “The FTT erred in deciding that there was a second PIP claim [on 29 July 2022 which brought the Appellant's entitlement to PIP on the first claim to an end on 28 July 2022] – the Respondent could arguably only decide entitlement to PIP on a properly completed and valid claim. Even on the facts found by the FTT, assuming the evidence did support it, the claim was not properly completed and was defective by virtue of Regulation 11(4) of the Regulations and the defect was not corrected in compliance with Regulation 11(6). Further, there is no date on which the [second] claim was made for PIP pursuant to Regulation 12 [because Regulation 12(1)(b) provides that the date on which a telephone claim is made is the date on which it is properly completed].”
29. The second issue raised by this appeal is whether the FTT materially erred in make findings in relation to the second PIP claim that invoke the principle ‘the

Secretary of State has made a later decision on a later claim for the same benefit' per [16] of GG.

30. This first involves deciding whether the second claim to PIP was properly made by the Appellant: was this when the second claim to PIP was made in a telephone call, even if the claim is defective and not completed because not all the information required for the DWP to determine the claim is provided, or was it only properly made when the PIP2 questionnaire was returned and only then was the claim both properly made and completed? It then involves determining whether the second claim to PIP was decided by the Secretary of State: does 'a decision' require a completed claim and a decision refusing or granting it on its merits based on the required information being provided or does a negative determination for failure to progress a claim and provide requested information suffice?
31. The Appellant adopted the observations set out in my decision granting permission to appeal that when an initial attempt to make a claim is abandoned and the defect is not remedied in accordance with Regulation 11 there may be no properly completed or valid claim on which a decision to refuse PIP could be made. The Appellant argued that his second claim to PIP remained a defective claim that could not and did not bring an end to the PIP entitlement which began in April 2021. Therefore, the FTT erred in law in ending the Applicant's entitlement on 28 July 2022 because there had been no valid decision on the second PIP claim because the claim was not valid or properly completed but remained defective.
32. He submitted that it is the Respondent's decision on entitlement to PIP under the new claim that is operative. At the time of the hearing before the FTT in March 2023, DWP had not yet have made any decision refusing entitlement on the telephone claim made on 29 July 2022 because there was no valid claim because he had not yet returned his PIP2 questionnaire. In other words, at the time of the FTT's Decision, the Respondent had not made a decision refusing his second claim and the FTT erred in finding this to have occurred on 25 September 2022. The Respondent had simply not progressed the Appellant's second claim to determination as it had not been completed. Likewise, a claimant could presumably withdraw a PIP claim before it is completed without the Respondent even make a formal decision or determination on entitlement. In the absence of any formal decision or determination refusing entitlement to PIP on a second valid claim, the FTT erred in limiting the award on the first PIP claim to the day before the making of the second claim (28 July 2022).

33. The Appellant argued that there was no valid decision refusing his entitlement to PIP on the second claim and he did not give the Respondent the required evidence upon which to make a valid decision following the telephone call on 29 July 2022. Therefore, the claim ran out of time, it was defective and there was no completed claim nor valid decision to refuse entitlement from 29 July 2022. Therefore, the FTT erred in ending the award on the first PIP claim on 28 July 2022.

The Respondent's submissions

Application to admit fresh evidence and reliance thereupon

34. Mr Edwards opposed the appeal on behalf of the Respondent. He relied on the Respondent's written submission filed on 9 July 2024.
35. He did so primarily on the basis that events subsequent to the FTT Decision proved beyond doubt that there had been a second valid claim to PIP made by the Appellant on 29 July 2022 which had subsequently been completed, fully determined and refused on 23 February 2024. Thus, entitlement to PIP had been refused from 29 July 2022. Therefore, the two grounds of appeal became irrelevant and the FTT did not err materially in deciding there had been a second claim to PIP on 29 July 2022 which had been refused and hence brought to an end the Appellant's entitlement to PIP on 28 July 2022.
36. In support of this argument, he sought to admit fresh evidence on the appeal before the UT, namely the documents that established the following sequence of undisputed events which took place subsequent to the FTT's decision in March 2023.
37. On 3 October 2023, the Respondent had looked again at its decision not to carry on with the Appellant's PIP claim begun on 29 July 2022 and decided there were good reasons for the Appellant not filling in and returning the claim form (or PIP2 questionnaire). Thereafter, in November 2023, the Appellant completed a claim form in respect of this second claim to PIP. On 23 February 2024 the Respondent considered the claim and rejected it entirely (in respect of daily living and mobility components of PIP from 29 July 2022). On 14 May 2024 the Respondent had confirmed its decision not to award the Appellant PIP from 29 July 2022 following a mandatory reconsideration.

38. Mr Edwards did also address the two grounds of appeal in the alternative.

Ground 1

39. Mr Edwards submitted that there was sufficient evidence before the FTT to decide that a second claim to PIP had been properly made by the Appellant on 29 July 2022 and negatively determined. Although there might have been fuller evidence before the FTT than simply the Respondent's written submission, this was sufficient evidence or material upon which it was entitled to make its decision. There was no error of law in the FTT's findings at [44] of the SOR therefore.
40. He also argued that the UT has not been informed what submissions or evidence was given about the second claim at the hearing before the FTT and there is no transcript of the hearing in order for this to be independently established. He argued that, in addition to the written submission to the FTT regarding the Appellant's second claim to PIP, we do not know if anything else was said by the Respondent's Presenting Officer at the hearing before the FTT in March 2023. There may have been further evidence presented establishing the Appellant's claim to PIP being made by telephone 29 July 2022 but it not being pursued.
41. In any event there does not appear to be any dispute that the Appellant made a telephone call to the DWP to make a second claim to PIP on 29 July 2022. In the absence of any dispute that a telephone claim to PIP was made on that date (and that a PIP2 questionnaire was not provided by the Appellant so his claim to PIP was disallowed or negatively determined on 25 September 2022), the FTT was entitled to make the findings that it did at [44] of the SOR.
42. Mr Edwards pointed out that if there had been any dispute as to what occurred, the burden would have been on the Appellant at the hearing before the FTT to say that what he said on the telephone call to the DWP on 29 July 2022 so as to support any suggestion he did not make a second valid claim to PIP on that date. There were no direct records of that telephone call, nor online systems nor any contemporary note of the call to support a suggestion that what was said by the Appellant on 29 July 2022 did not constitute a valid claim to PIP.

Ground 2

43. Mr Edwards submitted that there was a valid second claim to PIP made by the Appellant by telephone on 29 July 2022. It was validly made and registered by the Respondent irrespective of whether the PIP2 questionnaire was returned. Therefore, there was a valid decision by Respondent to close and disallow that

claim on 25 September 2022. Therefore, the FTT made no error of law in finding this to be the case at [44] of the SOR and thus limiting the award under the first claim to PIP to the time up until the second claim to PIP.

44. He submitted that regulation 11(1) requires that a claim to PIP be made by certain methods including by telephone (11(1)(b)). Regulation 11(4) only provides that a telephone claim is not completed and defective when information required to determine the claim is not provided but the absence of a PIP2 questionnaire return being returned does not render the invalid, incomplete or not properly made.
45. In effect, although he did not directly refer to it, Mr Edwards appeared to rely upon the obiter observations and reasoning in *GG* at [19] as to how Regulation 11(4) should be interpreted. He impliedly argued that a claim is valid and properly completed by satisfying the 'lay conditions' for a claim in the telephone call, as observed in *GG*, rather than on return of the information in the PIP2 questionnaire.
46. His express submission was that the second claim to PIP made on the telephone call on 29 July 2022 was properly made and completed, and the later absence of the return of a PIP2 questionnaire did not render it a defective claim. Therefore, the negative determination on 25 September 2022 regarding the second PIP claim (based upon the failure to progress the claim or file a PIP2 questionnaire) was an effective and valid decision refusing PIP entitlement from 29 July 2022.
47. Mr Edwards contended that the second PIP claim was not defective for failure to provide the information contained in the PIP2 questionnaire. He argued that the provision of the PIP2 questionnaire, the requested information, only goes to the existence and level of entitlement to PIP (whether sufficient points can be awarded) but the provision of information does not determine the fact of a valid claim being made. A person makes a valid claim to PIP on initiating the telephone call which claims it. There can be a valid claim made to PIP by telephone without the need for provision of the PIP2 questionnaire – it simply means that the details of the level of the benefit cannot be assessed so the claim is not closed. It does not make the claim defective.
48. He argued that the absence of the provision of the information required to determine the extent of the entitlement to the benefit does not undermine the validity of the claim. In other words, the initial telephone call became the valid claim to PIP which brought the claim into the existence and the provision of the

PIP2 questionnaire only went to the determination of the benefit and not the validity of the benefit. The evidence in support of a claim only goes to the entitlement to the benefit and the level of the award and not the validity of the claim.

49. Further, he argued that the reason in this case for the second PIP claim not being progressed (or negatively determined) on 25 September 2022 was the non-responsiveness of the Appellant and this could not be used to his advantage to submit that there was no valid claim to PIP made by telephone on 29 July 2022 (albeit Mr Edwards had to accept that the Respondent had decided in October 2023 that the Appellant had a reasonable excuse for not providing the PIP2 questionnaire back in 2022).
50. Mr Edwards did not address me on the effect of Regulation 12(1) but likewise he impliedly argued that the fact that Regulation 12(1)(b) provides that the date on which the claim is made by telephone is the date on which a claim is properly completed does not prevent a valid claim having been made or even properly completed when it is initiated by telephone.
51. I address the remainder of the parties' submissions below in the discussion and analysis section.

Discussion and Analysis

The Application to admit fresh evidence

The Appellant's objection

52. The Appellant objected to the Respondent seeking to admit the fresh evidence of the determination of the second claim to PIP in February and May 2024. He submitted that it would be unfair to admit the evidence. He relied on the fact that all the correspondence from October 2023 onwards was irrelevant to this appeal because it took place subsequent to the FTT decision in March 2023. He argued that it should not be taken into account when considering whether the FTT made an error of law in making its decision at the material time because it was not before the FTT. He contended that the FTT had no power to make any findings in relation to the second PIP claim as it was only making a decision on the first PIP claim. He also argued that he only continued down the route of reigniting the second claim in October 2023 because he had been advised to continue down this route after losing his appeal in March 2023 in respect of the first PIP claim. It would be unfair for the UT to rely on further evidence that he had sent to the

Respondent in November 2023 because it only existed because he lost his appeal before the FTT. He further submitted that the second claim initiated by telephone on 29 July 2022 was void, defective or not existence at that time and continued to be so at the time of the FTT's decision in March 2023 and onwards up to the present day.

53. These were also submissions he relied upon in arguing that the FTT erred in law in making its decision in March 2023 that he had made a second claim to PIP that had been negatively determined. He alternatively submitted that even if the FTT admitted the fresh evidence, there was only a valid second claim made to PIP on the subsequent return of his PIP questionnaire in November 2023 so his entitlement to PIP on the first claim should at least be extended to that date and the FTT's decision must be set aside and remade in his favour.
54. The Appellant did also volunteer that he had separately appealed to the FTT against the Respondent's decision of February 2024 (as upheld on mandatory reconsideration in May 2024) in respect of his second claim to PIP. That appeal is waiting to be heard by the FTT.

Determination of the application to admit fresh evidence

55. Notwithstanding the force of the Appellant's submissions and objection, I do admit the fresh evidence provided by the Respondent on this appeal to the UT. I do so for the following reasons, accepting that it was not evidence before the FTT at the time of deciding the appeal in March 2023.
56. I take into account the tests for admitting fresh evidence on appeal set out in *Ladd v Marshall* [1954] 1 WLR 1489:

"... first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."
57. This test was explained as applying to the UT in *Donald Graham Ketley v Revenue and Customs* [2021] UKUT 218 ('*Ketley*') at [52]-[54] but on the basis that the UT ultimately must apply the tests under Rules 2 and 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to decide if it is just and fair to admit the new evidence.

58. I grant the application to admit the fresh evidence on this appeal to the UT. I have decided that it is just and fair and in accordance with the overriding objective to admit the fresh evidence for the following reasons.
59. First, the evidence could not have been obtained with reasonable diligence for use at the hearing before the FTT because it related to events that have occurred subsequently. Secondly, it will probably have an important influence on the result of the case because if there has been a decision refusing the Appellant's entitlement to PIP from 29 July 2022 based upon the second claim, then the FTT will not have erred materially in the outcome of the appeal whether or not its original reasoning and interpretation or application of the law was correct. Thirdly, the evidence is more than credible or cogent – it is incontrovertible and constitutes an undisputed record of subsequent events and it is directly relevant to the legal issues under consideration in the appeal. Furthermore, I am satisfied that in all the circumstances of the case it is just and fair to admit the evidence. The Appellant is not unfairly prejudiced as he has indicated that he has separately appealed to the FTT against the refusal in February 2024 of his second PIP claim, which appeal is outstanding, so he will have an opportunity to challenge the merits of that decision and assert his entitlement to PIP from 29 July 2022.

Determination of the appeal on the basis of materiality

60. Having admitted the fresh evidence served by the Respondent, it is unnecessary to determine Grounds 1 or 2. This is because I am satisfied that the FTT cannot have erred materially in deciding the outcome of the Appellant's appeal and the period of his award of PIP as ending on 28 July 2022.
61. The FTT was correct in finding that the Appellant's second claim to PIP was subsequently refused by the Respondent which made a decision ending the Appellant's entitlement to PIP from 29 July 2022. This is the case irrespective of whether there was sufficient evidence before the FTT on which to find this in March 2023 and irrespective of whether the second claim was validly made or properly completed on 29 July 2022 and properly refused on 25 September 2022.
62. Therefore: it no longer matters whether there was sufficient evidence before the FTT relating to a second claim being made on 29 July 2022 and refused on (Ground 1). Likewise, it no longer matters whether or not the FTT erred in deciding there was a second valid claim made on 29 July 2022, whether or not it was completed or defective, or whether there was a valid negative decision or determination in respect of that claim on 25 September 2022 (Ground 2).

63. This is because there was a completed claim to PIP made by the Appellant in November 2023 made in respect of the second claim initiated by telephone on 29 July 2022 and the Respondent has treated that claim as being made on 29 July 2022. Thereafter it is beyond dispute that there is a decision of the Respondent in February 2024 refusing the Appellant entitlement to any award of PIP from 29 July 2022.
64. As a consequence, the principle explained in *GG* applies:
- 15.... 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.”
65. For the sake of clarity, the final phrase of paragraph 16 of *GG* might read as follows with square brackets inserted by way of amendment:
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 [date of effect of the] second decision.”
66. The principle is that ‘there cannot be two or more overlapping decisions concerning the same period’ so in this case the FTT jurisdiction in respect of the first PIP claim is only up to the date immediately prior to the date of effect of the negative decision in respect of the second PIP claim (ie. up to the day before the date of the second PIP claim being made).
67. Therefore, there was no material error in the FTT deciding that the Appellant’s entitlement to PIP on the first claim made in April 2021 must end on 28 July 2022 because there had been a negative determination on a second claim for PIP that the Appellant was not entitled to PIP from 29 July 2022. Whether or not there was such a decision on the second claim at the time of the hearing before the FTT in March 2023, it is clear that there has now been a negative decision in respect of the Appellant’s PIP entitlement from 29 July 2022.

68. The Appellant is not significantly prejudiced by this decision because he has a full right of appeal against the Respondent's decision of February 2024 in respect of his entitlement to PIP from 29 July 2022. That appeal will be heard and decided by the FTT.
69. Therefore, this appeal must be dismissed.
70. It follows that I will not determine Grounds 1 and 2 as these may be important points of law with significant ramifications and implications in other cases. This is particularly so in relation to Ground 2 on the proper construction of Regulation 11(4) because the Appellant's interpretation might lead to claimants only being entitled to the award of PIP from the date that written evidence is provided in support of a telephone claim rather than the date of the initial telephone call.
71. I will avoid expressing any view upon the parties' submissions and the obiter observations on the construction of Regulation 11(4) in *GG*. I reserve any judgment for this to be decided on appeals where these points may be determinative of the outcome of the case and where both parties are represented so that competing submissions can be fully considered.

Conclusion

72. I therefore conclude that the decision of the First-tier Tribunal did not involve a material error of law. I dismiss the appeal.

Judge Rupert Jones
Judge of the Upper Tribunal

Authorised by the Judge for issue on 18 January 2025