IN THE UPPER TRIBUNAL **Case No.** CE/1674/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made on 14 February 2017 at Darlington under reference SC262/16/00677) involved the making of an error of law, it is set aside under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is remitted to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. In so doing, the tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: R(DLA) 2 and 3/01.

C. The Secretary of State is directed to provide to the First-tier Tribunal, within one month of the issuing of this decision of the Upper Tribunal, copies of all documentary evidence in his possession which was relied upon when the decision to award the claimant personal independence payment (such decision having been communicated to the claimant by a letter of 16 May 2016) was made. If, however, the Secretary of State no longer possesses any such evidence then that should be confirmed to the First-tier Tribunal, along with an explanation, within the above time-frame.

REASONS FOR DECISION

1. Both the claimant and the Secretary of State have expressed the view that the decision of the tribunal involved the making of an error of law. The Secretary of State has urged me to set aside the tribunal's decision and to remit for a complete rehearing before an entirely differently constituted panel of the First-tier Tribunal. The claimant, through her representatives, has not objected to that proposed course of action and, indeed, has expressed gratitude to the Secretary of State for his conciliatory stance. The level of agreement that there now is between the parties makes it unnecessary for me to say very much about the history of the case or the arguments which have been relied upon in the grounds of appeal to the Upper Tribunal. I will, though, say something about those arguments even though certain of what I have to say is not essential to the decision and, therefore, might be regarded as simply an expression of opinion rather than something which is properly binding.

2. The claimant appealed to the tribunal against the Secretary of State's decision of 7 March 2016 to the effect that he did not have limited capability for work and was not therefore, from that date, entitled to employment and support allowance. His appeal was

dismissed and the tribunal explained its reasons for so doing in a statement of reasons for decision (statement of reasons) of 22 March 2017. That decision was made after an oral hearing which was attended by the claimant and his representative. There was no attendance by the Secretary of State.

3. The hearing took place on 14 February 2017 but shortly before that the claimant's representatives had written to the tribunal enclosing what was referred to as "further evidence in support of this appeal". What was said to be the further evidence was a letter of 16 May 2016 informing the claimant that he had been awarded the standard rate of the daily living component and the standard rate of the mobility component of personal independence payment (PIP) from 11 February 2016 to 4 May 2020. The letter also confirmed that it had been decided, with respect to mobility, that the claimant met the requirements of mobility descriptor 2c in that she was able to stand and move unaided more than 20 metres but no more than 50 metres. The claimant did not provide any of the evidence which the Secretary of State had relied upon in order to make that PIP decision. The Secretary of State has never provided it either. The tribunal did consider adjourning in order to obtain any such evidence that there might have been but decided not to do so because the claimant "was represented by an experienced representative who did not invite us to adjourn to obtain the PIP papers". It accepted the fact of the award of PIP (it could hardly do anything else) but went on to make its own decision with respect to employment and support allowance on the basis of the material it already had. As to the possible applicability of the descriptors linked to activity 1 as contained within Schedule 2 to the Employment and Support Allowance Regulations 2008, it found that there was entitlement to 6 points under descriptor 1d. It justified its conclusion as to that with reference to various items of evidence before it. Since the tribunal was only able to identify entitlement to a further 6 points (under descriptor 3c) and since it did not think the requirements of regulation 29 of the 2008 Regulations were met, the appeal failed.

4. Permission to appeal was sought by the claimant. It was granted by a District Tribunal Judge of the First-tier Tribunal who identified two specific issues it was thought merited the attention of the Upper Tribunal. The first was the extent to which, if at all, the Secretary of State's decision as to the claimant's mobility as evidenced by the award of the mobility component of PIP was binding on a tribunal dealing with an appeal concerning employment and support allowance. The second was whether, where reliance was being placed on an award of PIP, it was for the claimant or any representative that claimant may have, to place before the tribunal any further evidence which had been used to make such an award or whether the tribunal was to be expected to obtain it for itself in light of its inquisitorial function.

5. As I say though, there is for the purposes of this appeal, agreement between the parties. That is because the Secretary of State's representative has submitted to the Upper Tribunal that the tribunal did err in law in failing to make its own decision as to whether or not to adjourn in order to obtain any evidence relied upon by the Secretary of State when the favourable (from the claimant's perspective) decision on entitlement to PIP was made. It should, says the Secretary of State's representative, have made a decision as to an adjournment "of its own volition" rather than simply relying upon the failure of the claimant or her representative to ask for one.

6. Since there is agreement between the parties I am happy to conclude that, for the purposes of this appeal and on the basis of the particular circumstances in this case, the tribunal

erred in failing to make its own decision as to whether or not to adjourn. In light of that agreement I have decided to set aside the tribunal's decision. That means, strictly speaking, that I do not need to say anything more about that the adjournment issue nor do I need to deal with any other errors of law that the tribunal may have made. Any such errors there might have been will be subsumed by the rehearing which will now follow.

7. Having said the above, I would nevertheless wish to make some brief, albeit non-binding since I have already resolved the appeal, observations. First of all, I see no reason why, generally speaking, a tribunal ought not to be able to rely upon the absence of an adjournment request in order for further evidence to be obtained where a claimant has an experienced representative in the field of welfare benefits law. But it may well be good practice for a tribunal, where it thinks such an application could reasonably and sensibly be made, to query with the representative whether or not doing so has been considered. Where a representative is able to indicate that it has been and that it has been decided not to seek an adjournment then that would very probably be the end of the matter. But if the representative indicates that making such an application has not previously occurred and is then prompted to make one, the tribunal will of course have to decide the matter. In the case of unrepresented claimants it seems to me that, at least generally speaking, it is highly likely to be appropriate for the tribunal to make its own decision rather than to rely upon the unrepresented claimant's failure to seek an adjournment.

8. Secondly, it may be thought that a failure on the part of the Secretary of State to provide the sort of evidence which here might have been obtained as a result of an adjournment and the issuing of an appropriate direction (so long as there is some such evidence which has been retained) represents a breach of the duty under rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 to provide "copies of all documents relevant to the case in the decision maker's possession". Since the PIP decision was made on 16 May 2016 and since the appeal regarding employment and support allowance was not received until 8 July 2016, the Secretary of State would have been in possession of any such evidence prior to preparing his appeal response for the benefit of the First-tier Tribunal. There may or may not be an issue as to the extent to which the rule 24(4)(b) duty extends to the provision of documents of relevance which come into being after the appeal response is sent (possibly that is covered under rule 2(4) (a) and (b)) but none of that arises here. Of course, a failure to comply with the duty does not automatically translate into an error of law on the part of the tribunal. But nevertheless, such a breach may have relevance to such considerations and, in any event, it is important for reasons of fairness that the Secretary of State has proper regard to his duty.

9. Thirdly, if I am understanding matters correctly, the claimant's representatives appeared, at least at one point, to take the view that the mere fact that the favourable PIP decision in the context of the mobility component had been made, was determinative or close to being determinative with respect to entitlement to points under activity 1 within Schedule 2 to the 2008 Regulations. The argument seems to have been that the specific PIP award which had been made showed the claimant could not possibly mobilise for more than 50 metres. If the representatives were of that view that might explain why they did not seek the evidence which had underpinned the PIP mobility award. It would not have been considered necessary. But I have to say, if that was the representative's contention, I would strongly disagree. The letter confirming the award of PIP is evidence of the fact of the award and evidence as to which descriptors have been found to be applicable. It is also suggestive, in this case, of the fact that

there might be evidence in existence suggesting that the claimant has difficulties with respect to standing and moving and which might, in turn, have relevance to an assessment with respect to activity 1 within Schedule 2 for the purposes of employment and support allowance. But it is not more than that. The statutory tests are not the same. One is concerned with standing and moving and the other with mobilising which includes the possible use, where appropriate, of a manual wheelchair. Anyway a tribunal, whatever award has been made in respect of a different benefit, will be entitled to make its own decision with respect to entitlement to the benefit with which it is concerned on the appeal before it. It should not simply ignore the possible relevance of an award of a different benefit but that relevance is likely to be in relation to the possibility of there being further relevant evidence which might not be before the tribunal on the appeal and the appropriateness or otherwise of adjourning to get it. My approach as to this does not differ to that taken by the Upper Tribunal in NL *v SSWP (ESA)* [2013] UKUT 174 (AAC) to which the representative of the Secretary of State referred.

10. For the above reasons the decision of the tribunal has been set aside and there will be a complete rehearing. The tribunal rehearing the case should follow the directions I have given. The rehearing will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Nor will it be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of all of the evidence before it including any further written or oral evidence it may receive.

11. Finally, I am hopeful that, in consequence of the directions I have made, the tribunal will have before it any documentary evidence which was relied upon when the PIP decision was made. I have directed the Secretary of State to supply that evidence but if the claimant or her representative has copies there is no reason why they should not provide such copies to the tribunal.

Signed:

M R Hemingway
Judge of the Upper Tribunal

Dated: **13 October 2017**