DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Gray **CPIP/1950/2017**

Decision: This appeal by the claimant succeeds.

Having given permission to appeal, in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Leeds and made on 4 April 20167 under reference SC 265/17/00161. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Directions

1. These directions may be supplemented or changed by a District Tribunal Judge (DTJ) giving listing and case management directions.
2. The case will be listed as an oral hearing in front of a freshly constituted tribunal. The appellant is advised to attend. If he wishes to do so he must contact HMCTS in writing or by telephone within 14 days of the date of issue of these directions.
3. **I direct that HMCTS shall arrange and fund a taxi to the hearing venue if he indicates that he wishes to attend. I do this on the basis that he was provided with a taxi to his PIP medical assessment.**
4. He should be aware that the new tribunal will be looking at his health problems in relation to the qualifying periods for entitlement to a Personal Independence Payment, but that it must not take into account matters which did not obtain at the date that the decision under appeal was made 22/12/2016. That does not mean than later matters are never relevant, but their relevance is limited to them shedding light on what the position was likely to have been at that time.
5. The new panel will make its own findings and decision on all relevant descriptors.

Reasons

1. This matter concerns a potential award of PIP, and unless otherwise specified references to the Regulations are to the Social Security (Personal Independence Payment) Regulations 2013.
2. Both parties agree that the decision of the tribunal was made in error of law. I need not give detailed reasons, although there are certain matters I wish to explain.
3. Initially I must deal briefly with the appellant's argument that he feels he has already been accepted as a disabled person means that he should automatically qualify for PIP. That is not necessarily the case. The criteria under which he qualified for DLA previously were not as strict as under the new PIP regime. He may feel that is unfair, but it does represent a change in the law which the government was allowed to make. He mentions that he is in receipt of a War Disablement Pension, and makes the point that the criteria

do not coincide. This is true. It is a different benefit, and different considerations apply. There is no "passport" to PIP because of that entitlement.

4. His position will be considered under the legislative provisions relating to PIP.

The transition from DLA to PIP

5. The appellant was born on 31 July 1950. I wish to mention at this stage the way in which his transition from DLA fits into the scheme, and an apparent, but not real, difficulty as to him being over 65 at the date of his PIP claim. This was not dealt with at the permission stage, nor in the Secretary of State's submission, but I am satisfied that, despite his age he should be assessed at this initial PIP transition under the usual PIP criteria, due to the application of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (hereafter the PIP Transitional Regulations.

6. He qualified for the middle rate of the care component and the lower rate of the mobility component of DLA prior to attaining 65. Under the provisions that governed that benefit, someone who qualified before age 65 stays on it when they reach that age. It is for that reason that nothing would have changed on his 65th birthday in July 2015.

7. After that, however, the process of transition from his DLA award to a PIP claim occurred. It seems that the general principle was that for those over 65 and already in receipt of DLA award, that award would continue. However that applied only to those who had reached the age of 65 at about the time of the commencement of the PIP scheme, the cut-off date being those who had reached age 65 by 8 April 2013: PIP Transitional Regulation 3(2) So this claimant was not immune to the change, and was required to claim PIP: this is expressed as an invitation to claim, however, to paraphrase a memorable piece of 1970s literature, it is an invitation that cannot be refused[1] as to do so would lead to cessation of the DLA award.

8. The appellant accordingly made his claim for PIP on 31 October 2016. At that time he was over 65. It is yet possible for him to claim DLA because PIP Transitional Regulation 27 waives the normal rule in migration cases.

9. His PIP claim was refused, the effect of that being that his DLA award terminated at the end of the next full four weeks after the PIP refusal decision. The decision under appeal was made on 22 December 2016, so under PIP Transitional Regulation 17 his DLA ceased on 23 January 2017. If, following the fresh tribunal hearing a PIP award is made, that date will also be the effective date of it commencing.

10. Following the refusal the appellant tried to make a further claim for PIP, but he was told that he would have to claim Attendance Allowance (page 276). Because that claim was made after the appellant was no longer part of the DLA to PIP transitional process the normal rules about age once again apply.

[1] The Godfather by Mario Puzo

As an analogy the position would have been the same under DLA had a DLA award been stopped following a supersession.

11. The position currently is that if an award is made it can continue despite his having attained 65; if an award is not made, then any further claim must be for Attendance Allowance, for which the criteria are different once again.

12. I know that the appellant finds the differences between the various benefits, and the fact that this case has gone on for so long and is not yet resolved frustrating and confusing. I hope the explanation above, and what is to come gives him a little more understanding about that process, and helps him to come to terms with those differences.

The factors in my setting aside the FTT decision

13. To deal with the main points in the appeal I adopt the reasons set out by Ms Gilfoyle in her submission on behalf of the Secretary of State, which itself accepts a number of the points that I identified as arguable in granting permission to appeal when I said the following:

2. *The statement of reasons is extremely sparse. It seems to me arguable that the reasoning is inadequately set out.*
3. *Little consideration appears to have been given as to whether or not the applicant was able to perform the activities to an acceptable standard, repeatedly and within a reasonable time period (regulation 4(2A). Further, reference is made to him walking a considerable distance but with many halts, and, as well as the above, the question of pain may not have been considered (PS-v-SSWP [2016] UKUT 326 (AAC))*
4. *As to toilet needs, the statement of reasons does not indicate that the FTT considered the precautionary use of incontinence pad (as an aid) given a level of risk (although unquantified). (SSWP-v-NH (PIP) [2017] UKUT 258 (AAC)).*
5. *A reference is made at paragraph 8 as to the applicant being a carer for his wife. In the absence of any further detail it is arguable that emphasis was erroneously placed upon this, particularly given the observations of the Department at in the response at page F. If this factor was relied upon it was incumbent upon the FTT to find out what the applicant did for his wife, the papers indicating that her problems were psychological, and therefore the help being given may have been consistent with the level of difficulty the applicant claimed. If the status of the applicant as his wife's carer was not considered relevant it is hard to know why it was mentioned, particularly in such an otherwise sparse statement and given the comments that I have referred to in the response.*
6. *Given the level of factual dispute with the healthcare professional indicated by the applicant's notes on the report the FTT might arguably have given consideration to adjourning the case to an oral hearing, in light of the applicant's attendance at the medical examination by taxi.*

7. Ms Gilfoyle accepts that the points I made as to the apparent lack of consideration as to whether the claimant could carry out the various activities for which he sought points to the standards set out in regulation 4(2A), which is to say that what is being assessed is the ability to carry out an activity safely; to an acceptable standard; repeatedly and within a reasonable time

period. If the activity cannot be carried out in such a manner, then the descriptor is not satisfied. She also agrees that the approach to the Carers Allowance issue (about which more below) was erroneous, and that these points constituted errors of law of sufficient materiality to warrant the decision being set aside and the matter remitted for further findings to be made.

8. In relation to the issues concerning the inadequacy of the statement of reasons, in view of the clear support for the tribunal having fallen into error in its treatment of the legal provisions I need not adjudicate on that or any other issues since, as Ms Gilfoyle explains, any other matters will be subsumed in the new appeal, which is to say that the new tribunal will start again, and take all relevant matters into account. The grounds of appeal, the submission of the Secretary of State and the appellant's observations will all be before the fresh tribunal.

The receipt of PIP and the receipt of a Carer's Allowance

9. I say this, regarding the Carer's Allowance issue, because it has been a feature in a number of appeals which I have dealt with recently.
10. If a Carer's Allowance is in payment to somebody claiming a disability benefit on their own behalf it is understandable for a tribunal to wish to examine that. However it is not axiomatic that the receipt of Carers Allowance precludes entitlement to PIP, and the enquiry cannot start from that premise.
11. Although the facts will be for the tribunal rehearing the case, the circumstances set out by Ms Gilfoyle refer to the appellant's partner suffering from a psychotic illness, and the possibility, in those circumstances, that the care given is in the nature of verbal support for her mental health problems, rather than physical care. It will be for the tribunal to decide whether the care provided is inconsistent with the physical difficulties claimed.
12. The case cited by Ms Gilfoyle, a decision of Upper Tribunal Judge Wikeley dating from 2011 *(DLA/2499/2011)* makes this very point.
13. I should reassure the appellant that the inclusion of this case was not the taking into account of irrelevant matters. The case is legal authority for the proposition that it states, and it made a point in his favour. It was very helpfully referred to by Ms Gilfoyle in her capacity not simply as the representative of the Secretary of State, the respondent to the appeal, but as a legal representative acting to assist the tribunal to achieve a legally fair and proper outcome.

Other factors for the FTT to take into account

14. Clearly the mobility issue needs to be addressed in terms of distance, bearing in mind the difficulties which are spoken of due to pain. The decision of Upper Tribunal Judge Markus QC in *AP-v-SSWP [2016] UKUT 501 (AAC)* may be of assistance.
15. I mention once again the potential for points under activity 5 where, as a precaution an incontinence pad is reasonably required as an aid. It is the reasonable requirement for protection that needs to be in existence for more than 50% of the time, even if actual incontinence occurs less than that, as Upper tribunal Judge Mesher points out in *SSWP-v-NH (PIP) [2017] UKUT 258 (AAC).* Agreeing with, and perhaps extending the principle set out in the three judge panel decision *RJ and others [2017] UKUT 105 (AAC)* which held, at paragraph 55 of its decision -

'…. if, for the majority of days, a claimant is unable to carry out an activity safely or requires supervision to do so, then the relevant descriptor applies. On a correct analysis, as we have determined, that may be so even though the harmful event or the event which triggers the risk actually occurs on less than 50 per cent of the days'

16. I need add only that, given the nature of the appellant's problems it will be critical for the FTT to establish whether any of the activities set out in the Schedule are affected by the level of his pain, and to what extent, with focus on the terms of regulation 4 in relation to the quality of performance of the activities in addition to the rule set out in regulation 7 as to the need for performance to be affected for the majority of the time.
17. As to the application of regulation 7 the decision of Upper Tribunal Judge Hemingway in *TR-v-SSWP (PIP) [2015] UKUT 0626 (AAC)* is likely to be pertinent. It establishes that if a claimant is unable to perform an activity for part of a day that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34].
18. The appellant must understand that the fact that his appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course.
19. I do encourage the appellant to attend the next hearing, because there are a number of important issues about which the FTT may wish to ask him questions. These will be primarily about his difficulties in mobilising and carrying out day-to-day activities, including any pain, and the sort of things that he does to assist his wife, for which he receives a Carer's Allowance. The tribunal is not able to take into account changes that have happened since the date of the decision under appeal, 22 December 2016, but it can hear about things that have happened since then if they shed light on how matters were likely to have been at that time.
20. I have made provision in my directions for him to notify HMCTS if he wishes to attend. I have directed that he be provided with a taxi if he wishes to do so on the basis that he was provided with a taxi to attend the medical in relation to his PIP claim. That seems to me no more than a reasonable adjustment for a level of disability. That is not, of course, to pre-empt entitlement.

Paula Gray

Judge of the Upper Tribunal **Signed on the original on 13 December 2017**