IN THE UPPER TRIBUNAL **Case No** CPIP/3272/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Sutton on 9 June 2016 under reference SC173/16/00311 involved the making of an error on a point of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 22 of the Reasons.

REASONS FOR DECISION

1. Both the claimant and the representative of the Secretary of State have expressed the view that the decision of the tribunal involved the making of an error on a point of law and have agreed to a rehearing. That makes it unnecessary to set out the history of the case or to analyse the whole of the evidence or arguments in detail. I do need to deal with the reason why I am giving a direction for the next tribunal in relation to a point which may be of importance in other cases, namely whether a tribunal may be required, as part of its duty to give adequate reasons for its decision, to explain in a case concerning personal independence payment ("PIP") why it is differing from an earlier decision taken in relation to disability living allowance ("DLA").

2. The claimant, born in 1992, had been in receipt of DLA, it appears virtually since birth. According to the DWP's submission to the First-tier Tribunal ("FtT") this had latterly been at the higher rate of the mobility component and the middle rate of the care component. Because of the operation of the Personal Independence Payment (Transitional Provisions) Regulations 2013 she was required to claim PIP. Her claim form indicated needs in connection with every daily living descriptor and, as regards the mobility component, with getting to familiar and unfamiliar locations and with moving around, in respect of which her mobility was said to be restricted to less than 20 metres.

3. On 17 March 2016, a decision was taken awarding her 6 points for daily living (because she needed an aid or appliance to prepare food, to wash or bathe and to dress or undress) and 0 points for mobility. On her appeal to the FtT, she was awarded only 4 points (aid or appliance to dress or undress and prompting to engage with other people face to face.) The FtT found the claimant not to be a reliable witness and took the view that she had overstated the effect on her of the illnesses which it was acknowledged that she had.

4. The claimant appealed, submitting (among other things) that:

> "I have been in receipt [of] DLA for approximately 23 years, but the tribunal's decision on my PIP award does not give a reasonable explanation [of] why it departed from all those previous decisions."

Further, she observed that the FtT's belief that she had overstated her case:

> "does not make sense, in view of the fact that for 23 years, the DWP awarded me benefits for my disabilities."

5. I directed the DWP to produce copies of the most recent decision on the claimant's DLA claim together with any available evidence on which it was based. This resulted in the production of the 2010 claim form, a GP report dated 3 August 2010 and a decision notice dated 12 August 2010 awarding higher rate mobility component ("HRMC") and middle rate care component ("MRCC") (for day supervision because of risk of falls) from 21 April 2010, recorded as being made because of an increase in mobility needs. An earlier decision notice, dated 1 June 2010, had awarded lower rate mobility component ("LRMC") and MRCC and the claimant had evidently asked for the matter to be looked at again. The GP report had referred to her disabling conditions, including dizziness symptoms, cerebral palsy, mild left hemiplegia, collapse symptoms and poor balance. The conditions were described as "mild to moderate". The GP observed that "due to poor balance, collapse symptoms, she uses a wheelchair when attending college and is escorted by her carer." Her ability to get around was "affected due to collapse symptoms and dizziness symptoms."

6. While not formally limiting the grant of permission I indicated what I considered were the main arguable points:

> 1. It was in evidence (page A) that the appellant had previously been in receipt of DLA at the higher rate of mobility component and middle rate of care component. The award of the mobility component, in particular, and the evidence behind it, were capable of shedding some light on the claim for the mobility component of PIP. In the absence of any application on the claimant's behalf, did the tribunal err in law by not calling for those papers which the DWP had, arguably wrongly, failed to include? Now that they have been retrieved, was their omission material?
>
> 2. Did the tribunal err by failing to give a sufficient explanation to meet the requirements of R(M)1/96 in relation to why it was making no award when a substantial one had been made under the predecessor benefit?
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> 3. Did the tribunal err by taking away the points previously awarded for washing and bathing without explaining why? Even though (it appears) the representative was not arguing for this descriptor, the award had been supported by the Healthcare Professional ("HCP") and there was evidence at p46 that the claimant uses bath rails.
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> 4. Did the tribunal err by not considering whether to award points in respect of managing toilet needs or incontinence (even though, it appears, the representative was not asking for them)? The evidence at p40 suggested that the claimant (a) uses Tena underwear and (b) a raised toilet seat. The HCP's reason (p48) for not awarding points goes to getting up off the toilet and probably sufficiently addresses (b) in the absence of an express challenge, but what about (a)? Was there enough

> there at least to require the tribunal to ask whether in the light of that evidence there was any claim made for incontinence points?

7. Mr Whittaker, for the Secretary of State, submits in reply:

> 1. The FtT's failure was either not erroneous or was not material. It had plenty of evidence before it and, now that the evidence has been obtained, it is evident that it dates from 2010 and is of little value.
>
> 2. Whilst it has been established by a line of recent Upper Tribunal cases that the duty in R(M)1/96 applies in cases where the previous award was also a PIP award:
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> "It cannot apply where the previous award was a DLA award. The principle of R(M)1/96 is that the claimant should be informed of why an award of benefit has been reduced, however, when someone transfers from DLA to PIP it is no longer the same benefit. Whatever occurs with the PIP decision it bears no specific relation to the DLA decision as they have completely different criteria. As such, the R(M)1/96 obligations should not apply in "transfer" cases, and the tribunal did not err in not making reference to it."
>
> 3. The tribunal did err in this respect, but of itself it could only result in 2 further points, still below the threshold.
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> 4. The tribunal's findings sufficiently addressed the ability of the claimant to get up from the toilet, while the limited degree of protection afforded by Tena underwear, the claimant's failure expressly to pursue "managing toilet needs" in the appeal and the evidence in the round all indicated that the FtT did not err in law by failing to address this activity in any detail.

8. Mr Whittaker very properly draws attention to another issue, which neither the claimant nor I had raised. The claimant had reported to the HCP that she experiences non epileptic seizures (Vasuaga Syndrome), secondary to her brain condition. She indicated that she has 4 episodes of seizures a week and they last for five minutes. She gets no warning signs prior to her seizures and she faints randomly. She said much the same to the FtT. As Mr Whittaker correctly submits, it is not evident what the FtT made of these episodes. While the FtT indicated that the claimant overstated the effects of her illnesses, it is not clear from that whether they meant that they did not accept that the episodes occurred at all, or not with the claimed frequency, or that their effect was overstated. He submits, again correctly in my view, that such episodes, if accepted, could be particularly relevant to consideration of activity 1 (preparing and cooking food), activity 4 (washing and bathing) and mobility activity 1 (planning and following journeys).

9. I accept that submission and of itself it provides a sufficient reason to set aside the FtT's decision. Mr Whittaker submits, again correctly, that that has the effect of making the FtT's error of law in relation to washing and bathing

material also. As the FtT's decision is being set aside on other grounds, I need not address the issue of managing toilet needs further.

10. As to whether R(M)1/96 applies to a conversion decision, it is worth setting out what Mr Commissioner Howell QC said in that case:

> "15. It does however, seem to me to follow from what is said by the Court of Appeal in *Evans, Kitchen & Others*, that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an apparent variation in the treatment of similar **relevant** facts appears from the record of their decision.
>
> 16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance) then in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant "not virtually unable to walk" without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law."

Although the decision was taken against the background of the Adjudication Regulations then in force, nothing turns on that and the case is regularly applied under the FtT's current rules and rightly so. The case is rooted in the view that inconsistency for which no explanation is provided, whether explicitly or because it is reasonably obvious from the circumstances, will cause the reasons given to be inadequate. As such, it is a generalised principle about the adequacy of reasons.

11. What is trickier is when two awards may be judged to be inconsistent. The situation where the rules of the benefit remain the same and the claimant's condition has remained the same or worsened is straightforward: if

a later decision differs from the decision preceding it, then compliance with R(M)1/96 will be necessary.

12. Where a benefit is changed, such as from incapacity benefit to employment and support allowance or, as in this case, from DLA to PIP, in my view for the reasons below it is not enough on the one hand to point to the law having changed and to claim that as a result an earlier decision is of no consequence and need not be addressed. However, nor is it enough to say, in effect, that a claimant was awarded the benefit intended for e.g. (as here) people with disabilities under a predecessor benefit and so any decision that s/he does not qualify under the successor benefit must necessarily be inconsistent, for there will be many cases when the predecessor benefit is based on an entirely different approach. What is required on the part of the FtT is a degree of analysis as to the potential for a genuine inconsistency. Here are some examples; they are not intended as a definitive list.

13. For DLA, the test for HRMC of being "virtually unable to walk" is elaborated on by reg 12(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991 by reference to factors such as the time, manner, speed and distance of walking. The borderline between qualifying and not qualifying is thus a somewhat flexible one, but 50 yards or, as it appears to have become without comment, 50 metres has in my experience and that of others been taken as something of a benchmark. Whilst the DWP's own guidance (para 61324) is – understandably enough given the legal framework – not that prescriptive, it is consistent with such an approach, indicating that that:

> "In the absence of any significant indications as to the other three factors…if a claimant is unable to cover more than 25 to 30 metres without suffering severe discomfort, his walking ability is not "appreciable" or "significant"; while if the distance is more than 80 to 100 metres, he is unlikely to count as virtually unable to walk."

The authors of the respected Child Poverty Action Group Welfare Benefits and Tax Credits Handbook 2017/18 observe at p599 (emphasis added) that:

> "The law does not require a specific distance to be used when determining a child's inability to walk. *In practice s/he may be refused benefit if you state othe claim form that s/he can walk more than 50 metres.* However, her/his walking speed, the time it takes to cover the distance and the manner of walking are also relevant…"

(The reference to "child" merely reflects that an adult claimant now has to claim PIP, not DLA.)

14. PIP mobility activity 2 is concerned with the ability to "stand and then move". As noted at para 4.245 of Social Security Legislation 2017-18 Vol 1:

> "The guidance given by DWP to the HCP explains this by saying that the requirement for most of [the relevant] Descriptors is that the claimant must be able to "stand" and then "move" which means that the moving must be while he is still standing. In broad terms moving will equate with the popular notion of walking even though the walking may be with the use of sticks, walking frames or crutches."

While there may be exceptions (e.g. as the same paragraph notes, the ability to make progress by "swinging through" would count for PIP but not for DLA), in general, both are about walking.

15. The distances set by the PIP descriptors are such that a person who can stand and move unaided more than 20 metres but no more than 50 metres will score 8 points, enough for the standard rate of the mobility component. Bearing in mind the benchmark above, a person who had previously qualified for HRMC and whose condition had remained the same might feel some surprise at being told that s/he did not qualify for 8 points for fulfilling mobility descriptor 2c.

16. On the other hand, there will in general be no inconsistency between the mere fact of a previous award of HMRC and a claimant's inability to achieve descriptor 2e for being unable to stand and then move more than 1 metres but no more than 20 metres either aided or unaided: an award of HRMC does not presuppose such a degree of limitation.

17. There may be a variety of subtle nuances around such matters as variability, manner of walking and so on, but if there are, they can be set out as part of explaining why the two decisions are diferent. In determining whether there is a duty to provide that explanation in the first place, a less sophisticated approach is called for: as Commissioner Howell's remarks make clear, it is about providing a sufficient explanation to address claimants' perceptions of unfairness.

18. That is not to say that the process of providing such reasons may not have wider-ranging benefits for the adjudication process. Referring to an earlier decision and even more, where it is available, to the underlying evidence may cause a tribunal to re-evaluate its initial view of the more recent evidence before it.

19.There are other possible areas of overlap also. LRMC (awarded to the present claimant before it was overtaken by HRMC) was awarded on the basis that a claimant

> "is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty of walking out of doors without guidance or supervision most of the time."

There is an obvious potential for overlap with PIP mobility descriptor 1d which (in the form in which it stood at the time of the decision under appeal) was applicable where a claimant "cannot follow the route of an unfamiliar journey without another person…", a descriptor which has to be understood in the light of the decision of the three-judge panel in MH v SSWP (PIP) [2016]

UKUT 531 (AAC).[1] A person who had previously qualified for LRMC might understandably feel surprised if told that s/he did not now meet that descriptor. I do not exclude that there might be an explanation, but if there is one, it should be provided to the extent that R(M)1/96 requires.

20. Beyond this, inconsistencies are less easy to spot. Awards of MRCC could be made where the day or night condition regarding attention or supervision was fulfilled (Social Security Contributions and Benefits Act 1992, s.72(1)(b) and (c)), requiring an assessment more across a claimant's functioning as a whole, rather than the tests for the daily living component of PIP, which are directed towards whether or not specific descriptors in respect of specific activities apply. However, it is still necessary to analyse what is involved. By reg 4(2A) of the PIP Regulations, in which a claimant is termed "C":

> "(2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so —
> (a) safely;
> (b) to an acceptable standard;
> (c) repeatedly; and
> (d) within a reasonable time period."

When the present claimant was awarded the MRCC, it was on the basis of the day supervision condition, that

> "[she] is so severely disabled physically or mentally that, by day, she requires from another person –
> …
> (ii) continual supervision throughout the day in order to avoid substantial danger to [her]self or others."

In PIP, daily living activities 1 (preparing food), 2 (taking nutrition), 3 (managing therapy or monitoring a health condition), 4 (washing and bathing), and 5 (toilet needs) all contain descriptors where points are scored if supervision is needed to accomplish them. "Supervision" is a defined term: it means "the continuous presence of another person for the purpose of ensuring C's safety." Daily living activities 1 to 5 are everyday activities: a claimant is likely to have been engaged in most if not all when awarded the MRCC. If she needed "continual supervision throughout the day … in order to avoid substantial danger to herself or others" the question is posed, on what basis is it thought that she can accomplish daily living activities 1 to 5 "safely" without supervision. There may be answers; but the question is posed and answers need to be given in accordance with R(M)1/96.

21. Further illustration is unnecessary. I am not intending to set down a rule of law beyond that where the conditions on which a previous award of a different benefit was made are reasonably capable of being material to whether the conditions for the award of a subsequent benefit are met, where

[1] Questions of the subsequent amendment to that descriptor by SI 2017/194 and the challenge to those regulations in R(RF) v SSWP [2017] EWHC 3375 (Admin) are beyond the scope of this decision.

there is an apparently divergent decision on the subsequent benefit, R(M)1/96 should be applied.

22. I direct that the tribunal must conduct a complete rehearing in accordance with the law including that set out in this decision 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. While the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to these but must consider all aspects of the case, both fact and law, entirely afresh. The tribunal must not take into account any circumstances that were not obtaining at the date of the decision appealed against – see section 12(8)(b) of the Social Security Act 1998- but may take into account evidence that came into existence after the decision was made and evidence of events after the decision was made, insofar as it is relevant to the circumstances obtaining at the date of decision: R(DLA)2/01 and 3/01.

23. The fact that this appeal has succeeded on a point of law carries no implication as to the likely outcome of the rehearing, which is entirely a matter for the tribunal to which this case is remitted.

24. I apologise that this decision has taken as long as it has.

(signed)

C.G.Ward
Judge of the Upper Tribunal
17 January 2018