THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
DECISION OF THE UPPER TRIBUNAL

An oral hearing of this appeal has been requested by the claimant. That request is refused as I am satisfied after considering the circumstances of the case, and the reason advanced for the request that the appeal can be properly decided without a hearing.

The appeal against the decision of the First-tier Tribunal given at Glasgow on 26 February 2018 is refused. It is dismissed.

REASONS FOR DECISION

1. The claimant has appealed against the decision of the Tribunal which awarded her the daily living component and the mobility component at the standard rates from 9 August 2017 to 8 August 2020. The grounds of appeal are set out at page 159 and are related to the mobility component. What the claimant says in her grounds of appeal is:

> "I have been let down on all occasions by Moray Council and Government representation regarding the indignity that I have to suffer when my ileostomy bag can fill up at a moment's notice on any form of transport sometimes hitting up to 14 times a day.
> With no local transport and Moray Council's toilets being closed down it is unsafe for me and not viable to undertake public transport journeys and this is seen as a health hazard and to others traveling on the public transport which does not include the stench on changing my bag and disposing of my bag.
> Personal Independence Payment and the mobility component of it is what I require for my independence so that I can change a bag safely away from preying eyes and the general public.
> I propose to take this all the way to [the] European Court if necessary to do so. I do not want to suffer any more indignity by a bag leaking or bursting and soiling my clothes on public transport. Any Judge that asks a woman of this is not a people's champion."

2. Upper Tribunal Judge Gamble who granted permission to appeal said in doing so:

"Specifically, it is arguable that the Tribunal should have expressed, albeit briefly why their award of PIP was less than your former award of DLA."

3. The Secretary of State has supported the claimant's appeal. In his submission it is stated:

"4.1 Permission to appeal has been granted by the Upper Tribunal Judge Gamble in light of the Upper Tribunal decision YM V SSWP (PIP) UKUT 16 (AAC). The claimant was previously in receipt of the higher rate of mobility and middle rate care components of DLA before the claim for PIP was made. I submit that it is evident that at no point during the claimant's appeal hearing has the Tribunal considered the previous award of DLA. This is an error of law, as the R(M)1/96 principle (that a reduction of a previous award of benefit must be explained) also applies to transfer cases between DLA and PIP, as stated by Judge Ward in YM V SSWP(PIP) UKUT 16 (AAC)."

"4.2 The Secretary of State has lodged an appeal against the judgment of YM V SSWP (PIP) [2018] UKUT 16 (AAC). This application has been refused permission to appeal at the Upper Tribunal, however the Secretary of State is considering appealing against the decision to the Court of Appeal (CoA). The issue has also been considered at an oral hearing of the UT in CPIP/2307/2017 and CPIP/2386/2017 (heard on 19 June 2018); however, the decision for this is outstanding. As such the Secretary of State is unable, at this stage, to provide any guidance to the Tribunal hearing the appeal on how to apply YM. However, the Secretary of State acknowledges that YM stands as operative case law and that First-tier Tribunal re-hearing the case (if remitted) should have regard to it"

"4.3 I enclose the DLA evidence which has been sent by post, from that previous award for the benefit of the new tribunal, if the Judge is minded to remit as per this submission."

4. In response to the Secretary of State's submission the claimant says:

> "Nothing has ever been discussed that I am aware of, of my carpel tunnel operations to both my hands which were undertaken before the First Tribunal and to which I am still in severe pain. This is complicated by the fact that there is no toilet facilities on local buses and Moray Council shutting down toilet facilities in and out around Moray. By taking away my DLA mobility payment I have no privacy left to me in changing my stoma bag in privacy.
> It is therefore been recognised by family and friends that I was withdrawing myself from family life and therefore turning myself into a recluse in my own home, simply due to a fear that I would not manage my toilet needs in the full view of the travel public.
> It has also come apparent to me whilst visiting Nairn that the Co-op Group, Supermarket Group has refused me entry to their toilet facilities whilst in desperate to use them after being in public transport with no toilets.
> Surely full PIP is designed to take away this adjutation (agitation) and worry that is constantly on my mind whether I am to get toilet facilities at the end of my journey, all in all, had I my own transport I would be able to drive to places I know I can use which my DLA payment gave me.
> I have read the submissions from the court and I can only say I am truly from the female gender, which I like to be noticed as."

5. I am not persuaded that the claimant has demonstrated any error in law on the part of the Tribunal. Her Member of Parliament added in a letter dated the 2 August 2018:

> "She feels very strongly that her medical needs have not changed or improved since 2001 when she had a full ileostomy in 2001. Due to needing to be near a toilet (she wears a bag) she encounters difficulties when she travels any distance by public transport, and feels very strongly that she deserves the full components of daily living and mobility care awards, due to these functional disabilities."

It is apparent from both her grounds of appeal, what was said by her MP and response to the Secretary of State's submission that the claimant's principal concern is the effect of the Tribunal's decision rather than its substance. The effect of the award made by the Tribunal would

be that she no longer has motability by car which she says enables her to cope with dealing with her ileostomy bag.

6. Neither the claimant nor her member of Parliament addressed the Tribunal's decision in the context of the application mobility activity 2 "moving around". What the Tribunal required to do was make a judgment as to which of the point scoring descriptors applied to the claimant. It decided that descriptor 2d applied, which is:

> "can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres"

The Tribunal justified its decision in respect of which descriptor applied in paragraph 6 of its reasons where it said:

> "6. The Tribunal considered she used both moderate and strong pain killers (paracetamol and tramadol) to ease her arthritic pain and this coupled with discomfort from her ileostomy caused them to conclude these problems were reasonably consistent with an award of activities 1b, 4b, 5b, 6b of the daily living activities. While the Tribunal had reservations that the Appellant's mobility was likely to be as restricted as satisfying descriptor 2d, neither the opinion of the healthcare professional nor what the Appellant actually did, suggested she could repeatedly stand and then move further than 50 metres. The Tribunal considered there would really not be much fluctuation from day to day in what the Appellant could achieve and considered both Regulations 4 and 7 when confirming descriptors awarded."

7. I am not persuaded that the Secretary of State has demonstrated any error in law on the part of the Tribunal. The Secretary of State's submission is not directed to the merits of the Tribunal's decision in respect of the number of points scoring descriptors satisfied. It is purely on the technical basis that as the claimant had a previous award of Disability Living Allowance the Tribunal should have considered that and explained in the context of the previous award of Disability Living Allowance why she satisfied descriptor 2d rather than either of the two higher scoring descriptors e and f. The Secretary of State submits that in the light of YM v SSWP(PIP) UKUT 16 (AAC) the Tribunal were bound to apply the principles in R(M)1/96. In that decision Mr Commissioner Howell QC said:

> "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."

The Secretary of State's submission in my view is misconceived.

8. The basis upon which R(M)1/96 is said by Upper Tribunal Judge Ward to apply in cases where an award of Personal Independence Payment has succeeded an award of Disability Living Allowance is set out in paragraph 21 of his decision where he says:-

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

9. It is I think significant that in the submission to the First-tier Tribunal in pages C – G no reference was made to the award of Disability Living Allowance and the only reference to the award

is found at page 8 in the letter for mandatory reconsideration where it is stated by the claimant's then representative simply that such an award had been made as a matter of fact. The contention made by the representative was that the claimant should have received 12 points rather than 10. The Tribunal did not have before it the papers in relation to the claimant's award of Disability Living Allowance, there was no request by the claimant's representative for these to be produced for the Tribunal and thus it had no evidence before it about the award other than its existence. I cannot see that in these circumstances it can be held that the Tribunal erred in law by not explaining the award it made in the context of the Disability Living Award.

10. In respect of the case of YM I note that the observation of the Upper Tribunal Judge in respect of the decision in R(M)1/96 applying to conversion decisions to a different benefit is obiter. I refer in that connection to paragraphs 8 & 9 where the decision of the Tribunal in that case was set aside for reasons other than the application of R(M)1/96. His comments on application of R(M)1/96 are in the form of a direction to the tribunal which is to renew the appeal he was dealing with. I also note from paragraph 21 of his decision the Upper Tribunal Judge says R(M)1/96 should be applied where the conditions on which the previous award of a different benefit was made are reasonably capable of being material as to whether one other condition for the award of a subsequent benefit are met. The conditions for the award of higher rate of the mobility component of Disability Living Allowance made to the claimant are those set out in Section 73 1(a) of the Social Security Contributions and Benefits Act 1992 and Regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991. They involved the finding that she was virtually unable to walk. Whether she did so was essentially a jury question for decision maker who made that decision and it was one he answered in her favour. There was a degree of latitude in respect of how these conditions were to be applied in each individual case. That element of latitude is not given to decision makers or Tribunals applying Regulations relating to Personal Independence Payment. The points scoring descriptors are more prescribed and mathematical in their application. In the context of activity 2 of moving around the descriptors are essentially degrees of disability which range from descriptor a:

> "can stand and then move more than 200 metres, either aided or unaided"

to:

> "f cannot either aided or unaided:
> (i) stand; or
> (ii) move more than one metre.

The Tribunal addressed the descriptors and for clear reasons decided that 2d was the appropriate descriptor. I do not see how the selection of that descriptor as opposed to descriptor 2e could have been explained in the context of a decision of an award of Disability Living Allowance based on a

criteria of the claimant being “virtually unable to walk”. I am therefore not persuaded that R(M)1/96 is capable of being applied . Even if I were wrong on that issue that would not be material as the reasons as to why descriptor 2d applied was plain and clearly obvious, namely for the reasons set out in paragraph 6.

(Signed)
D J May QC
Judge of the Upper Tribunal
Date: 24 August 2018