IN THE UPPER TRIBUNAL **Appeal No: CPIP/2748/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Watford on 10 February 2017 under reference SC304/16/02073 involved an error on a point of law and is set aside.

The Upper Tribunal substitutes its own decision for that of the First-tier Tribunal. The substituted decision of the Upper Tribunal is to set aside the Secretary of State's decision of 29 August 2016 and replace it with a decision that the appellant is entitled to standard rate of the daily living component of the Personal Independence Payment (PIP) and the standard rate of the mobility component of PIP for the period 28 September 2016 to 11 February 2019.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007

REASONS FOR DECISION

1. The parties in effect are in agreement that the First-tier Tribunal's decision of 10 February 2017 ("the tribunal") should be set aside for material error of law on the overarching ground identified in paragraph 3 below. I agree.

2. There is a difference of view amongst the parties as to whether in consequence the appeal should be remitted to the First-tier Tribunal to be re-decided or be re-decided by me. Contrary to the argument of the Secretary of State, it is my view that there is no need for the appeal to be remitted as I can decide the sole live issue (entitlement to the standard rate of the mobility component of PIP) on the facts.

3. The tribunal in my judgment erred in law in failing to provide sufficient findings of fact and an adequate explanation in its reasons for why the appellant did not satisfy descriptor 2c under Part 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regs). That is the descriptor that covers a person's ability to stand and then move (i.e. walk) a distance of between 20-50 metres.

4. An important context was that the appellant had had an award of the higher rate of the mobility component ("hrmc") of Disability Living Allowance immediately before that DLA award was converted over to PIP. This gives rise to the possible inference that as a rule of thumb the appellant's walking at the time of DLA award had been shown on the evidence to have been limited (without severe discomfort) to 50 metres: see paragraph 6 of *R (Sumpter) v Secretary of State for Works and Pensions* [2015] EWCA Civ 1033). I say "possible" only because the appellant's breathlessness might have meant that he had qualified for the hrmc instead under the "exertion required to walk would constitute a danger to his health or would be likely to lead to a serious deterioration in his health" alternative test for the hrmc. None of the other tests for entitlement to the hrmc of DLA can have any relevance.

5. In either event, given the terms of regulation 4(2A) of the Personal Independence Payment Regulations 2013 in my judgment either of these routes of entitlement to the hrmc of DLA, and more particularly the evidence that had led to that award and its continuation, was potentially relevant to the appellant's ability to stand and then move the PIP statutory distances of 20, 50 and 200 metres repeatedly and safely. The tribunal's reasoning, however, does not address this potentially important evidence and whether it ought to have been before it.

6. In addressing this aspect of the appeal to the Upper Tribunal the Secretary of State has submitted, following *AP –v- SSWP* [2016] UKUT 0416 (AAC), that such DLA evidence may be relevant. Furthermore she

accepts that as the appellant has a degenerative condition "you would not expect there to be an improvement in his condition such that he was able to walk a greater distance than was determined in his claim for DLA". I will return to this view of the evidence when I discuss my reasons for deciding the entitlement question myself. I should add that the Secretary of State has not put the DLA evidence before the Upper Tribunal.

7. In addition, the tribunal's reasoning in my judgment also fails to address the evidence of Ms Inge (about the short distance from reception to clinic room) and Ms Lewis (that the appellant's condition had worsened in the year since November 2015 – the decision under appeal is dated 29 August 2016), at pages 221 and 222, or the extensive evidence the appellant gave to the tribunal about his walking. This last evidence is recorded in the record of proceedings on pages 245-247 and 249. Other than the evidence about walking done at Lords cricket ground on page 249, which was not relied on in the tribunal's reasoning about the mobility component of PIP, pages 245-247 contain evidence about the appellant leaning on the shopping trolley (which itself might raise an issue of whether he was standing upright when walking), taking the shopping back to the lifts at his sheltered accommodation with (an unidentified number of) rests, and in some detail about his staged walking from the disabled bay to his seat at Luton Town football club's ground.

8. The key reasons the tribunal gave against descriptor 2c applying in terms of the walking done by the appellant were his ability to get around his small flat (which in and of itself was very unlikely to involve distances of more than 50 metres) and his stated ability to walk for five minutes before stopping. However, given the evidence highlighted above which the tribunal did have before it (e.g. page 246 appears to show the appellant saying he was fatigued 10 yards inside the gates of the football ground), and the "informal observations" the Health Professional made of the appellant's breathlessness on walking the

(presumably short distance) to the consulting room, in my judgment the tribunal's reasoning and fact-finding needed to address more adequately and critically than it did the basis for, and credibility of, this 5 minute claim made by the appellant. As the mandatory reconsideration on page 140 implied, this would amount to the appellant being able to walk about 225 metres before stopping, which appears entirely at odds with all of his other evidence.

9. The tribunal therefore erred in law in failing to consider **all** the evidence relevant to the appellant's ability to walk/move around.

10. A related aspect of the ground on which this appeal is being allowed, and which in other circumstances may have amounted to a determinative ground in its own right, concerns whether the Secretary of State erred in law in not putting the evidence that led to the hrmc of DLA award before the tribunal as relevant evidence (per *ST –v- SSWP* (ESA) [2012] UKUT 469 (AAC)) and, more importantly, whether the First-tier Tribunal erred in law in failing to consider whether the evidence underpinning that award ought to have been put before it by the Secretary of State.

11. The extent to which the Secretary of State keeps such hrmc evidence on PIP claims was addressed in *GD v SSWP (PIP)* [2017] UKUT 415 (AAC). From that case it would seem that the hrmc evidence from the DLA award is kept by the DWP in certain circumstances. One circumstance is where the claimant being transferred over from DLA to PIP has been "asked at the outset if they want the DWP to include their DLA Medical Evidence when considering the PIP claim" (paragraph 4.5 of the Secretary of State's submission to the Upper Tribunal in *GD*) and the claimant says "Yes". That question and answer would be useful if it was indicated in the First-tier Tribunal's appeal bundle, because it would provide a basis for the tribunal determining whether to seek such evidence, but I can find no indication of this question being asked in the appeal bundle in this case.

12. This aspect of the appeal was addressed in some detail by the Secretary of State in further submissions on the appeal to the Upper Tribunal dated 2 February 2018. In those submissions the Secretary of State referred to the *AP* and *GD* decisions (set out above), stated that "all the evidence that is ordinarily needed in order to determine a person's eligibility for PIP" is produced by the PIP assessment procedures, but continued that "[n]onetheless the Secretary of State does give claimants the option, if they want, to rely on the older DLA evidence in support of their PIP claim".

13. The Secretary of State's further submission continued:

> "However, naturally, more weight is expected to be given to current medical evidence, collected specifically for the PIP claim than to evidence from the DLA file because the DLA evidence addressed a wholly different assessment regime and is also likely to be outdated.
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> As recognised in *AP*, when cases come before the tribunals on appeal, tribunals may have questions or doubts about the medical evidence on which the Secretary of State's PIP determination was made. If so then, as part of their own factual inquiries, the Secretary of State accepts that the tribunals might find it helpful to see DLA medical evidence, even where the claimant didn't ask the Secretary of State to consider it.
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> In order to assist the tribunals in determining whether DLA evidence is relevant to a PIP appeal before them…….the Secretary of State acknowledges that it may be useful for more information about the DLA evidence to be communicated in their submission to the FtT in these transfer cases. Judge Wright refers to the process of obtaining DLA evidence in transfer cases, explored in *GD v SSWP* [2017] UKUT 415 (AAC). In that case, Judge Markus quoted an explanation of that process:
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> > "5a. PIP Reassessment Claimants are asked at outset if they want the DWP to include their DLA medical evidence when considering the PIP claim. Where DLA medical evidence is used, then that evidence will be attached to the claimants PIP file and marked as supporting that PIP decision. This will be kept for at least 2 years if the PIP decision was a disallowance. Or longer if the decision was an award. If there has been no request from the claimant to use their DLA medical evidence for their PIP claim then the old DLA evidence will be destroyed 14 months after the DLA decision has terminated. The PIP retention period is 24 months if the evidence is no longer classified as supporting. Once the DLA evidence has been included as part of the PIP claim it will have the same retention as any other PIP supporting document.

> b. There is a departmental policy regarding document and data retention. However, benefits decide what fits their circumstances as documents can be retained for longer/shorter if there is a valid business need e.g. DLA is roughly 14 months for documents but PIP is 24 months due to the potential linking provision of Regulation 15 of the Social Security (Personal Independence Payment) Regulations 2013, but is consistent within each benefit.
> c. Please refer to answer a. Normally the DLA File is destroyed 14 months after it ceases to support an existing award. This period starts from 7 months after termination of award. The computer record will keep for 7 months and then close. The paper file will then be destroyed 14 months after that. However if any of that DLA evidence has been considered within the PIP claim then that evidence will support the PIP decision and it will be kept for as long as the PIP decision is current and 2 years after the PIP is no longer current.
> d. If the DLA medical evidence has been used to consider the PIP claim then this will be include in the evidence bundle sent to the tribunal."

If the claimant answers 'yes' to the question about their DLA medical evidence being used in the PIP claim then no issue arises as the evidence is present in the bundle. If the claimant answers 'no' the Secretary of State will endeavour to ensure that information is recorded in the submission, so the Judge will know that the claimant did not want that evidence to be considered.

Furthermore, the Secretary of State will also endeavour to provide further details about the DLA decision. One can see, for example, at page A of this bundle, that all that is said on the DLA decision is the level of award and end date. The date of the last DLA decision will be added to this. This would give the approximate date of the evidence on file in most cases (even if the evidence is older than the decision, the evidence must have been deemed still pertinent to the claimant's condition as at the time of the DLA decision). The DLA decision could have been made at any time since the introduction of DLA in 1992, so the date of that decision could be a significant factor in whether the tribunal feels it necessary to obtain that evidence. The Secretary of State believes that the inclusion of this information might better inform the tribunals as to the potential relevance of any DLA medical evidence where it is not already in the bundle.

The Judge may wonder why the Secretary of State has not provided this very same information in this submission. The Secretary of State hoped to have that detail before this submission was due but as yet those details have not been communicated to the writer (the information cannot be drawn from a computer but rather the physical file has to be recalled from storage). However, if remitted, those details would appear in the bundle for the freshly constituted tribunal."

14. I am grateful for this further explanation the Secretary of State has provided, and it may provide some assistance to First-tier Tribunal's in their consideration of PIP transfer cases where the prior DLA evidence may be relevant. However the submission leaves unclear whether the option of asking for the DLA evidence was made available to the appellant in this case and whether it has been a procedure which has been in place since the beginning of the transfer of DLA awards to PIP.

15. The submission distinguishes between cases where the option has been exercised by a claimant in favour of his or her DLA evidence being included, when the DLA evidence **will** be included in the appeal bundle, and those cases where the option is not exercised by an appellant. If the option was made available to the appellant in this case at the time he was invited to make his claim for PIP in or before July 2016, on the face of the appeal bundle it was an option he chose not to exercise as none of the DLA evidence appears in the bundle. I need not explore this issue further on this appeal as I have decided that justice is best served by deciding the appeal now and remaking the entitlement decision, and the issue is to be further considered in other appeals. Based on what I have seen however I express a little surprise that the appellant would not have chosen the option of having his DLA evidence included in the appeal bundle.

16. The rest of what is set out in the parts of the Secretary of State's further submission I have set out above seems to be concerned with cases where the option is *not* exercised, but on the evidence in this case the steps to be taken to better inform First-tier Tribunals of prior DLA awards appear very much to be 'works [which are still] in progress'. Certainly there is no evidence that, on the assumption that the appellant did not ask for his DLA evidence to be included in his PIP claim or appeal papers, any further information about the DLA award was set out in the Secretary of State's appeal response to the tribunal. I may add that it is unfortunate that the submission does not explain from when this further information has in fact, or is to be, introduced.

However, as I have indicated above, these issues are likely to be explored in two other appeals which are before the Upper Tribunal (CPIP/2307/2017 and CPIP/2386/2017), and do not need to be further explored on this appeal.

17. It is for the reasons set out in paragraphs 3-8 above that I set aside the tribunal's decision.

18. I raised with the parties whether if the tribunal's decision was to be set aside I should then go on to decide the first instance appeal myself or remit it to be re-decided by the First-tier Tribunal; and if I did the latter whether I should direct the new tribunal not to disturb the award of the standard rate of the daily living component of PIP and concentrate simply on the mobility component.

19. The appellant asks me to re-decide the first instance appeal and in so doing focus solely on the mobility component and award him what he terms the "mid range of the PIP mobility", by which I take it he means the standard rate of the mobility component. (His case in the PIP claim pack was that his walking was limited to between 20 and 50 metres (page 83), which accords with the standard rate.)

20. The Secretary of State in the further submission referred to above opposed my deciding the appeal or my directing the new First-tier Tribunal not to consider the daily living component award. She also opposed me awarding the appellant the standard rate of the mobility component. Her reasons were as follows:

> "The Secretary of State was not explicit in the original submission, but it desired that the whole of the matter to be remitted for rehearing by the First-tier Tribunal. On the first deficiency, the Secretary of State did not mention whether they would be satisfied with the daily living component being undisturbed on remission. The Secretary of State is not generally in favour of remitted cases being limited in that way, whereby upon the return of the case for rehearing to the First-tier Tribunal one component is fixed and the other is not. Rather, we feel it is best that the new tribunal is free to explore whatever evidence may arise from their questioning and from what extra pertinent evidence may be filed prior to the hearing. There is often overlap between the

> two components, and evidence supplied or obtained by the tribunal on mobility activities could then trigger thoughts about the daily living activities (and vice versa). Say, for example, in investigating mobility activity 1 the tribunal learns that the claimant is a driver, when this knowledge was not before known, this could significantly change the tribunal's opinion of descriptor choices for many of the daily living activities.
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> On the second deficiency the Secretary of State submits that it is not appropriate for the Upper Tribunal to substitute a decision awarding the claimant the enhanced rate mobility component. Judge Wright refers to the rule of thumb that in DLA a claimant limited to 50 metres would satisfy the enhanced rate of DLA. However, that is a rule of thumb, it cannot be assumed that the claimant was exactly limited so. Moreover, the Upper Tribunal would also be wrongly assuming the DLA *decision* to establish facts for the purpose of PIP. The correct approach is for the FtT to request sight of the DLA *evidence* if it deems that necessary. As the 50 metre mark is the borderline between PIP mobility descriptors 2b and 2c/2d, and that also marks the material difference between receiving 4 points or 8/10 (leading in itself to an award at the standard rate) there needs to be precision in the findings on that point. There would also need to be a consideration of whether there has been any improvement or change since the time of the DLA decision and its accompanying evidence. As the Secretary of State has already argued for a remit on the ground that the FtT failed to consider adjourning in order to obtain the DLA evidence, I submit that it would be appropriate to remit the case and direct that DLA evidence to be produced, in order for the next tribunal to be able to find the factual details required in establishing the descriptor choice in this activity, by reference to any further evidence obtained."

21. I reject these arguments of the Secretary of State. Section 12(2)(b)(ii) and 12(4) of the Tribunals Courts and Enforcement Act 2007 gives me a broad discretion as to whether or not to remit the appeal for reconsideration. This appeal is of some age, the appellant is anxious for it to be resolved, and the sole issue on which I consider it needs to be resolved can be done by me on the papers as they stand alone.

22. As for whether consideration should be given on the appeal to the daily living component, that was awarded by the Secretary of State and was not an issue raised by the appeal to the First-tier Tribunal (per section 12(8)(a) of the Social Security Act 1998 – see final sentence in paragraph 3 of the tribunal's statement of reasons), nor is the Secretary of State putting forward any argument to bring that daily living component entitlement into issue. In the circumstances, I do not

consider there is any proper basis for me considering it to be an issue raised by the appeal or, in the alternative, for me not to direct any First-tier Tribunal on remittal not to consider it (as it is not an issue raised by the appeal) if I had decided to take the remittal course. I note, moreover, that in other cases alike to this one the Secretary of State has not objected to my remitting the appeal to a new First-tier Tribunal with a direction that that tribunal should not consider entitlement to the daily living component (see, for example, CPIP/2740/2018).

23. As for the correct level of entitlement, in my judgment the balance of the evidence shows that the appellant was entitled to the standard rate of the mobility component (as well as the standard rate of the daily living component) of PIP. I take as my starting point the Secretary of State's view that you would not expect there to be an improvement in the appellant's condition such that he was able to walk a greater distance than was determined in his claim for DLA. I add to this starting point the proposition that it was more likely than not that the evidence underpinning the appellant's prior DLA award showed that his walking was limited to 50 metres. The Secretary of State has had the opportunity to put that evidence before me, in a context where I had indicated I may well re-decide the entitlement appeal myself, and has not put that evidence before me to rebut the evidential inferences I have drawn from the fact of prior hrmc DLA award. This taken together with the evidence I have highlighted in paragraph 7 above and the focus of regulation 4(2A) of the PIP Regs leads me to conclude that the appellant on the balance of probabilities satisfied descriptor 2c under Part 3 of Schedule 1 to the PIP Regs for the dates set out above, as well as qualifying for the standard rate of the daily living component for the same period.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 9th March 2018