DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Durham First-tier Tribunal dated 19 June 2018 and issued on 3 July 2018 under file reference SC292/16/00073 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 18 April 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the District Tribunal Judge who considered this appeal on 19 June 2018.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely 18 April 2016).

(4) If the Appellant has any further written evidence to put before the tribunal, especially medical evidence, this should be sent to the HMCTS regional tribunal office in Newcastle-upon-Tyne within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> by the Secretary of State under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is concerned only with the Appellant's potential entitlement to Personal Independence Payment (PIP) for the closed period from 26 November 2015 (the date of claim) to 4 September 2018 (the day before the start of the new award following a subsequent claim).

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This case is a good illustration of the jurisdictional and procedural knots in which tribunals can find themselves, in part because of the way that the Department for Work and Pensions (DWP) carries out its decision-making functions in relation to Personal Independence Payment (PIP), allied with some confusion in both the DWP and the First-tier Tribunal (FTT) as to the requirements for a valid appeal.

2. In summary, a DWP decision-maker decided that the Appellant was not entitled to PIP because he had failed without good reason to attend a medical. This decision involved making a so-called negative determination. Following an unsuccessful application for a mandatory reconsideration of that refusal, the Appellant appealed to the FTT. The DWP then made a new appointment for him to attend a PIP assessment, which he went to. The DWP indicated it was not inclined to alter its original decision disallowing entitlement. The FTT issued various interlocutory directions which did not progress matters, largely because of the DWP's limited engagement with the appeal process. The appeal did not go to a final hearing as a FTT District Tribunal Judge struck out the appeal, ruling that (i) the appeal had lapsed as the DWP, in accepting the Appellant had good reason for not attending the medical, had revised its original decision; and also (ii) in any event, the Appellant had not obtained a mandatory reconsideration notice of the DWP's substantive decision to refuse the claim following the assessment the Appellant had attended.

3. For the reasons that follow, my conclusion is that the FTT was wrong on both counts. I therefore allow the appeal to the Upper Tribunal, set aside the FTT's decision and remit the case for re-hearing before a new tribunal. I start by charting the main stages along the Appellant's 'PIP journey'.

The long and winding road – the Appellant's PIP journey

4. On 26 November 2015 the Appellant, who suffers from anxiety and depression, made a telephone claim for PIP. He was sent a PIP questionnaire to complete and return within one month, but he failed to send it back within that timescale.

5. On 6 January 2016 the DWP wrote to the Appellant informing him that he did not qualify for PIP as he had failed to return the information requested. This was an 'outcome decision' (a term explained later) refusing PIP as from 26 November 2015.

6. On 11 March 2016 the Appellant belatedly returned the PIP questionnaire. On 28 March 2016 Atos Healthcare, on behalf of the DWP, invited the Appellant to attend a PIP medical assessment on 11 April 2016. The Appellant did not attend.

7. On 18 April 2016 the DWP wrote another letter to the Appellant informing him that he did not qualify for PIP, this time because he had failed to attend the medical assessment. This was technically a refusal to revise the decision of 6 January 2016.

8. The Appellant requested a reconsideration of the decision of 18 April 2016, stating that he had not received either the original Atos appointment letter or the follow-up text message reminding him of the appointment. He said the first he knew about the appointment was when he received the DWP's letter of 18 April 2016.

9. On 1 July 2016 the DWP sent the Appellant a mandatory reconsideration notice, refusing to change the decision of 18 April 2016 and advising him as to his appeal rights.

10. On 28 July 2016 the Appellant completed a SSCS 1 notice of appeal, repeating his claim that he had not been informed about the date for the PIP medical assessment. The appeal seems to have been received by the FTT office on 2 August 2016. If it was marginally late it was sensibly accepted as being in time.

11. On 6 August 2016 the FTT office advised the DWP that the appeal had been received and requested a written response to the appeal within 28 days.

12. On 2 September 2016, and so just before that deadline, the DWP appeals officer telephoned the Appellant and (according to the note of that phone call) advised him that the DWP was "willing to allow good cause at appeal stage if he is willing to attend a consultation". The Appellant agreed. In a subsequent request to the FTT office for an extension of time, the DWP appeals officer reported that "good cause has been given … and a new consultation date has been requested".

13. What was the status of this action by the DWP? I have deliberately avoided using the expression "decision by the DWP" as that would be to beg the question. There is no copy on the appeal file of any decision letter formally confirming that "good reason" (to use the correct statutory terminology) had been accepted in respect of the failure to attend on 11 April 2016. Nor was there any evidence of any formal decision revising the subsequent substantive disallowance decision of 18 April 2016. That being so, the decision of 18 April 2016 stood unchanged. At best, the DWP had conceded that the Appellant should "have another go". Thus, the DWP's acceptance of "good reason" (or "good cause" as they insisted on calling it) was legally insignificant. It was no more than an acknowledgement that the Appellant had not attended the assessment appointment but was willing to do so should a further opportunity be afforded. In the jargon, he was back on the PIP journey. He had a claim from 26 November 2015 which had been turned down but which he was challenging.

14. On 4 October 2016 the Appellant was duly advised of a new appointment scheduled for 18 October 2016. The Appellant did not attend the appointment. On 25 October 2016 he explained that he had been away staying with family and had again received neither the appointment letter nor the follow-up text reminder. On the same date the DWP appeals officer sent the FTT office a written response opposing the Appellant's appeal against the decision of 18 April 2016.

15. However, on 18 November 2016 the Appellant did attend an Atos Healthcare assessment. The appeal file is silent as to the circumstances in which that further appointment came to be made. There is, however, no doubt but that he did attend on this occasion. The nurse who conducted that assessment completed a PIP *Consultation report form – PA4*. If that report was accepted at face value, then the Appellant scored nil points on the PIP assessment.

16. On 6 December 2016 the DWP sent the FTT office a copy of the nurse's report, along with a short supplementary submission (p.48):

> "The health professional that assessed [the Appellant] did not recommend any points to be awarded for any descriptors. It [is] highly likely that if a decision was to be made on the basis of this assessment [the Appellant] would not be entitled to any rate of personal independence payment. In order for a decision [to] be made on this report, we respectfully ask the tribunal to direct us to lapse the appeal dated 02/08/2016. This will give [the Appellant] the right of appeal on the negative outcome decision."

17. For present purposes it is sufficient to note that this submission gives no hint that any new decision had been taken by the DWP on the Appellant's claim – in fact, quite the contrary.

18. On 16 January 2017 a District Tribunal Judge (DTJ) issued directions asking the Appellant to confirm whether "the appeal in relation to the non-attendance at a medical assessment for PIP" had been resolved to his satisfaction. If so, or in the event of no reply, it was said the appeal would automatically lapse. The DTJ added that the DWP would have to make a separate decision on the Appellant's PIP claim which would give rise to its own appeal rights.

19. On 28 January 2017 the Appellant replied to those directions, explaining the difficulties he faced with attending appointments and setting out in some detail why he disagreed with the nurse's assessment of his ability to undertake various PIP activities. He had obviously been sent a copy of the DWP's supplementary submission and the nurse's report.

20. On 8 February 2017 a FTT registrar issued directions stating that the appeal had lapsed, following the Appellant's attendance at the re-arranged appointment, but that the Appellant wanted the appeal to continue. The FTT registrar directed the DWP (or the Appellant) to produce a copy of (i) the decision letter following the assessment on 18 November 2016 and, if that was a negative outcome decision, (ii) a copy of any subsequent mandatory reconsideration notice.

21. Neither party replied, and on 21 April 2017 another FTT registrar reviewed the file and made further and more detailed directions, but essentially to the same effect, directing the production of both a post-assessment decision letter and consequential mandatory reconsideration notice. Before those directions were actually issued to the parties, the DWP belatedly responded on 24 April 2017 to the directions of 8 February 2017 in the following terms ('AP' in this context means Assessment Provider e.g. Atos):

> "The information below is taken from Case Manager instructions:
>
> - Following receipt of the AP report is: the outcome of any revision would result in the disallowance continuing, don't make a determination, proceed with the appeal, and inform the tribunal and the claimant of the new reasons for the decision within the appeal response.
>
> [The Appellant] previously failed to attend (fta) and good cause was given. He fta again and the appeal response was written. He attended a face to face assessment on 18/11/2016. The health professional did not recommend any points. We sent a sub dated 06/12/2016 to respectfully ask the tribunal to direct us to lapse the appeal from 02/08/2016.
>
> As per our instructions we will not make a determination if the result is not in the appellant's favour."

22. Again, it is sufficient to note this submission gives no hint that any new decision had been taken by the DWP on the Appellant's claim – in fact, quite the contrary, as the final sentence makes clear.

23. On 27 June 2017 a second DTJ issued further directions requiring the DWP to explain whether any decision had been taken following the medical assessment and the position as regard any mandatory reconsideration of such a decision.

24. On 3 October 2017, following yet more directions from the FTT, the DWP lodged a further substantive response. This referred (for the first time on this PIP journey) to a decision having been taken on 21 November 2016, namely that the Appellant scored 0 points for daily living and 0 points for mobility. This response addressed the various PIP activities in issue and sought to explain why no scoring descriptors were appropriate.

25. But where was this mysterious 'decision' of 21 November 2016? There was certainly no copy of any letter to the Appellant notifying him and explaining the supposed decision of 21 November 2016. There was no copy of any internal DWP record of any decision taken on 21 November 2016. There was not even a copy of a screen-print to support the claim that a decision had been taken on 21 November 2016. The only "evidence" that there had been any such decision was that against the relevant box for "date of decision" on the front of the DWP's supplementary response the date "21 November 2016" had been entered. This was immediately after the two boxes for the date of claim and the decision's effective date, which were both given as 26 November 2015.

26. To anticipate my finding below, I conclude on the evidence that there was no 'decision' of 21 November 2016. At most there was an indicative view or a recommendation.

27. On 6 December 2017 the FTT (at last) held a hearing but adjourned for copies of the Appellant's GP records for the past four years to be produced. These were duly provided.

28. On 17 January 2018 the FTT held a further hearing but again had to adjourn, this time because heavy snow had prevented the Appellant from attending at the tribunal venue. A further hearing in May 2018 was postponed as no medical member was available to sit on the panel. Another hearing was scheduled for 4 July 2018. The Appellant, who was understandably upset by the delays in resolving his appeal, had by this time had the good fortune to secure assistance from Durham Welfare Rights.

29. On 14 June 2018 Durham Welfare Rights made an application to the FTT for directions. The Appellant's representative asked that the DWP be required to confirm the statutory basis for the appeal to proceed or, failing that, to confirm that the Appellant's earlier correspondence could be treated as a request for a mandatory reconsideration and duly actioned.

30. On 16 June 2018 the representative's application was put before a third DTJ. Having considered the matter on the papers on 19 June 2018, the DTJ issued the decision notice which is the subject of the present appeal. This decision stated in no uncertain terms that "The tribunal has no jurisdiction. The appeal is struck out. The hearing for 4 July 2018 is cancelled". This decision notice was not actually issued to the parties until 3 July 2018, so requiring the FTT office staff on that same day to telephone or e-mail all those concerned with the hearing about the late cancellation.

31. Rather puzzlingly, the FTT office's GAPS2 archive for this appeal includes a letter dated 29 June 2018 from the FTT office to the Appellant's representative stating that "Consideration is being given to striking out the appeal. This means the appeal will not go ahead". The letter invited representations by 13 July 2018. I say "puzzlingly" as on the face of it this letter was dated 10 days after the DTJ had already decided to strike out the appeal. In addition, the Appellant's representative has made no mention of the letter of 29 June 2018 in any of his submissions. It is perhaps possible it was either never sent or never received. I need not enquire any further as it matters not.

32. Returning to the substance of the matter, the gist of the DTJ's reasoning in his decision notice of 19 June 2018 was as follows: (i) the DWP's original decision of 18 April 2016 was a 'negative determination' based on the Appellant's failure to attend the medical assessment; (ii) the Secretary of State had subsequently accepted the Appellant had good reason for that failure; (iii) the decision of 18 April 2016 had therefore lapsed as the new decision was a more favourable decision; (iv) the (supposed) decision of 21 November 2016 refusing PIP was "a completely different decision carrying separate appeal rights"; but (v) those appeal rights could not be exercised as the Appellant had not applied for or received a mandatory reconsideration notice in respect of this latter decision.

33. As noted above, the FTT's decision notice was not issued to the parties until 3 July 2018. The GAPS records indicate that the FTT office sent out two cover letters on the same date to the Appellant's representative. The first notified him that the appeal had been struck out because of unreasonable delay by the Appellant. Even more confusingly, the second letter bearing the same date announced that it had been decided not to strike out the appeal, which would now continue. The Appellant's representative has not referred to that second letter, so again perhaps it was never sent or never received. Or perhaps the more likely explanation is that the Appellant's representative had by now become completely inured to contradictory correspondence emanating from the FTT office.

34. Be that as it may, on 13 July 2018 the Appellant's representative responded to the first of those two letters from the FTT. He complained about "the Judge's unilateral actions" and requested that the appeal be reinstated under the FTT's case management powers as governed by rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; "the 2008 Rules"). The representative argued that the result of the strike-out was that the only beneficiary of the Respondent's failure to comply with the FTT's earlier and repeated directions was the DWP itself. He concluded:

> "In allowing the appeal to get to the doors of the Tribunal Hearing before taking such draconian action HMCTS have arguably been complicit in preventing the Appellant from bringing forth his legitimate appeal, or in the alternative allowing the Appellant to hold a reasonable belief that his appeal was valid and was due to be heard."

35. I simply observe that the Appellant's original claim for PIP had been made in November 2015 and this correspondence was taking place more than 2½ years later in July 2018.

36. On 30 July 2018 the DTJ issued a further Direction by way of a response to the representative's arguments. The DTJ observed that the question of jurisdiction had been raised as an issue in the representative's application for directions dated 14 June 2018. The DTJ repeated that the FTT had no jurisdiction as the appeal had lapsed, and lapsing was automatic with the result that "there is nothing for the Tribunal to consider" (citing *CJSA/2655/2012* at paragraph 7, a decision now known as *GM v SSWP (JSA)* [20142] UKUT 57 (AAC)). He added that the FTT could only proceed to hear the case if it had the appropriate statutory jurisdiction to do so. Furthermore, he repeated, not only had the original appeal lapsed but there had been no mandatory reconsideration of a subsequent and separate decision to refuse to make an award of PIP based on the descriptor scores following the assessment the Appellant did attend.

37. The Appellant's representative then made an application to the FTT for permission to appeal to the Upper Tribunal which the DTJ in question refused. I later granted permission to appeal.

The proceedings before the Upper Tribunal

38. Ms Stacey Kiley, the Secretary of State's representative, supports the appeal to the Upper Tribunal. She invites me to allow the Appellant's appeal, set aside the FTT's decision and remit the case to be reheard by a differently constituted FTT. She consents to a decision without reasons. She helpfully points out that the Appellant has subsequently made a successful claim to PIP. The new claim for PIP resulted in an award of the standard rate of the daily living component of PIP (the Appellant having scored 8 points) for the period from 5 September 2018 to 7 May 2021. There was no award of the mobility component. It follows that the re-hearing of the present remitted appeal is confined to the closed period from 26 November 2015 to 4 September 2018.

39. The Appellant's representative agrees with that course of action but asks for a decision with reasons as "the case brings forth a procedural matter that ideally requires clarification".

40. I agree with the outcome identified by both representatives even if I do not agree with every step of their arguments along the way. I have concluded that the FTT's decision of 19 June 2018, issued on 3 July 2018, involves an error of law for three main reasons. The first concerns the process adopted for the strike out of the purportedly lapsed appeal. The second deals with whether that appeal had indeed lapsed as a matter of law. The third revolves around the FTT's mistaken insistence on a second mandatory reconsideration.

The Upper Tribunal's analysis – the process of striking out the lapsed appeal

41. In a word, the process adopted by the FTT in making its decision of 19 June 2018 was *unfair*.

42. In four words, this process amounted to a *breach of natural justice*.

43. The FTT is subject to the overriding objective of dealing with cases fairly and justly (see rule 2 of the 2008 Rules). Clearly it is in nobody's interests if the FTT devotes scarce judicial time and other resources to dealing with a case in which it lacks jurisdiction. But equally fairness would suggest that any party to an appeal is warned of the possibility of a strike out and is asked for any representations before an appeal is struck out on that basis. Unsurprisingly, that principle is embodied in the 2008 Rules. Rule 8(2)(a) provides that the FTT "must strike out the whole or a part of the proceedings if the Tribunal – (a) does not have jurisdiction in relation to the proceedings or that part of them". However, this is subject to rule 8(4), which expressly states that:

> "(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

44. The "may" there refers to the FTT's discretion as to whether to strike out; it does not give any discretion about providing the potentially affected party with the prior opportunity to make representations. The simple fact of the matter is that the FTT here did not give the Appellant that opportunity. It would be positively perverse to regard the preceding request by the Appellant's representative for case management directions (the application dated 14 June 2018) as such an opportunity. First, and most obviously, there was at that stage no "proposed strike out". The representative was simply seeking to protect the Appellant's position by highlighting the procedural confusion that remained from the previous interlocutory stages of the appeal. There had certainly been no application for a strike out from the DWP and there was no reasoned warning from the FTT to the effect that a strike out was contemplated. Second, the Appellant's representative was asking that the DWP be directed to confirm and 'bottom out' its last stated position, namely that there was jurisdiction. Whether or not the FTT office letter of 29 June 2018 inviting representations was ever sent or received (a question which I have decided is not necessary to pursue), it was well after the horse had already bolted. Rule 8(4) precludes striking out "without first giving the appellant an opportunity to make representations in relation to the proposed striking out". It does not permit striking out "after giving the appellant an opportunity to make representations in relation to a decision that has already been taken". That latter approach is permissible where there has been a strike out for failure to comply with a direction which warned that such failure could lead to a strike out, where the affected party may make an 'after the event' application for reinstatement (see rule 8(3)(a) and *LB of Camden v FG (SEN)* [2010] UKUT 249 (AAC)). It is not permissible in a 'no jurisdiction' case.

45. In this context the guidance of the three-judge panel of the Upper Tribunal in *LS and RS v HMRC (TC)* [2017] UKUT 257 (AAC); [2018] AACR 2 on matters of practice relating to lapsed appeals is apposite. The fact that the appeal in question concerned the issue of lapsing in tax credits cases does not affect the generality of the guidance:

> "52. If the First-tier Tribunal lacks jurisdiction to hear an appeal, the proper disposal before that tribunal is to strike out the proceedings. It is unlikely that the Upper Tribunal would give permission to appeal if the tribunal took a different course, such as refusing to admit the appeal, dismissing it or recording that it has lapsed. But the strike out procedure contains an important safeguard in that the claimant has a chance to make representations, which the duty of fairness would require the tribunal to respect if it did take another course. That is not a mere formality; it may save a tribunal from using its powers inappropriately or without first ensuring that the conditions for a strike out are met."

46. The FTT's decision of 19 June 2018 accordingly involves an error of law in that there was a breach of natural justice and of rule 8(4) of the 2008 Rules.

47. But, in any event, had the Appellant's appeal actually lapsed?

The Upper Tribunal's analysis – the lapsing of the original appeal

Introduction

48. The FTT was absolutely categorical that the Appellant's appeal had lapsed by virtue of the Respondent's acceptance that he had good reason for missing the relevant Atos Healthcare appointment. Unfortunately, the FTT was also absolutely and categorically wrong.

49. In order to understand why the FTT was so wrong, one has to track through three inter-connected stages in the argument. The first is about the nature of a social security decision and of any consequential appeal. The second concerns the nature of the curious statutory creature that is a 'negative determination'. The third turns on the statutory criteria for lapsing.

The nature of a social security decision and consequential appeal

50. The adjudication regime established by the Social Security Act 1998 ("the 1998 Act") is premised on decisions. Although the 1998 Act does not use this language, it is accepted that as a matter of general principle (and so subject to some exceptions in the regulations, none of which applies here) appealable decisions are *outcome decisions*, e.g. where the Secretary of State's decision maker makes a decision about a claimant's entitlement (or not) to a particular benefit at a given rate for a specified period. The decision maker may make other determinations along the way to reaching that outcome decision. However, such intermediate findings are not outcome decisions in themselves, but are (as they are sometimes described) 'building blocks' or 'stepping stones' that lead towards the eventual (and appealable) outcome decision. So, in the present case, a conclusion that the Appellant did not have good reason for missing the PIP medical assessment was not itself an outcome decision. Rather, it was a stepping stone to making the negative determination followed by an outcome decision that the Appellant was not entitled to PIP as from the date of claim.

51. A further principle underpinning the 1998 Act is that decisions taken by the Secretary of State are final, subject to the provisions of that part of the 1998 Act and the Tribunals, Courts and Enforcement Act 2007 (see section 17(1) of the 1998 Act). In effect, this provision embodies the rule of law. Outcome decisions cannot be arbitrarily changed. Rather, they can only be changed by the statutory mechanisms of revision, supersession and appeal, each of which is subject to specific statutory controls. Moreover, as decisions are about outcomes, it follows that appeals are against the outcome of the decision and not the reasons for the decision (of course, a challenge to the underlying reasons may result in a change in the outcome). It also follows that a successful revision or supersession means that the outcome of the original decision has been changed. If the Secretary of State's decision maker declines to change the outcome of the original decision, then there is no revision or supersession – rather, there has been a refusal to revise or a refusal to supersede (see the majority decision in *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53 reported as R(DLA) 1/03).

The nature of a negative determination

52. The concept of a 'negative determination' is not defined in the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013 No. 377; "the 2013 Regulations"). However, as Upper Tribunal Judge Mesher explained in *OM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 458 (AAC) (at paragraph 3), the regulation making power that relates to negative determinations is to be found in section 80(5)(a) of the Welfare Reform Act 2012, For those purposes, section 80(6) provides that a negative determination means "a determination that a person does not meet the requirements of – (a) section 78(1)(a) and (b) or (2)(a) and (b) (daily living component); section 79(1)(a) to (c) or (2)(a) to (c) (mobility component)".

53. Regulation 8(3) of the 2013 Regulations further provides that where a claimant fails to comply with a request to provide information (e.g. by failing to return the PIP questionnaire) then "a negative determination in relation to the component to which the failure related must be made". This was the basis on which the DWP's original decision to refuse the Appellant's PIP claim was made.

54. Additionally, regulation 9(2) of the 2013 Regulations provides that where a claimant fails to participate in a PIP medical assessment, "a negative determination must be made". This was the

basis on which the DWP's subsequent decision to refuse the Appellant's PIP claim was made, and which was the subject of the present appeal to the FTT.

55. Reading section 80(6) and regulation 9(2) together, a negative determination cannot be an outcome decision. It is simply a stepping stone decision effectively deeming that the claimant does not have either a limited ability, or a severely limited ability, to carry out daily living and/or mobility activities (because s/he has not shown good reason for failing to attend the required medical). The outcome decision itself is a decision that the claimant is not entitled to PIP as from a specified date (i.e. the date of claim). This is also evident from *OM v SSWP (PIP)*, where Judge Mesher referred to the failure of the DWP's written response to a FTT appeal in that case to "go through the chain from a negative determination to a consequent non-entitlement decision" (at paragraph 9). This confirms that a negative determination is a building block that may result in an outcome decision – but it is not an outcome decision in itself.

56. In *OM v SSWP (PIP)* Judge Mesher re-made the decision that was under appeal to the FTT. That decision was that the claimant was not entitled to PIP as from a specified date as he had failed to participate in a medical assessment. Judge Mesher found that the FTT had erred in its approach to the issue of whether the claimant had shown good reason for his non-participation. Re-making the decision, the judge concluded that in all the circumstances there was good reason for the claimant's failure to attend. The result was that no negative determination could be made under regulation 9(2) and the consequential outcome decision disallowing entitlement to PIP could not stand (paragraph 35). Accordingly, Judge Mesher allowed the claimant's appeal, set aside the FTT's decision and remitted the matter to the Secretary of State to determine the outstanding claim for PIP. The fact there was no longer any negative determination also meant that the claimant's award of disability living allowance had to be reinstated (paragraph 37).

57. I note in this context that guidance subsequently issued by the DWP to its decision-makers in the wake of *OM v SSWP (PIP)* acknowledges that once good reason has been accepted there can be no outstanding negative determination. Instead "the claimant's PIP claim will proceed to a full assessment and a decision made on entitlement, from the date of the PIP claim" (DWP, *PIP negative determinations – effect of UT decision*, Memo ADM 24-18, paragraph 9).

The criteria for lapsing

58. Section 9(6) of the 1998 Act provides as follows:

> "Except in prescribed circumstances, an appeal against a decision of the Secretary of State shall lapse if the decision is revised under this section before the appeal is determined."

59. For present purposes the prescribed circumstances for the purposes of the exception to section 9(6) are set out in regulation 52 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013 No.381). Regulation 52(1) provides as follows:

> "(1) An appeal against a decision of the Secretary of State does not lapse where—
> (a) the decision is revised under section 9 of the 1998 Act before the appeal is decided; and
> (b) the decision of the Secretary of State as revised is not more advantageous to the appellant than the decision before it was revised."

Applying those principles in the present case

60. The FTT in its decision made on 19 June 2018 found that the Appellant's appeal against the decision of 18 April 2016 had lapsed because the Secretary of State had accepted the Appellant's explanation for missing the appointment "and placed him back on the PIP journey". The Secretary of State's concession undoubtedly did return the Appellant to that long and winding road. However, the Secretary of State's acceptance of good reason for the Appellant's failure to attend was not itself a

revision of an outcome decision. The original outcome decision of 18 April 2016 that there was no entitlement to PIP as from the date of claim had not itself been changed; instead, all the Secretary of State had done was to agree that the Appellant could attend a fresh appointment. The basis for the original disallowance may well have been taken away, but no steps were taken at that stage to revise the decision of 18 April 2016.

61. It follows from the analysis above that the FTT in its decision of 19 June 2018 fell into error by conflating *the reason for the decision* under appeal with *the decision itself*. The outcome decision which the Appellant had appealed against was the decision – embodying a negative determination – that he was not entitled to PIP. The reason for the negative determination incorporated into that outcome decision was that he had failed to attend a medical assessment and had not shown good reason for that failure. He had applied for, and received, a mandatory reconsideration notice relating to that outcome decision, but the decision (that he was not entitled to PIP) had not been changed. Subsequently the Secretary of State had had a change of heart about the issue of good reason for the failure to attend and had arranged a further appointment for a medical assessment. While the process of making that further determination and its notification was at best opaque, it remained the case that it was no more than a change to one of the stepping stones. The outcome decision (that there was no substantive entitlement to PIP as from the date of claim) had not been revised but rather remained the same. As explained above, the appeal therefore did not lapse.

62. The FTT sought to rely on *GM v SSWP (JSA)* for the proposition that lapsing of an appeal was automatic, leaving nothing for the tribunal to determine. However, this is not quite what Upper Tribunal Judge Rowland said in that decision (emphasis added):

> "7. A ruling that an appeal has lapsed is in principle appealable (see *LS v LB Lambeth (HB)* [2010] UKUT 461 (AAC); [2011] AACR 27). I agree with the Secretary of State that the First-tier Tribunal has no power to decide whether or not an appeal should lapse, because lapsing occurs automatically by virtue of, in this case, section 9(6) of the Social Security Act 1998. *However, if there is a dispute as to whether an appeal has, by operation of law, lapsed, the First-tier Tribunal must rule on the issue and such a ruling is appealable*."

The Upper Tribunal's analysis – the second mandatory reconsideration

63. What then of the supposed decision of 21 November 2016? As noted above, there is no supporting documentation to substantiate the claim that a decision was actually taken (let alone notified) on that date. The assertion that a decision was taken on 21 November 2016 was first made nearly a year later, in the DWP's supplementary submission dated 3 October 2017. The contemporaneous evidence points to no such decision as ever having been taken. Thus, the submission dated 9 December 2016, shortly after the events in question, flatly contradicted the notion that any decision on the Appellant's entitlement to PIP had actually been taken following the assessment. Instead, it stated "It [is] highly likely that *if a decision was to be made on the basis of this assessment* [the Appellant] would not be entitled to any rate of personal independence payment" (emphasis added; see paragraph 16 above). Rather, all the evidence suggests that the Secretary of State had abided by her own procedural guidance, however inelegantly it may have been put, that if "the outcome of any revision would result in the disallowance continuing, don't make a determination, proceed with the appeal, and inform the tribunal and the claimant of the new reasons for the decision within the appeal response" (see paragraph 21 above). The only tenable conclusion is that the purported 'decision' of 21 November 2016 was at most a recommendation from the DWP appeals officer that the PIP claim be refused on the basis of a nil score on the descriptors. Given that there was no decision as such on 21 November 2016 – and certainly no notification of any such decision to the Appellant – it followed by definition that there could be no mandatory reconsideration of such a non-decision.

64. In any event, the Appellant had already had a mandatory reconsideration notice in relation to his rejected claim for PIP. The statutory provisions for mandatory reconsiderations are telling. A claimant's right of appeal is against any initial decision under section 8 of the 1998 Act or any

supersession decision under section 10 (whether as originally made or as revised under section 9) – see section 12(1). The right of appeal is to the FTT, subject to section 12(3A) – see section 12(2). Section 12(3A) in turn enables regulations to provide that the right of appeal arises only "if the Secretary of State has considered whether to revise the decision under section 9. Regulation 7(2) of the 2013 Regulations confirms that the right of appeal under section 12(2) "in relation to the decision only if the Secretary of State has considered on an application whether to revise the decision under section 9 of that Act".

65. As Ms Kiley, in her submission on behalf of the Secretary of State, puts it:

> "The purpose of mandatory reconsideration is to give the Secretary of State an opportunity to address the claimant's initial grievance before the matter proceeds to appeal. It is not to insist that the Secretary of State be given an opportunity to twice consider (initially and then on revision) every novel issue that happens to arise in the tribunal's investigation of the claimant's initial grievance. A single mandatory reconsideration, carried out in relation to the decision appealed to the tribunal suffices."

66. The underlying principle is clear. Once there has been a mandatory reconsideration notice (a revision of, or a refusal to revise, an outcome decision), it matters not how many times the decision in question is then further revised. It is still the same outcome decision, the mandatory reconsideration requirement has been satisfied and an appeal lies to the FTT in the normal way.

What happens next: the new First-tier Tribunal

67. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the Appellant is entitled to PIP (and, if so, which component(s) and at what rate(s) and for what period). That is all a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact accordingly.

68. The new FTT will have to focus on the Appellant's circumstances as they were as long ago as April 2016, and not the position as at the date of the new FTT hearing, which will obviously be more than a year later. This is because the new FTT must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The decision by the Secretary of State which was appealed against to the FTT was taken on 18 April 2016.

69. As noted above (see paragraph 38), the new FTT is concerned only with the Appellant's potential entitlement to PIP for the closed period from 26 November 2015 (the date of claim) to 4 September 2018 (the day before the start of the new award following a subsequent claim).

Conclusion

70. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case is remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)).

Signed on the original
on 26 March 2019

Nicholas Wikeley
Judge of the Upper Tribunal