IN THE UPPER TRIBUNAL **Appeal No. CPIP/2717/2018**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

Appellant: NW
Respondent: Secretary of State for Work and Pensions

Decision date: 8th May 2019

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 6th July 2018 under number SC944/17/01845 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely. This must include the medical evidence relating to the previous award of disability living allowance (that made on 19th December 2013) or a written explanation by the Secretary of State as to the steps taken to obtain this evidence since the submission dated 28th February 2019 and why it is not available.**

4. **The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is the 25th July 2017. Any further evidence, to be relevant, should shed light on the position at that time.**

5. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

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

REASONS FOR DECISION

1. The Appellant had been in receipt of the lowest rate of the care component and the lower rate of the mobility component of disability living allowance ('DLA'). Pursuant to the Personal Independence Payment (Transitional Provisions) Regulations 2013, he made a claim for personal independence payment ('PIP'). On 25th July 2017 the Secretary of State decided that the Appellant was entitled to 4 points for the daily living component and 4 points for the mobility component of PIP, so that no award of PIP was made. On appeal to the First-tier Tribunal, the tribunal decided on 22nd August 2018 that the Appellant was entitled to 6 points for the daily living component and 4 points for the mobility component, and so confirmed the Secretary of State's decision that he was not entitled to PIP.

2. On the 26th September 2018 the Appellant sought permission to appeal from the First-tier Tribunal. The grounds were that the tribunal had not been provided with the evidence relating to the previous DLA award, and that the tribunal had failed to make adequate findings of fact or explain how it addressed conflicting evidence. On 10th October 2018 the First-tier Tribunal refused to give the Appellant permission to appeal. The District Tribunal Judge also made some observations about more general difficulties in obtaining DLA records. He said:

> "7. The experience of this DTJ is that the SSWP routinely ignores directions from both UTJ's (on remittals) and DTJ's/TJ's [sic] for DLA records. Some examples are illustrated below.
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> 8. I have recently sent a case back to UKUT where the directions of the UTJ have been ignored.
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> 9. Last week I have had approximately 10 appeals in which there had been non-compliance by SSWP. In one case the adjournment requesting DLA records had been issued in March 2018. Those records have still not been provided.
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> 10. I have had to issue a summons with a penal notice in two appeals in order to get the DWP to issue the documentation. In those appeals the officer had initially refused to provide the documents. The line initially adopted by SSWP was that they could ignore the direction as they were appealing the UKUT decision relating to DLA records and that the lodging of that appeal obviated any need for compliance. The summons achieved its aim but non-compliance caused satellite litigation and took up valuable time and resources. If I was to issue a summons in each and every case where there was non-compliance I would cease hearing substantive appeals.
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> 11. In another appeal which I have dealt with on 5 October 2018, I have been provided with a file which shows an email chain consisting of 12 emails between SSWP and HMCTS. That email chain arises solely due to the fact that SSWP have not complied with the direction. That is not a proper use of HMCTS limited resources.
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> 12. This non-compliance appears endemic and is taking up significant FtT time which could be used more productively. More pertinently it is having a knock-on effect of causing serious delays and prejudice to appellants."

3. On 12th November 2018 the Upper Tribunal received an application for permission to appeal from the Appellant's representative. The representative added to the previous grounds of appeal, including that the Appellant had had two medical examinations for the purposes of his DLA award, that his condition had got worse since then (as to this, I note in passing that the Appellant's submissions to the First-tier Tribunal had been that there had been no change to his condition – page 101),

and that the Appellant had made a freedom of information request to the Department for Work and Pensions ('DWP') to provide the DLA documents.

4. On 4th October 2018 I had decided two appeals, *CH and KN v SSWP* [2018] UKUT 330 (AAC), in which I gave guidance as to the relevance of DLA evidence in appeals against PIP transfer decisions and when tribunals should consider obtaining DLA evidence in those appeals.

5. On 20th December 2018 I gave permission to appeal against the First-tier Tribunal's decision in this case regarding PIP mobility activity 1. It was arguable that the tribunal had failed to address the Appellant's challenge to the HCP report or the potential overlap with the DLA mobility component, had failed adequately to explain its decision in the light of the DLA award, and had unreasonably failed to obtain the DLA evidence. I also asked the Secretary of State to address the wider issues raised by the District Tribunal Judge.

6. In written submissions the Secretary of State supported the appeal, and made submissions regarding the wider issue regarding DLA evidence. The Appellant has made no further comments on the appeal. Neither party has requested an oral hearing and I am satisfied that I can fairly determine the appeal without a hearing.

Whether the First-tier Tribunal erred in law

Mobility activity 1

7. The Secretary of State's representative submitted that, in finding that no descriptor under PIP mobility activity 1 applied, the First-tier Tribunal had failed to distinguish between the Appellant's ability to follow the route of a familiar and an unfamiliar journey, and had inadequately addressed the claims by the Appellant to suffer panic attacks and their impact on his ability to follow journeys.

8. I agree. There was an inconsistency between what the Appellant had said in his claim form and in evidence at the hearing. In resolving the inconsistencies, the tribunal relied on what he was alleged to have told the healthcare professional ('HCP') who examined him but which the Appellant disputed. The tribunal did not explain why it nonetheless accepted the HCP's account. In addition, as the Secretary of State's representative correctly observed, the tribunal failed to distinguish between familiar and unfamiliar journeys.

Absence of DLA evidence

9. The First-tier Tribunal noted that the Appellant had requested the DLA evidence. It decided that it did not need to seek that evidence because it considered that it had sufficient evidence in the documents already before it and the Appellant's oral evidence, it was concerned with his condition in 2017 (rather than at the time of the DLA award), and the conditions of entitlement for PIP were different to those for DLA.

10. In written submissions for this appeal, the Secretary of State's representative noted that the DLA care component was for the "main meal test" due to lack of motivation. As this would only score 2 points under PIP daily living descriptor 1d, and as the Appellant had in any event been awarded 2 points under daily living descriptor 1b, it could not be said that any overlap between the daily living component of the DLA award and a potential PIP award could have resulted in a different decision regarding the daily living component. I agree.

11. The Secretary of State submitted that the position was different in relation to the mobility component. An award of the lower rate of the mobility component of DLA is made 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 out of doors without guidance or supervision from another person most of the time" (section 73(1)(d) of the Social Security Contributions and Benefits Act 1992). In the present case, the basis of the award to the Appellant had been that due to "anxiety or panic attacks" he needed "someone to guide or supervise [him] to walk outside in places [he did not] know well". This was similar to PIP mobility descriptor 1d: "cannot follow the route of an unfamiliar journey without another person…".

12. The Secretary of State's representative noted that the difficulties claimed by the Appellant were consistent with the previous award of DLA and that the DLA evidence could have been relevant in that regard. Although it had been unusual to request the DLA evidence by way of the Freedom of Information Act, the DWP should have responded and the representative was unable to explain why it had not done so.

13. The First-tier Tribunal decided this case prior to my decision in *CH and KN*. In accordance with the guidance which I gave in that decision, I consider that the Secretary of State was correct to submit that medical evidence relating to the DLA mobility component award was likely to have been relevant in the light of the overlap between that award and the basis on which the Appellant claimed to be entitled to PIP and because he said that there had been no change in (or even a deterioration in) his condition since then. However, as I also said in *CH and KN*, even if medical evidence relating to a previous DLA claim is relevant, that does not mean that a tribunal is always required as a matter of law to obtain it. There are no hard and fast rules, but I gave some general guidance in that case.

14. In the present case, the fact that the tribunal had been provided with other evidence relating to the PIP award, and had heard the Appellant's oral evidence, was relevant to its decision whether it should obtain the DLA evidence. However, the Appellant disputed the HCP's account of what he said during the medical examination. The GP's evidence regarding his ability to plan and follow a journey was vague and so did not assist materially. If there had been medical evidence in the DLA file, that may well have provided considerable assistance in resolving the particular dispute. As far as I can tell, the Appellant had not told the First-tier Tribunal prior to or at the hearing that he had been medically examined for the purpose of the DLA award. However, that is an obvious question that the tribunal could have asked of him. There is no indication that the tribunal appreciated the particular reason why the DLA evidence may have been of assistance in this case. The tribunal's decision to proceed without seeking the DLA evidence was based on general considerations but without addressing the specific potential value of the evidence in the light of the disputed matters in this appeal. That does not mean that the tribunal could not have proceeded without the evidence, but rather that it failed to give adequate consideration to whether to do so.

15. Following the grant of permission to appeal the Secretary of State's representative had obtained the DLA file but the evidence relating to the previous DLA award, made on 19 December 2013, was not on the file. The contractor responsible for storage of the DWP files had been instructed to undertake a full search of their records but nothing has yet been provided to the Upper Tribunal. The Secretary of State's representative provided the evidence relating to the previous

award of DLA (21st January 2012 to 20th April 2014) which had been at the same rates as the later award. This comprises the DLA claim form and the decision letter of 17th January 2012, from which it appears that the decision was made without medical evidence. As I said in *CH and* KN at paragraph 51, the claim form alone is unlikely to be relevant. I do not know whether there had been medical evidence in relation to the more recent DLA award. The documentation relating to the more recent DLA award is unlikely to provide any further assistance, even if it can be found, unless it included relevant medical evidence.

16. If the DLA file is found, the next First-tier Tribunal should either be provided with the medical evidence or informed that there is no medical evidence. If the file cannot be found, this should be explained to the First-tier Tribunal. In that eventuality, the First-tier Tribunal will have no alternative but to proceed in its absence. For the reasons explained above, it seems to me that the loss of those documents might not cause any material prejudice to the Appellant.

The broader issues raised by the DTJ

17. The description and examples given by the DTJ of the regular failure by the Secretary of State to provide DLA evidence, even when directed to do so, and the consequent additional burden placed on HMCTS and the tribunal judiciary, is very concerning. The Secretary of State's response was as follows:

> "There is certainly not an intention to ignore instructions from the First-tier Tribunal, and operational instructions have always stated that these directions must be complied with fully, including in respect of providing DLA evidence to the Tribunal. The actions of the Department in this case and those referred to by Judge Durance clearly do not meet the standards required to allow the timely and correct progress of these appeal cases and those serious concerns have been passed onto the operational officers who manage these matters."

18. It is certainly welcome that the Secretary of State recognises the seriousness of the matters raised by the DTJ and has said that they will be addressed. It may be that matters have improved since the DTJ made his comments in this case. I observe that in *CH and KN* the Secretary of State had told the Upper Tribunal that there had been IT changes (which would have post-dated the Appellant's PIP claim or the Secretary of State's submission to the First-tier Tribunal in this case) which should ensure that, if requested, DLA material is provided to the First-tier Tribunal.

19. Compliance with directions by the Upper Tribunal or the First-tier Tribunal are mandatory. It is worth bearing in mind that the First-tier Tribunal has a range of options open to it where directions are not complied with (see rule 7 of the Tribunal Procedure (First-tier Tribunal) Rules 2008) including referring the matter to the Upper Tribunal in order to exercise its powers under section 25 of the Tribunals Courts and Enforcement Act 2007.

Signed on the original
on 8th May 2019

Kate Markus QC
Judge of the Upper Tribunal

Corrected on 28th May 2019