DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Sutherland Williams

Decision

1. **This appeal by the claimant succeeds**. Permission to appeal having been given by District Tribunal Judge Rocke on 17 July 2018, and in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set aside the decision of the First-tier Tribunal sitting in Carlisle on 13 February 2018 (under reference SC924/17/00318) and remit this matter to a differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the Directions given below.

2. Both parties agree that the decision of the tribunal was made in error of law. Neither party has requested an oral hearing and I am satisfied that this matter can be dealt with on the papers before me. The submissions from the parties are clear and further oral submissions are unlikely to assist.

Primary issue and conclusions

3. In this appeal, I consider the general powers of a tribunal following an appeal from a personal independence payment supersession decision.

4. I conclude that on an appeal against a decision superseding or refusing to supersede, where the tribunal finds that the reasons given for the decision by the Secretary of State are inadequate, the tribunal has jurisdiction to make its own superseding decision, providing that there are grounds and an evidential basis to do so.

5. In particular, if the First-tier Tribunal finds that there is both a ground and basis to supersede, it has jurisdiction to make the decision that the Secretary of State should have made (thereby remedying any defects in the decision) and should therefore not simply set the Secretary of State's inadequately reasoned decision aside as invalid.

6. While cases will always rest on their individual circumstances and facts, I have herein identified a three-stage approach for tribunals in such appeals, which may assist as a starting point:

    i. First, the Tribunal should ask: is there a basis in law for the Secretary of State's supersession decision?
    ii. Second, and if so, the Tribunal should ask: has the Secretary of State provided adequate reasons (when addressing all of the evidence available) to explain and sustain the decision?

iii. Third, if the Secretary of State has not provided adequate reasons, the First-tier Tribunal has jurisdiction to make the decision that the Secretary of State should have made, rather than simply setting such a decision aside as invalid.

7. *R(IB) 2/04* applied.

Background

8. This appeal concerns a claim for personal independence payment (PIP). The claimant reports hypothyroidism; Meniere's disease; arthritis; and other health issues.

9. The First-tier Tribunal's decision reinstated the initial PIP award made by the Secretary of State on 19 December 2014 ('the original decision'); and set aside the superseding decision made on 10 April 2017 ('the supersession decision').

10. The tribunal found the supersession decision to be unlawful (and to therefore have no legal effect), on the basis that the Secretary of State had not shown adequate reasons for the supersession.

11. The original decision had awarded 5 points for daily living and 12 points for the mobility component, leading to an award of the enhanced rate of the mobility component from 8 November 2013 to 7 December 2017. The supersession decision reduced the mobility component from enhanced rate to standard rate from 10 April 2017 to 15 March 2021.

12. In the statement of reasons, dated 1 June 2018, the tribunal judge went to considerable lengths to explain why the tribunal considered the reasons given for the supersession to be inadequate; and why therefore the supersession decision was being set aside, essentially reinstating the original decision.

13. One of the net effects, however, of the tribunal's decision was that consequent upon it, the award of PIP ran out in December 2017, whereas under the supersession decision the award would have run until March 2021.

14. In a letter to HM Courts and Tribunals Service, written on 16 May 2018, the claimant said that the decision had had the effect of '*wiping out the actual [reason] I came to the tribunal for, this has now stripped me of my PIP award totally, I have no income from it, no mobility, no blue badge and not to mention the amount of over £2000 that was owed me in back pay'.*

15. The appellant adds:

> 'I cannot explain what effect this has had on both my mental state and my physical state, I am truly devastated that this has happened after going to the tribunal for help and support on what was clearly a wrong decision made by the DWP. Even the judge said they had acted illegally as they had no evidence to reduce my award. The whole impact has altered my life in more ways than I can list… When I was at the court and was awarded my mobility

> back I thought it was a positive win for me… In fact, it's the total opposite and has left me with no award at all'.

16. In granting permission to appeal, Judge Rocke stated it was in the interests of justice for an appellant to understand what powers the tribunal had to change an award to an appellant's disadvantage should evidence exists to show an award by the Secretary of State is wrong. She observed that the legislative scheme for changing decisions in PIP cases was causing great difficulties for Tribunals.

17. In addressing Judge Rocke's concern, I am about to take (to use a cricketing analogy) a fairly long run at a fairly short ball. It appears to me that existing case law can be interpreted to address the situation that I have been asked to consider and in the instant matter the correct outcome would have been for the First-tier Tribunal to substitute its own supersession decision. I explain the reasons for this below.

The power to supersede

18. Regulation 11 of the Social Security (Personal Independence Payment) Regulations 2013 provides as follows:

> Re-determination of ability to carry out activities
>
> **11.** Where it has been determined that C has limited ability or severely limited ability to carry out either or both daily living activities or mobility activities, the Secretary of State may, for any reason and at any time, determine afresh in accordance with regulation 4 whether C continues to have such limited ability or severely limited ability.

19. Regulation 11 however is not a basis for supersession itself. It is still necessary for the Secretary of State to show that there is a ground for supersession in accordance with the Universal Credit, Personal Independence Payment, Jobseekers Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013, No. 381) ('(Decisions and Appeals) Regulations 2013'), *per* Upper Tribunal Judge Mesher in *KB v Secretary of State for Work and Pensions* (PIP)[2016] UKUT 537 (AAC), who stated:

> 17. The precise terms of regulation 11 have to be looked at carefully. They only allow the Secretary of State to make a *determination* on the question of whether the claimant continues to have limited or severely limited ability to carry out daily living and/or mobility activities, not an overall *decision* on the use of those particular words….Thus, regulation 11 does not directly allow supersession of the decision making an award whenever the Secretary of State feels like it. To put it another way, the mere existence of the subsequent determination on one question, that the claimant does not have limited or severely limited ability to carry out daily living and/or mobility activities, cannot in itself take away the authority entitling the claimant to payment of benefit under the decision awarding entitlement. That authority can only be removed by the Secretary of State under

the powers of revision and supersession in the 2013 Decisions and Appeals Regulations.

20. In the instant appeal, the Secretary of State superseded the previous decision on the basis of regulation 26 of the (Decisions and Appeals) Regulations 2013– which provides:

> **Medical evidence and limited capability for work etc.**
>
> **26.**—(1) An employment and support allowance decision, a personal independence payment decision or universal credit decision may be superseded where, since the decision was made, the Secretary of State has—
>
> (a) received medical evidence from a healthcare professional or other person approved by the Secretary of State; or
>
> (b) made a determination that the claimant is to be treated as having limited capability for work in accordance with regulation 16, 21, 22 or 29 of the Employment and Support Allowance Regulations 2013 or Part 5 (capability for work or work-related activity) of the Universal Credit Regulations.
>
> (2) The decision awarding personal independence payment may be superseded where there has been a negative determination.
>
> (3) In this regulation—
>
> "an employment and support allowance decision", "personal independence payment decision" and "universal credit decision" each has the meaning given in Schedule 1 (effective dates for superseding decisions made on the ground of a change of circumstances);
>
> "healthcare professional" means—
>
> (a) a registered medical practitioner;
> (b) a registered nurse; or
> (c) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under section 60 (regulation of health professions, social workers, other care workers etc.) of the Health Act 1999.

21. A new healthcare professional's report was completed on 16 March 2017. Applying regulation 26, this was the foundation of the supersession.

Discussion

22. In terms of approach, this appeal essentially raises three issues for tribunals to consider.

i. Is there a basis in law for the Secretary of State's supersession decision?

23. First, a tribunal should ask what is the basis in law/the regulation used for the supersession decision? i.e. has the Secretary of State demonstrated the starting point for any decision to supersede?

24. There are various grounds in which the Secretary of State may supersede, such as change of circumstances (see regs 23-26 of the (Decisions and Appeals) Regulations 2013).

25. In *DS v Secretary of State for Work and Pensions* (PIP) [2016] UKUT 538 (AAC), Upper Tribunal Judge Mesher held that all grounds of supersession can apply insofar as the conditions they contain are made out, without any artificial rules to try to make them mutually exclusive. It follows from *DS* that a decision-maker should identify:
    i. a ground of supersession under the legislation;
    ii. a factual basis for the superseding decision; and
    iii. the date from which the superseding decision is effective (para 14-15 of *DS*).

26. The First-tier Tribunal in this appeal, correctly in my judgement, accepted that the basic ground for supersession under the legislation was that contained in regulation 26 (medical evidence from a healthcare professional).

27. However, the mere receipt of a healthcare professional's report, while the trigger for a possible supersession, is not in itself sufficient. There must be consideration of the evidence therein (the factual basis for the superseding decision), compared and contrasted to the other evidence available, to sufficiently justify exercising the power to supersede.

28. The above point was illustrated by Upper Tribunal Judge Wikeley in *TH v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0231 (AAC), where Judge Wikeley observed:

> '…it was not simply enough to assume that the appearance of a new PIP assessment report provided an automatic grounds for supersession of the original award decision under regulation 26(1)… It could not simply be assumed that the second PIP assessment report, in some way trumped the first PIP assessment report, for example, by virtue of being more recent. The appellant, as a matter of justice, was entitled to an explanation as to why his award has been terminated ahead of time…[see] *R(M) 1/96* and *SF v Secretary of State for Work and Pensions (PIP)* UKUT 481 AAC.'

29. The above gives rise to the second issue a tribunal is required to consider.

ii. Has the Secretary of State provided adequate reasons (when addressing all of the evidence available) to explain and sustain the decision to supersede?

30. The second central issue the tribunal has to consider, having accepted there was a ground in law for supersession, is whether the decision-maker was correct to supersede the earlier decision having regard to all of the evidence (identified by Judge Mesher as the factual basis for the superseding decision).

31. In *TH (above)* Upper Tribunal Judge Wikeley stated:

> '.. The lesson in this case is clear. As Judge Mesher held in *KB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 537 (AAC), there is in effect a two-stage process. In short, first, regulation 11 of the PIP regulations enables the Secretary of State to look into an existing PIP award. Secondly, however, the Secretary of State will need to show that one of the grounds of supersession is made out and the subsequent decision on entitlement must have regard to all of the evidence….'

32. In the instant matter, the First-tier Tribunal dealt with the issue of (in)adequate reasons with some care, considering in detail the evidence relied upon by the respondent to support superseding in 2017 the original decision made in 2013; before concluding that the respondent had, on this occasion, not provided adequate reasons for the decision to supersede the existing award of benefit.

33. Importantly, in so doing, the tribunal was not finding that there were no grounds for a supersession decision at all, but simply that the decision-maker had failed to provide adequate reasons for the contested decision.

34. This knits in with the third issue a tribunal needs to consider in circumstances such as this: having decided that the Secretary of State had not given an adequate explanation, were there nonetheless grounds to supersede?

iii. The First-tier Tribunal has jurisdiction to make the decision that the Secretary of State should have made, rather than simply setting such a decision aside as invalid.

35. The effect of the instant tribunal's decision that the respondent had failed to provide an adequate explanation for the supersession was to reset things. It was now open to the tribunal to ask whether there was any other basis for supersession, and if so, to consider the correct award and period of entitlement for this claimant.

36. This was the claimant's appeal. She maintained that her condition had deteriorated in the 3 years since she had first been entitled to PIP. She also provided details of her care needs/daily living difficulties.

37. Indeed, the tribunal notes in its statement of reasons that if the healthcare professional report of 16 March 2017 had been followed, the claimant would have scored 8 points for daily living:

> '41. There is no satisfactory explanation from the decision maker as to why he or she chose not to follow the recommendation as contained in the medical assessment report that the appellant satisfied the criteria of activity 7B. It was worthy of comment from the decision-maker, particularly given that when added to the 6 points awarded this would have entitled the appellant to standard rate daily living. The decision-maker endorsed the other points awarded by the healthcare professional, so why not 7B? The appellant was entitled to an explanation'.

38. At the point at which the tribunal determined that the decision maker had failed to provide an adequate explanation on the evidence for the supersession, the tribunal essentially stood in the shoes of the decision-maker, *per* paragraph 25 of *R(IB) 2/04*:

> 25. In our judgment, that approach to the nature of an appeal as a rehearing, which is how it was understood in the social security context before the 1998 Act changes, is to be applied to the current adjudication and appeal structure, subject only to express legislative limitations on its extent. Taking the simple case of an appeal against a decision on an initial claim, *in our view the appeal tribunal has power to consider any issue and make any decision on the claim which the decision-maker could have considered and made. The appeal tribunal in effect stands in the shoes of the decision-maker for the purpose of making a decision on the claim.* As to the nature of an appeal to a tribunal, we therefore agree with the position stated by Mr Commissioner Jacobs in paragraphs 11 and 12 of CH/1229/2002.
>
> *[My emphasis added]*

39. The (then) Tribunal of Commissioners considered the tribunal's jurisdiction and its powers on an appeal following a supersession or refusal to supersede (or a revision or refusal to revise) and at paragraph 55 the Commissioner's stated:

> (8) For the reasons set out above, in our judgement an appeal tribunal's task on an appeal following either a section 9 or section 10 decision is first to decide whether the Secretary of State was right to change (or not change) the claimant's entitlement to benefit in the way that he did. If it decides that the Secretary of State was wrong, its power is, subject to the express limitation in section 12 (8)(b), to make the decision which the Secretary of State ought to have made. That may involve making a decision under section 9 when the Secretary of State acted under section 10, or vice versa.
>
> (9) … As explained above, it is in our judgement exercising its own power, derived from the nature of an appeal by way of rehearing, to determine on appeal whether the Secretary of State's decision changing the original award was correct, and to make the correct decision if it was not.

40. I see no proper reason why such an approach should not be followed in cases under the PIP regime (and while I am not considering revision in this appeal, the same rationale would apply). In my judgement, emphasis needs to be placed on the fact that the tribunal can make any decision that the Secretary of State could have made at the time the decision under appeal was made.

41. Paragraphs 25 and 55 of *R(IB) 2/04* therefore give to a large extent the steer that Judge Rocke was looking for in terms of the difficulty tribunals may encounter. Instead of simply setting the decision aside as invalid, the tribunal should have gone on to redetermine the appeal, making its own findings as appropriate. In so doing, the claimant would have had an explanation for why her appeal either succeeded or failed and/or why (if it had been the case) there had been an apparently disadvantageous decision.

Conclusion

42. In the instant matter, it remained open to the tribunal to consider superseding the decision under appeal under regulation 26 of the (Decisions and Appeals) Regulations 2013 (medical evidence from a healthcare professional had been received), if the tribunal considered there was a basis to do so (or another relevant supersession ground existed).

43. It follows from the above that the tribunal, having dismissed the reason that the decision-maker had given for superseding the original award, still had jurisdiction to itself make a decision to supersede that original award and/or extend the length of that award, having regard to all of the evidence before it, and, like in all tribunal cases, should have gone on to give adequate reasons to explain to the claimant its findings in terms of why the tribunal reached the decision it did. Its failure to do so amounts to an error of law.

44. The Secretary of State concurs with the above analysis. In supporting this appeal, the Secretary of State submits that it might be argued that both an extension of the period and an increase of the amount were matters raised by the evidence. Both matters, therefore could and should have been dealt with by the tribunal as part of a supersession.

45. I have considered whether I should remake the decision in this matter, but because the tribunal's narrative falls short of making specific findings of fact on the evidence touched upon, I am unable to do so. I therefore propose to remit this matter.

46. For remittal purposes, it should be borne in mind that the Secretary of State could have decided to either supersede so as to increase the award, supersede so as to reduce the award, supersede so as to terminate the award from a date earlier than the end of the award, or given a decision not to supersede, therefore allowing the award to end naturally when the current award expired. These were all options also open to the tribunal and it is helpful for tribunals to provide such an indication at the start of any hearing, so that claimants understand the potential for a disadvantageous decision, as well as an advantageous decision.

47. **The claimant should note that the new tribunal will be looking at her health problems and how they affected her at the time that the decision under appeal was made, namely 10 April 2017, and not subsequent events.**

48. **The new panel will make its own findings in relation to the descriptors in issue. They will consider all aspects of the case afresh.**

49. In determining this appeal, the tribunal will bear in mind regulation 4(2A) of the Personal Independence Payment Regulations (as amended) which provides:

(2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

(a) safely;

(b) to an acceptable standard;

(c) repeatedly; and

(d) within a reasonable time period.

50. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course.

AND I DIRECT:

1. The decision of the First-tier Tribunal sitting in Carlisle on 13 February 2018 under reference SC924/17/00318 is set aside.

2. Within 21 days of the issue of this decision the claimant shall send to the relevant HM Courts and Tribunals Service office any further submission or evidence upon which she or her representative wish to rely.

3. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions. A District Tribunal Judge may wish to consider expediting this matter, bearing in mind the appeal dates back to 2017 and the stark way in which the claimant explains how the decision has impacted upon her.

M. SUTHERLAND WILLIAMS
Judge of the Upper Tribunal

Signed on the original on 16 May 2019