IN THE UPPER TRIBUNAL **Appeal No. CPIP/1859/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

MH

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge K Markus QC

Decision date: 22 May 2020
Decided on consideration of the papers

Representation:
Appellant: Bury and Bolton Citizens Advice
Respondent: Decision Making and Appeals, Leeds

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 1 April 2019 under number SC946/18/00631 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.**

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 10 January 2018. Any further evidence, to be relevant, should shed light on the position at that time.**

5. **The new tribunal must consider the case in accordance with the guidance in this Decision and the points made at paragraphs 33 and 34 below.**

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. This is an appeal against a decision of the First-tier Tribunal ('FTT') confirming a supersession decision by the Secretary of State to the effect that the Appellant, who was over 65 years of age, was not entitled to the enhanced rate of the mobility component of Personal Independence Payment ('PIP'). I have concluded that the FTT based that decision on two premises each of which involved an error of law. First, the FTT wrongly decided that the basis of the supersession was a change of circumstances rather than receipt of medical evidence as a result of which it erroneously applied regulation 27(2) of the Social Security (Personal Independence Payment) Regulations 2013. Second, the FTT wrongly decided that the Appellant had previously been in receipt only of the standard rate of PIP as a result of which it erroneously held that regulation 27(3)(a) applied so that the Appellant could not be awarded the enhanced rate of the mobility component.

Factual background

2. On 17 February 2013 the Appellant was awarded PIP at the standard rate of the daily living component and the enhanced rate of the mobility component, for the period 4 July 2013 to 2 December 2016.

3. The Appellant's 65th birthday was on 5 April 2014.

4. On 12 April 2016 the Secretary of State superseded the previous decision and awarded the Appellant the standard rate of the mobility component and no daily living component from that date to 25 February 2022. The Appellant appealed against that decision and the FTT allowed the appeal on 2 December 2016, awarding the standard rate of the daily living component and the enhanced rate of the mobility component from 12 April to 27 May 2016. The short period of the award was because, on 17 July 2016, the Secretary of State had (by way of supersession) awarded the enhanced rate of the daily living component and standard rate of the mobility component from 28 May 2016 to 6 July 2018.

5. On 2 December 2016 the Appellant requested revision of the decision of 17 July 2016 because he claimed he was entitled to the enhanced rate of the mobility component. There is no copy in the file of a decision in response to that request. On 31 January 2017 the Secretary of State wrote to the Appellant confirming the FTT's decision of 2 December 2016 and setting out his entitlement accordingly. In another

letter, also dated 31 January 2017, the Secretary of State notified the Appellant of the annual updating of rates from 10 April 2017 and that his award would be updated accordingly. The letter set out the amount of the mobility component that the Appellant was in receipt of at that time and the amount that he would receive from 10 April. Both were at the enhanced rate. The Appellant was also provided with a certificate of entitlement to PIP stating that he had been awarded the enhanced rate of the mobility component and could get free vehicle tax from 12 April 2016 to 6 July 2018. There was also a letter dated 14 February 2017 informing the Appellant of the expected delivery of his motability vehicle (he could not have had this unless he had been in receipt of the enhanced rate of the mobility component).

6. In November 2017 the Secretary of State commenced a review of the PIP award. The Appellant completed the form provided, stating that there had been no change in his condition. A healthcare assessment was undertaken on 27 December 2017. On 10 January 2018 the Appellant was notified that from 10 January 2018 to 26 December 2020 he was awarded the daily living component at the enhanced rate and the mobility component at the standard rate.

7. The Appellant appealed to the FTT on the basis that he should have had the enhanced rate of the mobility component. The FTT refused the appeal. The FTT treated the 10 January decision as having been a supersession of the decision of 17 July 2016 on the ground of a change of circumstances so that regulation 27(2) of the Social Security (Personal Independence Payment) Regulations 2013 applied. As the award made on 17 July 2016 had included the standard rate of the mobility component, the FTT applied the restriction in regulation 27(3)(a) and decided that the Appellant could not be awarded the enhanced rate of the mobility component regardless of his condition. It therefore heard no evidence and made no findings of fact as to his mobility

8. The FTT judge gave the Appellant permission to appeal to the Upper Tribunal. The judge's view was that, although the Secretary of State had relied on new medical evidence, "it was axiomatic that the supersession was for a change of circumstances". The judge asked the Upper Tribunal to consider whether or not the FTT had erred in law in deciding that the restriction in regulation 27(2) applied where the Respondent relied on new medical evidence as the ground for supersession.

Legislative framework

9. Part 3 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, SI 2013/381 ('the Decisions and Appeals Regulations') makes provision for supersession of existing awards. By regulation 23(1) a decision may be superseded where there has been a relevant change of circumstances since the decision had effect. By regulation 26(1) a decision may be superseded where the Secretary of State has received medical evidence from a healthcare professional or other approved person.

10. Entitlement to PIP by virtue of a new claim will generally cease when a claimant reaches pensionable age (section 83 of the Welfare Reform Act 2012). However, by regulation 25 of the Social Security (Personal Independence Payment) Regulations 2013 ('the PIP Regulations') this does not apply if the claimant was entitled to PIP immediately before reaching pensionable age.

11. Regulation 27 of the PIP Regulations provides for revision and supersession of an award after a person has reached pensionable age:

> "27(1) Subject to paragraph (2), section 83(1) of the Act (persons of pensionable age) does not apply where —
>
> (a) C has reached the relevant age and is entitled to an award ("the original award") of either or both components pursuant to an exception in regulation 25 or 26; and
>
> (b) that award falls to be revised or superseded.
>
> (2) Where the original award includes an award of the mobility component and is superseded for a relevant change of circumstance which occurred after C reached the relevant age, the restrictions in paragraph (3) apply in relation to the supersession.
>
> (3) The restrictions referred to in paragraph (2) are —
>
> (a) where the original mobility component award is for the standard rate then, regardless of whether the award would otherwise have been for the enhanced rate, the Secretary of State -
>
> (i) may only make an award for the standard rate of that component; and
>
> (ii) may only make such an award where entitlement results from substantially the same condition or conditions for which the mobility component in the original award was made.
>
> (b) where the original mobility component award is for the enhanced rate, the Secretary of State may only award that rate of that component where entitlement results from substantially the same condition or conditions for which the mobility award was made.
>
> (4) Where the original award does not include an award of the mobility component but C had a previous award of that component, for the purpose of this regulation entitlement under that previous award is to be treated as if it were under the original award provided that the entitlement under the previous award ceased no more than 1 year prior to the date on which the supersession takes or would take effect."

The parties' submissions

12. The Appellant's representative submits that the FTT was wrong to apply regulation 27(2) because in this case the supersession was made under regulation 26(1) on the basis of new medical evidence and not under regulation 23(1) on the basis of a change of circumstances. He also submits that the FTT had been wrong to apply regulation 27(3)(a) because it had approached the case on the incorrect basis that the original award of the mobility component of PIP had been at the standard rate.

13. The Secretary of State supports the appeal, essentially for those reasons.

14. Neither party has requested an oral hearing. As the appeal is on a point of law only, as the documentation available to me provides all the information which I require to determine the appeal and as the parties' representatives have both been

able to make full and clear written submissions, I am satisfied that I can determine the appeal fairly without an oral hearing.

Discussion and conclusions

a) The tribunal erred in applying regulation 27(2) of the PIP Regulations.

15. The FTT decided that regulation 27(2) applied because in its view the Secretary of State had superseded the award on the ground of a relevant change of circumstances. In approaching the case in this way, the FTT made some fundamental errors of law.

16. The FTT's task was to stand in the shoes of the decision-maker and make any decision that the decision-maker could have made. In the present case, the decision in question was whether to supersede the previous decision. In order to make out a ground for supersession a decision-maker or tribunal must make findings of fact on the evidence, decide what if any ground for supersession those findings of fact give rise to and, if there is a ground for supersession, must decide what the claimant's proper entitlement was: *PV v SSWP* [2019] UKUT 82 (AAC) at paragraph 7. As has been said in many Upper Tribunal decisions - see, for instance, *DS* to which I refer below - if the existing award is changed, then the FTT must explain why.

17. The FTT in the instant case did not do any of this. Instead the FTT assumed (without making any relevant findings of fact) that the decision had been superseded for change of circumstances. That was wrong as a matter of fact. The letter of 10 January 2018 made it clear that the decision was based on the recent medical assessment and did not identify a relevant change of circumstances since the last decision, and the Secretary of State's submission to the FTT stated that the decision had been made under regulation 26 (new medical evidence).

18. It is true that the Secretary of State's submission to the FTT also stated that the new medical report indicated that the Appellant's circumstances had changed. However, no evidence was provided as to a relevant change of circumstances and, presumably in consequence of that, the submission also said that the Secretary of State was unable to state when a change of circumstances occurred. It is clear from reading the submission as a whole that the only change was that the latest medical report (which the Secretary of State accepted) did not support the previous award.

19. This may explain why the FTT thought that the decision was based on a change of circumstances. That is the implication of the judge's observation when giving permission to appeal (the same judge presided on the FTT which decided the appeal). If so, that was incorrect. A supersession decision based on the receipt of new medical evidence under regulation 26(1)(a) of the Decisions and Appeals Regulations does not require a change of circumstances to be identified, although the existence of new medical evidence does not preclude supersession on the ground of relevant change of circumstances: *SF v SSWP (PIP)* [2016] UKUT 0481 (AAC) at paragraphs 14 and 16. If a tribunal is to supersede on the ground of a relevant change of circumstances, it must make findings of fact to establish that ground. A health professional's opinion is not a change of circumstances relevant to a claimant's entitlement (*PV* at paragraph 5) and neither is the mere fact that the tribunal considers that the new medical evidence does not support the previous award. For instance, the new medical evidence might indicate that the previous award and the evidence upon which it was based had been wrong.

20. The relationship between regulations 23 and 26 was discussed by Upper Tribunal Judge Wright in *PM v SSWP* (PIP) [2017] UKUT 0037 (AAC). At paragraph 11 Judge Wright observed that, where regulation 26(1)(a) applies, "change of circumstances" may be relevant. This is because (as explained by Upper Tribunal Judge Mesher in *KB v SSWP* (PIP) [2016] UKUT 537 (AAC)) receipt of a medical report provides a ground of supersession but does not determine the outcome. The outcome is determined by the conditions of entitlement. As Judge Mesher said, "although it is not necessary to identify a change of circumstances in order to authorise a supersession, it may be necessary to consider the circumstances obtaining when the existing award was made and during the period of the award as part of "all the relevant evidence" and as part of an adequate explanation of the outcome if it is less favourable than the existing award that is being replaced on supersession". In the present case the Appellant had said that his mobility difficulties were unchanged. That brought into play the potential relevance of the previous award and the evidence supporting it (see Judge Mesher at paragraphs 27 and 28 of *KB*, cited by Judge Wright in *PM* at paragraph 12). The FTT did not consider this.

21. Moreover, even if the FTT had been able to identify a relevant change of circumstances, that would not have meant that the supersession should necessarily be on that basis. In *DS v SSWP (PIP)* [2016] UKUT 0538 (AAC), [2017] AACR 19 Upper Tribunal Judge Mesher rejected the suggestion that regulation 26 of the Decisions and Appeals Regulations should be regarded as supplying a ground of supersession of last resort for cases where no other ground can be made out. He went on to say, at paragraph 15:

> "In my view, all grounds of supersession can apply in so far as the conditions they contain are made out, without any artificial rules to try to make them mutually exclusive. So far as decisions that are advantageous to the claimant go, there is then no difficulty in applying a general principle that the claimant should be able to take the benefit of whatever ground gives the most advantage. So far as decisions that are not advantageous to the claimant are concerned, which will in the great majority of cases be supersessions carried out at the Secretary of State's own initiative, I do not see why the same principle cannot apply. The Secretary of State is entitled to rely on whatever of the grounds of supersession that are made out that result in what he says is the correct position being applied for the longest period. But if the Secretary of State chooses to rely on the simpler ground of supersession in regulation 26(1)(a), without going to all the bother of investigating and thinking about what the claimant should or should not have realised needed to be notified in the past, and is content for the superseding decision to take effect from the date on which it is made, I do not see why on appeal a tribunal should be obliged to consider all the elements of and under regulation 23(1) on relevant change of circumstances first."

22. Thus, even if it had been open to the FTT to find that there was a relevant change of circumstances, the correct approach would have been to allow the Appellant to take advantage of supersession on the ground of new medical evidence so as to avoid the limitations arising pursuant to regulation 27(2) of the PIP Regulations.

23. As the FTT's decision that there was a supersession for change of circumstances was made in error of law, it follows that the FTT wrongly applied regulation 27(2) of the PIP Regulations.

b) The tribunal erred in applying regulation 27(3)(a) of the PIP Regulations.

24. My conclusion on the above ground is a sufficient basis on which to allow the appeal. However, even if regulation 27(2) had applied, there was a second fundamental error by the FTT. It approached the appeal on the basis that the decision which had been superseded on 10 January 2018 was that of 17 July 2016, and so the previous award of the mobility component had been at the standard rate which meant that regulation 27(3)(a) applied. In reaching this conclusion the FTT failed to take into account substantial evidence which strongly suggested otherwise. It is relevant to determine this ground because the next tribunal cannot properly approach the question of supersession without correctly identifying the previous award

25. The tribunal's decision of 2 December 2016 had restored the award of the enhanced rate of the mobility component only for the limited period from 12 April to 27 May 2016. It did not address the Appellant's entitlement from 27 May because, by then, the decision of 17 July 2016 had been made awarding the mobility component at the standard rate from 28 May 2016. However, on 2 December 2016 the Appellant had requested a revision of the decision of 17 July 2016. No notification of a decision in response to that request has been produced. The possibility that there had been a decision after 17 July 2016 was picked up by a tribunal on 15 February 2019 which adjourned the hearing of the appeal which is the subject of these proceedings, and directed the Secretary of State to provide a further submission to identify the award which was in place on 10 January 2018 and, in particular, whether that was the decision of 17 July 2016 or a revision or supersession of that decision.

26. All that was sent to the FTT on behalf of the Secretary of State subsequent to that direction were copies of the Secretary of State's response to the appeal (which, of course, was already in the FTT file and did not provide the answer to the question asked by the tribunal. The Appellant's representative did, however, provide further relevant evidence. This comprised the uprating letter of 31 January 2017, the certificate of entitlement confirming the enhanced rate of the mobility component and the letter informing the Appellant of delivery of the motability vehicle (see paragraph 5 above). In addition, the Secretary of State's submission to the FTT stated that the previous decision (ie the decision which had been superseded) included the enhanced rate of the mobility component and so that could not have been a reference to the decision of 17 July 2016.

27. At the hearing on 1 April 2019 the FTT did not address the Secretary of State's non-compliance with the direction by the earlier tribunal. It did not address any of the evidence provided by the Appellant's representative even though it was clearly relevant to the issue identified by that earlier tribunal, nor did it address the issue itself. The record of proceedings shows that no evidence was taken nor submissions made. The judge told the Appellant at the outset of the hearing that "the rules mean that because he is over 65 the maximum award he can receive is enhanced daily living and standard mobility because that was the award that was made in July 2016 and is the decision which is being looked at now". The written statement of reasons repeated this in substantially the same terms.

28. The FTT had a discretion under rule 7(2) of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 as to what action to take in consequence of the Secretary of State's failure to comply with the previous tribunal's direction. It was required consciously to exercise that discretion and to explain what action it took: *MT v SSWP (IS)* [2010] UKUT 382 (AAC) at paragraph 23. The FTT did not do so. Indeed, I have the strong impression that the FTT did not realise that there was an issue in this regard.

29. As the application of regulation 27(3) of the PIP Regulations turned on the correct identification of the previous award, it was critically important that the FTT should have approached this matter with care. It did not do so. It assumed that the previous decision was that of 17 July 2016.

30. Both the Appellant's and the Secretary of State's representatives agree that the FTT failed to make adequate findings as to the previous decision and they submit that further evidence will be required in order to confirm the decision history. I have explained (in my discussion of ground (a))) that the next tribunal will need to consider all relevant evidence which, in the light of the Appellant's case, is likely to include the previous award and the evidence supporting it. It will therefore be incumbent on the Secretary of State to provide the next tribunal with all the evidence in her possession in that regard.

31. However, my analysis of the evidence strongly suggests that the original award of the mobility component (ie the award in existence at the time of the decision of 10 January 2018) had been at the enhanced rate. In the absence of persuasive evidence to the contrary, I do not consider that the next tribunal could proceed on any other basis.

Conclusions and disposal

32. Both parties submit that the FTT's decision should be set aside and remitted to another tribunal. I agree that this is the proper course. Findings of fact will be required in order to decide whether the award should be superseded and what the Appellant's entitlement was at the relevant date.

33. The Appellant is concerned only with the decision regarding the mobility component. As set out above, the evidence shows that the decision of 10 January 2018 superseded a previous decision awarding the mobility component at the enhanced rate. As the Secretary of State does not contend that at 10 January 2018 there had been a relevant change of circumstances since the previous decision, and in the light of paragraph 15 of *DS,* there will be no need for the next tribunal to consider whether the decision can be superseded under regulation 23(1)(a) of the Decisions and Appeals Regulations. The question for the tribunal will be whether to supersede the previous award under regulation 26(1). It follows that, if the tribunal decides that the previous award should be superseded, regulation 27(2) of the PIP Regulations will not apply.

34. The next tribunal need not reconsider the daily living award. As that was never put in issue at any stage, the tribunal should accept the decision of 10 January 2018 to award it at the enhanced rate. The tribunal must address which mobility descriptors applied to the Appellant at the relevant time and, if the decision is that the Appellant was not entitled to the enhanced rate of mobility, it must explain why in the light of the previous award at that rate.

35. Although the Appellant's representative submitted that the appeal should be remitted to another tribunal, he also invited the Upper Tribunal to substitute a decision reinstating the award of the enhanced rate of the mobility component on the basis that the medical assessment report is not consistent with an award of the standard rate. Remittal and remaking a decision are alternatives under section 12(2)(b) of the Tribunals Courts and Enforcement Act 2007. Remittal is the correct disposal in this case as the Appellant disputes the medical assessment and further findings of fact are required.

Signed on the original
on 22 May 2020

Kate Markus QC
Judge of the Upper Tribunal