DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER) CI/339/2019

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant, although in the event this does not assist him.

The decision of the Cardiff First-tier Tribunal dated 29 May 2018 under file references SC188/17/04894 involves an error on a point of law and is set aside.

The decision that the First-tier Tribunal should have made is as follows:

> *The appeal is dismissed.*
>
> *The decision made by the Secretary of State on 4 September 2017 was correct and is confirmed.*
>
> *This is because the Appellant's Form BI168, received by the Department on 26 July 2016, was an application for a supersession of an existing award of industrial injuries disablement benefit, based on a change of circumstances. The new aggregated rate of industrial disablement benefit, payable at 70%, was accordingly payable with effect from 26 July 2016 (Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), regulation 7(2)(b)(iii)), rather than from three months earlier.*

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

REASONS FOR DECISION

An outline of my decision

1. I am technically allowing the Appellant's appeal to the Upper Tribunal, but unfortunately this does not assist him in any practical way. I am allowing the appeal because there is a legal error in the reasoning of the decision by the First-tier Tribunal dated 29 May 2018. However, on the facts, and properly directing itself as to the law, I conclude that the First-tier Tribunal on that date reached the only decision it properly could. I therefore re-make the decision under appeal to the same effect but with some additional reasoning.

The background to this appeal

2. This appeal, and the Appellant's corresponding award of industrial injuries disablement benefit (IIDB), has a long and convoluted history. This was explained in detail by Upper Judge Tribunal Mitchell when giving permission to appeal. That history is well-known to both parties and all its twists and turns need not be repeated here (although some of the details are necessarily considered further below). Judge Mitchell gave the Appellant permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (FTT) dated 29 May 2018, but that grant of permission was confined to two points only (pp.218-219 at paragraph 23). However, before addressing what this appeal is about, it may help if I briefly explain what this appeal is not about.

What this appeal is not about

3. There are, or have been, at least two other recent tribunal cases involving the Appellant's entitlement to IIDB. I emphasise these other two cases are not part of the present proceedings.

4. The first concerns the Appellant's entirely separate appeal to the First-tier Tribunal that resulted in an oral hearing at Cardiff on 30 October 2018 (FTT file reference SC188/16/01706). That case concerned an industrial accident which the Appellant had experienced on 19 February 1968. The FTT on 30 October 2018 decided that the evidence showed that the Appellant's problems with his neck and back were caused by degenerative disease of the spine and were unrelated to the 1968 industrial accident. On 4 November 2019, Upper Tribunal Judge Ward, following an oral hearing on 25 October 2019, refused the Appellant's application for permission to appeal against the FTT decision of 30 October 2018 (Upper Tribunal file reference CI/835/2019). The Appellant then sought permission in the Administrative Court to apply for judicial review of Judge Ward's decision. On 10 March 2020 HH Judge Jarman QC, sitting as a Judge of the High Court, refused permission to apply for judicial review (Administrative Court file reference CO/94/2020). Those proceedings have no bearing on the present case.

5. The second set of proceedings, which also are not part of the present appeal, concern a further and more recent Cardiff FTT decision dated 5 March 2020 (under file reference SC188/19/00077). In that case the FTT confirmed the Secretary of State's decision dated 6 November 2018 to the effect that there were no grounds to supersede the Department's earlier decision that had awarded the Appellant 1% from 3 September 1961 for life for epidermophytosis of the feet. On 22 April 2020, and on behalf of the FTT, District Tribunal Judge Bennett refused permission to appeal to the Upper Tribunal in that appeal.

6. However, on 1 May 2020 the Appellant signed an Upper Tribunal UT1 application form, renewing that application for permission to appeal against the FTT's decision of 5 March 2020. This UT1 application form was received by the Upper Tribunal office on 4 May 2020, along with the Appellant's accompanying correspondence and associated documents. These arrived during the period when the Upper Tribunal's operations were most severely affected by the first lockdown in response to the Covid-19 pandemic. Unfortunately, the Appellant's UT1 was incorrectly filed away in the papers relating to the present appeal, rather than being registered as a fresh case, as should have happened. The most likely explanation is that as a result of clerical error it was assumed that the new documents related to the existing appeal file and were not a new application. To compound the error, the Appellant's covering letter and documents were issued to the parties in the current proceedings as pp.285-310, rather than being placed on a new file. I have therefore directed the Upper Tribunal office to register the new application in the proper manner as a matter of urgency. It will then be placed before a different Upper Tribunal Judge for determination in the usual way (under UT reference CI/1552/2020).

7. Finally, in a letter dated 13 April 2020, the Appellant states that "I don't understand why two Judges would be on this case". This was a reference to my directions in this Upper Tribunal appeal (dated 4 December 2019), which appeared shortly after District Tribunal Judge Price's directions (dated 19 November 2019) in the second set of proceedings mentioned above (FTT reference SC188/19/00077). Obviously, both these cases concern the Appellant and both are about his

entitlement to IIDB. In that sense at least they are about the same case. However, they are technically separate proceedings with separate decisions and separate appeal rights. In the social security decision-based system, a tribunal only has jurisdiction (the legal power) to consider the particular and specific decision under appeal. It has no power to consider all matters about a person's potential benefit entitlement in the round.

8. Mr Commissioner Powell explained the "decision based" system in Social Security Commissioner's decision *CA/1020/2007* (at paragraph 12):

> "What is meant by this is that the system proceeds, or is based, on formal decisions being given. If a benefit is awarded it must be awarded by a formal and identifiable decision. If that decision is to be altered by, for example, increasing or decreasing the amount involved, it can only be done by another formal and identifiable decision. Likewise a decision is required if the period of the award is to be terminated, shortened or extended."

9. The precise scope of each such decision is critical. A claimant's right of appeal to the First-tier Tribunal is a right of appeal against the Department's particular 'decision' (see Social Security Act 1998, section 12(1)). The onward right of appeal to the Upper Tribunal is likewise against a 'decision' of the First-tier Tribunal (see Tribunals, Courts and Enforcement Act 2007, section 11(1)). It is not a general right of appeal about the claimant's level of entitlement to a particular social security benefit (although in many cases that may well be determined by the decision under challenge in the decision-based system).

The chronology of key decisions

10. The Appellant, an ex-miner who is now aged 82, has had an aggregated award of IIDB for many years. His current assessments appear to be as follows:

- 1% from 11 April 1955 for epidermophytosis (old prescribed disease (PD) treated as industrial accident
- 10% from 26 February 1968 for life for PD D5 (non-infective dermatitis) [this is the subject matter of the present appeal]
- 63% from 20 December 2013 for life for PD A14 (osteoarthritis of the knee).

11. Arithmetically, that produces an aggregate assessment of 74%, which is rounded down to 70% under the rule in section 103(3) of the Social Security Contributions and Benefits Act 1992.

12. The adjudication history of the Appellant's entitlement to IIDB is very complex and has resulted in several appeals at various times. Cutting a very long story short, the starting point for present purposes can be taken as being on 26 July 2016, when the Appellant sent the DWP a change of circumstances BI168 form (p.23). The background was that he had had a series of small assessments for PD D5 from 1964 through to 1968, when dermatitis was then disallowed on the basis there was no ongoing relevant loss of faculty. In his new BI168 the Appellant said that his dermatitis had got worse on 2 March 2016 and he wanted the decision on dermatitis to be looked at again.

13. On 21 December 2016, a DWP decision-maker decided that the Appellant's dermatitis was not due to the nature of employed earner's employment. It is fair to say there was some confusion within the Department at this time as to whether the

BI168 was a new claim for IDB or a request for a supersession on the basis of a change in circumstances. Be that as it may, the Appellant appealed to the FTT.

14. The FTT on 15 May 2017 allowed the Appellant's appeal (it should be noted this FTT decision is not under challenge in these proceedings). The FTT identified "the main issue" as being whether the Appellant's dermatitis was occupational or constitutional in nature. It decided it was the former (see statement of reasons at paragraph [7]):

> "… [The Appellant] gave a good history of occupational dermatitis in particular his exposure to hydraulic fluid whilst working in the mines between 1953 and 1977. He was also exposed to allergens in acrylic resins used for bolt fixing and had an allergy to the rubber in his wellington boots. During his time in the mines [the Appellant] worked in wet conditions (up to his waist in water) which caused irritant eczema. [The Appellant] did not suffer from eczema before he started work in the mines. Since he left the mines in 1977 he has had dermatitis ever since in the areas where he was exposed to irritants…".

15. The FTT went on to make an assessment of disablement for dermatitis at 10%. The tribunal added in the final paragraph of its statement of reasons that as his "claim was treated as a new claim, payment of Industrial Injuries Disablement Benefit can be made from 3 months before the date of claim."

16. In its decision notice, the FTT recorded as follows:

> "The appellant has suffered from Prescribed Disease No. D5 from 31/12/1955.
>
> The relevant loss of faculty is severe irritation of the skin.
>
> The extent of the resulting disablement is assessed at 10% for the period from 3 months before the date of claim for life offsetting 1% for epidermophytosis.
>
> This is a final assessment".

17. On 4 September 2017, the Department's decision-maker made a consequential decision in the following terms:

> "Having regard to the Appeal Tribunal advice of 15/05/17 I have decided that the degree of disablement resulting from the relevant loss of faculty in respect of PD D5 is to be assessed at 10% from 26.2.68 for life.
>
> Form BI 168 received on 26.7.16 is accepted as a claim for benefit, since there is no existing award of Disablement Benefit.
>
> As a result, I have superseded the decision of the Decision Maker dated 2.12.13, awarding Disablement Benefit from 20.12.13 for Life because of the above tribunal decision.
>
> As a result Disablement Benefit is payable at the weekly rate of:
> - £117.60 from 26.7.16 to 11.4.17
> - £118.79 from 12.4.17 for Life."

18. It hardly seems appropriate for the decision-maker to refer to the FTT as having given 'advice'. Furthermore, in doing so, the DWP decision-maker somewhat

confusingly (a) seemingly treated the BI168 form as a claim for IIDB; (b) decided the disablement in respect of PD D5 was 10% as from 26 February 1968 for life (and so used a different date of onset to that identified by the FTT); (c) superseded the previous awarding decision of 2 December 2013; and (d) aggregated the FTT's 10% award with the Appellant's existing assessments to arrive at a new IIDB assessment of 74%, so IIDB was now payable as from 26 July 2016 (the date of the Appellant's Form BI168) at the 70% rate (with rounding).

19. The confusion over the correct date of onset for PD D5 need not be resolved now as it is not material to the present appeal, which primarily concerns the date from which the new 10% assessment for dermatitis was actually payable.

20. The Appellant was evidently unhappy with the Secretary of State's decision of 4 September 2017 in at least two respects. First, he argued that the new rate of IIDB should have been paid from 26 April 2016 and not just from 26 July 2016, on the basis that he was entitled to be paid for the three months before the date of any new claim. Second, he challenged the Department's related decision to withhold just over £1,000 from his arrears of IIDB on the basis of what was described in other correspondence on file as "Pension Credit that is owed to us". As we shall see presently, those two concerns also formed the basis of the grant of permission to appeal to the Upper Tribunal as made by Judge Mitchell. In any event, the Appellant appealed again to the FTT, following an unsuccessful request for mandatory reconsideration.

21. The mandatory reconsideration notice explained that an assessment of 10% in isolation on a new claim would have led to a nil award, as it fell below the statutory 14% threshold. The mandatory reconsideration notice also recorded as follows:

> "… we could not pay 3 months back from the date of receipt of your claim as it was not a payable claim in its own right. As you had an underlying payable award of Industrial Injuries Disablement Benefit (IIDB) in respect of other Prescribed Diseases/Industrial Accidents, then we could only treat your claim as an application for a change of circumstances and then aggregate to the existing awards, giving an increased overall assessment of benefit. When an application for a change of circumstances is made and there is an existing assessment, the date of receipt is treated as the date of change. Therefore, in your case the assessment was given from and including 26.7.2016 (the date of receipt of your application)."

22. On 29 May 2018, a further FTT dismissed the Appellant's appeal and confirmed the DWP's decision of 4 September 2017. This is the specific decision now under appeal to the Upper Tribunal in the present proceedings. The nub of its decision was explained at paragraph 4 of the Decision Notice (p.114):

> "4. The Tribunal found the Respondent correctly decided that as a result of the Tribunal's decision dated 15/05/2017, the previous decision regarding this disease should be superseded with effect from the date of the application for a change of circumstances, i.e. from 26/07/2016, the assessment of disablement being 10%. This was more advantageous to him than treating his application of 26/07/2016 as a new claim."

23. It seems to me there is considerable force in Judge Mitchell's observation (when giving permission to appeal) that the present case should not have proceeded as a fresh appeal at the FTT (p.218 at paragraph 22). Rather, the matter should instead

have been referred back to the earlier FTT (from May 2017), on the basis that the decision of 4 September 2017 involved the Secretary of State working out the consequences of that FTT's decision. However, be that as it may, and as Judge Mitchell also noted, we are where we are.

24. As already noted, the Appellant had queried the start date for the new IIDB assessment. For example, on 11 September 2017 he had written to the DWP querying why they had not taken account of the three months before the date of his new claim (p.84). He had also written complaining about the deduction from his arrears of IIDB. The DWP's Pension Credit office had written to the IIDB section of Jobcentreplus certifying that a total of £1,045.85 had been paid in pension credit that "would not have been paid if the Industrial Injuries Disablement Benefit … had been in payment" (p.181).

The Appellant's grounds of appeal to the Upper Tribunal

25. Ground 1 was that the FTT on 29 May 2018 had arguably erred in law by failing to explain the legislative basis for its refusal to backdate the Appellant's altered IIDB award for 3 months prior to the date on which his July 2016 form was received. Mr Peter Thompson, the Secretary of State's representative, supports that ground of appeal (p.225 at paragraphs 4-7), citing Lord Brown of Eaton-under-Heywood's judgment in *South Buckinghamshire District Council v Porter* [2004] UKHL 33 on the required standard for adequacy of reasons.

26. Ground 2 was that the FTT had arguably erred in law by failing to deal with the Appellant's complaint that a portion of his IIDB arrears had been withheld by the DWP on account of a claimed overpayment of pension credit. Mr Thompson did not support this second ground of appeal (p.225 at paragraph 8).

The Upper Tribunal's decision on the grounds of appeal

27. The appeal succeeds by consent on the first ground of appeal. That suffices for me to decide that the FTT decision involves an error of law and as such should be set aside. There are no new facts to establish. In the circumstances it is appropriate for me to re-decide the original appeal before the FTT rather than remit the case for a re-hearing before a fresh FTT. I deal with, and re-decide, each point in turn.

Ground 1: The legislative basis for the FTT's refusal to backdate the Appellant's altered IIDB award

28. At the outset the DWP itself, as has been seen, was plainly confused as to whether the Appellant's BI168 constituted a new claim for benefit (in which case payment could be backdated by three months from the date of claim) or was an application for a change of circumstances (in which case payment could only run from the date of the application).

29. I have discussed the legal complexities involved in such cases in an earlier appeal, *ED v Secretary of State for Work and Pensions* [2009] UKUT 206 (AAC) (at paragraphs 47-68, on file at pp.241-245). The underlying principle was set out by Mr Commissioner Rowland in *CI/420/1994* (at paragraph 5):

> "It seems to me that the requirement that assessments of disablement be aggregated makes it abundantly clear that there can only be one award of disablement pension in respect of any period and that that single award will take account of all disablement arising from industrial accidents and prescribed diseases. It must follow that the award must be reviewed each time an assessment of disablement is made in respect of any further industrial accident

> or prescribed disease. If there were no aggregation then separate claims would be required in respect of each accident or disease and there would be separate awards."

30. *ED v Secretary of State for Work and Pensions* was an appeal in which the Secretary of State's representative (Mr Kendall in that case) had argued that the claimant there had made a fresh claim, rather than an application for a supersession. I disagreed with that analysis, concluding as follows:

> "62. I therefore disagree with Mr Kendall's reasoning. The claimant could not make a new claim for industrial disablement benefit in respect of the foot injury, as he already had an ongoing award of that benefit and he was not seeking to establish a new entitlement, but rather to reinstate a previous entitlement that had since been withdrawn. It follows also that what he undoubtedly could do was to apply for a supersession of a decision in relation to his existing award of benefit. So in my view the Secretary of State was right first time (and Tribunal 6 was right) to regard the claimant's August 2008 BI 100A as an application for supersession of the last relevant decision in relation to his then current award of industrial disablement benefit. It is important to focus on the substance rather than the form of the dispute."

31. The present case is on all fours, in that here also the Appellant "was not seeking to establish a new entitlement, but rather to reinstate a previous entitlement that had since been withdrawn. It follows also that what he undoubtedly could do was to apply for a supersession of a decision in relation to his existing award of benefit."

32. In this context I note also that the DWP's manual, *Industrial Injuries Disablement Benefit: technical guidance*, updated in December 2019 is available online as follows: https://www.gov.uk/government/publications/industrial-injuries-disablement-benefits-technical-guidance/industrial-injuries-disablement-benefits-technical-guidance#prescribed-diseases

33. This documents states (at section 5.4):

> **"When to claim**
>
> You can make a claim at any time on or after the date you think you contracted the prescribed disease.
>
> …
>
> Do not delay claiming. If you do you may lose some benefits. This is because Industrial Injuries Disablement Benefit cannot be paid:
>
> - for a period more than 3 months before the date of your claim
> - if you are already in receipt of Industrial Injuries Disablement Benefit for other accidents or diseases, more than 1 month before the date of claim. (Legislation (51) - SS (C&P) Regs 1987 reg 19(1) & Sched 4)"

34. I recognise this passage is no more than a statement of the DWP's understanding of the relevant law. Moreover, the reference to the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) appears to be mistaken.

The correct source would appear to be regulation 7(2)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991). This provides for the situation where a supersession decision that is advantageous to the claimant follows notification of a change of circumstances that itself takes place more than a month after the change happened. In such a scenario (as here) the default position is that the supersession decision takes effect from "the date of notification of the relevant change of circumstances" (regulation 7(2)(b)(iii). Putting to one side the incorrect statutory reference, the passage in the DWP's technical guidance accurately states the underlying rule.

35. I conclude that given that the application in the present case was for a supersession of an existing IIDB award, based on a change of circumstances, the date the change took effect was the date of notification, in accordance with the default position under the standard rule for supersessions.

36. Finally, the following question arises: how is this conclusion affected by the previous FTT decision on 15 May 2017? It will be recalled that that tribunal's decision notice recorded that "the extent of the resulting disablement is assessed at 10% for the period from 3 months before the date of claim for life offsetting 1% for epidermophytosis" (emphasis added). In its statement of reasons that FTT likewise added that as the Appellant's "claim was treated as a new claim, payment of Industrial Injuries Disablement Benefit can be made from 3 months before the date of claim." On the face of it, this statement flatly contradicts the DWP decision-maker's decision of 4 September 2017. How then could the latter's decision stand and be confirmed by a subsequent FTT, given the principle of finality in decision-making (see Social Security Act 1998 section 17) and the fact that neither party had lodged an appeal to the Upper Tribunal against the FTT decision of 15 May 2017?

37. The answer, in my view, is to examine carefully what the issues were before the FTT on 15 May 2017 and what it actually decided. The issue before that tribunal was one of causation, namely was the Appellant's dermatitis due to the nature of his employed earner's employment. Put another way, was it occupational or constitutional in nature? This was the issue that was determined in the Appellant's favour by that FTT. The tribunal noted that there had been some differences of opinion within the Department as to whether the BI168 was a new claim or an application for a supersession (see statement of reasons at paragraph 3). However, the FTT did not decide which was the correct approach. Indeed, its reasons expressly noted that as the "claim was treated as a new claim, payment of Industrial Injuries Disablement Benefit can be made from 3 months before the date of claim" (emphasis added). In other words, the FTT was expressing the view that on the basis on which the DWP was then proceeding, it would follow that payment could be made for the previous three months. It was not deciding in terms that that approach was necessarily correct. It follows that the question of the 'payment from date' had not been determined on appeal by the FTT on 15 May 2017.

Ground 2: The withholding of a portion of the IIDB arrears on account of a claimed overpayment of pension credit

38. Pension credit, as payable under the State Pension Credit Act 2002, is a means-tested benefit. So, a claimant's level of entitlement depends on the amount of their other income that is coming in. As such, one might reasonably expect that a payment of arrears of another social security benefit (such as IIDB) would lead to an adjustment to entitlement to the means-tested benefit for that same past period. This ensures that a claimant does not benefit from 'double recovery'. This principle against double recovery is now contained in section 74 of the Social Security

Administration Act 1992 ('the Administration Act'). Two provisions are of particular note.

39. First, section 74(1) provides as follows:

> **74.—**(1) Where–
>
> (a) a payment by way of prescribed income is made after the date which is the prescribed date in relation to the payment;
>
> (b) it is determined that an amount which has been paid by way of income support, an income-based jobseeker's allowance, state pension credit or an income-related employment and support allowance, would not have been paid if the payment had been made on the prescribed date,
>
> the Secretary of State shall be entitled to recover that amount from the person to whom it was paid.

40. Second, section 74(2) provides as follows:

> **74.—** (2) Where–
>
> (a) a prescribed payment which apart from this subsection falls to be made from public funds in the United Kingdom or under the law of any member State is not made on or before the date which is the prescribed date in relation to the payment; and
>
> (b) it is determined that an amount ("the relevant amount") has been paid by way of universal credit or income support, an income-based jobseeker's allowance, state pension credit or an income-related employment and support allowance, that would not have been paid if the payment mentioned in paragraph (a) above had been made on the prescribed date,
>
> then–
>
> (i) in the case of a payment from public funds in the United Kingdom, the authority responsible for making it may abate it by the relevant amount; and
>
> (ii) in the case of any other payment, the Secretary of State shall be entitled to receive the relevant amount out of the payment.

41. Section 74 gives the Secretary of State what is, in effect, an automatic right to recover such an overpayment or double payment. There is no need to show any misrepresentation or failure to disclose a material fact on the part of the claimant (which is required for recovery instituted under section 71 of the same Act). Section 74 of the Administration Act replaced section 27 of the Social Security Act 1986, which was essentially in the same terms.

42. On the face of it, section 74(1) and (2) seem to be expressed in rather similar terms. Perhaps the most helpful way to read the provisions is that section 74(1) operates if payment of both benefits has already been made and the DWP then seeks to recover the duplicated payment of the means-tested benefit from the arrears of the other form of income that has been already paid over to the claimant. Section 74(2), on the other hand, operates to allow the DWP to deduct in advance from any arrears of other income otherwise due to be paid, by a process of abatement, so no excess payment is made in the first place. The latter was the procedure adopted in the present case (see paragraph 24). As Upper Tribunal Judge Rowland explained in *PT v Secretary of State for Work and Pensions (JSA)* [2013] UKUT 372 (AAC) at paragraph 10:

> "Section 74(2) is concerned with cases where a claimant in receipt of an income-related benefit is entitled to arrears of another benefit (or other payment from public funds) that would have fallen to be taken into account as income and so would have reduced entitlement to the income-related benefit had it been paid at the correct time. In such a case, the arrears of the other benefit may be withheld to the extent that the amount of income-related benefit would have been reduced."

43. This principle against double recovery lies behind Mr Thompson's submission on this ground of appeal. His argument proceeds in three steps.

44. First, he says the withholding of some IIDB arrears was a recovery effected by the Secretary of State under regulations 15(1) and 16(3) of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 (SI 1988/664; 'the 1988 Regulations').

45. Second, he contends that there is no right of appeal against a decision under regulations 15 or 16: see the 1999 Regulations. Paragraph 20 of Schedule 2 to those Regulations stipulates that "A decision of the Secretary of State under the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988" caries no right of appeal to a tribunal, subject to various exceptions which do not cover regulations 15 and 16 of the 1988 Regulations.

46. Third, and as a result, Mr Thompson argues the FTT had no jurisdiction in the matter and was right not to trespass into such territory.

47. The Appellant, having taken specialist welfare benefits advice, takes issue with the first step in Mr Thompson's argument. We must therefore consider the terms of regulations 15(1) and 16(3) of the 1988 Regulations. Regulation 15, as much amended (to reflect the changes in the range of social security benefits that are affected) reads as follows:

> **Recovery by deduction from prescribed benefits**
>
> **15.**—(1) Subject to regulation 16, where any amount is recoverable under sections 27 or 53(1) of the Act, or under these Regulations, that amount shall be recoverable by the Secretary of State from any of the benefits prescribed by the next paragraph to which the person from whom the amount is determined to be recoverable is entitled.
>
> (2) The following benefits are prescribed for the purposes of this regulation—
>
> (a) subject to paragraphs (1) and (2) of regulation 16, any benefit under the Social Security Act 1975;
>
> (aa) a state pension under Part 1 of the Pensions Act 2014;
>
> (b) subject to paragraphs (1) and (2) of regulation 16, any child benefit;
>
> (c) . . .
>
> (d) subject to regulation 16, any income support, an employment and support allowance, or state pension credit or a jobseeker's allowance.
>
> (e) . . .
>
> (f) any incapacity benefit.
>
> (g) personal independence payment.
>
> (h) universal credit.

48. Regulation 16(3) in turn provides that:

> (3) Regulation 15 shall apply without limitation to any payment of arrears of benefit other than any arrears caused by the operation of regulation 20 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (making of payments which have been suspended).

49. Accordingly, regulation 16(3) makes provision for an exception which is not applicable in the circumstances of the current case. However, regulation 15 is central to the parties' competing arguments. In short, the Appellant's case is that IIDB is not a prescribed benefit for the purpose of regulation 15(2) of the 1988 Regulations. As such he argues that recovery of overpaid pension credit from arrears of IIDB is not permitted by regulation 15(1). If that contention is right, then the right of appeal was necessarily not excluded by paragraph 20 of Schedule 2 to the 1999 Regulations.

50. I do not accept the Appellant's argument, although I readily acknowledge that the drafting of regulation 15 is less than crystal clear. It is certainly the case that industrial disablement benefit as such is not expressly listed by name in regulation 15(2) as one of the prescribed benefits from which a recoverable amount of e.g. pension credit may be recouped. However, regulation 15(2)(a) provides (my emphasis) that "*any benefit* under the Social Security Act 1975" is just such a prescribed benefit. Industrial disablement benefit was a benefit payable under the Social Security Act 1975, under provisions which have now been repealed. However, the reference in regulation 15(2) to benefits payable under the 1975 Act must be read as including a reference to the current equivalent consolidating legislation (namely, in this instance, Part V of the Social Security Contributions and Benefits Act 1992). By the same token, the reference in regulation 15(1) to section 27 of the Social Security Act 1975 must now be read as a refence to section 74 of the Administration Act.

51. This principle of continuity of the law is specifically provided for by section 2 of the Social Security (Consequential Provisions) Act 1992, which provides as follows (reflecting the general principle on repeal and re-enactment as provided for by section 17(2) of the Interpretation Act 1978):

> **2.— Continuity of the law**
> (1) The substitution of the consolidating Acts for the repealed enactments does not affect the continuity of the law.
> (2) Anything done or having effect as if done under or for the purposes of a provision of the repealed enactments has effect, if it could have been done under or for the purposes of the corresponding provision of the consolidating Acts, as if done under or for the purposes of that provision.
> (3) Any reference, whether express or implied, in the consolidating Acts or any other enactment, instrument or document to a provision of the consolidating Acts shall, so far as the context permits, be construed as including, in relation to the times, circumstances and purposes in relation to which the corresponding provision of the repealed enactments has effect, a reference to that corresponding provision.
> (4) Any reference, whether express or implied, in any enactment, instrument or document to a provision of the repealed enactments shall be construed, so far as is required for continuing its effect, as including a reference to the corresponding provision of the consolidating Acts.

52. It follows that I agree with Mr Thompson. The withholding of some of the arrears of IIDB was an abatement recovery effected by the Secretary of State under regulations 15(1) and 16(3) of the 1988 Regulations, a decision against which there is no right of appeal to the FTT.

53. Whilst it might have been desirable as a matter of good practice for the FTT in this case to have addressed the point about the statutory basis for the withholding of arrears, it was not strictly necessary to do so. Certainly, its failure to do so was not in any way material to the outcome of the appeal. As the FTT observed in its Decision Notice (at paragraph (5)), "The fact that the Respondent's decision may have had a 'knock on' effect in respect of other benefits he had been awarded was outside the jurisdiction of the Tribunal".

Conclusion

54. I conclude that the decision of the First-tier Tribunal involves an error of law for the reason summarised above as regard Ground 1. I therefore allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). There is no point in another hearing of the case by a new First-tier Tribunal (as may be directed under section 12(2)(b)(i)). Accordingly, I re-decide the appeal that was before the First-tier Tribunal (section 12(2)(b)(ii)) in the same terms. My substituted decision, for the reasons as explained above, is as follows:

> *The appeal is dismissed.*
>
> *The decision made by the Secretary of State on 4 September 2017 was correct and is confirmed.*
>
> *This is because the Appellant's Form BI168, received by the Department on 26 July 2016, was an application for a supersession of an existing award of industrial injuries disablement benefit, based on a change of circumstances. The new aggregated rate of industrial disablement benefit, payable at 70%, was accordingly payable with effect from 26 July 2016 (Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), regulation 7(2)(b)(iii)), rather than from three months earlier.*

(Approved for issue on 2 November 2020)

Nicholas Wikeley
Judge of the Upper Tribunal