IN THE UPPER TRIBUNAL **Case No: CPIP/2836/2018**
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed to the extent hereafter appearing. The decision of the First-tier Tribunal sitting at Durham on 4 July 2018 under reference SC292/17/00745 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 20 of the Reasons. Unless a District Tribunal Judge decides otherwise, the remitted appeal is to be heard together with the claimant's appeal against the DWP's subsequent decision, in case reference SC292/19/00160.

REASONS FOR DECISION

1. The claimant was born in 1956. She had until 4 April 2017 been in receipt of disability living allowance (DLA), receiving the higher rate of the mobility component and the highest rate of the care component. On 2 December 2016 an invitation to claim personal independence payment (PIP) instead was issued. On 12 December 2016 what the Secretary of State considered to be a valid claim was made over the phone. What appears to have happened in practical terms was that the claimant was asked to give her national insurance number, date of birth, address, contact addresses for GP and any other relevant health/social care professionals, nationality or immigration status, details of time spent abroad and bank account details. This then resulted in the issue to her of Form PIP 2 "How your disability affects you", which the claimant returned, duly completed, on 5 January 2017. The DWP arranged to obtain a GP report and a consultation with an HCP took place, following which the DWP decided on 7 March 2017 to award 10 points in respect of the daily living component and 4 for the mobility component. In consequence, the claimant was entitled only to the daily living component, at the standard rate.

2. The claimant appealed to the First-tier Tribunal (FtT). She was represented by the appointee, her husband. They had previously had some assistance from an organisation known as Fightback for Justice (FfJ) but were not represented by them at the hearing. The FtT on 4 July 2018 dismissed the appeal.

3. As to her previous award of DLA, the FtT said (Reasons, para 47):

> "We were aware that [the claimant] had previously had a maximum award of DLA. It was unclear to us what the basis of that award was. We did not think that COPD could have been a factor as the COPD appeared to have been a recent problem. We know that [the claimant] had suffered more significant mental health problems in the past; there were 3 recorded drug overdoses in 1994, 2000 and 2001 as well as a reference to harmful alcohol use in 2009. Whether any or all of those were part of the rationale for the award of DLA we did not know. We did not find though, that those issues were current at the time this decision was taken. Also, we had the benefit of GP records, which we thought gave a more accurate picture of the difficulties suffered by [the claimant]."

4. Beyond the bare facts that the claimant had been in receipt of DLA at the higher or highest rate of each component for at least 5-6 years, it appears that no DLA evidence was before the FtT.

5. Grounds of appeal to the Upper Tribunal were provided with the initial assistance of FfJ, challenging (among other things) the FtT's dealing with the previous award of DLA and indicating that they (FfJ) had requested the DLA papers.

6. I directed an oral hearing of the application, which was held at Gateshead on 14 March 2019. What emerged was puzzling in that (a) the appointee volunteered that they had "ticked the box" to say they wanted DLA evidence taken into account – it appeared an odd thing to suggest if it were not true, unless the appointee had a particularly good grasp of recent social security caselaw, but no such box was evident in the papers before the FtT; and (b) there was no indication on the file, or on the GAPS case management system, that FfJ had in fact requested the DLA papers. I deferred a decision on the application, directing the Secretary of State, amongst other things, to:

> (a) file a submission indicating whether or not the claimant would have had the opportunity when claiming PIP to tick a box to say that she wanted her DLA evidence included in the PIP case papers and if so, attaching a copy of any such form that she (or her husband/appointee on her behalf) did sign or, if unavailable, a sample of the relevant form; and
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> (b) file with the Upper Tribunal copies of such evidence as is still available as was used for the most recent award of DLA in the claimant's favour and a copy of the decision (or, if that is unavailable, details derived from the DWP's records) awarding it.

I also permitted the appointee if he saw fit to file a witness statement from FfJ providing evidence as to when, to whom and how it was said that a request for the DLA papers had been made.

7. In response, the Secretary of State's representative filed a submission which

(a) attached DLA evidence[1] – and also ESA evidence, provision of which had also been directed;

(b) submitted that:

"Most people who apply for PIP do so by telephoning the DWP. If the claimant is unable to make a claim over the telephone, they are sent Form PIP1 which asks about reusing DLA evidence[2]. However, in the present case the claimant claimed PIP over the telephone on 12 December 2016 and so form PIP1 would not have been sent to her";

(c) indicated that on 5 December 2017 the DWP received a Subject Access Report request from the claimant[3], on which the box indicating that DLA information was sought had been ticked as part of the request. It was suggested that this might be the box which the appointee remembered ticking. The submission indicated that the DLA information was sent to the claimant as part of the fulfilment of the request on 17 January 2018.

The appointee disputed that the DLA information had been sent and subsequently the Secretary of State provided evidence of the fulfilment of the request, showing merely (emphasis added) "PIP computer and clerical records issued to customer" i.e. there was nothing to suggest that fulfilment of the request had in fact included any DLA papers at all and the Secretary of State's representative has subsequently resiled from the earlier suggestion that it did.

8. The appointee meanwhile did not file any evidence from FfJ and made out an apparently compelling case that neither he, nor the claimant, nor FfJ had received any DLA papers.

9. FtT rule 24(4)(b) provides that:

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[1] As the case is to be remitted to the FtT I will not comment in detail on the DLA evidence apart from, in order to demonstrate its potential materiality, repeating my observation in earlier Directions that "The DLA papers at first sight make out a compelling case for the award of that benefit at that time. The report, compiled by a doctor, appears detailed and specific. Further, the instructions to the health care professional (i.e. the doctor) indicate that [the claimant] had been on DLA since 2008, apparently supported by two previous reports. My provisional view is that if this material had been in front of the [FtT], it would have needed to take it into account and to explain in its reasoning how its decision on the mobility part of [the claimant's] PIP claim could be squared with the 2013 decision on her DLA claim."

[2] A copy of Form PIP1 (Version dated June 2018) was attached which, at its internal page 18, does indeed do so. However, that form, even in a previous version, appears to have played no part in the present case.

[3] There may have been an earlier Subject Access Request dated 12 July 2017 made by the claimant also, but there is no suggestion that this resulted in any DLA papers being made available to her.

> "The decision-maker must provide with the response … copies of all documents relevant to the case in the decision-maker's possession, unless a practice direction or direction states otherwise."

10. Merely because the Secretary of State may have been in breach of rule 24(4) does not mean that the FtT was in error of law: see *FN v SSWP* [2015] UKUT 670 (AAC) [2016] AACR 24. The application of that case and of the principles of the decision of a Tribunal of Commissioners in Northern Ireland in *JC v Department for Social Development (IB)* [2011] NI Com 177; [2014] AACR 30, to the provision of evidence relating to DLA claims when a claimant was transferring to PIP was considered by Upper Tribunal Judge Markus QC in *CH and KN v SSWP (PIP)* [2018] UKUT 330 (AAC). In fairness to the FtT, that decision had not been issued when the FtT decided the present appeal to it:

> "58. My task, as that of the Upper Tribunal in *FN,* is to decide what the First-tier Tribunal should do where DLA evidence has not been provided.
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> 59. As was made clear in *JC* and *FN* the tribunal is not required as a matter of law to consider DLA evidence on a PIP appeal if the evidence is not relevant (*JC* at [50(vi)] and *FN* [79]). Moreover, a tribunal will not always err in law in determining an appeal without all relevant evidence (*FN* at [78] and [79]). The question is whether the evidence is necessary fairly to determine the appeal. Thus, at [84] the Upper Tribunal said:
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> > "a First-tier Tribunal is entitled to call on what evidence it considers relevant *to the proper determination* of the issues arising in the appeal" (emphasis added)
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> 60. In disability appeals there is frequently relevant evidence, such as GP records, which is not before the tribunal. There is no general requirement on the tribunal to obtain such evidence. It is for the tribunal to decide whether it is proportionate to do so, consistently with the overriding objective. The position has been put succinctly by Judge Nicholas Paines QC in *GC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 0174 (AAC):
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> > "34. Tribunals are often faced with cases in which categories of information that might be helpful to the tribunal are not in their papers. For example, they may or may not have a claimant's GP records; the claimant may have been to a specialist for treatment, but the papers do not contain any report from the specialist; the claimant may not have been examined on behalf of the DWP by an examining medical practitioner; or, as here, an ability similar to the ability at issue before the tribunal may have been adjudicated on for the purposes of another social security benefit, but the papers are not before the tribunal. Other examples can no doubt be proffered. In all these situations, it seems to me, the tribunal has a discretion, to be exercised judicially, as to whether they adjourn with a view to obtaining the further material.
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> > 35. In exercising that discretion, the tribunal will balance the competing factors, which include: the wishes of the claimant, particularly if represented; the delay to the proceedings before it; the amplitude of the evidence already before it; the likely relevance or helpfulness, so far as it can be judged, of the missing material, etc."
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> 61. Ultimately it is for the First-tier Tribunal to make its own judgment whether DLA evidence may be relevant and whether to call for it in a PIP appeal. In accordance with the decisions in *JC* and *FN*, and without setting down any hard and fast rules,

the following guidance should assist in deciding whether to call for the relevant evidence.

62. First and most obviously, it must reasonably be considered that the DLA evidence would be relevant to the PIP decision as discussed above. At a minimum this will depend on there being relevant overlapping criteria in issue and a plausible case that the claimant's condition has not improved.

63. Second, even if the DLA evidence is likely to be relevant on the above basis, the First-tier Tribunal will not be required to obtain that evidence if it is satisfied that the PIP evidence is reliable and sufficient to enable it to determine whether the PIP criteria which are in issue are satisfied.

64. Third, if the First-tier Tribunal considers that the PIP evidence is insufficient or if it has cause to doubt the reliability of the PIP evidence, it should consider obtaining potentially relevant DLA evidence.

65. Fourth, if the First-tier Tribunal decides that the appellant is not credible and so making false or exaggerated claims about their difficulties, that may make it unnecessary to call for the DLA evidence. However, the tribunal might also consider whether the DLA evidence could assist in assessing the appellant's credibility where that is called in to question.

66. Fifth, if the claimant relies on the DLA award, the tribunal must address the argument made - see the discussion in *KW v Secretary of State for Work and Pensions* [2018] UKUT 216 (AAC) – but it is a matter for the tribunal to determine whether to obtain the DLA evidence.

67. If the DWP's processes work, the question whether the tribunal should obtain the DLA evidence should only arise where the claimant did not ask for it to be taken into account and the Secretary of State has decided that it is not relevant. It is not consistent with the tribunal's investigative and enabling role simply to leave matters there. The claimant may not have appreciated that DLA evidence may be relevant, and the Secretary of State does not have the last word on relevance. But how is the First-tier Tribunal to go about the task of deciding whether to call for the DLA evidence where it does not know what DLA evidence there is? In the light of what the tribunal knows about the level and date of the last DLA award, it will be able to make a judgment as to whether there is any question of DLA evidence being potentially relevant and, in particular, whether any overlapping criteria are likely to be in issue. If they are not, it need not consider further whether to obtain that evidence. But if there is a possibility of the DLA evidence being relevant, then the tribunal ought to consider whether to obtain it.

68. Where an appeal is determined in the absence of the claimant it would only be in very obvious cases that the tribunal might consider obtaining the DLA evidence, for instance where there is a clear and substantial inconsistency between the PIP assessment and a recent DLA award. If the claimant is present, the tribunal can explore matters further if it appears that the DLA evidence may be relevant. It could find out more about the basis for the award, whether there was a medical examination, what other medical evidence there was, and why the claimant did not ask for the DLA evidence to be taken into account. It is for the tribunal to decide what inquiries to make but I give these examples to show that they can be made quickly and easily at a hearing and do not impose an undue burden on the tribunal.

69. In summary, the tribunal need only consider whether to obtain the DLA evidence if it has decided that it is or may be relevant. There is no question of it being required to obtain it simply to see what else there is. Even where the tribunal decides that the DLA evidence would be relevant, it may decide to determine the appeal without obtaining it. But it must consider whether to do so and take into account the range of relevant considerations, as explained in *GC,* and with due regard to the restraint to be

> exercised as urged by the Upper Tribunal in *FN* at [80]. Finally, where the question whether to seek DLA evidence has arisen and the tribunal decides to proceed without it, the duty on the tribunal to act judicially means that an appropriate explanation should be given. In most cases a brief explanation will suffice."

11. There is existing caselaw which referred to what was said to be the Secretary of State's policy and practice with regard to the making available of DLA evidence in connection with PIP claims. See *GD v SSWP (PIP)* [2017] UKUT 415 (AAC) at para 5:

> "5. The Secretary of State has also provided the following answers to my questions:
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> a. PIP Reassessment Claimants are asked at outset if they want the DWP to include their DLA medical evidence when considering the PIP claim. Where DLA medical evidence is used, then that evidence will be attached to the claimant's PIP file and marked as supporting that PIP decision. This will be kept for at least 2 years if the PIP decision was a disallowance. Or longer if the decision was an award. If there has been no request from the claimant to use their DLA medical evidence for their PIP claim then the old DLA evidence will be destroyed 3 months after the DLA decision has terminated. The PIP retention period is 24 months if the evidence is no longer classified as supporting. Once the DLA evidence has been included as part of the PIP claim it will have the same retention as any other PIP supporting document.
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> b. There is a departmental policy regarding document and data retention. However, benefits decide what fits their circumstances as documents can be retained for longer/shorter if there is a valid business need e.g. DLA is roughly 14 months for documents but PIP is 24 months due to the potential linking provision of Regulation 15 of the Social Security (Personal Independence Payment) Regulations 2013, but is consistent within each benefit.
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> c. Please refer to answer a. Normally the DLA File is destroyed 14 months after it ceases to support an existing award. This period starts from 7 months after termination of award. The computer record will keep for 7 months and then close. The paper file will then be destroyed 14 months after that. However if any of that DLA evidence has been considered within the PIP claim then that evidence will support the PIP decision and it will be kept for as long as the PIP decision is current and 2 years after the PIP is no longer current.
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> d. If the DLA medical evidence has been used to consider the PIP claim then this will be included in the evidence bundle sent to the tribunal."

12. On 29 August 2019 I gave permission to appeal, indicating that notwithstanding *FN*, I considered the FtT arguably was in error of law in the present case for the following reasons:

> (a) The previous awards were regarded as potentially relevant by the FtT and now it has been provided, the evidence behind them clearly is; [the claimant's] conditions are long-running; the claimant and her appointee were not professionally represented; arguably the FtT needed to probe further.
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> (b) The FtT may have made an error of fact sufficient to constitute an error of law – that the reasons behind the previous DLA award were effectively unknowable - and responsibility for such an error appears to be that of the Secretary of State rather than the claimant/appointee.

(c) It appears from what is said at p324 that the policy recorded at para 5 of *GD v SSWP* is factually incorrect, so if the FtT was applying that, it was again in material error of fact for which the claimant was not responsible.

(d) One is to an extent forced to speculate as to whether the FtT did consider calling for the evidence and, if they did, why they decided not to do so, thus it is also arguable that their reasons were inadequate.

13. By a submission dated 12 November 2019 the Secretary of State accepted that the decision of the FtT (in particular by reference to its para 47, quoted at [3] above) had been in error of law for (essentially) grounds (a), (b) and (d) on which permission was given, as set out above.

14. As to ground (c), which raises issues going beyond the present case, the Secretary of State's representative sought to supplement the earlier submission, which had suggested that the claimant could not physically tick a box as her claim had not been made by telephone, indicating:

> "Unfortunately, my submission did not make clear the procedure about requesting DLA evidence when a claim is made by telephone. During this phone call the DWP call handlers will ask the claimant if DLA evidence should be considered. If the claimant wants it to be considered, then the call agent would task operational colleagues to retrieve it.
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> I have been advised that the call record in the present case regrettably has been destroyed in accordance with General Data Protection Regulation ("GDPR") Guidelines by our telephone operator. However as stated above claimants should be asked during the PIP telephone call claim if they wanted the DWP to include their DLA evidence when considering the PIP claim. Accordingly, I stand by the response by the Secretary of State in paragraph 5 of *GD v SSWP* which sets out the Departmental policy on the retention /disclosure of the evidence relating to a claimant's previous DLA claim".

15. The appointee has at a late stage provided the letter inviting the claimant to make her claim for PIP. What it asked her to provide was the information set out in para 1 above. We know that she was then sent form PIP 2, which is in evidence. I am doubtful whether the GDPR provides a sufficient justification for destroying evidence when there are ongoing proceedings but have not heard argument on this point so say no more about it here. What is clear, though, is that the Secretary of State is not in a position to negate the impression created by the documents in the case and the submission of the appointee that the matters covered by the claimant's initial phone call did not extend to whether or not she wished DLA evidence to be included and that the form she was sent did not contain any opportunity equivalent to that provided by the form PIP1 in its June 2018 version.

16. This decision of course is relating to events which occurred in December 2016 and January 2017. The decision of the FtT that was under appeal in *GD* was dated 28 October 2016, thus the claim for PIP giving rise to it will necessarily have been some time beforehand; in any event, well before the events in the present case. It is not clear to what extent the practice and policy set out at para 5 of *GD* was in fact applied in that case, as Judge Markus noted at para 6 of her decision. Like Judge Markus in *GD*, I have to decide whether to prolong these this appeal by making the further enquiries as to both the DWP's practices in general terms and as to how they were implemented (or not implemented) in the present case, for which scope undoubtedly exists, or whether that would be disproportionate in all the circumstances. For reasons which appear below, I have concluded that it would be. In the present case I merely find as fact that the claimant was not given the opportunity, either in the course of an initial phone call or via the PIP2 form, to request that her DLA evidence be provided, nor was it provided in response to one or more Subject Access Requests. Given the lack of reasons on this aspect we cannot know, but if the FtT did think, perhaps influenced by the decision in *GD* which had been decided more than 8 months before the FtT heard the present case, that any lack of DLA evidence was due to the claimant having had the chance to request that it be provided, but had failed to exercise it, that would have been an error of fact sufficient to amount to an error of law.

17. It follows that if the issue continues to arise (and the passage of time inevitably means that it will now do so less frequently, at any rate in Great Britain)[4] FtTs should probe whether what is said at para 5 in *GD* is accurate in relation to the particular time which the case before them concerns and its application to that case.

18. The Secretary of State's submission of 12 November 2019 indicates that on 10 July 2018 the claimant reported a change of circumstances. That is not how the appointee interprets what was done, but that does not matter for present purposes. What does matter for those purposes is that the outcome was that on 26 November 2018 the claimant was awarded the daily living and the mobility component of PIP, each at the standard rate and that she has appealed against that decision to the FtT under reference SC292/19/00160, which according to my interrogation of the FtT's case management system on 8 January 2020 was awaiting listing.

19. The Secretary of State invited me to remit the case to the FtT. A large amount of the very detailed and careful submissions by the appointee are at least implicitly inviting me to remake the decision in the claimant's favour. I suspect that it is for that reason that he has requested an oral hearing in the Upper Tribunal, rather than a wish to argue further the points of law. It would be a somewhat unusual case in which the Upper Tribunal might remake a decision concerning the functional limitations caused by a claimant's disability when the matter can be considered by the First-tier Tribunal with the benefit of

[4] Northern Ireland is on a later timescale for the implementation of PIP; on the other hand, it is administered by a Northern Ireland Department which may have different procedures

input from a Medically Qualified Panel Member and a Disability Qualified Panel member. Whilst I might, in view of the delay there has already been in this case, have nonetheless considered whether I could properly substitute a decision and spare the claimant and the appointee a further hearing before the FtT, that is not achievable in this case because of the existence of the further appeal to the FtT, even were I to consider it otherwise appropriate. It is also apparent from the appeal against the later decision that the award of the mobility component at the standard rate – conceptually where it is easiest to conclude that the existing DLA award may have relevance – would not satisfy the claimant or the appointee. I am therefore led to the conclusion that this appeal should be remitted, with a view to it being heard together with the claimant's appeal against the DWP's decision of 26 November 2018. It follows from this that, whilst I have had regard to the appointee's request for an oral hearing of the appeal in the Upper Tribunal, I do not agree to hold one.

20. I direct therefore that:

a. the question of whether the claimant is entitled to either component of PIP and if so at which rate is to be looked at by way of a complete re-hearing in accordance with the legislation and this decision;

b. the case is to be heard together with the appeal in SC292/19/00160 unless a District Tribunal Judge otherwise directs;

c. the appointee must check that the bundle for the new hearing contains the relevant DLA evidence which has been provided in the Upper Tribunal proceedings and any other relevant evidence on which he on behalf of the claimant wishes to rely;

d. Unless otherwise directed, the claimant or the appointee must ensure that any further written evidence is filed with the First-tier Tribunal no less than 21 days before the hearing date;

e. the tribunal will need to make full findings of fact on all points that are put at issue by the appeal;

f. if the tribunal rejects the claimant's evidence, including any evidence on which she seeks to rely which is derived from her previous DLA award, it must provide a sufficient explanation why it has done so;

g. the tribunal must comply with paras 71-85 of the decision in *CH and KN*, which deal with the duty to give sufficient reasons where there is a degree of overlap between a previous DLA award and the criteria for an award of PIP; and

h. the tribunal must not take account of circumstances that were not obtaining at the time of the decision under appeal, which was taken on 7 March 2017- see section 12(8)(b) of the Social Security Act 1998 - but may have regard to subsequent evidence or subsequent events for

the purpose of drawing inferences as to the circumstances obtaining at that time: R (DLA) 2/01 and 3/01.

21. While it is not a matter for me to direct, it is strongly suggested that both the claimant and the appointee should attend the re-hearing.

22. The decision on the re-hearing is a matter for the First-tier Tribunal and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

C.G.Ward
Judge of the Upper Tribunal
Date: 6 March 2020