IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2020-001502-PIP
(formerly CPIP/1814/2020)

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

Between:

Mrs S.C.

Appellant

- v –

The Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 28 March 2022
Decided on consideration of the papers

Representation:

Appellant:	In person
Respondent:	Mr R. Naeem, Decision Making & Appeals, Department for Work & Pensions

DECISION

I dismiss the Appellant's appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal concerns the restrictions on entitlement to the mobility component of personal independence payment (PIP) that apply once a person passes their 65th birthday.

A bare outline of the factual background

2. The Appellant had previously had an award of the higher rate of the disability living allowance (DLA) mobility component (and the middle rate of the DLA care component). On being transferred to PIP, in an award that took effect shortly after her 65th birthday, she was initially awarded the standard rate of both the mobility and daily living components. Her PIP award was then reviewed when she was still aged 65, at which point the mobility component was stopped and a new award of just the daily living component (at the standard rate) was made.

3. Some 2½ years later, when the Appellant was aged 68, the Department carried out a further review of her PIP entitlement. Again, the decision-maker made an award of the standard rate of the PIP daily living component but with no mobility element. The First-tier Tribunal ('the Tribunal') dismissed the Appellant's subsequent appeal, holding that she was excluded from entitlement to the mobility component because of her age and irrespective of her actual mobility problems. This is the decision now under challenge before the Upper Tribunal.

The short reason why this appeal is dismissed

4. This decision is lengthy and necessarily involves some highly technical law. For that reason, and in the hope that it helps the Appellant's understanding, I now give a short explanation at the outset as to why I am compelled to dismiss this appeal.

5. There is no dispute that the Appellant has for many years had medical conditions that seriously affect her mobility. These conditions certainly pre-date her 65th birthday. However, as a general rule, and subject to certain exceptions, people aged over 65 do not qualify for the mobility component of PIP after that age. In the present case, none of those exceptions applies to assist the Appellant. Although the Appellant initially received the standard rate of the mobility component after her 65th birthday, this was removed by a decision in 2016, when a decision-maker decided on review that her mobility had improved somewhat (this followed a knee replacement operation). It was accepted by the time of a further review in 2019 that her mobility had worsened. However, by this stage none of the exceptions to the age 65 cut-off rule applied, and so there could be no entitlement to the PIP mobility component.

6. I now turn to consider the policy intent behind the rules governing entitlement to the mobility component for people over the age of 65.

The policy intent

7. Age restrictions have been an integral part of the statutory framework for mobility benefits since the introduction in 1976 of the original mobility allowance (the precursor to the mobility component of DLA, itself the forerunner of the PIP mobility component). These restrictions have been carried forward into the DLA and PIP schemes, both of which were designed to focus support on those who

have become disabled earlier in life, i.e. before state pension age, and so who have had less opportunity to work, earn and save for retirement. Thus, the policy is based on the fact that developing mobility needs in later life is a normal consequence of the ageing process which (in theory at least) non-disabled younger people of working age have had opportunity to plan and save for.

8. The policy intent is reflected in two main principles in the PIP scheme (as was also the case in the DLA scheme). First, individuals can continue to receive PIP when they attain state pension age, assuming they claimed PIP before reaching that age and so long as they continue to meet the relevant entitlement conditions. Secondly, however, the general rule is not to make a new award, or to increase an existing award, of the mobility component once a claimant has attained state pension age.

9. Of course, those individuals who become disabled after reaching state pension age may be able to claim attendance allowance for their personal care needs. However, attendance allowance has no dedicated mobility element.

An outline of the legislative scheme

10. The statutory provisions governing entitlement to PIP for those aged 65 and over were helpfully summarised by Upper Tribunal Judge West in *RJ v Secretary of State for Work and Pensions (PIP)* [2020] UKUT 107 (AAC) at paragraphs 18-20 (with footnote as in the original text):

> 18. S.83(1) of the Welfare Reform Act 2012 ("the 2012 Act") provides for a general bar on entitlement to personal independence payment after the "relevant age":
>
> > "A person is not entitled to the daily living component or the mobility component for any period after the person reaches the relevant age".
>
> 19. The relevant age means pensionable age, or if higher, 65 (s.83(2)). The relevant age in the case of the claimant is 65. For the sake of simplicity, references in the text below are to the age of 65.
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> 20. Section 83(3) of the Act permits exceptions to be set out in regulations. Exceptions are made by the following provisions:
>
> > (1) regulation 25(a) of the 2013 Regulations applies where a claimant was entitled to an award "of either or both components" before the age of 65. "Component" means "the daily living component or, as the case may be, the mobility component of personal independence payment": regulation 2. That means that regulation 25(a) does not apply in a disability living allowance transfer case ("a DLA Transfer Case"), where (as defined) there would have been no award of personal independence payment before the age of 65.
> >
> > (2) regulation 25(b) applies where a claim for personal independence payment has been made before the age of 65, but had not been determined before the claimant reached the relevant age.
> >
> > (3) regulation 15 of the 2013 Regulations, as applied by regulation 26: see further below.
> >
> > (4) regulation 27 of the 2013 Regulations, which makes special provision in relation to the revision or supersession of awards of

personal independence payment where a person is over the age of 65: see further below.

(5) regulation 27 of the Personal Independence Payment (Transitional Provisions) Regulations 2013 ("the TP Regulations"). Regulation 27(2) of the TP Regulations provides for a one-off exception to s.83 of the 2012 Act when a person (under 65 on 8 April 2013) with a current award of disability living allowance[1] claimed personal independence payment for the first time. Regulation 27(3) applies in similar circumstances, where there was no entitlement to disability living allowance on the day on which the claim for disability living allowance was made, but where there was entitlement in the past year.

(Somewhat confusingly, two of the exceptions arise out of two different regulations, coincidentally both numbered 27, one under the 2013 Regulations and the other under the TP Regulations as I have defined them, although even more confusingly both were passed in the same year.)

11. In this decision I adopt the same abbreviations as Judge West deployed in his decision – thus the principal Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) are referred to as 'the 2013 Regulations' and the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387) as 'the TP Regulations'.

12. Furthermore, and so as to bring that summary up to date, I note there is now a sixth category of exception to the general rule that a claimant who has reached the "relevant age" (being 65 in the present case too) is not entitled to an award of either component of PIP. This further exception is contained in regulation 27A of the TP Regulations, as inserted by regulation 2 of the Personal Independence Payment (Transitional Provisions) (Amendment) Regulations 2019 (SI 2019/1011) with effect from 4 July 2019. This amendment corrected an unintentional gap (or lacuna) in the TP Regulations to ensure that all claimants in receipt of PIP after the relevant age could continue to receive PIP where their award has been subject to revision or supersession. This lacuna was identified in Judge West's decision in *RJ v Secretary of State for Work and Pensions (PIP)* (see above).

The Appellant's personal independence payment claims chronology in detail

13. The Appellant, who was born in October 1950, has suffered from severe osteoarthritis of the spine and knees (and other joints) for many years. As a consequence, she has had longstanding mobility problems (resulting more recently in knee replacement surgery on both knees). Before the rollout of PIP, these difficulties were reflected in an award of the higher rate of the DLA mobility component (along with the middle rate of the DLA care component). As a result, the Appellant was able to access the Motability car scheme.

14. In August 2015 (and so when she was aged 64) the Appellant was invited to claim PIP under the transfer arrangements associated with the withdrawal of

[1] Regulation 2 of the TP Regulations defines "DLA entitled person" as a person aged 16 or over who is entitled to either component or both components of disability living allowance.

DLA. The Health Care Professional (HCP) advised the Secretary of State's decision-maker that mobility descriptor 2d applied ('can stand and then move using an aid or appliance more than 20 metres but not more than 50 metres'). The HCP also recommended that 'short term review is appropriate due to knee replacement surgery in potential 3-4 months; will require 3 months of recovery'.

15. On 5 October 2015 the decision-maker accordingly scored the Appellant at 10 mobility points (and 9 daily living points), and so made an award of the standard rate of each PIP component. In keeping with the HCP's recommendation, this PIP award ran from 4 November 2015 to 21 May 2017. The Appellant's previous DLA award was accordingly terminated on 3 November 2015. In passing, I note that the Appellant's walking ability would have had to be assessed as being restricted to no more than 20 metres in order to qualify for the *enhanced* rate of the PIP mobility component (on the basis of either descriptor 2e or 2f, each of which carries 12 points), which would have been the direct equivalent (in cash terms at least) of the higher rate DLA mobility component.

16. The Appellant applied for a mandatory reconsideration of the decision dated 5 October 2015, but this resulted in no change. She then lodged an appeal to the Tribunal, which was due to be heard in July 2016. However, for reasons that are unclear that appeal was later withdrawn. However, it may be explained by the fact that it was shortly before this that the Appellant underwent a total knee replacement on her right knee. The effect of withdrawing the appeal was that the PIP decision of 5 October 2015 (an award of the standard rate of both the daily living and the mobility components) remained in force.

17. Meantime, in May 2016, the Department had initiated a review of the Appellant's PIP award. The Appellant completed another PIP questionnaire in which she explained that 'since my new knee replacement I have found it more difficult to get about'. However, an HCP took a very different view in July 2016, expressing the opinion that the Appellant could stand and then move more than 50 metres but no more than 200 metres, either aided or unaided (mobility descriptor 2b, which attracts a score of just 4 points).

18. On 10 October 2016, following this review, the decision-maker notified a new PIP decision. The new award was for the daily living component only (at the standard rate, with a score of 8 points) for the three-year period from 10 October 2016 to 9 October 2019. There was no award of the mobility component because descriptor 2b, as noted above, which was recommended as applicable by the HCP, scores only 4 points. It followed that the last day of the Appellant's entitlement to the PIP mobility component was 9 October 2016. A week later, on 17 October 2016, the Appellant turned 66. The decision remained unchanged following mandatory reconsideration. Again, there was no appeal.

19. Two years later, in October 2018, the Department initiated a further review of the Appellant's entitlement to PIP. The Appellant explained that her arthritis had got much worse over the previous year. The HCP's assessment on this occasion was that the Appellant could stand and then move using an aid or appliance more than 20 metres but not more than 50 metres. As such, it was recommended that mobility descriptor 2d applied. On 8 May 2019 the decision-maker made an award of the standard rate of the daily living component for the

period from 8 May 2019 to 26 March 2022, but accompanied by no award of the mobility component. Descriptor 2d would normally result in a mobility score of 10 points, and so an award at the standard rate, but the decision letter advised that 'the law says we cannot award or increase the mobility part of PIP for claimants of state pension age or over. Whilst I accept your mobility has worsened, I cannot look at your award as this happened after you reached State Pension age.' The Appellant sent in further evidence but the decision was maintained on mandatory reconsideration. She then lodged an appeal with the Tribunal.

20. Following a telephone hearing on 9 July 2020, the First-tier Tribunal dismissed the Appellant's appeal and confirmed the DWP decision of 8 May 2019 (i.e. the award of the standard rate of the PIP daily living component but with no mobility element). In its summary decision notice, the Tribunal explained that it 'accepted that [the Appellant] has restricted mobility but has no entitlement by virtue of her age and the statutory provisions which [do] not enable the Tribunal to make an award.'

21. The Tribunal expanded upon this brief explanation in its statement of reasons. Having reviewed the history of the Appellant's claim, the Tribunal concluded as follows:

> 28. Regulation 25 of the Social Security (Personal Independence Payment) Regulations 2013 recognises that a claimant who was entitled to an award of PIP or DLA prior to reaching the relevant age namely 65, their award will continue provided they remain eligible for that award.
>
> 29. [The Appellant] ceased to be entitled to the mobility component from 10 October 2016. Regulation 26 of the Social Security (Personal Independence Payment) Regulations 2013 states that where there has been an interval between a previous award and the new claim provided no more than one year has passed where the claimant is assessed as having severely limited ability to carry out mobility activities for the purpose of the new claim, then the claimant is entitled to the enhanced or standard rate of mobility only if they were entitled to it under the previous award.
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> 30. When this matter was looked at for the purpose of the decision dated 8 May 2019 more than 12 months had passed since the previous decision in any event and furthermore for the purpose of the 2016 decision, [the Appellant] had not been entitled to an award.
>
> 31. The Tribunal recognises longstanding physical health issues with arthritis in the back [and] in the spine, shoulder, knee albeit the right was replaced in 2016 and continuing knee problems with the left knee the issue is not the condition dating prior to the 65th birthday but satisfying the entitlement to the award.
>
> 32. From 10 October 2016 [the Appellant] having by that date in any event attained the age of 65 she was no longer entitled to the mobility component. By the date of decision under appeal she was aged 68. The Tribunal accept deterioration in walking ability which would give rise to an entitlement, however that cannot be the case as that potential entitlement has been established after attaining the age of 65.

> 33. In those circumstances the decision is confirmed. The appeal is dismissed … There can be no award of the mobility component by virtue of the age restrictions.

22. The Appellant then wrote to the Tribunal asking for permission to appeal to the Upper Tribunal. She said that her mobility component had been stopped "because I was told my present condition started after my 65th year". She included a letter from her GP confirming that her osteoarthritis dated back at least to the early 2000s.

The grant of permission to appeal to the Upper Tribunal

23. A District Tribunal Judge granted permission to appeal to the Upper Tribunal. His grant of permission reads by way of a mini-treatise on the complex statutory provisions dealing with entitlement to the mobility component of PIP for those claimants who are aged over 65. It merits inclusion here in full:

> The grounds of the appeal are that the Appellant considers that her award of the mobility component should not have been ended in 2016 and that as her condition has worsened since she turned 65, she should be entitled to an award of the mobility component. The Tribunal is not satisfied that this amounts to an error or law as the Tribunal has clearly applied Regulation 26 of the Social Security (Personal Independence Payment) Regulations 2013 ('The PIP Regs') which has the effect outlined by the Tribunal at paragraph 29 of the Statement of Reasons of preventing the Appellant from receiving an award of Personal Independence Payment unless she had been in receipt of an award of the Mobility Component less than a year before the mobility component was claimed. Save as set out below, this appears to be a correct application of the law.
>
> In cases where the Tribunal does not consider it appropriate to review a decision, it may nevertheless grant permission to appeal if satisfied that there was an arguable error of law. In this case, the Tribunal correctly found that the Appellant originally came within the exception to the restriction on claimants over 65 receiving an award of Personal Independence Payment as the claimant had made her claim before turning 65 and her claim had not been determined by the time she reached 65. The Appellant had, accordingly, come within the scope of Regulation 25(b) of the PIP Regs. Therefore, she had been entitled to an award of PIP after reaching 65 as Reg 25 expressly provides that Section 83(1) of the Welfare Reform Act 2012, which prevents claims for those over 65, should not apply to someone in those circumstances. However, when the Tribunal went on to apply Regulation 26 of the PIP Regulations to exclude an award of the mobility component, it arguably erred in law.
>
> The arguable error of law in applying Regulation 26 arose because Regulation 26 only applies where a Claimant over 65 makes a "new claim" for PIP. In this case, it may be strongly arguable there was no "new claim" as the Appellant had already been in receipt of PIP since 2015 and it is not possible to make a "new claim" if already in receipt of PIP, even if only in receipt of one component. If this is correct, then the limitation on an award of the mobility component applied by this Regulation is of no effect in the present case.

In this case, the decision which the Appellant disputes was a planned review of her previous entitlement to an award. The Social Security (Claims and Payments) Regulations 1987 defines a "claim for benefit" as including certain applications for revision or supersession of existing awards, albeit notably not of an application for revision or supersession of an existing award of Disability Living Allowance made by the Claimant. The Universal Credit, etc (Claims and Payments) Regulations 2013 does not define what may amount to a "claim for benefit". Accordingly, it is arguably the case that the Tribunal erred in law in applying the limitation imposed by Regulation 26 of the PIP Regulations as there had been no "new claim". Even if the Appellant had made an application for a supersession so as to seek an award of the mobility component where the mobility component was not in payment, Regulation 26 would still not operate as a bar to such an application as no new claim had been made. If Regulation 26 did not come into effect, then the only bar at law to an award of the mobility component being awarded at either rate to a claimant who benefits from the exception under Regulation 25 is to be found in Regulation 27 of the PIP Regs However, it is arguably the case that this would not have operated as a bar to an award of the mobility component upon an application for supersession or supersession by the Secretary of State upon her own initiative as it is arguable in the light of *MH v SSWP (PIP)* [2020] UKUT 185 (AAC) that this Regulation only limits an award of the mobility component where the claimant may already have an award of the mobility component and it is being superseded for a change of circumstances.

In the light of the above, it is arguable that on any application for supersession by a claimant who benefits from the exception provided under Regulation 25, or a planned review by the Secretary of State, there is no bar to an award of the mobility component at either rate unless the claimant already has an award of the mobility component and is seeking an increase because there has been a change of circumstances arising after the claimant reached 65. It is arguably the case that if a claimant has an award of the daily living component alone and there is a change of circumstances, Regulation 27 provides no bar to an award of the mobility component at either rate which would mean that if this analysis is correct, the Tribunal erred in law in not considering the factual grounds for a supersession with a view to awarding the mobility component if there had been a change of circumstances or by relying upon Regulation 26 of the Universal Credit, etc (Decisions and Appeals) Regulations 2017.

It would further appear in the light of the above that there are two issues on which guidance from the Upper Tribunal would be beneficial. The first is as to what is meant by a "new claim" for the purposes of Regulation 26 of the PIP Regs. The second is whether Regulation 27 should be read so as to exclude claimants over 65 from an award of the enhanced rate of the mobility component if since they reached pensionable age their award included either no mobility or reduced rate and a subsequent supersession is carried out on the ground of change of circumstances, or whether it is restricted only to cases where there was an existing award of the mobility component at the standard rate and it is sought to supersede due to a

change of circumstances. It would appear that the exclusion set out in Regulation 27 should not apply if there was no existing award of the mobility component, which would also mean that there was no bar upon an award of the mobility component. If correct, it may be argued that Regulation 27(3)(b) is of no effect and otiose. The Tribunal is further concerned that it may arguably be the case that the reference in Regulation 27(1)(a) to the "original award" means that the protection against the operation of Section 83(1) may only apply upon a review or supersession of the decision which gave rise to the exceptions under Regulations 25 or 26 of the PIP Regs and that, therefore, it is only upon a revision of that decision or the first supersession thereof, that the protection exists, subject the limitation in Regulation 27(2), meaning that, thereafter the lacuna identified in *RJ v SSWP (PIP)* [2020] UKUT 107 not only applies to those who come within the scope of Regulation 27 of the Personal Independence Payment (Transitional Provisions) Regulations 2013 ('the Transitional Provisions'), but also to those who come within the scope of Regs 25 or 26 of the PIP Regs on, as in this case, the second supersession of the award which gave rise to the exception, thereby depriving the Appellant of entitlement to any award. If correct, then the Appellant's entitlement to PIP would fall to be removed entirely. The saving provisions of Regulation 27A of the Transitional Provisions would be of no effect as they only apply to those who derive entitlement from Regulation 27 of those Regulations and are not of retrospective effect, meaning that, as for those who were excluded by the said lacuna and may not benefit from Regulation 27A due to its lack of retrospective effect, the Appellant may arguably have no entitlement to PIP at all and should now claim Attendance Allowance, receiving no benefit at all pending that application.

The issues are, therefore, whether the Tribunal was correct to apply Regulation 26 and, if not, what award might it have been open to the Tribunal to make in the light of Regulation 27.

The proceedings in the Upper Tribunal

24. Mr R Naeem has provided a detailed written response on behalf of the Secretary of State opposing the appeal, together with a supplementary submission in response to my further case management directions. I refer to his arguments at the appropriate junctures in the discussion that follows.

25. The Appellant has filed her reply. She explains that she feels she has been treated very unfairly. She says that her condition has never improved and in fact her arthritis has just got worse over time. She states that the change from her DLA to PIP entitlement meant that she lost her Motability car (this was because the Transfer decision involved an award of the standard but not the enhanced rate of the mobility component). She complains that she was never told about the possibility of claiming attendance allowance. She adds that "I was told my arthritis only started after 65 years which is not true – I was in my 50s, my GP sent a letter to confirm this." I return to the Appellant's arguments again later.

The Upper Tribunal's analysis

Introduction

26. I agree with the outcome of Mr Naeem's analysis – namely that the Appellant's appeal must be dismissed – for the following reasons.

27. A good place to begin is to identify the precise nature of the four decisions taken by DWP decision-makers on the Appellant's entitlement first to DLA and then subsequently to PIP. The latter three PIP decisions are those decisions dated 5 October 2015, 10 October 2016 and 8 May 2019, as summarised above.

The four decisions in outline

28. The first decision concerned the Appellant's entitlement to DLA, which pre-dated the current appeal proceedings by quite some time. The date of that decision is not on file, but it is clear that at some stage the DWP had awarded the Appellant the higher rate of the DLA mobility component (hence her ability to access the Motability Scheme under that regime) and the middle rate of the DLA care component. I call this 'the DLA decision'.

29. The second decision was the decision dated 5 October 2015. This was an award of the standard rate of both PIP components for the period from 4 November 2015 (when the Appellant was 65) to 21 May 2017 (when she was 66). This decision also terminated the DLA award on 3 November 2015. I call this decision 'the Transfer decision'.

30. The third decision was that taken the following year dated 10 October 2016. This followed a planned review initiated by the DWP. The decision was to award the standard rate of the daily living component of PIP only (from 10 October 2016, when the Appellant was 65, to 9 October 2019, when she was 68). The mobility component was accordingly withdrawn with effect from 10 October 2016. I call this 'the First Planned Review decision'.

31. The fourth decision was the decision dated 8 May 2019. This followed a further planned review initiated by the DWP. The decision was to award the standard rate of the daily living component of PIP only (from 8 May 2019, when the Appellant was 68, to 26 March 2022, when she would be 71). There was no award of the mobility component. I call this 'the Second Planned Review decision'. It is this decision of 8 May 2019 that was the subject of the appeal to the First-tier Tribunal in the present case.

The relevant primary legislation

32. We can put the DLA decision to one side. The starting point for an analysis of the effect of the three PIP decisions must be sections 81 and 83 of the Welfare Reform Act 2012. Section 81 sets out the high level criteria for entitlement to the mobility component of PIP. However, section 81(6) provides that the section "is subject to the provisions of this Part, or regulations under it, relating to entitlement to the mobility component (see in particular sections 82 and 83)". Section 83 in turn provides as follows:

> **Persons of pensionable age**
>
> (1) A person is not entitled to the daily living component or the mobility component for any period after the person reaches the relevant age.

> (2) In subsection (1) "the relevant age" means—
>
> (a) pensionable age (within the meaning given by the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995); or
>
> (b) if higher, 65.
>
> (3) Subsection (1) is subject to such exceptions as may be provided by regulations.

33. There is no dispute that the "relevant age" for the Appellant by virtue of section 83(2) is 65. Furthermore, as a matter of simple fact, it is clear that as at the date of each of the three PIP decisions in question the Appellant was aged at least 65. As such, in principle at least, she was not entitled to either PIP component (see section 83(1)) unless she could claim the benefit of one of the exceptions provided for by regulations (section 83(3)). These exceptions were summarised in the passage from Judge West's decision in *RJ v Secretary of State for Work and Pensions (PIP)*, cited above (at paragraph 10).

The Transfer decision of 5 October 2015

34. I start with the first of the three PIP decisions, being the Transfer decision. There is disagreement as to the basis for this decision in law. The Tribunal seemed to take the view that this was governed by the exception in regulation 25 of the 2013 Regulations, but without being any more specific (Tribunal's statement of reasons at paragraph [28]). The District Tribunal Judge considered that regulation 25(b) of the 2013 Regulations applied (Tribunal's grant of permission, 3rd paragraph). Mr Naeem submits that regulation 25(a) of the 2013 Regulations was the operative provision. We therefore need to focus on the effect of regulation 25.

35. Part 6 of the 2013 Regulations is concerned with "provisions relating to age", comprising regulations 25 – 27 inclusive. Regulation 25 of the 2013 Regulations provides as follows:

> **Exceptions to section 83 where entitlement exists or claim made before relevant age**
>
> **25.** Section 83(1) of the Act (persons of pensionable age) does not apply where C has reached the relevant age if C —
>
> (a) was entitled to an award of either or both components on the day preceding the day on which C reached the relevant age; or
>
> (b) made a claim for personal independence payment before reaching the relevant age and that claim was not determined before C reached that age but an award of either or both components would be made in respect of C but for section 83(1) of the Act.

36. There are three definitions to note in this context. First, "C" is defined as "a person who has made a claim for or, as the case may be, is entitled to personal independence payment" (see regulation 2 of the 2013 Regulations). Second, "the relevant age" means state pension age or, if higher, 65 (see Welfare Reform Act 2012, section 83(2), as applied by regulation 2). Third, "component" means either the daily living or the mobility component of PIP (see regulation 2). It is not a reference to a DLA component.

37. The relevant dates around the Transfer decision are also important. The date of the Transfer decision was 5 October 2015. The Appellant's 65th birthday was 12 days later on 17 October 2015. The PIP aspect of the Transfer decision took effect on 4 November 2015. It follows that the Appellant "reached the relevant age" for the purpose of regulation 25(a) on 17 October 2015. It also necessarily follows, as night follows (or in this case precedes) day, that "the day preceding the day on which C reached the relevant age" for the purpose of regulation 25(a) was the day before, namely 16 October 2015.

38. The question then is whether the Appellant "was entitled to an award of either or both components" (being PIP components) on 16 October 2015 and so fell within the scope of the exception in regulation 25(a).

39. I must confess my initial thinking was that the Appellant did not fall within the terms of that exception. This was on the assumption that, strictly speaking and as matters stood on the relevant date, she was not at that point "entitled to an award of either or both [PIP] components". On this thinking, she was still entitled to DLA on 16 October 2015, so could not simultaneously be entitled to PIP, albeit she had a prospective award of the PIP components which was due to start on 4 November 2015. If that approach were correct, then the Appellant's circumstances were not covered by regulation 25(a) once she had attained 65.

40. I am, however, persuaded to the contrary by Mr Naeem's helpful supplementary submission. Mr Naeem accepts that the Appellant's entitlement to PIP commenced with effect from 4 November 2015 (due to the operation of regulation 17(2) of the TP Regulations). However, he submits that the fact remains that the Appellant was awarded PIP on 5 October 2015. As such, the Appellant was entitled to an award of PIP made before she reached the relevant age (albeit that it was not yet in payment). Mr Naeem further contends this interpretation is consistent with the approach of Upper Tribunal Judge West at paragraph 20(1) of his decision in *RJ v Secretary of State for Work and Pensions (PIP)* [2020] UKUT 107 (AAC) (see paragraph 10 above). Mr Naeem adds persuasively that regulation 25(a) is drafted in terms of entitlement to an 'award' of a component of PIP, and not to entitlement to a component of PIP as such. The distinction he makes is a very fine one linguistically speaking, but remains a valid one which I had overlooked in my initial thinking on the issue of the proper construction of regulation 25(a).

41. I also agree that Mr Naeem's reading of the provision makes sense in terms of the construction of regulation 25 as a whole and the policy intent. The other limb of regulation 25, regulation 25(b), covers the cases where a claimant has "made a claim for personal independence payment before reaching the relevant age and that claim was not determined before C reached that age but an award of either or both components would be made in respect of C but for section 83(1) of the Act". It would simply not make any sense in policy terms to exempt those people who claim before they reach the relevant age and whose claim is only decided after that, but not to exempt those individuals who also claim before they reach the relevant age, whose claims are decided before that date, but whose entitlement only starts after they attain the relevant age.

42. It follows that regulation 25(a) should be read in such a way as to include those claimants who are entitled to an award of either PIP component before they reach the relevant age but who have a gap between the date the PIP award is

determined and the date on which entitlement to PIP actually commences. It makes no sense to confine regulation 25(a) to claimants whose PIP claims are determined before they reach the relevant age and whose entitlement to a PIP component also happens to start before they reach that age.

43. It follows that at the time of the Transfer decision regulation 25(a) applied so as to exempt the Appellant from the age 65 cut-off rule. For the time being at least she remained entitled to the PIP mobility component after the age of 65.

The First Planned Review decision of 10 October 2016

44. This was the Secretary of State's decision to award the Appellant the standard rate of the daily living component of PIP for the period from 10 October 2016, when the Appellant was 65, to 9 October 2019. There was no award of the mobility component because descriptor 2b, which was recommended by the HCP as being applicable to the Appellant, attracts only 4 points. The mobility component was accordingly withdrawn with effect from 10 October 2016. Thus, on this occasion at least, the Appellant's claim for the mobility component was not refused because of her age. It was refused because the decision-maker took the view, rightly or wrongly but on the HCP's advice, that the Appellant's mobility difficulties were not sufficiently serious at that time to score the minimum required of 8 points. In the absence of any appeal the First Planned Review decision remained in place until the Second Planned Review decision.

45. At this stage, therefore, the Appellant did not qualify for the PIP mobility component because her difficulties in walking were not regarded as severe enough to warrant a score of at least 8 points.

The Second Planned Review decision of 8 May 2019

46. This was the Secretary of State's decision to award the standard rate of the daily living component of PIP from 8 May 2019, at a time when the Appellant was 68, to 26 March 2022. It is this decision of 8 May 2019 that was the subject of the appeal to the First-tier Tribunal. There was no award of the mobility component, but the reason for that refusal was different to the reason that applied in the First Planned Review decision. On this occasion the HCP's assessment was that the Appellant could stand and then move using an aid or appliance more than 20 metres but not more than 50 metres. As such, the HCP recommended that mobility descriptor 2d applied, which in principle would score 10 points and so make the claimant eligible for the standard rate of the PIP mobility component. However, the Secretary of State's decision-maker now applied the age restriction rule under regulation 27 of the 2013 Regulations so as to refuse to make an award of the mobility component.

47. The Tribunal, however, took the view that the Appellant's lack of entitlement to the PIP mobility component was a consequence of regulation 26 of the 2013 Regulations, which provides as follows:

> **Claim for personal independence payment after an interval and after reaching the relevant age**
>
> **26.**—(1) Where C has reached the relevant age and makes a new claim in the circumstances set out in regulation 15 the following exceptions apply.
>
> (2) The exceptions referred to in paragraph (1) are —

(a) section 83(1) of the Act (persons of pensionable age) does not apply;

(b) the reference to '2 years' in regulation 15(1)(b) is to be read as '1 year';

(c) where C is assessed as having severely limited ability to carry out mobility activities for the purposes of the new claim –

(i) C is entitled to the enhanced rate of the mobility component only if C was entitled to that rate of that component under the previous award; and

(ii) where C is not entitled to the enhanced rate of that component because of paragraph (i), C is entitled to the standard rate of that component provided that C was entitled to that rate of that component under the previous award; and

(d) where C is assessed as having limited ability to carry out mobility activities for the purposes of the new claim, C is entitled to the standard rate of the mobility component only if C was entitled to that component, at either rate, under the previous award.

48. However, on a proper reading this provision did not apply to the Appellant in this case. In summary, regulation 26 applies to claimants who have reached the relevant age, who have had a previous award of PIP which has ended and who then re-claim PIP after an interval but within a year of their previous entitlement ending. If regulation 26 is to operate as intended, the previous award must have ended without being renewed or superseded. It is true that in the present case there had been a gap of more than a year between the First and Second Planned Review decisions. But in this case the Tribunal was not concerned with a new PIP claim after an interval had elapsed. Rather, it was concerned with a supersession decision. As to that, I agree with Mr Naeem that regulation 27 of the 2013 Regulations was in point here (and not regulation 26). At the material time this provided as follows:

27.— Revision and supersession of an award after the person has reached the relevant age

(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.

49. I interject here (but only for completeness at this stage) that regulation 27(2) has since been amended by the Social Security (Personal Independence Payment) (Amendment) Regulations 2020 (SI 2020/1235) (and with effect from 30 November 2020). This followed Upper Tribunal Judge Markus QC's decision in *MH v Secretary of State for Work and Pensions (PIP)* [2020] UKUT 185 (AAC), in which she held that the reference to "a relevant change of circumstance" in regulation 27(2) applied only to the ground for supersession available under regulation 23 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decision and Appeals) Regulations (SI 2013/381; the D & A Regulations'). Accordingly, and in this context, regulation 26 of the D & A Regulations, which permits the Secretary of State to supersede a PIP decision where there has been new medical evidence (from a health care professional) had to be considered as a wholly separate ground for supersession. The statutory amendment made following Judge Markus's decision ensures that supersessions on the basis of either regulation 23 or regulation 26 of the D & A Regulations fall within the scope of regulation 27 of the 2013 Regulations.

50. So what then is the purpose of regulation 27, putting to one side the complication of that recent amendment?

51. I agree with Mr Naeem that regulation 27 provides – subject to several exemptions – for restrictions on entitlement to the PIP mobility component in cases where a claimant has reached the relevant age and the "original award" falls to be revised or superseded. In the present case there can be no dispute that by this time the Appellant had reached the relevant age. So, the question then is whether it was the "original award" that fell to be revised or superseded. The District Tribunal Judge (when giving permission to appeal) seems to interpret the "original award" as meaning the first award that gave the claimant entitlement to PIP once they had reached the relevant age. However, I do not think that reading can be correct. It makes much more sense for the "original award" to mean just the current PIP award that now falls to be revised or superseded. The drafting of regulation 27(1)(a) refers to the "original award" and by virtue of regulation 27(1)(b) it is "that award" which falls to be revised or superseded, implying that it is the immediately preceding award which is treated

as the "original award". This construction is confirmed by regulation 27(4), which refers to "a previous award" as being before the "original award".

52. The District Tribunal Judge also apparently concludes that, in cases where the original award does not include entitlement to the mobility component, then the restrictions on entitlement set out under regulation 27(2) and (3) do not take effect. I agree with Mr Naeem that this appears to overlook the effect of regulation 27(4). This provision is designed as a linking rule for cases where the "original award" does not include an award of the mobility component but "a previous award" (i.e. an award prior to the "original award") did, at least where that was the case within 12 months of the date of the supersession. This provides, at least on a very limited basis, some assistance for those claimants who have a short-term improvement in their mobility followed by a deterioration shortly afterwards. Read as a whole, the effect is that there is no entitlement to the mobility component under regulation 27(1)-(3) inclusive in any case where the linking rule in regulation 27(4) is not satisfied.

53. It follows, that where the "original award" does not include entitlement to the mobility component, and the regulation 27(4) linking rule is not met, then there can be no entitlement to the mobility component on any supersession – instead, the usual exclusionary rule under section 83 of the Welfare Reform Act 2012 applies. This reading is consistent both with the parallel 12 month linking rule in regulation 26 (see regulation 15(1)(b) as modified by regulation 26(2)(b)) and the overall policy intention.

54. In this particular case, in the context of the Second Planned Review decision, the First Planned Review decision of 10 October 2016 is the "original award" for the purpose of regulation 27. That "original award" did not include an award of the mobility component. The Appellant had indeed had a "previous award" which included the mobility component but by the time of the Second Planned Review decision, superseding the "original award", more than 12 months had elapsed since that "previous award" (under the Transfer decision). The linking rule in regulation 27(4) accordingly did not apply and the Appellant was subject to the standard age-related exclusion from entitlement in section 83.

55. I therefore agree with Mr Naeem that regulation 27 applies to the Second Planned Review decision so as to defeat the Appellant's claim for the mobility component.

56. In summary, both the First and the Second Planned Review decisions involved an award of the standard rate of the PIP daily living component but no award of the mobility component. At the operational date for each decision the Appellant was aged 65 or over (being aged 65 and 68 respectively). As such, she was presumptively excluded from entitlement to either PIP component (section 83(1) of the Welfare Reform Act 2012) unless entitlement was preserved by one of the exceptions laid down in the regulations (section 83(3)).

57. The Appellant's principal concern throughout, and understandably enough, has been the question of her entitlement to the PIP mobility component. This was terminated by the First Planned Review decision with effect from 10 October 2016. Unfortunately, that decision was never the subject of any appeal. Whether correct or not on its facts, it is now too late to try and 'unpick' that decision. The effect of section 83(1) of the Welfare Reform Act 2012 is that there can be no entitlement to the PIP mobility component, as none of the

exceptions in regulations 25-27 of the 2013 Regulations applies to the Appellant.

58. The Tribunal applied regulation 26 of the 2013 Regulations rather than regulation 27 but it had no effect on the outcome of the appeal.

Conclusion

59. The Appellant may well be bemused by the highly technical law that governs her PIP claim now that she has passed the age of 65. It is understandable that she may have understood (although this is not the case) that she had been denied the PIP mobility component because she had a condition that did not arise until after the age of 65. After all, the Department's letter explaining the Second Planned Review decision had stated "Whilst I accept your mobility has worsened, I cannot look at your award as this happened after you reached State Pension age." There is, however, no dispute that the Appellant's condition is of many years' standing. The problem is that although the Transfer decision provided for the Appellant's ongoing entitlement past the age of 65 to the standard rate mobility component, that element of the award was subsequently removed by the First Planned Review decision (on the basis, rightly or wrongly, that her mobility had improved following the knee replacement operation). Neither the Transfer decision nor the First Planned Review decision were taken to a concluded appeal. The Second Planned Review decision recognised the subsequent worsening in the Appellant's mobility, but by this stage none of the exceptions in regulations 25-27 of the 2013 Regulations to the age cut-off rule in section 83 applied, meaning that no award of the mobility component was permissible.

60. In summary, the First-tier Tribunal got to the correct decision in the end, even if some of its reasoning was less than satisfactory (again, understandably enough, given the complexity of the relevant secondary legislation). Any error of law by the Tribunal was not material to the outcome. I therefore dismiss the Appellant's appeal (under section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 28 March 2022