IN THE UPPER TRIBUNAL **Case No.** CPIP/1042/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: **M R Hemingway: Judge of the Upper Tribunal**

Decision: **The decision of the First-tier Tribunal, sitting at Preston on 2 February 2016 (tribunal reference SC263/15/00600), involved an error of law. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I set aside the tribunal's decision and remit the appeal for rehearing. Directions for the rehearing are set out below.**

Directions:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 18 May 2015 and refused on 28 July 2015.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998.

D. In addition to all of the other documentation which will be before it, the new tribunal shall be provided with a copy of the submission of the Secretary of State to the Upper Tribunal of 22 July 2016 (which sets out the disability living allowance adjudication history and which currently appears from page 184-185 of the Upper Tribunal Bundle) and copies of the documentary evidence provided with that submission (p186-291).

REASONS FOR DECISION

Introduction

1. This is the appellant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (hereinafter "the tribunal") dated 2 February 2016. That decision was to dismiss the appellant's appeal from a decision dated 28 July 2015, and subsequently confirmed by way of mandatory reconsideration, to the effect that her entitlement to disability living allowance would end on 25 August 2015 and that she was not entitled to a personal independence payment. For the reasons set out below I have allowed the appellant's appeal and have set aside the decision of the tribunal. I have remitted the case so that there shall be a rehearing before a differently constituted tribunal.

The background

2. The appellant, who was born on 20 May 1973, suffers from a range of health problems. Her GP, in a report of 23 June 2015, identified her disabling conditions as being depression and myofascial pain syndrome.

3. The Secretary of State's written submission to the tribunal, for the purposes of the appellant's appeal to that body, referred to her having previously been in receipt of the higher rate of the mobility component and the highest rate of the care component of disability living allowance. However, nothing further was said about that award at all in the submission so the tribunal could not have known, for example, the basis upon which it had been made, the date the most recent decision concerning entitlement had been made or whether that decision had been based upon any medical evidence which was still in existence. It is apparent though, from material helpfully provided by the Secretary of State's representative in this appeal to the Upper Tribunal, that she had originally been awarded the lower rate of the mobility component and the lowest rate of the care component from 12 August 2010 to 31 December 2012, that she was subsequently awarded the higher rate of the mobility component and the lowest rate of the care component to 30 September 2014 and that, in consequence of a renewal decision, she was then awarded the higher rate of the mobility component and the highest rate of the care component from 1 October 2014 to 30 September 2016. However, as part of the process whereby disability living allowance is being replaced by personal independence payments, she was invited to, and did, make a claim for personal independence payment on 18 May 2015. It was that which led to the decision of 28 July 2015 referred to above. In that decision the Secretary of State decided that she scored only 4 points under the activities and descriptors relevant to the daily living component of personal independence payment and only 4 points under the activities and descriptors relevant to the mobility component. Specifically, the Secretary of State concluded that she scored 2 points under descriptor 1(b), 2 points under descriptor 4(b) and 4 points under mobility descriptor 2(b). That was not sufficient to establish entitlement to even the standard rate of either component. Since the decision remained unaltered after a mandatory reconsideration, and since she remained dissatisfied with the outcome, the appellant appealed to the tribunal.

The appeal to the tribunal and its decision

4. There was an oral hearing of the appellant's appeal. The appellant attended and gave evidence as has been recorded in a record of proceedings kept by the tribunal. She was not represented at the hearing. Unusually, there was a Presenting Officer acting on behalf of the Secretary of State. The tribunal had quite extensive documentation before it (its bundle containing some 133 pages) and this included, in particular, the appellant's standard form PIP2, a factual report prepared by her GP which is dated 23 June 2015, a report of a health professional prepared for the purposes of the personal independence payment claim and dated 1 July 2015 and various other items of medical evidence which the appellant had submitted. A good deal of that consisted of medical appointment letters and the like which might not be thought to be of particularly probative value but there were a number of items of

evidence provided by her which might have been thought to be of somewhat greater value (see below).

5. The tribunal, having considered the documentation before it and having heard from the appellant, dismissed her appeal. It concluded that she was entitled to all of the points originally awarded by the Secretary of State but nothing more. It clearly found the content of the health professional's report to be persuasive and it preferred that to the various other items of medical and non-medical evidence before it. By way of explanation as to that, it said this:

> " 7. In all medical matters the tribunal relied on the expertise of the medical member of the tribunal and also relied upon the medical report of [the health professional] who considered all the health problems of [the appellant] and took a social history, and an occupational history. The examination conducted by [the health professional] was not diagnostic, but designed to assess [the appellant's] functional abilities. The medical report from [the health professional] was expert and objective and contained clinical findings to support its conclusions and was detailed based on discussion with, observation of and clinical examination of [the appellant] and focused on the criteria for entitlement to personal independence payment. The findings were consistent with [the appellant] having problems to cause her to have the physical difficulties associated with preparing food, washing and bathing, and moving around.
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> 8. The tribunal did not overlook the medical evidence detailed in the Schedule of Evidence, (pages 42-68) which included numerous letters from Lancashire Teaching Hospital NHS Trust, including the Primary Care Mental Health Team, Royal Preston Hospital, Discharge and Medication letter and GP factual report from Dr. Southall dated 23 June 2015. It took this evidence into account but it did not, in the tribunal's view, outweigh the examining medical report. This was because the examining medical report was expert and objective and contained clinical findings to support its conclusions and was detailed based on discussion with, observation of and clinical examination of [the appellant] and which focused on the criteria for entitlement to personal independence payment."

6. The tribunal then went on to identify what it regarded as inconsistency between what the appellant had had to say about her condition in form PIP2 (and it has to be said she had claimed an extreme level of disablement when completing that form) and what she had told it by way of oral evidence. In light of the inconsistency it concluded that she was not a "convincing or credible witness". The tribunal would have been aware of the fact of the previous award of the higher rate of the mobility and the highest rate of the care components of disability living allowance (it having been mentioned in the appeal submission) but did not say anything about it.

The proceedings before the Upper Tribunal

7. The appellant, having been refused permission to appeal by a district tribunal judge of the First-tier Tribunal, renewed her application to the Upper Tribunal. In so doing she contended that the tribunal ought to have contacted the various medical specialists who had treated her. She said that the tribunal had failed to understand the extent of her mental health difficulties and that she had found it difficult, in the context of the appeal, to explain them. She asserted that she had been at a disadvantage through not having a representative. She said that she had been tense during the hearing and, hence, had not been able to properly represent herself. She also complained about having been asked what she regarded as closed questions by the tribunal.

8. Although I did not see merit in the grounds submitted by the appellant I did grant permission to appeal. That is because I thought the tribunal, in looking at what it had had to say at paragraph 8 of its statement of reasons as set out above, might have erred in failing to subject the medical evidence other than that contained within the health professional's report to a proper analysis and might have further erred in failing to consider whether to call for any evidence which might have been in existence (and which is now known to have been in existence) concerning the appellant's award of disability living allowance. I wondered whether it might be said the Secretary of State had failed to comply with his duty to provide the tribunal with relevant evidence and whether that might relate to the question of whether the tribunal had erred. I directed written submissions and, with respect to the second basis upon which I had granted permission, I asked the respondent to confirm the adjudication history regarding disability living allowance, to provide copies of any relevant evidential material relating to the most recent award of disability living allowance and to confirm details of any policy (if there is one) of the Secretary of State concerning the production of evidence relating to previous awards of disability living allowance in personal independence payment appeals.

9. Ms J Blatchford, acting on behalf of the Secretary of State in connection with this appeal to the Upper Tribunal, provided an initial submission of 2 June 2016. In that submission she accepted that the tribunal had erred in law in the way it had gone about considering the medical evidence. She argued that it had failed to explain why it was attaching little weight to the evidence provided by the appellant which could also be regarded as expert, objective and incorporating clinical findings. As to the second issue I had raised when granting permission, though, she contended that the tribunal had made no error. The Secretary of State did have to provide, with its appeal submission, copies of all documents relevant to the case in the decision maker's possession (see rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008). However, said Ms Blatchford, the key word in the rule is "relevant" and what is or is not relevant would depend on the facts of any individual case. There is no rule that the Secretary of State must always provide documentation from a previous award of benefit and in any event, if such is not provided, the tribunal is always able to call for such evidence if it sees fit. Here, the documentation regarding disability living allowance was not relevant because the statutory tests for disability living allowance and personal independence payment are different and because any evidence obtained regarding disability living allowance would be concerned with how matters stood at a different time to that which would apply in relation to the personal independence claim. As I understand the submission Ms Blatchford suggested that, in general, any such evidence concerning disability living allowance would normally be of little or no evidential value to a tribunal dealing with personal independence payment in view of those two considerations. The appellant, by way of reply, reiterated her view that the Secretary of State and the tribunal ought to have contacted the medical practitioners who had treated her. In a further submission addressing the specific directions I have made and which are referred to above, Ms Blatchford set out the adjudication history concerning disability living allowance and provided the medical evidence which had been used in the most recent decision to award it. As to any policy, it does not appear that there is one as such because Ms Blatchford simply said this:

> "In relation to the final point, the First-tier Tribunal (F-tT) have the jurisdiction to obtain evidence relating to the claimant's previous award of benefit, whether that is employment and support allowance (ESA) or DLA. However, the F-tT are only expected to request this information if they find that the information contained within the ESA or DLA claim is relevant

> to the claimant's award to PIP. The same principle would apply to the Secretary of State, but is by no means mandatory given that both ESA and DLA are two different benefits with two different sets of criteria to be satisfied for an award to be made."

I would take it from that, though, that the practice is for the Secretary of State to consider what is required by way of production in each individual case which is, indeed, what the rule itself would appear to require.

10. The appellant, by way of a further reply, restated once again her concern that her medical practitioners had not been contacted. She also asserted that the examination conducted by the health professional in relation to personal independence payment had been rushed.

Discussion

11. I have considered whether or not to hold an oral hearing of the appeal before the Upper Tribunal. However, neither party has sought one nor is there any reason to think such a hearing would advance matters. Accordingly, I have determined this appeal on the basis of the documentation before me.

12. As to the first basis upon which I granted permission to appeal an error of law is conceded by the Secretary of State. I am satisfied that that is an appropriate concession. There was, in fact, quite a lot of medical evidence of various sorts before the tribunal other than the report of the health professional. There was a letter from the appellant's consultant written on 30 September 2014 (page 46 of the appeal bundle) which gave some general information concerning pain she was experiencing in her lower back and her lower left side and which set out the medical treatment she was then having in order to address that. There were two letters bearing the heading "Psychology Clinic Letter" the first of those dated 5 November 2014 and the second 21 September 2015. Those letters provided background information regarding pain and mental health issues (page 52-53 and pages 120-121). There was the GP factual report of Dr. Southall which contained some quite specific information regarding her disabling conditions, the history of those conditions, symptoms and variability, ongoing treatment and the effects of the disabling conditions on her day to day life.

13. I appreciate that the tribunal did make some brief references to Dr. Southall's report at paragraphs 10, 11 and 15 of its statement of reasons in addition to what it had to say at paragraph 8 which I have set out above. Nevertheless, it does seem to me in looking at paragraph 8 and in reading the statement of reasons as a whole, that it failed to submit the medical evidence other than that contained in the health professional's report to any proper critical analysis or evaluation. I appreciate that most of the medical evidence other than the report was not geared specifically towards the applicable statutory test for personal independence payment. However, that did not mean it was to be disregarded or that it could not have probative value with respect to possible entitlement to that benefit. Further, and as Ms Blatchford acknowledges, certain of the positive factors the tribunal saw in the report of the health professional, such as its being expert, objective and its incorporating clinical findings, could also be found in certain of the other medical evidence which I have referred to above. In particular, there is nothing to suggest that the various medical letters or the GP factual report were not expert and objective. I appreciate that, in giving reasons, a first instance tribunal only has to attain a standard of adequacy but it does seem to me, in the

circumstances of this case, this tribunal was required to say more than it did about the additional medical evidence and that its failure to do so did result in its either failing to have proper regard to relevant evidence or its failing to adequately explain the conclusions it had reached in light of the medical evidence. I do not say had the tribunal subjected the evidence to a more detailed analysis it would necessarily have decided that there was entitlement. However, I cannot preclude the possibility that it might have done. Accordingly, its error is material with the consequence that its decision has to be set aside. That is what I do.

14. Having reached the above view it is not strictly necessary for me to go on to consider the question of whether the tribunal might have erred in failing to consider calling for the evidence which had been used in relation to the previous disability living allowance awards nor, indeed, for me to address the various other arguments which the appellant has advanced. That is because any other errors the tribunal may have made will be subsumed by the fresh hearing which will now follow (see below) and because the new tribunal will, in consequence of my directions, have before it the full adjudication history regarding disability living allowance as well as copies of the medical evidence considered when the most recent decision as to that benefit was made. However, I will offer the brief observations set out below which are not now essential to the decision and therefore not legally binding as precedent or, for those who prefer the Latin, which are obiter dicta.

15. Logically, the first thing to consider here is the duty of the Secretary of State to provide, pursuant to rule 24 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 copies of all documents relevant to an appeal in the decision maker's possession unless a practice direction or direction states otherwise (see in particular rule 24(4)(b)). That is an important duty, as pointed out by Judge Wright in *ST v The Secretary of State for Work and Pensions* [2012] UKUT 469 (AAC). In appropriate cases it may be that the duty will require the Secretary of State to produce earlier evidence concerning disability living allowance awards so long as such evidence can properly be regarded as relevant to the issues raised by the appeal concerning personal independence payment. However, it seems to me that that would be quite rare bearing in mind the likelihood of such evidence being somewhat dated and the likelihood of there being more up to date evidence in the form of a report prepared by a health professional for the specific purpose of seeking to establish entitlement to personal independence payment. Nevertheless, in cases where the Secretary of State decides not to provide such evidence in a response, it does seem to me that it would be good practice for his Officers, when preparing a submission to the First-tier Tribunal, or to give it its more correct title the appeal response (see rule 24(1)), to provide details of the more recent adjudication history concerning disability living allowance, confirmation of the terms of the most recent award and an indication as to whether there is any relatively recent medical evidence available to it which it has not disclosed. That is because that sort of information will assist a tribunal in considering whether there might be a need to adjourn (though again I think such would be rare) in order to obtain such evidence.

16. As to the First-tier's own duties where the evidence has not been provided, matters will usually be straightforward. It will usually have an up-to-date report from a health professional which will normally (though not necessarily) have been compiled after a face-to-face meeting. It may well have additional medical evidence before it. It will often, though of course some cases are considered on the papers if that is what a claimant wants, receive oral evidence from the claimant and perhaps from a family member or some other witness. In such circumstances

it is unlikely that the interests of justice will require it to seek further evidence and to adjourn for the purpose of doing so. That is especially so bearing in mind that there is a difference in the statutory tests for the two different benefits though I do not think that that difference, of itself, means that medical evidence used for one benefit will not be of value when looking at entitlement to a different benefit.

17. Nevertheless, it does seem to me that there will be situations where material used in connection with a disability living allowance claim and award will be relevant or potentially so and will be capable of affording assistance to tribunals. That might be so, for example, where it is thought the health professional's report may be unreliable and there is little other medical evidence in the appeal bundle, where on the face of it there appears to be (as here) something of a disparity between the terms of the award of disability living allowance (here the maximum which was available had been awarded) and a refusal to award personal independence payment, where a claimant is relying upon a degenerative condition such that earlier medical evidence might very well be probative (since subsequent improvement would seem unlikely), or where there is good reason to think any undisclosed medical evidence is likely to be recent and particularly informative. That is not intended to be an exhaustive list and it may well be that it would take a combination of such and/or other factors before it becomes necessary for a tribunal to even turn its mind to the question of an adjournment. Of course, the wishes of the parties and any representatives will also be an important consideration. It may be, in this context, that an appellant will be anxious to proceed notwithstanding the possibility of there being undisclosed relevant evidence and such a wish will often command weight. It may be that a competent representative has not sought to raise the question of such evidence being obtained in which case the tribunal will not normally have to consider the matter any further for itself and may usually assume that representative does not see a need for such evidence. It may be that, conversely, an appellant and/or his/her representative positively asserts such evidence ought to be obtained and can present a persuasive argument as to why that should be so despite the tribunal having the sorts of other evidence referred to above (though it may be in such circumstances a representative will be able to obtain the evidence direct from the Secretary of State or even from a well organised claimant prior to any hearing).

18. So, all I am really saying is that it seems to me where there is something of substance to require a tribunal to at least consider calling for the disability living allowance evidence (and if there is not then it would seem unnecessary for it to even address the matter in its decision) it will have to carry out a balancing exercise based on the above considerations and any other ones it thinks pertinent, and then decide how to proceed. Where it does think the matter merits considering calling for the evidence but despite that it decides not to do so it should be prepared to say something about why it has decided not to do so though what it does say will, absent something exceptional, only need to be brief. Even if it does not say anything at all about the evidence in circumstances where it should have done and even if that is such, on the facts, to amount to legal error, such error will not, in any event, necessarily be material.

19. In applying all of that to the instant case, the tribunal was aware of the terms of the previous award, though not of anything else, and it did not actually appear to have turned its mind to the possibility of considering calling for the evidence at all. Further, although the appellant has never asserted that the disability living allowance evidence ought to have been provided, she had otherwise expressed dissatisfaction at what she perceived to be inadequate medical evidence. That said, as a matter of fact, there was a significant volume of medical and

other evidence before the tribunal. The report of the health professional appeared to be comprehensive. It also had the opportunity of hearing from the appellant. Had this been a live issue I would probably have taken the view, on these facts, that whilst it might have been better if the tribunal had specifically said, in no more than a sentence or two, why it was not calling for the evidence, it did not make an error of law through failing to explain itself or through failing to actually call for it.

20. Finally as to this issue, I am aware that these matters were also addressed in *DC v The Secretary of State for Work and Pensions* [2016] UKUT 0117 (AAC). For the avoidance of doubt, I do not see that my views and those of Judge Mitchell as expressed in *DC* are divergent.

What happens next?

21. My having set the decision of the tribunal aside, I have also decided to remit to a new tribunal so that all matters may be considered entirely afresh. The appellant will note that I have directed an oral hearing. Of course she is not required to attend it but she may well think it in her interests to do so as this will enable her to give evidence to the new tribunal and explain to it how she feels her medical conditions impact upon her. The new tribunal will have before it the full history of her disability living allowance claims and the evidence used to make the most recent decision as to that. The appellant has been tenacious in contending that the Secretary of State and the previous tribunal ought to have contacted her medical practitioners in connection with her application and appeal. However, she should note that there is no duty to do that. The new tribunal will have a great deal of evidence before it and the appellant will have an opportunity to supplement it by way of additional oral evidence. If she feels it would benefit from more, it will be for her to obtain and provide it.

Conclusion

18. The appeal to the Upper Tribunal is allowed on the basis and to the extent explained above.

Addendum

This decision has been corrected under the slip rule to show the correct citation of a decision of the Upper Tribunal referred to at paragraph 20 above.

Corrected under rule 42 and re-signed (signed on original)
M R Hemingway
Judge of the Upper Tribunal

Re-dated **22 December 2016**