IN THE UPPER TRIBUNAL **Appeal No: CPIP/1551/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Sutton on 4 July 2016 under reference SC154/16/00827 involved an error on a material point of law and is set aside.

The Upper Tribunal remakes the decision. The Upper Tribunal's decision is to uphold the Secretary of State's decision of 21 October 2015 (as revised on mandatory reconsideration on 22 December 2015) that the appellant is entitled to the mobility component of the Personal Independence Payment payable at the enhanced from 25 June 2015 to 1 December 2017. He is not entitled to any rate of the daily living component of the same benefit for the same period.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. As both parties to this appeal agree, and I concur in that agreement, the First-tier Tribunal's decision of 4 July 2016 ("the tribunal") was erroneous in material point of law on tow fundamental bases.

2. First, the tribunal acted in an unlawful and unfair manner in examining the mobility component award and then reducing it to the standard rate when that component was not in issue on the appeal. The most directly relevant case law in this area, apart from *R(IB) 2/04*, is *BTC – v- SSWP* [2015] UKUT 0155 (AAC). That decision was distinguished on

the facts at paragraph 14 of *MW –v- SSWP* (PIP) [2016] UKUT 0540 (AAC) (para. 14).

3. Following that case law and paragraph 28 of the Court of Appeal's decision in *Hooper –v- SSWP* [2007] EWCA Civ 495 (*R(IB) 4/07*), the correct analytical starting point in my judgment is to determine whether an issue is raised by the appeal. If it is raised then the effect of section 12(8)(a) of the Social Security Act 1998 is that that issue must be considered by the First-tier Tribunal. If, however, the issue is *not* raised by the appeal then the First-tier Tribunal has a discretion as to whether it should consider that issue, but that discretion must be exercised consciously and judicially, and reasons given to explain the exercise of the discretion: per paragraphs 93 and 94 of *R(IB)2/04*.

4. The First-tier Tribunal which first heard this appeal, on 19 May 2016, gave its "warning" at the outset of the hearing. It told the appellant (I have translated some of the shorthand used in the record of proceedings):

> "You have enhanced mobility and no daily living component. Appeal says you want daily living. On appeal we can increase or decrease. On what we've read quite a high risk we'd take award of mob away….".

In the decision notice adjourning the hearing this tribunal said:

> "..the tribunal had advised [the appellant] that the tribunal has the power to decrease or remove as well as increase his award of [PIP]. [The appellant] currently has an award of the enhanced rate of PIP and wished to be awarded the daily living component, too. [The appellant] was advised that although the tribunal had not made a decision, and would not do so without hearing his oral evidence, from the information in the papers, there was a risk that his award of the mobility component would be reduced or removed."

5. In neither place, however, does the tribunal make clear whether entitlement to the mobility component or its rate (a) was an issue raised by the appeal (such that it had to be considered) or (b) was an issue which as a matter of its discretion it considered should be addressed.

6. The reference to "power" in the decision notice, together with the lack of any sense that the tribunal considered it was obliged to deal with the issue, indicates it was probably the latter; but this ought to have been made clear. If it was the latter, however, there was no consideration by this first tribunal as to *whether* it should exercise the power to bring into issue the mobility component: per *R(IB)2/04*.

7. If, on the other hand, the tribunal considered it entitlement to the mobility component was an issue raised by the appeal, the reasoning is deficient for failing to explain why entitlement to the mobility component was an issue raised by the appeal even before it had started taking evidence from the appellant. What, it may be asked rhetorically, was "clearly apparent from the [documentary] evidence" (per paragraph 28 of *Hooper*) so as to bring the mobility component entitlement into issue.

8. Moreover, regardless of which of the two alternatives it was, following *BTC* the first First-tier Tribunal should have identified to the appellant what it was <u>in the evidence</u> that may have questioned the mobility component notwithstanding the ATOS supplementary advice note of 8 December 2015. This advice note had reasoned out on the evidence that due to the appellant's seizures every day it was "medically reasonable to suggest that [the appellant's] safety would be compromised when out and he would require support to plan and follow any journey safely, reliably and repeatedly". It has to be borne in mind, as *BTC* discusses, that if it had been the Secretary of State's position on the appeal that the appellant did not qualify for the enhanced rate of the mobility component of PIP

then he would have needed to set out his reasons why that was so on the evidence and in advance of any hearing.

9. I am therefore satisfied that the process adopted by the 19 May 2016 First-tier Tribunal so as to bring the enhanced rate of the mobility component into issue on the appeal was legally flawed and was unfair to the appellant. None of these errors and omissions were corrected by the tribunal which decided the appeal on 4 July 2016. There is little, or nothing, to indicate from its record of proceedings or its corrected decision notice (as paragraph 14 of its statement of reasons later claims was the case) that the 4 July 2016 tribunal in fact *re-warned* the appellant. But even if it did re-warn the appellant, the second warning was in my judgment as flawed as the first for the same reasons as set out above.

10. The second error of law the tribunal made concerns the reasoning it gave in substance for reducing the level of the mobility component award from the enhanced rate to the standard rate. Given the ATOS evidence referred to above, in my judgment the tribunal provided no adequate explanation for why the appellant was safely able to make his way along a familiar route unsupervised.

11. In the circumstances, neither party has objected to my in effect restoring the award which had been under appeal to the tribunal, and in my judgment that is the correct decision entitlement decision to be made. The effect of my decision is that the PIP award I have upheld will by now have expired. If he has not already done so, the Secretary of State will therefore need to take to take urgent steps to ensure that the appellant is able to make a renewal claim for PIP for the period from 1 December 2017.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 6th December 2017