

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the London Fox Court First-tier Tribunal dated 30 June 2017 under file reference SC242/17/05792 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

“The Appellant’s appeal is allowed.

The Secretary of State’s decision of 13 February 2017 on the Appellant’s entitlement to Employment and Support Allowance (ESA) is revised for official error.

The Secretary of State should have superseded the decision of 5 November 2013 awarding ESA from 18 September 2013 so as to include entitlement to the ESA (IR) severe disability premium from 24 October 2013, the date that the Appellant’s PIP entitlement commenced.”

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

REASONS FOR DECISION

The issue raised by this appeal to the Upper Tribunal

1. This appeal concerns the circumstances in which a claimant’s entitlement to income-related Employment and Support Allowance (ESA) can be backdated where that person has become entitled at a later date to Personal Independence Payment (PIP).

The Upper Tribunal’s decision in summary

2. The Appellant’s appeal to the Upper Tribunal is allowed. The decision of the London Fox Court First-tier Tribunal (“the Tribunal”), dated 30 June 2017, involves an error of law and is set aside. The Tribunal’s decision is of no effect.

3. A fresh Tribunal hearing is not necessary in the particular circumstances of this appeal. I therefore both (a) allow the Appellant’s appeal to the Upper Tribunal; and (b) re-make the decision that the First-tier Tribunal should have made and in the terms as set out above.

4. It follows that the Appellant is entitled to the income-related (IR) ESA severe disability premium with effect from 24 October 2013, the date that the Appellant’s PIP entitlement commenced, and not from 30 October 2016, as the Tribunal had found. My reasons for that decision are as follows.

The First-tier Tribunal’s decision

5. The Tribunal’s own decision was helpfully explained in summary from on the Decision Notice in the following terms:

“The Appellant had been awarded ESA (contribution based) in September 2013. He was awarded PIP from the end of October 2013, but did not notify the ESA department of this. In November 2016 he asked to be moved to ESA (income related) and to be awarded the severe disability premium, to which his award of PIP entitled him. The Tribunal agrees with the Appellant that he was not required to submit a fresh claim for ESA (IR) and the form he completed and submitted in December 2016 did not amount to a new claim. However, this is not the issue in this case. The issue in this case is the notification of a change of circumstances which could have a material effect on a person’s entitlement to benefit. In this case, the change of circumstances (the award of PIP) would have had a material effect, in the Appellant’s favour. This was not notified within a month of the change and therefore the maximum possible backdating of the change to his award is one month, which has been applied. The ESA and PIP departments are completely separate and the ESA department would not automatically have been notified of the Appellant’s award of PIP.”

6. The Tribunal later issued a full statement of reasons, expanding on that explanation. In a nutshell the issue was whether the Appellant’s entitlement to (IR) ESA with the severe disability premium could be backdated to 24 October 2013 (the date from which PIP had been awarded) or 30 October 2016 (one month before the Appellant’s request to move to (IR) ESA. The Tribunal concluded that the latter date was applicable.

7. The Tribunal ruled that there was no possibility of revising the November 2013 decision to award ESA as the Appellant had not applied for a revision either within the usual one month or the maximum of 13 months permitted (Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991; ‘the 1999 regulations’) regulations 3 and 4). Instead, the Tribunal, agreeing with the Department, held that the entitlement to (IR) ESA with the severe disability premium could be backdated by only one month, being the period allowed where there is a late notification of a change in circumstances (1999 Regulations, regulation 6(2)(a) and 7(2)(b)).

8. The District Tribunal Judge subsequently gave permission to appeal to the Upper Tribunal in the light of the detailed arguments advanced by Mr Simon Howells, the Appellant’s representative. He explained that:

“e. Rather I accept the submission of the Appellant’s representative that it is arguable that the Appellant’s circumstances fell within reg.6(2)(e) of the regulations: he had entitlement to a ‘relevant benefit’ (ESA) from 18/09/13 (Reg.6(2)(e)(i)), and subsequently was given entitlement to another relevant benefit (PIP) from 24/10/13 (reg.6(2)(e)(ii)). It followed that the date the supersession took effect was from the date on which entitlement to PIP arose (reg.7(7)(a)).

f. Whilst arguably the Appellant’s circumstances fell within both reg.6(2)(a) and 6(2)(e), more likely the latter is to be preferred as dealing more specifically and narrowly with the Appellant’s case.”

The relevant legislation

9. Regulation 6(2)(e) of the 1999 Regulations (as amended) reads as follows:

“(2) A decision under section 10 may be made on the Secretary of State’s or the Board’s own initiative or on an application made for the purpose on the basis that the decision to be superseded—

...

- (e) is a decision where—
- (i) the claimant has been awarded entitlement to a relevant benefit; and
 - (ii) subsequent to the first day of the period to which that entitlement relates, the claimant or a member of his family becomes entitled to ... another relevant benefit or an increase in the rate of another relevant benefit;”.

10. A “relevant benefit” is defined by section 8(3) of the Social Security Act 1998 to include a range of different benefits including both ESA and PIP (see section 8(3)(ba) and (baa) and see also section 39(1)).

11. Regulation 7(7)(a) then provides that:

“(7) A decision which is superseded in accordance with regulation 6(2)(e) or (ee) shall be superseded—

- (a) subject to sub-paragraph (b), from the date on which entitlement arises to the other relevant benefit referred to in regulation 6(2)(e)(ii) or (ee) or to an increase in the rate of that other relevant benefit;”.

The proceedings before the Upper Tribunal

12. Ms Stacey Kiley, who now acts for the Secretary of State in these proceedings before the Upper Tribunal, supports this appeal on the basis of the analysis advanced by Mr Howells for the Appellant. She invites me to set aside the Tribunal’s decision and make the decision the Tribunal should have made.

The Upper Tribunal’s analysis

13. I agree with both representatives that the Tribunal went wrong in law and so I allow the appeal and set aside the Tribunal’s decision. The Tribunal fell into the trap of thinking that supersessions of benefit decisions under regulation 6 were confined to cases where there had been a change of circumstances in general terms. But regulation 6(2) provides for a number of more specific situations.

14. There is no point in sending this case back for re-hearing as the facts are not in dispute. I therefore re-make the Tribunal’s decision under appeal. The Secretary of State’s ESA decision of 5 November 2013 should have been superseded under regulation 6(2)(e) of the 1999 Regulations. This was because that decision awarded the Appellant a relevant benefit (ESA) from 18 September 2013 so satisfying regulation 6(2)(e)(i). Further, the Appellant was awarded another relevant benefit (PIP) from 24 October 2013, i.e. from a date “subsequent to the first day of the period to which that entitlement relates” within the terms of regulation 6(2)(e)(ii).

15. So the decision that the First-tier Tribunal should have made, and which I now make, is therefore as follows:

“The Appellant’s appeal is allowed.

The Secretary of State’s decision of 13 February 2017 on the Appellant’s entitlement to Employment and Support Allowance (ESA) is revised for official error.

The Secretary of State should have superseded the decision of 5 November 2013 awarding ESA from 18 September 2013 so as to include entitlement to the ESA (IR) severe disability premium from 24 October 2013, the date that the Appellant’s PIP entitlement commenced.”

Conclusion

16. The decision of the First-tier Tribunal involved an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also re-make the tribunal's decision (section 12(2)(b)(ii)) in the terms set out above.

**Signed on the original
on 17 April 2018**

**Nicholas Wikeley
Judge of the Upper Tribunal**