THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal against the decision of the First-tier Tribunal given at Greenock on 10 April 2018 is refused. It is dismissed.

REASONS FOR DECISION

1. The claimant has appealed against the decision of the tribunal recorded at pages 105 and 106 which decided that she was not entitled to the Employment and Support Allowance. The First-tier Tribunal in a decision dated 9 July 2018 granted the claimant permission to appeal to the Upper Tribunal in respect of her first ground which as narrated by the First-tier Tribunal Judge was:

> "1. The Tribunal should have considered adjournment to obtain the evidence considered by the decision maker (and perhaps the Tribunal) in finding the Appellant entitled to PIP (AG v SSWP (ESA) [2017] UKUT 413 (AAC) refers)."

The claimant did not accept that limited grant of permission and made the subsequent application for permission to appeal to the Upper Tribunal on 3 August 2018. On 24 August 2018 I granted permission to appeal but limited it to the ground upon which the First-tier Tribunal was prepared to grant permission. I found the remaining grounds unarguable.

2. The Secretary of State supported the appeal and submitted:

> "9. CE/1674/2017 was cited in the claimant's appeal (and included in the bundle at pages 113-116), with a particular focus on paragraph 9. This explains that the tests for the mobility descriptors in PIP and ESA are not the same, and the tribunal is entitled to make its own decision on the benefit it is concerned with. However, as was quoted in the appeal, the tribunal should not ignore the possible relevance of an award of a different benefit, with the relevance most likely to be in any further evidence not before the tribunal, and how appropriate it is to adjourn in order to obtain it.

10. As previously mentioned, the apparent lack of mobility aids used by the claimant means that in my view, the criteria for assessing mobility in both PIP and ESA would have been very similar and would have focused on the distance she can walk. The PIP decision was made in 2017 so would have been based on recent evidence. The bulk of the evidence that was considered by the tribunal was the claimant's oral evidence, which it did not find to be credible. Other than that, there was a brief letter from the GP and a slip referring to a recent diagnosis of fibromyalgia. The tribunal did not accept the GP's evidence as it felt that it was unreliable. However, with both the claimant's evidence and the GP's evidence suggesting that she could not repeatedly mobilise more than 50 metres, and the claimant having been awarded the PIP mobility component as she could not move unaided more than 50 metres, I submit that the tribunal erred in law by not adjourning to obtain the PIP evidence as it would likely have been relevant. I believe it would have been appropriate to do so as the tribunal found the ESA evidence to not be credible, but the PIP decision makers must have found credible evidence to support what was in effect the same conclusion as what the ESA evidence suggested should be drawn. If the Upper Tribunal (UT) Judge agrees, I would invite them to set aside this decision and remit this case back to the FtT for a rehearing."

3. I do not consider there is any merit in the grounds of appeal or the support for them.

4. Before the tribunal the claimant was represented by the same representatives who appear in this appeal. These representatives are responsible representatives. They placed before the tribunal a submission recorded at pages 98 and 99 which sets out that the claimant receives a personal independence payment for mobilising no more than 50 metres. The representative also placed before the tribunal the decision notice of a tribunal sitting on 30 May 2017 which awarded the claimant both components of personal independence payment for the period 15 July 2016 to 14 July 2018. In the decision notice of that tribunal it is noted:

> "In reaching its decision the Tribunal placed particular reliance upon the evidence of the appellant."

At page 102 there is a medical report from the claimant's General Practitioner dated 8 March 2017 which was prior to the date upon which the award of personal independence payment was made by the tribunal of 30 May 2017. No motion was made before the tribunal, whose decision is appealed against in this appeal, for an adjournment of the hearing for the purpose of lodging the papers in the personal independence payment appeal heard on 30 May 2017. These papers would have been available to the claimant for the purposes of her appeal to the tribunal sitting on 30 May 2017. She appears to have been content to lodge the decision notice in that appeal along with the medical report to which I have referred. The first suggestion that the tribunal should have adjourned the hearing for the purposes of lodging the papers in the claim for personal independence payment only arose when her appeal had been refused.

5. I am not persuaded in these circumstances that it was necessary for the tribunal of its own volition to consider whether or not to adjourn the hearing before it. It was, in my view, entitled to proceed to hear the appeal in circumstances where the claimant was represented by a responsible representative, that representative had set out clearly in the written submission the case which was to be made on her behalf and had lodged such documents in respect of the personal independence payment which were considered by the representative to be relevant in the appeal. The tribunal were entitled to assume that the claimant's representative knew the case which was to be presented on her behalf and had lodged the documents considered to be necessary to support it. In these circumstances I do not consider that the tribunal erred in law along the lines submitted by both the claimant and the Secretary of State.

6. I do not consider that AG v SSWP (ESA) [2017] UKUT 413 (AAC) is of any assistance. That case was decided upon the acceptance of the Upper Tribunal Judge of a concession made by the Secretary of State as can be seen from paragraph 6 of the decision. As the Upper Tribunal Judge said:

> "That means, strictly speaking, that I do not need to say anything more about that the adjournment issue nor do I need to deal with any other errors of law that the tribunal may have made."

7. He did however choose to do so but accepts that anything he says is non-binding. In these circumstances I prefer to simply examine the circumstances that applied in this case. In doing so, as I have indicated, I am firmly of the view that the tribunal did not err in law by not considering adjournment. The Secretary of State's submission in paragraph 10 suggests that the PIP evidence would likely to have been relevant particularly having regard to its view in respect of the credibility of the claimant's evidence. However that is not an argument which I should be drawn into for it is simply speculation on the Secretary of State's part and the claimant's representative clearly made a conscious and informed decision as to what evidence in respect of the successful PIP claim ought to be presented to the tribunal for its consideration. In these circumstances the appeal is dismissed.

(Signed)
D J MAY QC
Judge of the Upper Tribunal
Date: 9 November 2018