

**Appeal No CPIP/580/2018**

**IN THE UPPER TRIBUNAL**

**ADMINISTRATIVE APPEALS CHAMBER**

**Before Upper Tribunal Judge Poynter**

## **DECISION**

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Wakefield on 13 November 2018 under reference SC264/18/00184 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

**I draw the attention of the parties to the facts that those directions are addressed to them as well as to the First-tier Tribunal, and that Directions 6 and 8 below contain time limits.**

## **DIRECTIONS**

### **To the First-tier Tribunal**

1. The First-tier Tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to act fairly to both parties—any other issues it may consider it appropriate to decide.
2. The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge, medical member, or disability-qualified member who made the decision I have set aside.
3. The appeal must not be heard until Direction 7 below has been satisfied or the time limit in Direction 8 below has expired, whichever is sooner.
4. Directions 6, 7 (as it relates to the provision of further written evidence) and 8 below may be varied by the First-tier Tribunal. The First-tier Tribunal may also vary Direction 3 above but only to reflect any variation in Directions 6-8 below.

### **To the Secretary of State for Work and Pensions**

5. The Secretary of State must make a new response to the First-tier Tribunal, setting out the relevant descriptors and explaining the legal basis on which the decision under appeal was made in terms that are sufficient to inform the claimant of the case he has to meet if he is to succeed in his appeal.
6. The First-tier Tribunal must *receive* that further response no later than no later than **one month** from the date on which this decision is *sent* to the parties.

### **To the claimant**

7. You may make a written reply to the Secretary of State's further response (see Direction 5 above). If there is any further written evidence that you would like the new tribunal to consider (and which relates to the period on or before 13 November 2017: see Direction 10 below), you must send it to the First-tier Tribunal with your written reply.
8. The First-tier Tribunal must *receive* your written reply no later than no later than **one month** from the date on which Secretary of State's further response is *sent* to you.
9. You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 13 November 2018 made a legal mistake, not because it has been accepted that you are entitled to personal independence payment. Whether or not you are entitled will now be decided by the new tribunal.
10. You are reminded that the new tribunal must consider whether the Secretary of State's decision was correct at the time it was made. That means:
  - (a) it cannot take into account changes in your circumstances that occurred after 13 November 2017; and
  - (b) it can only consider evidence from after that date if it casts light on how you were on or before 13 November 2017.

## REASONS FOR DECISION

### Introduction

1. The claimant appeals to the Upper Tribunal with my permission against the above decision of the First-tier Tribunal, which confirmed the Secretary of State's decision dated 13 November 2017. The Secretary of State decided that the claimant was not entitled to any rate of either component of personal independence payment ("PIP"). He had previously been entitled to the higher rate of the mobility component of disability living allowance.

2. I gave permission to appeal on two grounds. The first related to the First-tier Tribunal's failure to consider whether to call for the evidence on which the earlier award of disability living allowance had been based. However, I am informed by the Secretary of State's representative that that evidence has been routinely destroyed. Any error the Tribunal may have made on this point is therefore immaterial.

3. However, both parties are agreed that the second ground on which I gave permission should succeed; that the First-tier Tribunal's decision was made in error of law; and that the matter should be remitted to the First-tier Tribunal for reconsideration.

### The Secretary of State's response

4. When giving permission to appeal, I explained the issue in the following terms (I have taken the opportunity to correct some minor typographical errors):

#### "Inadequacy of the response

9. Has the Tribunal inadvertently infringed its duty to treat the claimant fairly by omitting to take steps to rectify the inadequacy of the Secretary of State's response?

10. Specifically, the response:

(a) Did not include a list of the PIP activities and descriptors (as to which see the decision of Upper Tribunal Judge Rowland in *LH v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 57 (AAC)).

(b) Contained only one express reference to the legal provisions on which the Secretary of State relied as authority for the propositions she was making (i.e., the reference to the Personal Independence Payment (Transitional Provisions) Regulations 2013 on page A).

(c) Did not include copies of any legal materials.

(d) Concluded with the general statement:

"The law for PIP can be found at: <http://www.legislation.gov.uk/ukdsi/2013/9780111532072/contents> and [www.dwp.gov.uk/publications/specialist-guides/law-volumes](http://www.dwp.gov.uk/publications/specialist-guides/law-volumes)"

that was, at best, misleading and, at worst, incorrect.

11. The former link was incorrect because it takes the reader to the **draft** Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations"), rather than to those Regulations as made, or as in force at the date of the decision under appeal. Apart from the general undesirability of referring claimants to draft legislation at a time when the actual legislation had been in force for nearly five years, the draft regulations did not include the important amendments made by the Social Security (Personal Independence Payment) (Amendment) Regulations 2013 (SI 2013/455), namely the introduction of regulation 4(2A).

12. The latter link is misleading because it diverts to the URL: <http://www.legislation.gov.uk/ukdsi/social%20security> which is the results page for a search for "UK Statutory Instruments with a subject starting with SOCIAL SECURITY". As at the date of this notice [*i.e.*, the notice giving permission to appeal] there are 2,433 such Statutory Instruments.

13. In my provisional judgment, that was grotesquely over-inclusive. How was an unrepresented claimant supposed to identify the set of Regulations that governed his entitlement—far less the individual regulations that were relevant—from among the more than 2000 sets of Regulations on offer to him?

14. Moreover, despite being over-inclusive, the latter link was also incomplete because it only referred to *regulations*. The response contained no reference to any Acts of Parliament. In particular, nothing in the response, would have alerted [the claimant] to the existence of the Welfare Reform Act 2012, which governs entitlement to PIP, or to the Social Security Act 1998 which governs the Secretary of State's powers to make decisions awarding benefit.

15. In this case, paragraph 5 of the written statement of reasons shows that the Tribunal applied the correct substantive law despite what I provisionally consider to be the inadequacy of the response.

16. However, the response is not just for the benefit of the Tribunal. It also serves the function of informing appellants of the criteria that were applied to reach the decision and, thereby, the matters that they have to establish if they are to win their appeals. In my provisional judgment, the response in this appeal did not properly explain either set of criteria. In those circumstances, and as presently advised, I cannot see how it would have been possible for [the claimant] properly to prepare his case."

5. In the light of the Secretary of State's support for the appeal, those paragraphs now represent my concluded views.

6. The Secretary of State's response to the appeal before the First-tier Tribunal was inadequate. And, to the extent that it referred the claimant to draft legislation that was not in the same terms as the legislation the Tribunal had to apply, the inadequacy was worse than in the *LH* case. That had the potential to cause unfairness because it denied the claimant information that he needed to prepare his case properly. If the claimant had opted for a decision without a hearing, it would have been necessary for the First-tier Tribunal to direct the Secretary of State to correct the response. As this appeal in fact went to an oral hearing, the very least the Tribunal needed to do was to draw the point to the attention of the claimant, seek his comments and provide him with any information for which he might reasonably have asked about the descriptors and the way in which entitlement to PIP is assessed. An adjournment might then have been necessary, although not inevitably so if the claimant had then been willing for the hearing to proceed.

7. I can see no indication that the Tribunal in this case did that. It may well have been unaware of the point itself.

8. I therefore conclude that there has been an inadvertent breach of the Tribunal's duty to act fairly towards the claimant. That is an error of law and, as I cannot say that it would not have affected the outcome, I set the Tribunal's decision aside and remit the case for reconsideration in accordance with the directions on pages 1 and 2 above.

9. Before concluding, I should say that the Secretary of State's representative has provided me with a template which I am told is now in use when preparing responses to the First-tier Tribunal in PIP appeals. That template refers to the law on which the decision has been based and lists the descriptors. I hope, therefore, that the error that has occurred in this case will not be repeated in future.

10. However, I will arrange for this decision to be made available on the website of the Administrative Appeals Chamber, because it may still be of relevance in appeals that are already in the system.

(Signed on the original)

Richard Poynter  
Judge of the Upper Tribunal

25 June 2019