IN THE UPPER TRIBUNAL **Case No.** CPIP/2567/2018
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made at Northampton on 05 June 2018) involved the making of an error of law, it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted tribunal panel.

DIRECTIONS FOR THE REHEARING

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 25 January 2017.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: *R(DLA)2&3/01*.

D. The parties should send to the relevant HMCTS office within 1 month of the issuing of this decision, any further evidence upon which they wish to rely. The Secretary of State must, in particular, send to the above office all medical evidence which was considered when the claimant was most recently awarded disability living allowance or, if such material is no longer available, must provide a written explanation confirming this and explaining why.

E. The presumption shall be that the appeal will be considered by way of a conventional face-to-face oral hearing at whichever hearing centre is the closest to the claimant's home. However, if the claimant wishes the tribunal to consider directing a telephone hearing, then she must write to the above office within 1 month of the issuing of this decision, to make her request and to provide reasons why she feels unable (even if accompanied) to attend at a hearing centre. It will then be for the tribunal to decide whether to direct a telephone hearing or not. But it need not consider holding one unless one is requested.

F. These directions may be replaced, supplemented or amended at any time by later directions made by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (the tribunal) which it made on 05 June 2018. For the reasons set out below, I have decided to allow the claimant's appeal to the Upper Tribunal, to set aside the decision of the tribunal of 05 June 2018 and to remit for a rehearing of the appeal before a differently constituted tribunal panel.

2. This decision is relatively brief because the parties are in agreement that the tribunal erred in law. Accordingly, it has not been necessary for me to set out, in very much detail, the relevant history or to analyse all of the arguments which the claimant has sought to raise. Nevertheless, this decision informs the parties why I have made the decision I have and why I have decided to dispose of the appeal in the way that I have.

3. The claimant was previously in receipt of the lower rate of the mobility component and the lowest rate of the care component of disability living allowance (DLA). I do not know when DLA was last awarded to the claimant because the Secretary of State did not give that information to the tribunal. But anyway, as a result of DLA being replaced by personal independence payments (PIP) it became necessary for her to make a claim for PIP. She did so on 21 January 2017.

4. As part of the assessment process the claimant completed a claimant questionnaire and attended a 'face-to-face assessment' with a health professional. That health professional prepared a report of 24 June 2017. On 06 July 2017 a decision- maker acting on behalf of the Secretary of State decided that entitlement to DLA would end on 08 August 2017 and that the claimant was not entitled to PIP from 25 January 2017. That was communicated to the claimant by letter of 08 July 2017. She sought a mandatory reconsideration but that did not result in any alteration to the decision. The claimant has an appointee and the appointee appealed to the tribunal on her behalf. Neither the claimant nor the appointee, nor indeed the Secretary of State, sought an oral hearing (I think the appointee now accepts that not requesting such a hearing was unwise) and so, unsurprisingly, the tribunal decided the appeal on the papers. In fact, it allowed the appeal, deciding that she was entitled to a personal independence payment comprising the standard rate of the mobility component only, from 09 August 2017 to 08 August 2020. But the claimant and/or appointee thought a greater award should have been made and asked for permission to appeal to the Upper Tribunal.

5. After hearing from the claimant's appointee at an oral hearing of the application, I granted permission to appeal on a single basis whilst expressly refusing permission on all other grounds. I explained all aspects of that decision in a written document of 04 June 2019 which was sent to the parties on 17 June 2019. There has been no subsequent challenge to my decision to refuse permission with respect to the grounds specifically advanced by the claimant and appointee. So, I shall say no more about that. I granted permission on a single discrete issue which I explained in this way:

> '7. There is, however, one single remaining point of possible concern. The F-tT, in allowing the appeal to the extent that it did, decided that the claimant was entitled to

> 10 points under mobility descriptor 1(d) because of an inability to follow the route of an unfamiliar journey without another person. If it had also decided she could not follow the route of a familiar journey without another person it would have awarded 12 points under mobility descriptor 1(f) and that would have established entitlement to the enhanced rate of the mobility component of PIP rather than the standard rate. In explaining why it was not doing that the F-tT expressed the view that the evidence, overall, suggested an ability on the part of the claimant to cope 'with a short familiar journey' on her own. But I wonder whether the F-tT was entitled to confine its enquiry to short familiar journeys and then base its decision as to the applicable descriptor within mobility activity 1 on its conclusion as to that. After all, a familiar journey is not necessarily a short one and it may be that some persons can manage some short familiar journeys but cannot manage lengthier familiar ones. Possibly this may be viewed as Upper Tribunal pedantry but, on the other hand, in *SSWP v IV (PIP)* 2016 UKUT420 (AAC) Upper Tribunal Judge Jacobs suggested that a journey envisaged under the PIP mobility component is not necessarily a local one. That is so notwithstanding an indication in the PIP Assessment Guide that only local journeys should be considered. So, it might be that the F-tT was required to undertake a more holistic consideration encompassing an ability or inability to make various types of familiar journeys and then reach an overall conclusion once it had done that. But possibly another way of looking at it might be to say that so long as the claimant is able to undertake any familiar journey (be it short or long) that is sufficient to preclude entitlement under mobility activity 1(f). But I am satisfied the point at least merits further consideration. So, I have granted permission to appeal on that single basis.'

6. I issued directions facilitating written submissions from the parties. Mr R J Whitaker has provided a characteristically helpful submission on behalf of the Secretary of State. He says that there is no requirement within the wording of the relevant descriptors themselves for a familiar or unfamiliar journey to be a short one. He agrees that a familiar journey can be of a length other than short. He says that the sort of holistic approach which I suggested might be appropriate when granting permission to appeal is, in fact, what is required. He accepts that the tribunal did not undertake that sort of holistic assessment. In the circumstances, he urges me to conclude it erred in law and he urges me to set aside its decision. He also invites me to remit because further findings, which should be made by a tribunal with a range of expertise available to it through the composition of its panel, are required.

7. In reply, the claimant and her appointee have made some factual assertions regarding the difficulty she says she experiences in venturing out of doors. Indeed she asserts that since the age of 13 or 14 years she has '*never left the house on my own'*. She appears to seek a hearing of the appeal before the Upper Tribunal on the basis that that will be attended by her appointee who, as her partner as well, is in a position to give relevant evidence regarding her difficulties. As I read it though, she does not actually preclude the possibility of attending a hearing herself. Neither the claimant nor the appointee expressly address Mr Whitaker's suggestion of remittal.

8. Since the claimant /appointee have requested it, it is necessary for me to consider whether to hold an oral hearing of the appeal before the Upper Tribunal. In so doing I have reminded myself of the content of Rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Upper Tribunal is primarily concerned with issues of law and the First-tier Tribunal is primarily concerned with issues of fact. There is effective agreement between the parties that the tribunal has erred in law although there may not necessarily be agreement as to the precise basis for that conclusion. But in those circumstances it seems to me quite obvious that there would be nothing to be gained by my holding a hearing of the appeal in the Upper Tribunal.

Where further factual findings are required it is, generally speaking, much better to have a hearing before the tribunal which is, after all, the expert fact-finding body in the field and which does have a range of expertise available to it through the composition of its panel. So, I have decided not to hold a hearing of the appeal. I now go on to decide the appeal.

9. I have already explained the basis for my limited grant of permission and have set out what Mr Whitaker has had to say about the issues on behalf of the Secretary of State.

10. The tribunal's statement of reasons for decision (statement of reasons) is, and I say this without condescension, flawless apart from the one discrete issue I identified when granting permission. But it did appear to limit itself, with respect to the claimant's ability to manage familiar journeys, to a consideration as to whether she could manage short ones. Mr Whitaker says that that is to impose a limitation as to its enquiry which is not justified by the terms of the legislation.

11. In *SSWP v IV*, cited above, it was stressed that what was important in the context of an evaluation of an ability to follow the route of a journey, was not the destination but the route. It was also said that the focus ought to be upon the effect of the mental condition a claimant suffers from in following a route. It is explained that the test is general in nature, without reference to the individual characteristics of the route whether by destination or any other factor (see paragraph 26).

12. I would respectfully agree with the above. But even in focusing upon the impact of following a route or attempting to follow a route will have upon a claimant, different issues may arise on lengthier journeys than would do on short ones. It might be that in certain circumstances certain claimants may find any adverse impact upon journeying outdoors will build up over time so that a journey of some length, even on a familiar route, might be precluded where a shorter one would not be. It would be wrong, though, to focus overly on the length of a journey. Doing so would probably generate difficult debate as to what might constitute a long journey and what might constitute a short one. So, what is required is a general overall assessment of a claimant's ability to follow the route of a (in this case) familiar journey which does not focus unduly upon the length be it long or short. But here the tribunal did appear to confine itself to short journeys and having satisfied itself that the claimant could manage such a journey, decided that the requirements of mobility descriptor 1(f) were not met. That approach was insufficiently holistic and was not open to the tribunal as Mr Whitaker accepts. So, in the circumstances I have, with some regret given that all other issues raised by the appeal have been fully and carefully considered, decided that the tribunal's decision has to be set aside.

13. I have already explained why I am not holding a hearing of the appeal in the Upper Tribunal. I agree with Mr Whitaker that there is a need for further fact-finding. I have, therefore, concluded that remittal is the appropriate course.

14. The claimant will note that, in my directions, I have facilitated the possibility of her asking the tribunal to hold a hearing by telephone. I would stress, though, that a conventional face-to-face hearing is very much to be preferred. Of course, whilst travelling to a hearing centre may be an ordeal for her, she may be accompanied in

making that journey. There is no substitute for a claimant giving direct oral evidence to a tribunal but if she really wishes to seek a telephone hearing or even to simply ask her appointee to attend a hearing on her behalf, then so be it.

15. The Secretary of State will note that I have directed production of the medical evidence relied upon when DLA was most recently awarded to the claimant. I would stress, as indeed was done by the Upper Tribunal in *NW v SSWP (PIP)* (2019) UKUT150(AAC) the importance of promptly complying with such directions.

16. Finally, the claimant should note that the immediate effect of my having set aside the tribunal's decision is that the terms of the Secretary of State's original decision to the effect that there is no entitlement to PIP are restored. That then will represent the tribunal's starting point (though of course not necessarily its end point) when this appeal is reheard.

17. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **27 August 2019**