IN THE UPPER TRIBUNAL **Case No.** CPIP/1262/2018
ADMINISTRATIVE APPEALS CHAMBER

Before E A L BANO

Decision: My decision is that the decision of the tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and re-make the tribunal's decision by substituting my own decision that the claimant is entitled to the standard rate of the daily living component of personal independence payment from 31 May 2016 to 14 January 2019 and is not entitled to the mobility component at any rate from 31 May 2016.

REASONS FOR DECISION

1. The claimant is a woman now aged 42 with, among other conditions, back and leg pain, together with depression. At some date which is not apparent from the papers she was awarded the standard rate of the daily living component and the standard rate of the mobility component of personal independence payment (PIP) for a fixed period from 27 June 2013 to 14 January 2017. However, on 16 January 2016 she was notified of a 'planned review' of her award and was asked to complete a 'how your disability affects you' form, which she returned on 10 February 2016.

2. On 16 May 2016 the claimant attended a face-to-face consultation with a healthcare professional at which she was assessed as scoring no points for PIP daily living activities and 4 points for mobility descriptor 2(b). On the basis of that assessment, a decision was made on 31 May 2016 superseding and removing the claimant's award of benefit with effect from the date of the supersession decision. The decision was maintained on mandatory reconsideration on 3 September 2016 and the claimant appealed against it on 8 February 2017.

3. At a hearing on 1 February 2018 the tribunal decided that there were no grounds for superseding the decision by which the claimant had been awarded benefit, and restored the award of both the daily living and mobility components of PIP which would have expired on 14 January 2017 (i.e. before the tribunal hearing) if the review had not taken place. The tribunal then proceeded to make findings of fact which resulted in an award of 2 points for each of PIP daily living descriptors 1(b), 4(b) 5(b) and 6(b), and 4 points for mobility descriptor 2(b). On the basis of those findings, the tribunal purportedly made an award of the daily living component of PIP at the standard rate for a period from 15 January 2017 (the day after the restored award expired) until 14 January 2019. Because the claimant had scored only 4 points for mobility activities, no award of the mobility component was made.

4. In his grounds of appeal, submitted on 28 March 2018, the claimant's representative challenged the tribunal's power to consider the claimant's entitlement to benefit in respect of any period after the expiry date of the original award and submitted that the tribunal had in any case erred in failing to alert the claimant to the fact that in considering that issue it was dealing with the claimant's entitlement to benefit at a different period of time to that which was relevant to the supersession decision. A district tribunal judge gave permission to appeal on 13 April 2018, expressing the view that the supersession decision which was the subject of the

appeal could in effect be considered both as a supersession decision and as a decision on a new claim.

5. In his original submission on the appeal, made in response to directions given by Judge Poynter on 13 June 2018, the Secretary of State's representative submitted on the basis of the decision of Judge Rowley in *CPIP/2224/2016* that on an appeal against a supersession decision the tribunal had been entitled to extend the period of the original award, and had therefore had jurisdiction to determine what benefit the claimant was entitled to after the expiry date of the original award. However, in a direction given on 20 September 2018 Judge Ovey queried whether the tribunal had power to vary the original award by removing the mobility component with effect from 15 January 2017 (the day after the expiry date of the original award), rather than 31 May 2016) (the date of the supersession decision under appeal). Judge Ovey also directed submissions on her proposal to substitute for the tribunal's decision a decision that the claimant was entitled to the daily living component of PIP at the standard rate from 31 May 2016 to 14 January 2019, but not entitled to the mobility component at any rate from 31 May 2016. In a further submission dated 3 October 2018 the Secretary of State's representative accepted the point made by Judge Ovey in relation to the date from which any variation of the original award could take effect and agreed to her proposal for the disposal of the appeal. However, in a submission in reply dated 5 December 2018 the claimant's representative has submitted that the case should be remitted to a new tribunal to give the claimant an opportunity of adducing evidence in respect of her medical condition in relation to any period covered by a new award.

6. The difficulties which have arisen in this case with regard to the tribunal's powers to make an award of benefit for any period after the expiry date of the claimant's original award seem to me to have come about because of what I consider was a mistaken approach taken by the tribunal in applying the relevant supersession provisions. The tribunal held (paragraphs 9-12 of the statement of reasons):

> "Although the Respondent seeks to rely on S26(1) [a reference to regulation 26 of the Universal Credit etc. (Decisions and Appeals) Regulations 2013] they must still be able to establish some reason for the early termination of the award beyond a change in opinion.
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> No reason is given in the Respondent's submission beyond S26(1), this is inadequate. [The claimant] is entitled to be told whether she is considered to be improved or whether the original decisions regarded as wrong.
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> In the absence of a Presenting Officer and any explanation the Tribunal found the Respondent had failed to make out the supersession grounds.
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> The Tribunal reinstated the original award to 14.01.2017."

7. That approach was in my judgment in error of law. So called 'planned reviews' of PIP awards are authorised by regulation 26(1)(a) of the Universal Credit (Decisions and Appeals) Regulations 2013 ("the 2013 Regulations") in all cases where the Secretary of State has "received medical evidence from a healthcare professional or other person approved by the Secretary of State" since the original awarding decision

was made. Regulation 26(1) stands apart from the other supersession grounds now found in the 2013 Regulations and, once the conditions entitling the Secretary of State to carry out a review under regulation 26 have been satisfied, it is not necessary to establish a change of circumstances under regulation 23 or any of the grounds for supersession permitted by regulation 24 of the 2013 Regulations in order to justify a supersession (although that does not of course relieve tribunals in regulation 26 cases from the need to give an adequate explanation for their decision in those cases where they decide to depart from an earlier award). Because the supersession decision in such cases is not on the ground of a change of circumstances, the effective date of the decision is not governed by Part 2 of Schedule 1 to the 2013 Regulations, and under section 10(5) of the Social Security Act 1998 the 'effective date' in regulation 26 cases is therefore always the date of the supersession decision itself.

8. In accordance with the leading case of *R(IB) 2/04*, a tribunal dealing with an appeal against a supersession decision made under regulation 26(1)(a) of the 2013 Regulations can exercise all the powers available to the Secretary of State under that provision, including the power to reconsider the period of an award-see paragraph 33 of *CPIP/2224/2016.* The tribunal can only take into account circumstances down to the date of the supersession decision which is the subject of the appeal-see paragraphs 55 and 191 of *R(IB) 2/04*, and by virtue of section 10(5) of the Social Security Act 1998 the only date on which any altered award can take effect is the date on which the supersession decision under appeal was made. Subject to those constraints, the powers of a tribunal on an appeal against a regulation 26(1)(a) supersession decision are not fettered in any way by the terms of the decision which has been superseded and it is open to the tribunal to make whatever award of benefit it considers to be appropriate on the basis of the facts as it finds them to be down to the date of the supersession decision. If the original award was for a fixed period which has come to an end prior to the determination of the appeal and the claimant has not made a new claim, in my view there is nothing to prevent a tribunal from making a supersession decision awarding whatever benefit it considers the claimant to be entitled to for a period extending beyond the expiry date of the original award.

9. The tribunal in this case found that the claimant was entitled to the daily living component of PIP at the standard rate but not the mobility component at the date when the previous award would have expired, which was about six months after the date of the supersession decision. However, it is apparent from the statement of reasons that the tribunal regarded their assessment of the claimant's walking ability as more accurate than the assessment which had led to the earlier award of mobility component because of the fuller information available to the tribunal. As Judge Ovey pointed out, there has been no challenge to the adequacy of the tribunal's findings in relation to mobility, and I can find no reason to suppose that there was any significant change in the claimant's ability to move around between the date of the supersession decision and the expiry date of the original award. I am therefore satisfied that the tribunal's findings of fact in relation to mobility component as at the original expiry date of the award apply also as at the date of the supersession decision.

10. The claimant's representative's submission that the case should be remitted for rehearing to allow the claimant an opportunity of adducing evidence relating to her medical condition in relation to any future period of entitlement is based on the

premise that the case involves both supersession issues and issues of the claimant's entitlement on a new claim. However, as I have tried to show, the case is concerned only with the tribunal's powers of supersession. The disposal of the appeal suggested by Judge Ovey seems to me to be the correct one on the basis of the findings of fact made by the tribunal and I therefore exercise my powers under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 to make that order accordingly.

(Signed) **E A L BANO**
Judge of the Upper Tribunal

(Dated) **3 January 2019**