THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CPIP/2110/2019
[2020] UKUT 178 (AAC)
BD V SECRETARY OF STATE FOR WORK AND PENSIONS

Decided without a hearing

Representatives

Claimant	Bristol Law Centre
Secretary of State	DMA Leeds

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference:	SC200/18/00765
Decision date:	7 February 2019
Venue:	Plymouth

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

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. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment at the time of the Secretary of State's supersession on 19 May 2018.

D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act

1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. The representatives for both the Secretary of State and the claimant are agreed that the First-tier Tribunal misdirected itself on the law in a manner that may have affected its approach to the case and therefore the outcome. It takes a complex set of reasoning to identify the flaw underlying the tribunal's approach, involving an analysis of the nature of supersession and of the relationship between regulations governing entitlement and those governing decisions and appeals.

A. History and background

2. The claimant made a claim for a personal independence payment on 7 January 2016. The Secretary of State refused the claim but the First-tier Tribunal made an award on 21 November 2016, consisting of the daily living component at the standard rate for the inclusive period from 7 January 2016 to 6 January 2019.

3. The Secretary of State sent the claimant a disability questionnaire, which he signed in January 2018. He was then interviewed and examined by a health professional on 10 April 2018, who provided a report. On the basis of that report, the Secretary of State decided that the claimant was no longer entitled to a personal independence payment from and including 19 May 2018. The only difference between this decision and that of the tribunal in 2016 was that the claimant did not score points for engaging with other people face to face. On appeal, the tribunal restored the claimant's entitlement to the daily living component at the standard rate until 18 May 2023.

B. How the tribunal went wrong in law

4. The tribunal's written reasons begin by outlining the Secretary of State's approach to the case, which relied on regulation 11 of the Social Security (Personal Independence Payment) Regulations 2013 (SI No 377) and regulation 26 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI No 381). I call these the Entitlement Regulations and the Decisions and Appeals Regulations from now on.

5. The judge then recorded that those provisions did not apply:

> 3. However in our judgement where the existing award is a Tribunal decision the position is different. There is no power that enables a supersession by a first instance decision maker of a Tribunal decision by simply relying on a new medical report. The law in Regulations 23 and 31 of

> the Universal Credit etc Regs requires the grounds for supersession to be a change of circumstances or ignorance of a material fact or an error of law.
>
> 4. So we had already decided from the outset that the appellant's appeal was bound to succeed (as a matter of law) at least to the extent of setting aside the decision [and] reinstating the award until it expired on 6 January 2019. (A date that we had already passed.)

6. The Secretary of State's representative supported the appeal, saying:

> 7. In my submission, the tribunal has misdirected itself as to the scope of regulation 26(1)(a) of the Decisions and Appeals Regulations and thereby erred in law. Had the tribunal not wrongly framed its examination of the case as a search for a change of circumstances, it is not impossible that it would have reached a different conclusion about the claimant's entitlement. I submit, therefore, that its error cannot be dismissed as immaterial. That is, it cannot be said with any confidence that the tribunal 'would have been bound to reach the same conclusion notwithstanding the error of law' (*Detamu v Secretary of State for the Home Department* [2006] EWCA Civ 604 at [14]).

7. I accept that argument and now have to explain why.

C. Why the tribunal went wrong in law

8. There is, as far as I know, nothing new in what I am about to say. Why, then, is it necessary to make these points? Why not just refer to other decisions of the Upper Tribunal like that of Upper Tribunal Judge Wright in *PM v Secretary of State for Work and Pensions* [2017] UKUT 37 (AAC)? The answer is that this case shows a misunderstanding at a very basic level of some fundamental principles on which social security operates, such that another attempt at an explanation may have some effect in supporting those other decisions.

The Welfare Reform Act 2012 controls the conditions of entitlement

9. The personal independence payment was introduced by section 77 of the Welfare Reform Act 2012. This Act contains some basic provisions on entitlement, but like much modern legislation, authorises more detailed provision to be made by regulations. Those Regulations are the Entitlement Regulations.

Other legislation controls adjudication

10. As part of the general social security system, the Social Security Administration Act 1992 and Social Security Act 1998 govern claims and payments and decision-making and appeals. Like the 2012 Act, these Acts authorise more detailed provision to be made by regulations. The Regulations relevant to this case are the Decisions and Appeals Regulations. The Secretary of

State relied on regulation 26. Here it is in so far as it relates to a personal independence payment:

> **26 Medical evidence and limited capability for work etc**
>
> (1) An employment and support allowance decision, a personal independence payment decision or universal credit decision may be superseded where, since the decision was made, the Secretary of State has—
>
> (a) received medical evidence from a healthcare professional or other person approved by the Secretary of State; …
>
> (2) The decision awarding personal independence payment may be superseded where there has been a negative determination.
>
> (3) In this regulation—
>
> …
>
> 'healthcare professional' means—
>
> (a) a registered medical practitioner;
>
> (b) a registered nurse; or
>
> (c) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under section 60 (regulation of health professions, social workers, other care workers etc.) of the Health Act 1999.

11. From the start of the modern social security system in 1948, the legislation has provided for decisions to be changed but only in specified circumstances. Under the current legislation, introduced by the Social Security Act 1998, those circumstances are called grounds for revision and grounds for supersession. These grounds provide a framework for decision-makers and a protection for claimants against arbitrary changes to decision. Initially in 1948, they provided for decision-makers to correct errors in the decision as made and to update a decision for change of circumstances. Since then, the grounds have been expanded to take account of other situations, such as the availability of further medical evidence.

The relationship between the conditions of entitlement and adjudication

12. It is important to understand the difference between conditions of entitlement and decision-making and appeals. A claimant's entitlement to a personal independence payment is governed by the conditions of entitlement contained in the 2012 Act and the Entitlement Regulations made under it. A decision on entitlement, whether the initial decision on a claim, or a later one on revision or supersession, has to be made on the basis of evidence relevant to those conditions.

Regulation 11 of the Entitlement Regulations is consistent with the analysis so far

13. The Secretary of State also relied on regulation 11 of the Entitlement Regulations, which may appear contrary to what I have just said. It provides:

> **11 Re-determination of ability to carry out activities**
>
> Where it has been determined that C has limited ability or severely limited ability to carry out either or both daily living activities or mobility activities, the Secretary of State may, for any reason and at any time, determine afresh in accordance with regulation 4 whether C continues to have such limited ability or severely limited ability.

Properly understood, there is nothing inconsistent between what I have said and what this regulation provides.

14. First, there is what the regulation says. By its terms, it deals only with a reassessment of the claimant's ability or inability to carry out activities, which is consistent with its location in Part 2 of the Regulations, which deals with assessment.

15. Second, a person's ability or inability to carry out activities is not the only factor relevant to entitlement to a personal independence payment, so the determination under regulation 11 would not be conclusive. There are also conditions that relate to residence and presence, as well as restrictions on when a personal independence payment is payable to claimants in hospitals, care homes or prison.

16. Third, despite the words 'for any reason and at any time,' the determination of the claimant's ability to carry out the relevant activities has to be made by reference to the specific activities and their descriptors set out in Schedule 1 and to the other requirements set out in regulations 2 to 7 and 12 to 15. Regulation 11 does not purport to override those provisions.

17. Fourth, there is nothing in the Entitlement Regulations that governs the making of a decision, whether by the Secretary of State or a tribunal. That is not surprising, because there is nothing in the 2012 Act that authorises such a provision. It is true that regulation 27 deals with the revision and supersession of an award after the person has reach the 'relevant age'. But it only deals with the provision that may be made; it does not deal with the decision-making process itself.

18. Fifth, there is nothing anywhere in any legislation that applies to personal independence payment, whether relating to entitlement or to decision-making and appeals, that affects the evidence that may be relevant or the manner in which it has to be assessed. It may appear that section 12(8)(b) of the 1998 Act is an exception in that it prevents a tribunal from relying on evidence that cannot be related to the circumstances obtaining at the time of the decision under appeal: *R(DLA) 2 and 3/01*. But this merely reflects section 8 of that Act, which provides that a claim for benefit does not subsist once a decision has been made

on it, so that any change of circumstances after that time can only found entitlement on a new claim.

19. The result of these points is this. The outcome of regulation 11 will not be a change to the claimant's entitlement to benefit. That change can only be brought about by a decision made on revision or supersession. The redetermination may provide evidence that will be taken into account as part of the revision or supersession, and it may provide one of the building blocks of the decision on entitlement that will be made, but of itself it will not and cannot be a new entitlement decision.

Supersession

20. Decisions and appeals relating to entitlement are not governed and undertaken by or under the 2012 Act. They are controlled by the 1992 and 1998 Acts and the Decisions and Appeals Regulations that were made under them. They are the means by which the claimant's entitlement is decided, the means by which the outcome of the assessment of the claimant's abilities, together with the other conditions of entitlement, are given a legal effect that is binding on the both the claimant and the Secretary of State and subject to an appeal to the First-tier Tribunal. The process results in what is sometimes called for convenience the outcome decision. The Regulations do not contain any provision about entitlement and would not be valid if they did, because that kind of provision would be outside the authority of the enabling powers under which they were made. In particular, they do not contain, and could not contain, any provision about what evidence is relevant and how the evidence as a whole is to be assessed.

21. Some of the grounds for revision and supersession identify factors that may lead to a change in the claimant's entitlement. One is that the decision was wrong as made, either in fact or law. Another is that there has been a change of circumstances. But not all of the grounds are like that. Regulation 26 merely refers to the availability of new evidence. It says nothing about the content of that evidence, which may indicate that the claimant's entitlement should be increased, reduced or stay the same. Nor does it explain the significance that is to be attached to that evidence in the context of the evidence as a whole. It links the report produced as part of the reassessment under regulation 11 to the decision-making process on supersession, allowing the decision-maker to give effect to the outcome of the reassessment.

Justifying a change in entitlement

22. The grounds for revision and supersession are written from the perspective of the Secretary of State, but they have to be applied by the First-tier Tribunal on appeal. It is that tribunal's decision that carries the right of appeal for error of law to the Upper Tribunal. The Upper Tribunal has no power to change the conditions of entitlement or to introduce new decision or appeal procedures. What

it can do, though, is to control the way that the First-tier Tribunal makes and explains its decisions. By requiring that the tribunal provide an adequate explanation for its decision, the Upper Tribunal is able to impose a requirement for an adequate explanation of why the claimant's entitlement was changed. That is what the Commissioner did in *R(M) 1/96*. That case concerned a renewal of an award of mobility allowance, but the principle was subsequently applied to 'renewal' claims for disability living allowance. Personal independence payment does not operate through 'renewal' claims, but the principle is equally applicable to supersessions in the course of an award.

23. Although it is concerned only with adequacy in the First-tier Tribunal's reasoning, *R(M) 1/96* has an impact on the decision-making by ensuring that there is a measure of consistency over time in the determination of the claimant's entitlement. I say 'a measure', because it only operates in cases that come before a tribunal and because the only requirement is for there to be a rational explanation. There is also the possibility, if the case comes before the Upper Tribunal, that the Upper Tribunal Judge will not personally agree with the tribunal's reasoning, but that of itself will not be an error of law. It is precisely at this point that the limits of the Upper Tribunal's jurisdiction matter; this is where the line is drawn between an appeal on error and an appeal on error of law.

It does not matter that the decision awarding a personal independence payment had been made by the First-tier Tribunal rather than the Secretary of State

24. The starting point is section 10 of the 1998 Act. Section 10(1) provides that 'any decision of the Secretary of State … and … any decision … of the First-tier Tribunal … may be superseded by a decision of the Secretary of State'. This is subject to section 10(3):

> (3) Regulations may prescribe the cases and circumstances in which … a decision may be made under this section.

The grounds for supersession are set out in regulations 22 to 31 of the Decisions and Appeals Regulations. Regulation 22 provides that 'the Secretary of State may make a decision under section 10 … of the 1998 Act in any of the cases and circumstances set out in this Chapter'. Some of the regulations apply to any decision. So regulation 23(1)(a) provides that 'the Secretary of State may supersede a decision in respect of which … there has been a relevant change of circumstances since the decision to be superseded had effect'. Other regulations only apply to decisions made by the Secretary of State. So regulation 24(a) provides that 'A decision of the Secretary of State … may be superseded where … the decision was wrong in law, or was made in ignorance of, or was based on, a mistake as to, some material fact'. In contrast, regulation 31(a) provides that 'the Secretary of State may superseded a decision of the First-tier Tribunal … which was made in ignorance of, or was based on, a mistake as to, some material fact'.

25. The key to understanding these regulations is that they authorise the circumstances in which a decision *may* be superseded under section 10. That is all that section 10(3) enables and it is what regulation 22 says. Regulations cannot provide for cases in which a decision may not be superseded. A supersession is permissible in any case or circumstances set out in regulations. Nothing else is allowed.

26. This is how that works out for the supersession of decisions made by the First-tier Tribunal. There is no power to supersede a decision of the tribunal for error of law. Error conveys that the tribunal got the law wrong at the time. The remedy for error of law is an appeal to the Upper Tribunal. The power to supersede for error of law is limited to decisions of the Secretary of State. The position is different if the law changes. That is a change of circumstances and a ground for supersession under regulation 23(1)(a), which applies regardless of whether the decision being superseded was made by the Secretary of State or a tribunal. There is power to supersede a tribunal's decision for error of fact under regulation 31. That regulation is limited to tribunals, because regulation 24 already provides grounds for superseding decisions made by the Secretary of State for error of fact.

27. Putting the same point differently, regulation 31 does not provide that a decision of a tribunal may *only* be superseded for error of fact. That would mean that a decision made by a tribunal could never be superseded on any other ground even if (a) there had been a change of circumstances or (b) the law had changed. That would be astonishing and it is not what the Regulations provide, once it is understood that what they do is to authorise, not prohibit.

28. It is permissible for the Secretary of State to supersede any decision that falls within any ground to the extent allowed by it. Regulation 26 authorises a supersession once a new report has been received from a healthcare professional. There is no need to show a change of circumstances, which is a ground under regulation 23, or an error of fact, which is a ground under regulation 31. What it does, as I have explained, is to allow a fresh assessment of the claimant's entitlement on the basis of the evidence then available. That evidence is not limited to the report that is the formal legal basis authorising a supersession. It includes all the evidence available to the decision-maker, whatever the nature or the source. In practical terms, this may not be very different from identifying a change of circumstances or finding an error of fact. But the approach is different. What regulation 26 requires is a fresh consideration of the evidence, including the new report, a process undertaken under regulation 11. That difference may be narrower for a tribunal that has to provide adequate reasons for changing entitlement, but there is a difference nonetheless and it is essential that tribunals approach the case on the correct understanding of the law.

Pulling these threads together

29. The tribunal said that nothing 'enables a supersession by a first instance decision-maker of a Tribunal decision by simply relying on a new medical report.' That is wrong on two levels. First, regulation 26 does not authorise a supersession simply by relying on a new report. A report may be the trigger that allows a supersession, but the supersession must be based on more than the report. The tribunal misunderstood regulation 11 and regulation 26, their respective roles and how they operate together, and the significance of the new medical report in that process. Second, regulation 31 does not limit the Secretary of State's power to supersede on any other permissible ground. A decision-maker may rely on regulation 26 in the way that I have described its proper application. The tribunal misunderstood the nature of the grounds for supersession, which led it to misunderstand the potential for a clash between those provisions and regulation 31.

30. That, in short, is why I accept the parties' agreement that the tribunal misdirected itself in law.

Signed on original
on 2 June 2020

Edward Jacobs
Upper Tribunal Judge