IN THE UPPER TRIBUNAL **Appeal No.** CPIP/401/2020
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

BH

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Hemingway

Decision date: 30 November 2020
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 3 December 2019 under number SC246/18/03009 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS FOR THE RE-HEARING

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **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 under section 12(8)(a) of the Social Security Act 2008, any other issues that merit consideration.**

3. **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 and 3/01*.**

4. **The tribunal panel which reconsiders the case shall not include any of the panel members who considered the case on 3 December 2019.**

5. **These Directions may be supplemented, amended or replaced by later directions made by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

REASONS FOR DECISION

1. The claimant had been in receipt of the higher rate of the mobility component and the highest rate of the care component of disability living allowance (DLA). However, in consequence of the phasing out of that benefit for adult claimants, it became necessary for him to apply for a personal independence payment (PIP) which he did. But on 8 September 2018 the Secretary of State concluded that he did not qualify for any points in relation to either the daily living component or the mobility component of PIP and was not, therefore, entitled to it. The position was not altered following a mandatory reconsideration. Dissatisfied, the claimant appealed to the First-tier Tribunal (F-tT). It held an oral hearing of the appeal on 3 December 2019. The claimant attended and gave oral evidence. It decided, for reasons which are explained in a statement of reasons for decision (statement of reasons) of 10 February 2020, that he was entitled to 5 points under the activities and descriptors relevant to the daily living component of PIP and no points under the activities and descriptors relevant to the mobility component of PIP. So, it confirmed the Secretary of State's decision.

2. The claimant, now represented by the Kirklees Citizen's Advice and Law Centre, asked for permission to appeal to the Upper Tribunal. The F-tT refused permission to appeal its own decision and the application was then renewed to the Upper Tribunal. The claimant relied upon multiple grounds and, in giving permission, I expressed the view that two of those grounds appeared arguable. Firstly, I thought the F-tT might have erred through failing to adequately explain why it was not calling for the medical evidence which would have been considered when the claimant was last awarded DLA. Secondly, I thought it might have erred through failing to explain why it was reaching an outcome on the appeal which appeared inconsistent with the terms of the previous award of DLA. Whilst not shutting them out, I expressed a preliminary view that the other grounds did not appear to be arguable. It has not been necessary for me to revisit them.

3. Since the granting of permission, I have received a written response to the appeal on behalf of the Secretary of State and a written reply on behalf of the claimant. The response and reply primarily deal with the question of whether the F-tT should have called for the DLA evidence or, at least, should have explained more fully why it was not doing so. The appeal is opposed.

4. I have concluded, albeit narrowly, that both grounds which I initially found to be arguable are made out. I have also concluded, that being so, that I should set aside the F-tT's decision and remit for a complete re-hearing. I shall explain why below.

5. The F-tT was aware of the fact that the claimant had been in receipt of the higher rate of the mobility component and the highest rate of the care component of

DLA. That, of course, was the highest level of entitlement the claimant could possibly have had. But it appears DLA had last been awarded to the claimant in 2013. That meant, of course, that any medical or other evidence which had been considered when DLA when the last award had been made would have been somewhat dated. Further, the claimant, it is not disputed, had, upon inquiry, indicated to the Secretary of State that he did not require the DLA evidence to be taken into account when his claim for PIP was being considered. The F-tT did ask itself whether it should adjourn the proceedings in order to obtain the DLA evidence. But it went on to answer the question in the negative and explained:

> "5….However, the Tribunal did not consider that it would be of any assistance in considering the matter under appeal, given that it would be about five years prior to the date of decision under appeal. The tribunal also noted that [the claimant] had not asked for any evidence relating to his DLA to be used as part of his PIP application..."

6. At a later point in its statement of reasons the F-tT revisited the matter but did not say anything very different.

7. I have reminded myself of what was said about the need or otherwise to consider adjourning to obtain DLA evidence in *CH and KN v SSWP* [2018] UKUT 330 (AAC) and, indeed, both representatives have relied upon parts of what was said by the Upper Tribunal in that decision. It is, in fact, clear from *CH and KN* that ultimately it is for a F-tT to make its own judgment as to whether DLA evidence might be relevant and as to whether to call for it in a PIP appeal; that even if it is likely to be relevant it will not always be necessary to obtain it; and that a belief that a claimant is making exaggerated claims about his/her difficulties may make it unnecessary for such evidence to be obtained. Further, it seems to me that since deciding to call for such evidence is essentially a matter for the F-tT and since it is experienced and expert in the task of evaluating evidence relevant to disability and therefore in evaluating what it might need in order for it to reach sound findings in relation to such matters, it would be relatively rare for the Upper Tribunal to seek to interfere with decisions it makes as to that consideration. Certainly, I am very resistant to what seems to me, on my reading of the grounds, to be an implied suggestion that a F-tT will have to specifically evaluate most or all of the potentially relevant considerations with respect to a decision as to whether to adjourn and obtain the DLA evidence, as set out in *CH and KN* and then demonstrate through comprehensive written reasoning that it has done so. I detect nothing at all in *CH and KN* suggestive of any such obligation.

8. Having said the above, though, it also seems to me that where a F-tT does expressly consider whether to obtain DLA evidence on the basis that there is proper reason for thinking it might legitimately wish to seek it, it ought to, ordinarily, offer an adequate (though very often a simple and succinct, perhaps even very succinct one will suffice) explanation of a decision not to do so, as a component of its overall decision to give adequate reasons as to the outcome it has reached on the appeal.

9. The F-tT here, as will be noted from what I have set out of its reasoning above, relied upon two considerations. It did not appear to take account of any other considerations at all. One of the matters it relied upon was the claimant's own

indication that he did not want the DLA evidence to be considered. The claimant's representative was sharply critical of that, putting forward the view:

> "It is absurd for a tribunal to imply that the appellant, somehow due to his carelessness, has lost the opportunity to have new evidence produced which would help the tribunal to make a reasoned decision. When a tribunal adopts such a stance, it is as if it is taking sides in an adversarial litigation process, as if it was a party to the proceedings, while forgetting its inquisitorial duty".

10. I am unpersuaded by that. No reason is given as to why the view is taken that the claimant's indication that he did not want to have the evidence considered was given as a result of carelessness. Nor was it the case, as seems to be implied in the above passage of the grounds, that the F-tT relied solely on the claimant's election for its decision not to obtain the DLA evidence. Nor do I think the mere fact that it attached weight to the claimant's freely given indication he did not require the evidence to be considered affords any proper basis for the assertion that it was forgetting its inquisitorial function or taking sides. Indeed, I think that, whilst there will undoubtedly be some cases where it would be unsafe or unfair to place any reliance on a claimant's expressed wish, ordinarily such will be a matter capable of attracting weight in a F-tT's consideration as to how to proceed. As to the evidence being dated, which was the other factor the F-tT considered, it was undoubtedly correct in observing that it would have been.

11. Despite the above, and having regard to the specific circumstances of this case, it is right to say that the claimant's physical health difficulties (seemingly arthritis in his right hand, his back, his knees and his feet, and asthma) were not ones which were obviously likely to improve with age and, indeed, might be regarded as ones which were likely to deteriorate over time. That was a consideration potentially capable of nullifying one of the only two bases (the dated evidence basis) upon which the F-tT relied for its decision not to call for the DLA evidence. The medical evidence which it did have was not obviously extensive. The evidence which had been considered by the decision-maker who had last awarded DLA had been, it might be thought, sufficient to persuade the relevant decision-maker that the claimant was, in or around 2013, "*virtually unable to walk*". As was noted in *YM v SSWP (PIP)* [2018] UKUT 16 (AAC) whilst the borderline between qualifying and not qualifying for the higher rate of the mobility component of DLA is a flexible one, an inability to walk 50 metres has historically been regarded as "*something of a benchmark*". Had it been thought that the claimant was unable to stand and then move unaided more than 20 metres but no more than 50 metres that would have resulted in his receiving 8 PIP mobility points and establishing entitlement to the standard rate of the mobility component of PIP. I do not say that the F-tT, in the particular circumstances I have summarised, was required as a matter of law to adjourn in order to obtain the DLA evidence. But I am (as I have said before narrowly) persuaded that it had to say a little more than it did, in light of all those circumstances, as to why it was deciding not to call for that evidence. It did, therefore, err in law in that regard with respect to the adequacy of its reasoning.

12. There is then the contention that it also erred in failing to adequately explain the apparent divergence from the terms of the previous award of DLA. The need or otherwise to offer such an explanation has been considered by the Upper Tribunal in

the two cases which I have cited above as well as a number of earlier ones. The F-tT was not silent as to any perceived inconsistency. What it said was this:

> "32.… However, PIP is different from DLA. It is assessed on different criteria. As a result, the Tribunal is not able to provide a view as to the basis of the original DLA award and why it might diverge from the outcome of this appeal. However, the tribunal found that [the claimant's] claim was, in any event, exaggerated".

13. The representatives have not said very much about this aspect of the appeal in their respective submissions though the claimant's representative did address it in his grounds. This was a case where, certainly with respect to mobility and perhaps in other areas too, there was something of an overlap with respect to the entitlement criteria for DLA and PIP, requiring of the F-tT a degree of analysis as to the potential for a genuine inconsistency. The F-tT did not actually evaluate the potential for inconsistency but I suppose, so long as a F-tT actually offers an explanation for any apparent inconsistency, a failure to take that preliminary step would be immaterial. But the F-tT did not here, in my judgement, actually offer an explanation. It came close, certainly on one reading, to suggesting that whatever might have been the position in 2013, the evidence before it now, including what it clearly thought to be exaggerated oral and written evidence relied upon by the claimant, did not support an award of PIP such that either there must have been improvement (though as I have said, in the context of the particular physical difficulties the claimant has, that sounds unlikely) or the previous award must have been generous. But the F-tT did not quite go that far. I have concluded, therefore, that that represents a further error of law on its part. Having said that though, had that been the only error of law I had found I might have been persuaded by an argument (had the Secretary of State offered one) that so long as the F-tT's findings were soundly made, any such error could not have been material since it could not have impacted upon the outcome of the appeal. At least, I would have given some thought to such an argument had it been raised.

14. My having decided to set aside the F-tT's decision I have also decided to remit for a re-hearing. No alternative course was urged upon me and, in any event, it does seem to me that any further fact-finding ought to be carried out by the expert fact-finding body in the field. Further, the F-tT panel which rehears the appeal will have a range of expertise available to it through the composition of that panel.

15. There will, therefore, be a complete re-hearing of the appeal. The F-tT itself shall decide what form that hearing will take but should have regard to any preferences which may be expressed by or on behalf of the parties. It will not be limited to a consideration of the matters which have caused me to allow this appeal to the Upper Tribunal. Nor will it be limited to a consideration of the evidence which was before the previous F-tT. It will decide all matters of fact and law itself on the basis of all of the material before it, including any further written or oral evidence it may receive.

16. The claimant should not assume that the mere fact that I have set aside the F-tT's decision means that he is ultimately likely to succeed. He might but then again, he might not. All of that will now be a matter for the good judgement of the new F-tT.

17. I would wish to stress that nothing in this decision is to be taken as an indication that a F-tT will typically be required to give detailed or comprehensive reasons for any decision not to obtain DLA evidence or for any apparent departure from the terms of a previous award of DLA in a PIP appeal. Whilst everything will depend on individual circumstances, it is right to say that for the most part, a brief, simple and straightforward explanation will suffice.

(Signed on the original)
M R Hemingway
Judge of the Upper Tribunal
30 November 2020