IN THE UPPER TRIBUNAL **Appeal No. CPIP/1748/2020**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

MM-C

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Hemingway

Decision date: 29 July 2021
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. The claimant in this case was previously in receipt of a Disability Living Allowance (DLA) comprising the highest rate of the care component and the lower rate of the mobility component. It appears that that benefit was last awarded in 2010. As a result of DLA being replaced by personal independence payments (PIP), at least for most claimants, it became necessary for her to make a claim for PIP which, on 22 May 2019, she did. Initially her claim was refused but on 1 October 2019 the initial decision was revised by way of reconsideration with the result that she was awarded the standard rate of the daily living component of PIP only, from 18 September 2019 to 18 July 2023. Dissatisfied, she appealed to the First-tier Tribunal (F-tT).

2. The F-tT held an oral hearing which, in view of the difficulties caused by the coronavirus pandemic was a telephone hearing. It took place on 1 June 2020. The F-tT dismissed the appeal but, despite a contention made on behalf of the Secretary of State that it should revisit the award of the daily living component and take it away, it confirmed the existing award. It set out its reasoning on the appeal in a detailed statement of reasons for decision (statement of reasons) of 16 July 2020. In its statement of reasons, it recorded the claimant's medical conditions as being "*a personality disorder, anxiety and depression, migraines, mastalgia and constipation*". But it is clear that it took the view (and nobody has suggested it was wrong to do so) that it was the mental health conditions which were the disabling ones. At some point after the dismissal of her appeal the claimant secured the assistance of a solicitor at her local Law Centre and an application for permission to appeal to the Upper Tribunal followed. On 11 November 2020 permission was refused by a District Tribunal Judge of the First-tier Tribunal. The application was pursued to the Upper Tribunal and seven separate grounds of appeal were advanced. I expressly refused permission with respect to six of those grounds because I thought them to be unarguable. No subsequent challenge has been made to my refusal of permission with respect to those six grounds and, therefore, it is not necessary for me to say anything further about them. I would though simply observe that one of the

grounds amounted to a contention that the F-tT had erred in law through not adjourning in order to obtain the evidence which would have been considered by the relevant decision-maker when the claimant had last been awarded DLA. As to the sole basis in respect of which I did give permission to appeal, I said this:

> "As to ground 2, the tribunal was, in light of *CH and KN* arguably required to explain why it was reaching an outcome on the appeal which appeared inconsistent with the terms of the previous award. It may be that, at least with respect to the previous award of the lower rate of the mobility component of DLA there was an apparent inconsistency such as to trigger that obligation. The tribunal did not seem to offer a direct and specific explanation for any such inconsistency and, on that basis, I have decided to give permission in relation to ground 2. But it may be that what the tribunal had to say when dealing with other matters (see paragraphs 15, 19 and 33 of the statement of reasons) might amount to an explanation on the basis of improvement. But the ground affords sufficient basis for the giving of permission".

3. The reference to *CH and KN* was, in fact, a reference to the decision of the Upper Tribunal in *CH and KN v SSWP*: [2019] AACR 11. As to the passages of the statement of reasons to which I referred when giving permission, the F-tT said this:

> "15. There has been some improvement in [the claimant's] mental health since she last saw the mental health team in 2009. She is now stable and more able to look after herself. Her condition does not vary from day to day [p 51]. She self-harms less frequently, although she is still prone to suicidal thoughts and took an overdose on 16/09/2019 [p173, p178]. She did not require any medical treatment following this overdose; she slept for a few hours and then woke up. She sees her GP regularly; she has had the same GP, Dr Martin for many years and he monitors her mental health".

And this:

> "19. [The claimant] learned to drive when she was a child but never passed her driving test. In 2012 she had further lessons and she passed her driving test on 25/06/2012. She has her own car and she is the only person insured to drive it. She initially had restrictions on her license in that her GP had to fill in a form and confirm to the DVLA that she was fit to drive despite her mental health condition. Her GP last had to do this in 2016".

And then this:

> "33. In relation to the lower rate of the mobility component, there is a clear overlap in the conditions of entitlement for DLA and PIP. The lower rate of the mobility component was awarded on the basis of a need for guidance and supervision out of doors, when following unfamiliar routes. The standard rate of the mobility component of PIP is awarded if a person cannot follow the route of an unfamiliar journey without another person. Therefore, the medical evidence used to award the lower rate of the mobility component of DLA might support [the claimant's] claim to the mobility component of PIP. Despite this, we decided not to adjourn to try and obtain the evidence, which would date back to 2010. This is because we concluded that there had been a change in [the claimant's] abilities since she had been awarded DLA in around 2010. Of particular note was the fact that she had been able to complete learning to drive and pass her driving test in 2012, and since then, had been driving regularly to a variety of locations. For this reason we did not think that the DLA evidence from 2010 would be reliable evidence of her abilities in 2019".

4. Although I did not specifically refer to this in my grant of permission to appeal, the F-tT had gone on to say:

> "35. We did accept that [the claimant] has a longstanding mental health condition that has some impact on her ability to function. Our conclusion that she had improved and was now more stable was based on her account of what she could do in her day-to-day life given to the HCP, the fact that she was no longer receiving any

> regular treatment, and the up to date GP evidence at p43 and p178. At p45, her GP said that the effects of her condition on her day-to-day life were only that she had lost weight and was forgetful. At p 178; her GP said that she was not fit for work due to her mental health condition but did not give any details of further problems in her day-to-day life. The most recent evidence suggesting a more serious problem was from 10/06/2016 when [the claimant] had been assessed for ESA and the HCP sent a report to her GP to say that she was suicidal and displayed psychotic symptoms [p 118].
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> 36. We concluded that by the time of the decision under appeal, [the claimant] was not having psychotic symptoms; if she were, we would expect her GP to mention it in the report as an effect of her condition as [the claimant] told us that her GP was aware of Melanie. We also thought that her description of the way in which Melanie spoke to her and was involved in her life was not a reflection of psychotic symptoms. In our view, [the claimant] had a reasonable amount of control over Melanie and used her, in effect, as a coping mechanism. At one point during the hearing, [the claimant], when explaining why she did not use public transport, told us that it was Melanie speaking, and said "There are too many people, [the claimant] can't do it". We did not accept that this was [the claimant] experiencing a hallucination or losing touch with reality during the hearing; rather she was using Melanie as a way to say something that she wanted to say to give it more emphasis. She soon reverted to speaking as herself".

5. Pausing there, "*ESA*" is an abbreviation for Employment and Support Allowance; "*HCP*" is an abbreviation for Health Care Professional and the reference to "*Melanie*" is a reference to what the F-tT referred to as the claimant's "*imaginary friend*" who talks to her at times by way of what are said to be auditory hallucinations.

6. It has long been established that an F-tT has to provide adequate reasons for its decision on an appeal. Whilst a little more than that might be desired, adequacy, not more than that, is the standard. Where entitlement to a benefit is changed (particularly where it is reduced or extinguished) as a result of a decision on an appeal, there may in certain circumstances be an obligation, as part of the overall duty to give adequate reasons, to explain the change.

7. The classic analysis of the duty to give reasons where an award of a particular benefit changes may be found in *R(M) 1/96*. In that case the claimant had been in receipt of mobility allowance but, on renewal, it was decided he was no longer entitled notwithstanding his claim to have suffered relevant deterioration. The Social Security Commissioner who decided that case said this:

> "15. It does however, seem to me to follow from what is said by the Court of Appeal in *Evans, Kitchen and Others* that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an apparent variation in the treatment of similar relevant facts appears from the record of their decision.
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> 16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise compliant with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in

> attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance, then in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obvious from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formally qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant "not virtually unable to walk" without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law".

8. In *SF v SSWP (PIP)* [2016] UKUT 0481 (AAC), which concerned a claimant who had originally been awarded PIP but had subsequently had that award taken away by way of a supersession decision, the Upper Tribunal made a strong statement to the effect that, in such circumstances, the principle in *R(M) 1/96* would apply. In *YM v SSWP (PIP)* [2018] UKUT 16 (AAC) the Upper Tribunal considered what the situation might be where, as here, a claimant had converted from DLA to PIP. It was said that, in such cases, the principle would potentially come into play in circumstances where there was a potential overlap between certain DLA tests and PIP tests such that in some cases there would be a need to explain "*apparently divergent decisions*". In *CH and KN*, a submission made on behalf of the Secretary of State to the effect that procedural and substantive differences between DLA and PIP meant any perception of inconsistency between awards would simply be a result of an individual's lack of understanding or appreciation of those differences, was rejected. Further, the approach taken in *YM* was approved in this way "*Accordingly, I agree with Judge Ward's approach at [21] of YM in setting out the principle but no rule of law beyond that. It is for the tribunal to judge in the circumstances of a particular case whether there is an apparent inconsistency such that reasons are called for*". It was also stressed that the principle in *R(M) 1/96* and the Upper Tribunal's application of it to cases of conversion from DLA to PIP in *YM* "*does not place an undue burden on the tribunal*". It was pointed out that it had been made clear in *YM* that an F-tT was not required to engage in comparative reasoning for the difference between DLA and PIP awards and that "*deciding whether there is a duty to provide the explanation does not call for a sophisticated approach*". The overarching indication from these decisions is that the duty to explain divergence, where it arises, is not a demanding one and that a detailed analysis will not be called for. Further, and importantly given the way this case has been argued (see below), the duty is only to convey to a party, simply and clearly, why it is the F-tT has reached an outcome on the appeal before it which is apparently divergent. In terms of whether that duty, where it has arisen has been complied with, it does not matter that the claimant finds the explanation unpersuasive or disagrees with any reasoning or finding which underpins it. The only issue is whether the explanation is understandable.

9. The Secretary of State's position on the appeal, as set out in a submission to the Upper Tribunal of 7 May 2021, is to the effect that the only area of potential divergence relates to the award of the lower rate of the mobility component of DLA when set alongside the failure to award enough points to establish entitlement under PIP mobility activity 1; and that what the F-tT had said in the various paragraphs referred to above amounts to sufficient by way of an explanation for any perceived divergence on the basis of improvement. It was also pointed out that in *CH and KN*, the Upper Tribunal had, in remaking the decision in the case of the individual claimant it called CH, said that although it would have been "*better practice if the tribunal had provided some brief explanation as to why the DLA award did not translate into the equivalent PIP award, perhaps simply explaining that the DLA award carried little weight given its age, that there was substantial up to date evidence, and that the tribunal had rejected CH's evidence*" it had not been in error of law through failing to do that because there had been little of substance it could have said by way of explanation given the lack of

any further information about the DLA award and because it had explained how it had evaluated the evidence and why it had rejected the evidence of CH. Accordingly, the Secretary of State's representative invited me to dismiss the appeal.

10. The representative for the claimant suggested that what had been said at paragraphs 15, 19 and 33 of the statement of reasons was insufficient to amount to a proper explanation. In seeking to develop that argument he sought to focus upon the quality of the F-tT's reasoning as set out in those paragraphs. By way of example, he contented that it could not be said, as had the F-tT, that there had been improvement in the claimant's mental health condition in circumstances where she had continual suicidal thoughts and where there had been a relatively recent incidence of her taking an overdose. Any improvement that there had been was "*very slight and not at all meaningful*". Another point taken, again by way of example, was to the effect that the F-tT had been wrong to perceive her driving with regularity as evidence of an improvement in her mental health. Rather, suggested the claimant's representative, it was evidence of her using her motor car as a tool in order "*to avoid contact with the public*" due to anxiety she would experience when going out of doors.

11. It does seem to me that the submissions made by the claimant's representatives with respect to the issue of the principle in *R(M) 1/96*, miss the point. As explained, the duty is a simple, straightforward and undemanding one which simply requires the F-tT to put the claimant in a position (if the findings and reasoning as contained in the statement of reasons do not otherwise do that) to understand why the F-tT has taken, if it has, an apparently divergent view. In my judgment the various paragraphs from the statement of reasons set out above make it clear to the claimant that the F-tT was of the view that there had been, in latter times, an improvement in her mental health condition which it found to be significant. Thus, the claimant cannot be in any real doubt as to why the F-tT concluded she did not score sufficient points to establish entitlement to the mobility component of PIP under mobility activity 1 notwithstanding the existence of the previous award of the lower rate of the mobility component of DLA. Attempted re-argument with the F-tT's reasoning which led to its conclusion that there had been improvement does not trespass on that.

12. In the circumstances the F-tT complied with the requirement as set out in *R(M) 1/96* so that the sole surviving ground of appeal fails. This appeal to the Upper Tribunal is, therefore, dismissed.

(Signed on the original)
M R Hemingway
Judge of the Upper Tribunal
29 July 2021