



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-001826-PIP
[2024] UKUT 198 (AAC)**

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

Between:

S.R.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 10 July 2024

Decided on consideration of the papers

Representation:

Appellant: In person

Respondent: Ms Uroosa Ali, Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 4 April 2023 under number SC285/22/01290 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

1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.
2. The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 4 April 2023.
3. The claimant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 20 April 2022).
4. If the Appellant has any further written evidence to put before the tribunal and, in particular, further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (see Direction (3) above).
5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds, but there will need to be a completely fresh hearing of the original Personal Independence Payment (PIP) appeal before a new First-tier Tribunal (FTT).

The central issue raised by this appeal

2. This appeal concerns the scope for an advance claim for PIP.

The Upper Tribunal's decision in summary and what happens next

3. I allow the Appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision.
4. However, I refuse the Appellant's request for an oral hearing of the Upper Tribunal appeal. The case now needs to be reheard by a new and different First-tier Tribunal. This will be at a local venue in Birmingham that is more convenient for the Appellant. I cannot predict what will be the outcome of the FTT re-hearing. So, the new tribunal may reach the same, or a different, outcome decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes.

The chronology of the appeal

5. On 5 September 2021 the Appellant suffered an accident at work.
6. On 15 November 2021 the Appellant made a claim for PIP.
7. On 20 April 2022 a DWP decision-maker awarded the Appellant the standard rate of the PIP daily living component, scoring him two points each for daily living activities 1, 4, 5 and 9. The Appellant applied for a mandatory reconsideration.
8. On 6 June 2022 a decision-maker confirmed the decision of 20 April 2022. The Appellant lodged an appeal with the FTT.
9. On 6 October 2022 a FTT adjourned a face-to-face hearing as the Appellant did not attend.
10. On 6 December 2022 a FTT again adjourned a face-to-face hearing as the Appellant did not attend. The adjournment notice included the following observation directed to the Appellant:
 6. You were notified in the previous Adjournment Notice dated 06/10/2022 that the Tribunal has the power to increase or decrease any award. You have been awarded the daily living component at the standard rate. This means that at your appeal hearing you may lose this benefit or it might be increased or stay the same. You may consider it appropriate to seek advice from a welfare rights organisation who can advise you on this.
11. On 4 April 2023 the FTT held a further hearing. The Appellant again failed to attend. The FTT decided to proceed in his absence. The FTT decided that the Appellant did not meet the 3-month initial qualifying period for PIP. The FTT accordingly refused the appeal and set aside the DWP's decision dated 20 April 2022 that had awarded the Appellant PIP.
12. In its statement of reasons the FTT summarised the issue as follows:

5. [The Appellant] faced the obstacle of not meeting the qualifying period for PIP, which requires disabilities to have lasted for at least 3 months before a claim is made. Ultimately, the Tribunal determined it could not award him any PIP points because his claim was not valid from the outset. The decision centered on whether [the Appellant] properly qualified for PIP and, if so, whether his restrictions entitled him to additional points under PIP criteria.

13. The FTT resolved this issue in the following way:

34. The Tribunal examined the appeal bundle evidence, including the Appellant's PIP2 form detailing his claimed activity restrictions. However, it ultimately found the Appellant did not meet the qualifying period for PIP, having claimed less than 3 months after his work accident.

35. Therefore, we could not award him any PIP points. The Tribunal set aside the Secretary of State's award decision, finding the Appellant was not entitled to PIP from the outset. It made this effective from the hearing date, rather than originally, to avoid unfairly penalizing the Appellant for the Secretary of State's oversight on the qualifying period. [The presenting officer], for the Respondent, confirmed this was both reasonable and fair.

14. The FTT further explained its reasoning as follows:

The Qualifying Period Issue

39. The Tribunal found that the Appellant did not meet the qualifying period to make his PIP claim.

40. PIP rules state that the first date a claim can be made is 3 months after the disability issues began. This 3-month period is called the qualifying period.

41. The Appellant's evidence was that his conditions arose after an accident at work on 5th September 2021. Therefore, the first date he could claim PIP was 3 months after that accident, on 5th December 2021.

42. However, the Appellant made his claim earlier, on 15th November 2021, just 2 months after the accident. By claiming on 15th November 2021, he did not satisfy the qualifying period requirement.

43. Given this failure to meet the qualifying period, the Tribunal ultimately determined it could not properly award the Appellant any PIP points for his claimed activities.

The proceedings before the Upper Tribunal

15. I gave the Appellant permission to appeal to the Upper Tribunal, commenting that the FTT may have erred in law as it appears not to have had regard to regulation 33(1) of the Universal Credit etc (Claims and Payments) Regulations 2013 (SI 2013/380). This makes provision for advance claims to PIP:

Advance claim for and award of personal independence payment

33.—(1) Where, although a person does not satisfy the requirements for entitlement to personal independence payment on the date on which the claim is made, the Secretary of State is of the opinion that unless there is a change of circumstances the person will satisfy those requirements for a period beginning on a day (“the relevant day”) not more than 3 months after

the date on which the decision on the claim is made, the Secretary of State may award personal independence payment from the relevant day subject to the condition that the person satisfies the requirements for entitlement on the relevant day.

16. Thus, as Upper Tribunal Judge Jacobs explained in *AH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 541 (AAC), regulation 33(1) “allows for the possibility that the claimant may have satisfied only part of the retrospective period when the decision is made” (at paragraph 15). Accordingly, as Judge Farbey QC (as she then was) observed in *EB v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 311 (AAC), “under regulation 33, a person may qualify for an advance award by scoring points for the three month period after the date on which the Secretary of State’s decision was made” (paragraph 28).
17. Ms Uroosa Ali, the Secretary of State’s representative in these proceedings, therefore supports the appeal to the Upper Tribunal and consents to the FTT’s decision being set aside. She sums up her analysis in the following terms:
 15. Throughout the statements of reasons (SoR) there is no evidence to indicate or suggest the FtT have considered or applied regulation 33. The FtT have focused only on the appellant’s work incident date and the date of claim. These dates appear to be the determining factors in their decision. The FtT stated in the SoR, ‘*However, it ultimately found the appellant did not meet the qualifying period for PIP, having claimed less than 3 months after his work incident*’ (para 34). This clearly indicates the FtT have decided the appellant does not meet the qualifying period however, regulation 33 allows for them to consider an award up to three months in advance. The FtT have failed to provide any reasons that would indicate regulation 33 was considered.
 16. Therefore, I respectfully submit the FtT have erred in law by failing to consider regulation 33. This resulted in the FtT’s decision to disallow the appellant’s entitlement to PIP.
 17. Furthermore, I submit that the FtT have not only erred in law by failing to consider regulation 33, but they have also failed by not sufficiently warning the appellant of their intention to disallow the award of benefit.
 18. The FtT stated in the SoR ‘*the appellant had been warned his existing PIP award could potentially be increased, decreased, or removed entirely by the Tribunal*’ (paragraph 25). While the FtT did inform the appellant of the potential adverse decision, they failed to correctly warn the appellant of their intention to disallow his award and at ‘*...no point was the appellant made aware of the specific concerns of the tribunal...so as to enable him to prepare his case...*’ (CPIP/3480/2016, paragraph 12). The FtT ultimately decided to disallow the appellants’ award without providing the appellant an explanation of their specific concerns therefore, failing to allow him the opportunity to prepare his case by adjourning the hearing.
18. I am satisfied that the First-tier Tribunal erred in law for both the reasons summarised above by Ms Ali. I therefore allow the Appellant’s appeal to the Upper Tribunal, set aside (cancel) the FTT’s decision and remit (send back) the original appeal for re-hearing to a new tribunal, which must make a fresh decision.

What happens next: the new First-tier Tribunal

19. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the claimant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.
20. In doing so, however, unfortunately the new Tribunal will have to focus on the claimant's circumstances as they were as long ago as in April 2022, and not the position as at the date of the new hearing, which will obviously and regrettably be more than two years later. This is because the new Tribunal must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The original decision by the Secretary of State, which was appealed to the FTT, was taken on 20 April 2022.

Conclusion

21. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Nicholas Wikeley
Judge of the Upper Tribunal**

Authorised for issue on 10 July 2024