DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Bexleyheath First-tier Tribunal dated June 4, 2016 under file reference SC168/16/00500 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated November 25, 2015 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge or members who were previously involved in considering this appeal on June 4, 2016.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely November 25, 2015).

(4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Sutton 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 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 Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This case is a further reminder of the need to identify the basis for any supersession and to provide an appropriate explanation for any change in a person's entitlement to personal independence payment (PIP).

The background

2. On March 10, 2015 a decision maker awarded the Appellant the standard rate of the daily living component of PIP for the three-year period from February 26, 2014 to February 26, 2017. This was on the basis (in large part) of a PIP medical assessment report dated February 27, 2015, which led to the award of 8 points for daily living activities.

3. The decision letter of March 10, 2015 explained that the Appellant would be contacted after February 26, 2016 "to make sure you're receiving the right level of Personal Independence Payment". The letter also stated that "if anything changes that could affect the amount of Personal Independence Payment you get, you must tell us straightaway".

4. In the Appellant's words, at some point in 2015 "I was advised by my doctor that my condition had got worse … after worrying I phoned your company and told them that my circumstances had changed and that my illness was worsening I done this as I didn't want to lie or get in trouble for not being true."

5. In September 2015 the Appellant completed a further PIP questionnaire. On October 15, 2015, so well ahead of the Department's planned review, he had another PIP medical assessment. On November 25, 2015 he was sent a further decision letter, saying that he now scored nil points for both daily living and mobility and so he no longer qualified for PIP as from October 26, 2015.

6. The Appellant asked for a mandatory reconsideration. As he said in his subsequent letter of appeal, "I am not asking for my rate to be increased just to stay at what I was awarded which is standard rate as I think it is totally unacceptable that I should be criticized for doing the right thing." The decision of November 25, 2015 was not changed and the Appellant lodged an appeal.

The First-tier Tribunal

7. The First-tier Tribunal heard the Appellant's appeal on June 4, 2016. The Tribunal confirmed the decision of November 25, 2015 to the effect that there was no entitlement to PIP. The Tribunal also scored the Appellant at 0 points for both daily living and mobility.

8. The Appellant was not represented at the hearing, but later obtained help from the Plumstead Community Law Centre. His law centre representative wrote a detailed letter applying for permission to appeal, taking issue with the Tribunal's fact-finding and reasons on several of the PIP activities.

9. A District Tribunal Judge gave permission to appeal on a separate point, namely whether the Tribunal had identified the ground(s) for changing the original award. The grant of permission referred to the Secretary of State's power in regulation 11 of the Social Security (Personal Independence Payments) Regulations 2013 (SI 2013/377; "the PIP Regulations").

The proceedings before the Upper Tribunal

10. I initially stayed (or deferred) the appeal pending the outcome of other Upper Tribunal appeals which have now been reported as *DS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 538 (AAC), *KB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 537 (AAC) and *PM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 37 (AAC).

11. Ms Frances Gigg, who represents the Secretary of State in these proceedings, supports the Appellant's appeal to the Upper Tribunal. She does so for three reasons.

12. First, the Tribunal failed to establish whether a ground for supersession existed, and moreover failed to explain to the Appellant why his existing award should be removed.

13. Second, in its statement of reasons the Tribunal referred to its consideration of the Appellant's situation for the three months before the date of his claim on February 26, 2014 and at least 9 months after. This suggests some confusion as to whether the appeal before the Tribunal was an appeal against the original award decision or the later supersession decision.

14. Third, and linking back to the first reason, it was not enough simply to assume that the appearance of a new PIP assessment report provided an automatic ground for supersession of the original awarding decision under regulation 26(1) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381; "the D & A Regulations"). It could not simply be assumed that the second PIP assessment report in some way trumped the first PIP assessment report e.g. by virtue of being more recent. The Appellant as a matter of justice was entitled to an explanation as to why his award had been terminated ahead of time – see R(M) 1/96 and *SF v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 481 (AAC) at paragraph 21.

15. So Ms Gigg is content that the appeal is allowed and the matter is remitted (or sent back) for re-hearing to a new tribunal. I agree and accordingly find that the Tribunal's decision involves the error of law as set out above and so should be set aside. This is unfortunate as in other ways it is clear that the Tribunal approached its task with some care, and the Tribunal Judge's statement of reasons is in other respects a model – it is clearly written, well organised and sets out a detailed analysis of the Appellant's medical problems and their effects. However, the twin failures to identify a supersession ground and to deal with the conflicts in the Department's own medical evidence (when the Appellant's case was that his condition had if anything worsened) are fatal to the decision.

16. The appeal therefore succeeds without needing to consider the other grounds advanced by the Appellant's representative.

17. The lesson in this case is clear. As Judge Mesher held in *KB v Secretary of State for Work and Pensions (PIP)*, there is in effect a two-stage process. In short, first, regulation 11 of the PIP Regulations enables the Secretary of State to look into an existing PIP award. Secondly, however, the Secretary of State will need to show that one of the grounds of supersession is made out and the subsequent decision on entitlement must have regard to all the evidence.

18. For the avoidance of doubt, it seems to me as a matter of principle that the two-stage test set out by Judge Mesher applies whether the original decision was made by the Secretary of State or a First-tier Tribunal. My decision in *MR v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 481 (AAC) should not be read as suggesting in planned review cases, and where the previous award was by a tribunal, that a supersession is only possible for change of circumstances (regulation 23 of the D & A Regulations) or mistake of fact (regulation 31). Receipt of new medical evidence under regulation 26 remains a possibility – but the application of the principles set out in R(M) 1/96 and *SF v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 481 (AAC) will need to be considered. See further the fuller analysis by Judge Wright in *PM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 37 at paragraphs 9-17.

What happens next: the new First-tier Tribunal

19. There will need to be a fresh hearing of the appeal before a new Tribunal. Although I am setting aside the Tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant is entitled to PIP (and, if so, which components and at what rate(s)). That is all 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 Appellant's circumstances as they were as long ago as at November 25, 2015, the date of the supersession decision. The new Tribunal will not be concerned with the position as at the date of the new hearing, which will obviously be more than 18 months later than the supersession date. 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).

Conclusion

21. I 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.

Signed on the original
on 2 June 2017

Nicholas Wikeley
Judge of the Upper Tribunal