Appeal No. UA-2025-000393-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

CJ

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley
Decided on consideration of the papers

Representation:
Appellant: Mr R. Colonna, Tribune Legal Practice
Respondent: Mr B. Wadham, Decision Making and Appeals, DWP

On appeal from:
Tribunal: First-Tier Tribunal (Social Security and Child Support)
Tribunal Case No: SC924/24/00089
Digital Case No: 1710931729671938
Tribunal Venue: Preston Magistrates Court
Hearing Date: 6 December 2024

SUMMARY OF DECISION

The judge considers that this case raises no point of principle or practice that is of wider interest and so no summary of the decision is provided.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) 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 this decision and 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 6 December 2024.**

3. **The Appellant 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 19 December 2023).**

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 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 <u>at the date of the original decision</u> of the Secretary of State under appeal (see Direction (3) above).**

5. **The new Tribunal hearing the remitted appeal will be dealing with the closed period from 4 September 2023 to 9 January 2025 (see paragraph 13 below).**

6. **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 Legal Officer, Tribunal Registrar or First-tier Tribunal Judge.

REASONS FOR DECISION

Introduction

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

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

2. 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.

3. The Appellant's case now needs to be reheard by a new and different First-tier Tribunal. I cannot predict what will be the outcome of the re-hearing. So, the new tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes.

The factual background

4. The chronology to this appeal is not in dispute. The FTT on 6 December 2024 confirmed the Secretary of State's decision of 19 December 2023, disallowing the Appellant's claim to PIP, having found that he scored 6 points for daily living activities and 4 points for mobility activities.

The grounds of appeal

5. The Appellant's grounds of appeal were as detailed on Form UT1 and associated correspondence.

6. In giving permission to appeal, I made the following observations:

> The Appellant's grounds of appeal are arguable. However, it may be that the representative's erudite submissions are really seeking to re-argue the factual merits of the case, in which case the appeal cannot succeed. That said, on first impressions the best point appears to be the ground of appeal identified at para 2(f) and paras 32 & 33. The FTT's reasoning at para 17 of the SOR [Statement of Reasons] is not easy to follow. At present I am struggling to see how a finding that walking between 50 and 200 metres was reasonable is consistent with the UC85 assessment suggesting "a severe restriction is likely for mobilising more than 50 metres" (paper p.90, electronic p.111).

7. Mr B. Wadham, the Secretary of State's representative in these proceedings, supports the appeal and helpfully consents to the FTT's decision being set aside. Mr Wadham argues as follows (with names redacted):

> **4.1** The Tribunal awarded the claimant 4 points for mobility activity 2 (moving around), providing its reasons in paragraphs 16 to 18 of the SOR. The Tribunal accepted the claimant experienced some restrictions in their ability to move around but did not accept that the nature and extent of the difficulties were significant enough to suggest there was limited ability to result in an award of the mobility component The Tribunal did not accept that the claimant's physical ability to move around was as significantly affected as the claimant stated, based on the dates of entries in the medical records, and the UC85 medical report.
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> **4.2** The Tribunal stated in paragraph 16 of the SOR that the claimant's PIP2 questionnaire did not report any restrictions with moving around. The Tribunal also noted that the medical evidence dated approximately 1 month after the claim form was completed, stated that the claimant *"went to walk at Talkin Tarn recently. Walked round ok but when sat in café felt tightness in chest and legs felt like jelly."* The Tribunal noted that Talkin Tarn is a park. This statement can be seen in the notes from Dr C recorded on 24/10/2023, however it does indicate potential problems, particularly in relation to the tightness in their chest and legs feeling like jelly [page 28, Addition D of the Tribunal appeal bundle]. The Tribunal concluded that this statement indicated no significant issues and was consistent with the fact that no claim was made in the PIP2 questionnaire in relation to moving around.
>
> **4.3** The Tribunal found in paragraph 17 of the SOR that it was reasonable the claimant could walk between 50 and 200 metres. This is despite the fact that the UC85 medical report completed by Dr M on 06/11/2023 concluded that the evidence suggested a severe restriction being likely when mobilising more than 50 metres. Dr M gave consideration to the claimant's musculoskeletal problems, Chronic Fatigue Syndrome (CFS) and Fibromyalgia. It was stated the claimant described daily pain, but was worse on mobilising, and that

this had been getting progressively worse over the last couple of months, leading up to the Universal Credit (UC) medical assessment. The claimant also reported bilateral weakness in their knees, and that pain restricts their movement. They also described spending 3-4 days resting after exertion [pages 89 – 90 of the Tribunal appeal bundle].

4.4 In their findings in paragraph 18 of the SOR, they did outline why they had preferred the GP evidence over that of the UC85 medical report, which was conducted 2 weeks later. Their justification however, focussed on the claimant's credibility, rather than consideration of pain on mobilising. There is no adequate explanation in the SOR regarding how the claimant satisfies regulation 4(2)(a) of The Social Security (Personal Independence Payment) Regulations 2013, specifically in relation to whether mobility activity 2 can be carried out to an acceptable standard due to pain, and repeatedly and within a reasonable time period due to both pain and fatigue. In *PS v SSWP* [2016] UKUT 0326 (AAC) ("*PS*"), UT Judge Markus QC stated;

> *"11. What the Appellant was saying in his written and oral evidence was that he suffered pain when he walked, that he would walk slowly for a short distance despite the pain but that it would get worse until the pain would stop him. It could not properly be assumed that, because the Appellant managed to keep going for a certain distance, any pain he experienced while he was walking was not relevant. If a claimant cannot carry out an activity at all, regulation 4(2A) does not come into play. Where a person is able to carry out an activity, pain is clearly a potentially relevant factor to the question whether he or she can do so to an acceptable standard.*
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> *12. Although not legally binding, the approach set out in PIP Assessment Guide (2016), which provides guidance for health professionals in assessing claimants, reinforces my conclusion: "3.2.5 The fact that an individual can complete an activity is not sufficient evidence of ability. HPs may find it helpful to consider:*
> *…*
> *Impact – what the effects of reaching the outcome has on the individual and, where relevant, others; and whether the individual can repeat the activity within a reasonable period of time and to*

> *the same standard (this clearly includes consideration of symptoms such as pain, discomfort, breathlessness, fatigue and anxiety).”*
>
> *13. This was also the approach taken by Upper Tribunal Judge Parker in CPIP/2377/2015 where she said of regulation 4(2A) and 4(4):*
>
> > *“6. … Matters such as pain, and its severity, and the frequency and nature, including extent, of any rests required by a claimant, are relevant to the question of whether a claimant can complete a mobility activity descriptor ‘to an acceptable standard’…”*

This decision holds that if an individual is “walking through pain” then the then they are not walking to an acceptable standard, although the frequency and severity of that pain would still be a consideration. This does not appear to have been considered by the Tribunal.

4.5 The above gives UT Judge Wikeley’s reasons for granting permission to appeal to the UT even more pertinence:

> *“At present I am struggling to see how a finding that walking between 50 and 200 metres was reasonable is consistent with the UC85 assessment suggesting “a severe restriction is likely for mobilising more than 50 metres”.*

In the UC85 medical report, it was concluded that *“Overall, the evidence suggests a severe restriction is likely for mobilising more than 50 metres.”* The Tribunal did refer to this in paragraph 17 of the SOR, but rejected the evidence in the UC85 medical report. The Tribunal appear to have overlooked the possibility the claimant may have been experiencing difficulties when mobilising up to 50 metres in terms of regulation 4(2)(a). This could potentially mean that although the claimant could walk more than 50 metres, the level of pain they experience could mean that they are unable to walk even 50 metres reliably. This does not appear to have been considered by the Tribunal.

> **4.6** I also note that in Schedule 1, Part 3 of The Social Security (Personal Independence Payment) Regulations 2013 the wording for mobility descriptor 2b is *"Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided"*. If the Tribunal had considered PS, they would have considered whether the claimant can walk more than 50 metres reliably, whether doing so causes pain, fatigue, or take too long, and whether the activity can be done repeatedly. Had the Tribunal given due consideration to *PS* it may have reached a different conclusion, finding instead that the claimant cannot stand and then move more than 50 metres reliably, and may therefore have awarded a higher scoring descriptor for this activity.
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> **4.7** I therefore respectfully submit that the Tribunal have erred in law on the grounds that they have failed to give adequate reasons for their findings on material matters, particularly in relation to why relevant evidence has been rejected, and regulation 4(2)(a) of The Social Security (Personal Independence Payment) Regulations 2013. This can be considered a material matter, as an increase to the descriptor awarded for mobility activity 2 would result in an award of PIP.

8. For completeness, I should add that Mr Colonna, the Appellant's representative, has no further observations.

Analysis: a summary

9. I agree with the detailed analysis of the Secretary of State's representative in his written submission on the appeal, as summarised above. In those circumstances I do not need to resolve the other grounds of appeal.

10. I am accordingly satisfied that the First-tier Tribunal erred in law for the reasons set out above. I therefore allow the Appellant's appeal to the Upper Tribunal, set aside (or cancel) the Tribunal's decision and remit (or 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

11. 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.

12. 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 December 2023, and not the position as at the date of the new hearing, which will obviously and regrettably be more than 18 months 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 19 December 2023.

13. The new Tribunal will also note it is now dealing with the case as covering a closed period. This is because on 10 January 2025 the Appellant made a further claim for PIP, which it appears has yet to be decided. The FTT hearing the remitted appeal will therefore be dealing with the closed period from 4 September 2023 to 9 January 2025.

Conclusion

14. 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 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The case must be remitted for re-hearing by a new tribunal subject to the directions set out above (section 12(2)(b)(i)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 4 June 2025