

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 Durham First-tier Tribunal dated 9 May 2019 under file reference SC292/17/01506 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 29 September 2017 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 (this may be a 'remote' hearing, e.g. by telephone or by Skype).
- (2) The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member who previously considered this appeal on 9 May 2019.
- (3) The Appellant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely 29 September 2017).
- (4) If the Appellant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the HMCTS regional tribunal office in Newcastle-upon-Tyne 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) At the re-hearing, the appeal is limited to determining the Appellant's entitlement to PIP, if any, for the closed period from 1 November 2017 to 10 June 2019 (see paragraph 10 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 Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

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

1. I allow the Appellant's appeal to the Upper Tribunal. The First-tier Tribunal's decision involves an error on a point of law. I therefore set aside the tribunal's decision. I give brief reasons as much for the benefit of the First-tier Tribunal as for the parties.
2. The case now needs to be reheard by a new First-tier Tribunal (or "FTT"). I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new FTT will succeed *on the facts*.
3. 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 background to this appeal to the Upper Tribunal

4. The Appellant had previously been awarded the higher rate mobility component of disability living allowance (DLA) along with the lowest rate care component. On transfer to personal independence payment (PIP), she initially scored nil points and so failed to qualify for either the daily living component or the mobility component for the period from 1 November 2017.
5. The Appellant appealed to the FTT, which on 9 May 2019 allowed her appeal in part. The FTT found she scored 2 points for daily living descriptors (not enough to qualify for that component). However, the FTT found mobility descriptor 2c applied, totalling 8 points, and so made an award of the standard rate of that component for the period from 1 November 2017 to 31 October 2022. Her representative lodged grounds of appeal, arguing that the FTT had failed to address properly physical problems with daily living activities 1, 4 and 6 and mental health issues with activities 9 and 10. I subsequently gave the Appellant permission to appeal.

The proceedings before the Upper Tribunal

6. Ms Clare Keates, who now acts for the Secretary of State in these proceedings, supports the appeal to the Upper Tribunal. She does so for the following reasons:

4.2 In relation to daily living activity 1- Preparing food, the FtT note at paragraph 21 of the SOR (page 168) that the Musculoskeletal examination was unremarkable and state that the claimant's ability to drive requires good dexterity and that she is able to grip a steering wheel and change gear. The FtT stated at paragraph 24 of the SOR that: *"The appellant said that she needed assistance to prepare a meal as she is unable to peel vegetables (156). However, as referred to above, she has sufficient dexterity to drive a car, handle vegetables in the supermarket and her grip was normal upon examination (66)"* The FtT appear to have attributed the claimant's ability to prepare and cook a meal as the same ability to drive a car (as noted above). The dexterity required to drive a car differs to what is required to peeling and chopping vegetables. In addition, an ability to pick up fruit and vegetables in a supermarket does not show an ability to peel and chop vegetables. Therefore, it is my submission that the FtT's reasoning in relation to daily living activity 1 is somewhat limited.

4.3 Furthermore, at page 55 of the appeal bundle there is a letter from the claimant's GP stating that she has severe Osteoporosis and suffers spontaneous rib fractures just with coughing and that pain radiates down her arms and that she needs to take regular pain medication. There is a further letter

at page 145 which confirms that she has Osteoporosis as such this has resulted in bone thinning for which she has yearly injections. The claimant has detailed in her PIP2 questionnaire that she has no strength in her bones and requires help. It is also noted at page 60 of the Healthcare Professional's (HCP) report that the claimant is unable to lift a kettle, she has an instant hot water tap and that she gets cramps in her hands when peeling. However, when reading the SOR in its entirety there is no mention of the claimant's Osteoporosis and the effects it has the claimant's ability to prepare and cook a meal. In fact, the FtT only list the claimant's health conditions at paragraph 10 of the SOR as Asthma, COPD, lower respiratory tract infections, mild pulmonary hypertension and reactive depression. As such, I submit that the FtT have erred in law by providing inadequate reasons to explain their choice of descriptor for daily living activity 1.

4.4 In relation to daily living activity 4 – Washing and bathing, the FtT concluded that the musculoskeletal examination was unremarkable and that the claimant had exaggerated her claims in so that she had difficulty washing her hair and that her GP had not made any comments about shoulder pain. As noted above, there is clear evidence that the FtT have failed to consider in relation to the claimant's Osteoporosis, which had been noted by the claimant and the HCP. Given that the claimant suffers from fractures to her ribs from 'just coughing' and that the HCP had noted at pages 57 and 61 that; "...*extra careful when coughing so not to break anything, rib fractures very easily...extra pain relief medication...last broke rib when sneezed last week... struggles to wash hair, daughter has to wash it...get pains in ribs...*". It is difficult to see how the FtT concluded that the claimant had exaggerated her claims and that she was able to wash and bathe. As such, I submit that the FtT have erred in law by making insufficient findings regarding this issue and that further findings of facts are required."

7. Given the support of the Secretary of State's representative for the appeal to the Upper Tribunal, which I have set out above, I am persuaded that the FTT erred in law for the reasons given. I therefore allow the appeal, set aside the FTT's decision and remit (or send back) the original appeal for re-hearing before a new tribunal. I formally find that the FTT's decision involves an error of law on the ground as outlined above. I do not need to address the other grounds of appeal.

What happens next: the new First-tier Tribunal

8. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the Appellant is entitled to PIP (and, if so, which component(s) and at what rate(s) and for what period). 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 accordingly.

9. In doing so, however, unfortunately the new FTT will have to focus on the Appellant's circumstances as they were as long ago as September 2017, and not the position as at the date of the new FTT hearing, which will obviously be more than three years later. This is because the new FTT 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 decision by the Secretary of State which was appealed against to the FTT was taken as long ago as 29 September 2017.

10. There is one other matter to mention, namely that the remitted appeal is concerned with a closed period. Ms Keates reports that the Appellant made a later claim for PIP on 11 June 2019 (see her submission at paragraph 4.6). It follows that the remitted appeal now relates solely to the closed period of just over 18 months from 1 November 2017 to 10 June 2019. I note that an award of the standard rate of both PIP components was made on the new claim. If the Appellant is not satisfied with the Secretary of State's decision on the new claim, and has lodged an appeal, then there may be much to be said for having the two appeals listed together. However, that is best left to the District Tribunal Judge responsible for re-listing directions, not least as the file does not reveal whether any further appeal has been made at first instance.

Conclusion

11. 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.

**Approved for issue
on 7 September 2020**

**Nicholas Wikeley
Judge of the Upper Tribunal**