1. The decision purported to supersede an earlier decision
2. Although the Secretary of State has purported to supersede the previous decision, it is arguable that she has not properly established any grounds for the outcome decision
   1. In MR v SSWP (PIP)[2017] UKUT 0046 (AAC) CPIP/3556/2016 Judge Wikeley held at [27]-[29]

27. It follows that the Secretary of State could only interfere with FtT 1’s decision by way of making a *supersession* decision. On the face of it this might have been undertaken in one of two ways

28. The first is under regulation 31 of the 2013 Regulations, as I noted when giving permission to appeal. However, the extensive papers before both tribunals included only the decision notice (and subsequent DWP implementing letter) from FtT 1. In the absence of both a record of proceedings and statement of reasons for FTT 1, it is difficult to see how the Secretary of State could ever have discharged the burden of showing that FTT 1 had made its decision “in ignorance of, or … based upon a mistake as to, some material fact” for the purposes of regulation 31. That was precisely the point which the Appellant had made in lay terms in her notice of appeal (see paragraph 15 above).

29. The second was under regulation 23(1) of the 2013 Regulations, which allows the Secretary of State to make a supersession decision where there had been “a relevant change of circumstances since the decision to be superseded had effect”. This was presumably the argument the Secretary of State’s response to the appeal was seeking to make, although it was not articulated as such. However, it is well established that a new medical opinion (or paramedic’s opinion) is not of itself a change of circumstances, although it might be evidence of underlying changes in a medical condition which could constitute a change of circumstances (see e.g. *Cooke v Secretary of State for Work and Pensions* [2001] EWCA Civ 734, reported as R(DLA) 6/01). In this case there was a singular absence of hard information about what FTT 1 had decided, other than the headline decision, meaning that the Secretary of State’s task in demonstrating a change of circumstances was not straightforward. In any event, the Appellant’s argument was clearly that there had been no such change and FtT 3 certainly failed to put the Secretary of State to proof. Indeed, quite the opposite

* 1. Judge Wikeley resiled somewhat in TH v SSWP (PIP) [2017] UKUT 0231 (AAC) and held that it was not necessary to demonstrate that a change of circumstances had occurred in order to establish the grounds for supersession. Judge Wikeley held at [18]

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)* [2017] UKUT 46 (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.

* 1. In SF v SSWP (PIP) [2016] UKUT 0481 (AAC) CPIP/1693/2016 Judge Wikeley held at [22]

22. Thus, the principles and guidance set out by Mr Commissioner Howell QC in R(M) 1/96 are not rendered redundant by the simple fact that the Secretary of State has instigated a Planned Review, obtained a fresh HCP report and concluded that there is now no longer any ongoing entitlement to PIP, making a supersession decision to that effect. The extent to which reasons have to be given in such a case will obviously be context-dependent. However, in a case such as the present, where there was such a stark contrast between the two decisions, the FTT could not simply pretend that the award the previous year was simply a matter of ancient history and of no current potential relevance. It was incumbent on the FTT at least to express a view e.g. that there had been a significant improvement in the Appellant’s condition and functioning in the intervening 15 months. That may well have been the situation in the present case, but the FTT did not say so and certainly did not make the necessary findings of fact to support such a conclusion. I therefore allow the appeal on this ground too.

* 1. The principles in R(M)1/96 were set out at [ 15]-[16]

“15.It does however, seemto me to follow from what is said bythe Court of Appealin *Evans, Kitchen & 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.

16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying 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 obviously 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 formerly 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

* 1. In KB v Secretary of State for Work and Pensions (PIP) [2016] UKUT 0537(AAC) CPIP/1623/2016Judge Mesher concurred with what Judge Wikeley held in SF. Judge Mesher holds at [12]-[13]

12. The effect of regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations taken on its own is relatively uncontroversial. A similar power of supersession has existed for some time for incapacity benefit (IB) and employment and support allowance (ESA) in the 1999 Decisions and Appeals Regulations. In relation to those powers, a three-judge panel of the Upper Tribunal said this in FN v Secretary of State for Work and Pensions (ESA) [2015] UKUT 670 (AAC), now reported as [2016] AACR 24:

“70. We accept this analysis [of how the pre-existing case law fitted together] and although we were not asked to consider the practical application of regulation 6(2)(g) or 6(2)(r)(i) [of the 1999 Decisions and Appeals Regulations], we re-emphasise that the purpose of both provisions is to provide that the obtaining of a medical report or medical evidence following an examination is in itself a ground of supersession and that, accordingly, there is no longer a requirement to identify a regulation 6(2)(a)(i) change of circumstances in order to supersede an IB or ESA decision. More importantly, however, we accept and endorse what was said by Mr Commissioner Jacobs in paragraph 10 of CIB/1509/2004. What both provisions do is to authorise a supersession procedure but do not determine the outcome. What determines the outcome is a decision by the decision-maker (initially) or the First-tier Tribunal (on appeal), after an assessment of all the relevant evidence, as to whether the substantive tests (incapacity for work or limited capability for work) are satisfied.”

Paragraph 10 of CIB/1509/2004 was as follows:

“10. On either approach, regulation 6(2)(g) merely authorises a supersession procedure. It does not determine the outcome. It merely recognises that evidence has been produced that may, or may not, show that the operative decision should be replaced. The outcome is determined by the conditions of entitlement for an award.”

13. In my judgment, those statements of principle apply just as much to the operation of regulation 26(1)(a) of the 2013 Decisions and Appeals Regulations in relation to PIP. Thus the tribunal of 11 March 2016 was correct in paragraph 20 of its statement of reasons in so far as it was referring to regulation 26(1)(a), but subject to the important proviso that, although it is not necessary to identify a change of circumstances in order to authorise a supersession, it may be necessary to consider the circumstances obtaining when the existing award was made and during the period of the award as part of “all the relevant evidence” and as part of an adequate explanation of the outcome if it is less favourable than the existing award that is being replaced on supersession. Although the tribunal here did plainly consider whether the substantive test for entitlement to PIP was met as from 22 July 2015, I conclude in paragraphs 27 and 28 below that there was an error of law in the inadequacy of reasons.

And at [ 16]-[17]

16. Does regulation 11 go further than that provision of context? The notes to regulation 11 in the 2016/17 edition of Volume I of Social Security Legislation (Non-Means Tested Benefits and Employment and Support Allowance) start by suggesting that it appears to mean that a decision awarding PIP can be reviewed and superseded by the Secretary of State at any time and for any reason, although they go on to suggest that that is not the case. However, some may have interpreted regulation 11 in the first sense and it is possible that the tribunal of 11 March 2016 had such a meaning in mind in paragraph 20 of its statement of reasons. If so, it would have been wrong.

17. The precise terms of regulation 11 have to be looked at carefully. They only allow the Secretary of State to make a determination on the question of whether the claimant continues to have limited or severely limited ability to carry out daily living and/or mobility activities, not an overall decision on entitlement or otherwise to PIP. It may be that too much significance should not be placed on the use of those particular words, but examination of the provisions of the Welfare Reform Act 2012 on PIP shows many references (see in particular sections 80 and 81) to the determination of various questions (including the question just mentioned) in accordance with regulations, in contrast to provisions as to entitlement or non-entitlement, under which entitlement follows from positive determinations on a number of questions. A positive answer to each necessary question is one element (in the past sometime described as one building block) that goes towards an eventual decision on entitlement. Thus, regulation 11 does not directly allow a supersession of a decision making an award whenever the Secretary of State feels like it. To put it another way, the mere existence of a subsequent determination on one question, that the claimant does not have limited or severely limited ability to carry out daily living and/or mobility activities, cannot if itself take away the authority entitling the claimant to payment of benefit under the decision awarding entitlement. That authority can only be removed by the Secretary of State under his powers of revision and supersession in the 2013 Decisions and Appeals Regulations

* 1. It is Mr X’s contention that at time of the decision under appeal his condition had not changed since the previous assessment and it is arguable that the burden of proof is on the decision maker( DM) to show otherwise in order to justify the superseding decision. (CIB/1509/2004 at [ 12]-[13], DB v Secretary of State for Work and Pensions (IB) [2010] UKUT 209 (AAC) CIB/2734/2009 at [ 17].