

IN THE UPPER TRIBUNAL

Appeal No: CPIP/1440/2018

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Jones

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Newcastle-upon-Tyne on 5 January 2018 under reference SC228/17/01175 involved an error on a material point of law.

However, the Upper Tribunal exercises its discretion not to set aside the decision of the First-tier Tribunal on the basis that the respondent is making an ex gratia payment to the appellant that provides the remedy which the appellant had sought in the appeal.

This decision is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007

REASONS FOR DECISION

1. The appellant sought the award of PIP in a claim made on 15 September 2016 which the Secretary of State ('the respondent') declined to give by negative determination on 21 March 2017. On 5 January 2018 the First-Tier Tribunal ('the First-tier') allowed an appeal setting aside that decision of 21 March 2017, reinstating the award of DLA to the appellant from 5 April 2017.
2. However, the First-tier in its decision of 5 January 2018 made no determination on the appellant's PIP claim but remitted this to the respondent to (re)consider.
3. The appellant appealed to the Upper Tribunal against the First-tier's decision of 5 January 2018 seeking the award of PIP from 5 April 2017.

Permission to appeal and background to the appeal

4. Permission to appeal was granted by Upper Tribunal Judge Stewart Wright on 12 June 2018 and directions also given to the parties in relation to the filing of submissions. On 29 November 2018 Judge Wright issued further directions in response to their agreed consent order (signed and dated 26 November 2018 by both parties) for the Upper Tribunal to approve to dispose of the appeal.
5. I agree with and adopt paragraphs 4 -16 of the Judge Wright's Reasons for Directions in which he set out the background to the appeal and reasons why he could not approve the consent order which granted the appellant the award of PIP from 5 April 2017:

“4. The appellant has a history psychiatric illness including conditions such as psychosis, low mood, anxiety, depression and panic attacks. Taken together, these cause limitations in his ability to satisfy the daily living and mobility descriptors.

5. He originally claimed PIP by telephone on 15 September 2016, though his original PIP application form was not, it seems, completed until 25 January 2017. In that form the appellant reported that he had difficulty preparing food, managing therapy or monitoring his health condition, washing and bathing, dressing and undressing, engaging with others and making budgeting decisions. He also said under mobility activity 1 that he had difficulty planning and following journeys.

6. The appellant was first invited to attend a face-to-face appointment with the Health Professional on 13 March 2017, but failed to attend and failed to give good reason for his failure to attend. Accordingly, he was informed by a letter dated 21 March 2017 that a 'negative determination' had been made and that his

claim for PIP was stopped. A decision to end his awarded of disability living allowance ("DLA") from 4 April 2017 was also made. The appellant's appointee contacted the respondent on 25 April 2017 to give the appellant's reasons for his failure to attend the face-to-face appointment. Good reason was accepted but, seemingly, did not lead to the decision of 21 March 2017 being revised in the appellant's favour. Instead a further assessment appointment was made for 17 May 2017, which the appellant also failed to attend. A 'mandatory reconsideration' (ie revision) decision was issued on 22 May 2017. This upheld the 21 March 2017 decision, notwithstanding the apparent acceptance of good reason for the failure to attend on 13 March 2017.

7. A further claim for PIP was then made by the appellant on 1 June 2017. Even though that claim was the subject of an assessment by a Health Professional ("HP") appointed by the Secretary of State on 19 September 2017, no decision was made on that second claim by the Secretary of State. It appears, instead, that on the appeal against the negative determination decision of 21 March 2017 the Secretary of State sought to rely on the HP's report of 19 September 2017 as establishing that as a matter of substance the appellant did not qualify for any rate of either component of PIP from 5 April 2017.

8. The First-tier Tribunal decided on 5 January 2018 that the original negative determination of 21 March 2017 should be set aside as the respondent had accepted that there was good cause to justify the failure to attend. The appeal was therefore allowed but only to that extent by the First-tier Tribunal. The First-tier tribunal said that the appellant's award of DLA was reinstated (following paragraph 37 of *OM v Secretary of State for Work and Pensions* (PIP) [2017] UKUT 438 (AAC)), but it remitted the decision as to the level of any award of PIP to the respondent. The First-tier Tribunal suggested that it should remit this issue for

decision by the Secretary of State because of *SY v Secretary of State for Work and Pensions* (PIP) [2017] UKUT 363 (AAC) and *OM v Secretary of State for Work and Pensions* (PIP) [2017] UKUT 438 (AAC).

9. It seems clear given the above history that what was to be remitted to be decided by the Secretary of State was entitlement (if any) to PIP on the first claim for that benefit which had been made on or after 15 September 2016.

.....

11. The parties inform me that the decision of the First-tier tribunal of 5 January 2018 resulted in the Secretary of State commissioning a new HP assessment on 23 January 2018. That presumably was done...in respect of the still undetermined claim(s) for PIP the appellant had made with effect from 15 September 2016 and 1 June 2017.....A decision was made by the Secretary of State on 14 February 2018 to award PIP at the enhanced rate for the daily living component and a nil award of the mobility component, with the award being paid from 21 March 2018.

.....

15. If all of the above is correct..., then is not the effect that the 15 September 2016 claim for PIP has been (finally) decided, albeit not until 14 February 2018, and therefore if I were to set aside the First-tier tribunal's decision there would be no PIP claim for me to make any decision on?

16. It is for all these reasons that I question by these directions whether there is a lawful basis for me to make a decision awarding PIP from 5 April 2017. That ship may have already sailed: because that claim has subsequently been decided by the Secretary of State on 14 February 2018 and the effect of the DLA to PIP transitional provisions is that the PIP decision only has prospective effect from the date the PIP claim is in fact decided.'

Material error of law by the First-tier

6. The first question for the Upper Tribunal to determine on the appeal is whether the First-tier erred materially in law in its decision of 5 January 2018 such that the appellant's appeal should be allowed.
7. Both the respondent and appellant have supported the appeal and invited the Upper Tribunal to find that the First-tier's decision of 5 January 2018 involved the making of a material error of law.
8. I am satisfied that the First-tier's decision contained the following material error of law.
9. The First-tier erred in law in its application of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations") in considering itself precluded from making a decision at the hearing on 5 January 2018 with regards to the appellant's entitlement to PIP as claimed on 15 September 2016 and refused by the respondent on 21 March 2017 (with DLA lapsing on 5 April 2017.)
10. The First-tier's decision re-instated the Appellant's claim to DLA from 5 April 2017 but remitted to the respondent any decision on whether to award the appellant PIP deciding it was precluded from doing so. However, this was an error of law - the First-tier did have the jurisdiction to determine the appellant's substantive claim to PIP at the hearing on 5 January 2018 and failed to exercise any properly reasoned discretion as to why it should not to do so.

The Error of law in the First-tier's decision

11. At paragraph 12 of its statement of reasons for decision (of 5 January 2018) dated 5 March 2018 the First Tier stated:

‘The Upper Tribunal decision of *SY v Secretary of State of Works and Pensions*...is authority that the appellant's claim to

entitlement to PIP should be decided by the respondent's decision maker and that following a successful appeal against a decision that included a negative determination, the claim should be referred back to the respondent for that purpose.'

12. At paragraph 17 of the statement of reasons the First-tier concluded:

'In light of the above decision of the Upper Tribunal in SY and for other reasons stated above, the Tribunal decided to refer the claim made on 15 September 2016 back to the respondent to make an outcome decision on entitlement containing an assessment determination made under regulation 17 of the transitional Provisions Regulations, in accordance with the decision in SY.'

13. For the reasons set out below which Upper Tribunal Judge Wright has previously stated to be arguable (at paragraph 17 of the reasons for directions dated 29 November 2018), I agree that the First-tier's decision did contain a material error of law:

'17. I am prepared to accept that the First-tier tribunal may have erred in law by misdirecting itself as to the effect of the decisions of *SY* and *OM*. This would be on the basis that the First-tier Tribunal appears to have wrongly considered it was bound to refer the decision on PIP entitlement back to the Secretary of State. I would also be prepared to accept that the true position is that.....it was open to the First-tier tribunal to have made a decision on entitlement to PIP rather than referring the decision back to the Secretary of State: see, by analogy, paragraph [35] of *OM*. I would add to these evidential considerations the important consideration of fairness. Fairness here would include ensuring that both parties were aware that this was a step the First-tier tribunal was contemplating and were properly able to address the evidence as to PIP entitlement, as well as the consideration that the First-tier tribunal deciding the PIP entitlement would remove

an important right of appeal on that issue the facts (appeal from the First-tier Tribunal being confined to issues of law).’

14. The Upper Tribunal’s decision in *SY* is not authority for the proposition that on a successful appeal against a ‘negative determination’, a claim for PIP must (*SY* uses the word ‘should’) be referred back to the Secretary of State. There is no authority which provides that the First-tier does not retain the jurisdiction to decide in its discretion that it is able fairly to determine the underlying entitlement to PIP.
15. As the parties agreed in their consent order dated 26/11/2018 (which they no longer seek the Upper Tribunal to approve):

‘9. The First-tier Tribunal erred in law by misdirecting itself as to the effect of the decisions of *SY* and *OM*. The First-tier thought itself bound to refer the decision on entitlement back to the Secretary of State; whereas, the true position is that depending on the evidence already before the First-tier, and on any further evidence it might have seen fit to obtain (consistent with its inquisitorial role) it was open to the First-tier to make a decision on an entitlement to PIP, rather than referring the decision back to the Secretary of State.

10. That the First-tier Tribunal has the ability to make an award of PIP, on an appeal from a failure to attend negative determination, in appropriate cases is clear from eg. the judgment of Judge Wikeley in *SY* (see at [45]) and by analogy, the judgment of Judge Mesher in *OM* (see at [32]).’

The parties’ position on the appeal

Exercising the discretion not to set aside the First-tier’s decision and make no further order on remedy

16. As I can allow the appellant's appeal simply by considering the legal arguments in the papers there is no need for me to hold a hearing of the appeal to the Upper Tribunal. The parties no longer requested an oral hearing of the appeal. I have all the necessary material before me.
17. Both parties supported the appeal against the First-tier Tribunal's decision of 5 January 2018 being allowed for error of law, but the decision not being set aside by the Upper Tribunal. Given I agree with that result, I can give my reasons for so doing in short order.
18. Prior to the Upper Tribunal determining this appeal, the respondent subsequently granted the appellant PIP from 21 March 2018 in a separate and later decision.
19. Between August and October 2018 the parties made their original submissions upon the appeal.
20. As set out above, on 26 November 2018 the parties agreed a consent order allowing the appeal on the basis that the First-tier had erred in law in its decision of 5 January 2018 and remaking the decision to award the appellant PIP at the enhanced rate of daily living component from 5 April 2017.
21. Following Upper Tribunal Judge Wrights' reasons for directions of 29 November 2018 as set out above, the Secretary of State ("the respondent") filed further submissions dated 21 December 2018. These submissions accepted that the consent order should not be approved. Instead the submissions set out the basis of the ex gratia payment the respondent proposed to make (as set out below). In light of that payment, the respondent invited the Upper Tribunal to dispose of the appeal by: a) Finding that the First-tier Tribunal's decision involved the making of an error of law, as per the draft consent order; and b) exercising the Upper Tribunal's discretion, under s.12(2) of the TCEA 2007, not to set-aside the First-tier's decision.

22. In submissions dated 31 December 2018 the appellant's representative requested an extension of time pending confirmation that that ex-gratia payment would in fact be made. Upper Tribunal Judge Wright granted an extension of time to 25 January 2019 in directions dated 7 January 2019.
23. On 25 January 2019 the appellant's representative confirmed that the respondent had approved the making of the ex gratia payment which would put the appellant and his family in the position they would have been in had an award of PIP with the enhanced rate of the daily living component been made effective from 5 April 2018. In those circumstances the appellant joined the respondent in inviting the Upper Tribunal to find that the First-tier decision involved an error of law for the reason previously identified but invited the Upper Tribunal to decline to exercise its discretion to set that decision aside.
24. By 25 January 2019 the parties have now agreed that the respondent will make an ex gratia payment to the appellant the difference in payment between the DLA and PIP rates for the period from 5 April 2017 to 20 March 2018 together with an amount equivalent to the passported benefits that would have been available to the appellant's family during that same period had PIP been paid.
25. Therefore, the appellant has obtained the remedy he sought within the appeal and the Tribunal exercises its discretion not to set aside the decision of the First-tier Tribunal where it would give no effective remedy.

Conclusion

26. For the reasons given above, the appeal against the First-tier's decision dated 5 January 2018 is allowed for material error of law. However, the Upper Tribunal exercises its discretion not to set aside that decision in

light of the parties' agreement and the respondent making the ex gratia payment to the appellant which provides an effective remedy and has also been agreed.

**Signed (on the original) Rupert Jones
Judge of the Upper Tribunal**

Dated 18 February 2019