[2017] AACR 19

(DS v Secretary of State for Work and Pensions (PIP)
[2016] UKUT 538 (AAC))

Judge Mesher
CPIP/1123/2016
2 December 2016

Supersession – decision on appeal must make findings on ground on which supersession decision made and date from which it properly took effect

In July 2013 the claimant, following a consultation with a health care professional (HCP), was awarded personal independence payment (PIP) on the basis that he met various descriptors. The award was subsequently reviewed and, following a further HCP consultation, the Secretary of State decided that the claimant was no longer eligible for PIP from June 2015, on the basis that no descriptors were satisfied. The claimant appealed to the First-tier Tribunal (F-tT), arguing that his condition had either not improved or had worsened. One member of the panel was a registered medical practitioner in accordance with the Senior President of Tribunals' practice statement. The F-tT upheld the Secretary of State's decision and the claimant appealed to the Upper Tribunal (UT), arguing that the medically qualified member had been an unsuitable person to sit on the tribunal because he did not have a licence to practise following a warning for inappropriate conduct. Among the issues before the UT were whether the member had been a registered medical practitioner under the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 and whether the tribunal had dealt adequately with the supersession of the existing PIP award.

Held, allowing the appeal, that:

1. the 2008 Order (as amended) defined "registered medical practitioner" as "a fully registered person within the meaning of the Medical Act 1983 whether or not they hold a licence to practise under that Act", and therefore it was irrelevant to qualification for appointment to a tribunal whether the person had a licence to practise, provided that they were fully registered (paragraphs 9 to 11);

2. a tribunal considering an appeal against a supersession decision must identify a ground of supersession under the legislation, a factual basis for the superseding decision and the date from which that decision was effective. In doing so all grounds of supersession could apply in so far as the conditions they contain are made out, without any artificial rules to try to make them mutually exclusive: *SF v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 481 (AAC) distinguished (paragraphs 14 to 15);

3. the F-tT erred in law; among other things its decision was incoherent and inconsistent – it gave two different effective dates for the superseding decision, it failed to deal with the supersession issue including the earlier medical evidence and the claimant's submission that his condition had not improved, and its reasons for its decision did not meet the required standard: R(M) 1/96 (paragraphs 16 to 20).

The judge set aside the decision of the F-tT and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with his directions.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Manchester First-tier Tribunal dated 7 January 2016 involved an error on a point of law and is set aside. The case is remitted to a differently constituted tribunal within the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the directions given in paragraph 23 below and any further procedural directions that may be given by a First-tier Tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

REASONS FOR DECISION

1. The claimant appeals against the decision of the tribunal of 7 January 2016 with the permission of Upper Tribunal Judge Wright given on 22 July 2016 after an oral hearing. The representative of the Secretary of State (Mr Spencer) in the written submission dated 5 September 2016 supports the appeal to the Upper Tribunal and submits that the decision of the tribunal of 7 January 2016 should be set aside and the case remitted to a new tribunal for rehearing. In his reply dated 12 October 2016 the claimant has asked for an oral hearing before the Upper Tribunal. As I have decided on consideration of the papers that his appeal to the Upper Tribunal should be allowed, there is no need for a hearing at the present stage. The claimant will have his opportunity for an oral hearing in front of the new tribunal that rehears his case. I suspect that that is what the claimant was really asking for in his reply.

2. The claimant had claimed personal independence payment (PIP) in 2013. He completed a PIP2 (how your disability affects you) form that he signed on 12 July 2013 and attended a consultation with a nurse on 9 August 2013. His GP had written that he suffered from tonic clonic epilepsy with frequent fits that was proving hard to control with consultant involvement. The nurse accepted that he qualified for the following points-scoring daily living descriptors: needs supervision or assistance to either prepare or cook a simple meal (1(e)); needs either to use an aid or appliance to be able to manage medication or supervision, prompting or assistance to be able to manage medication or monitor a health condition (3(b)); needs supervision or prompting to be able to wash or bathe (4(c)); needs to use an aid or appliance to be able to dress or undress (6(b)); and needs prompting to be able to engage with other people (9)(b)). She also accepted that he qualified for mobility descriptor 1(b) for needing prompting to be able to undertake any journey to avoid overwhelming psychological distress. She suggested a review after 12 months because the claimant was having his anti-epileptic drugs increased, which it was hoped would control his seizures, and was also awaiting the outcome of some investigation into a knee problem that might require further surgery.

3. The award of the daily living component of PIP at the standard rate, but no mobility component, was made for the period from 3 June 2013 to 8 August 2015, but the notification letter dated 20 November 2013 stated that the claimant would be contacted after 9 August 2014 to make sure he was receiving the right level of PIP.

4. The claimant was evidently contacted about that time because he completed another PIP2 form and signed it on 29 August 2014. He enclosed a letter dated 29 August 2014 from his GP saying that the epilepsy was proving hard to control and was currently getting worse, being due for a change of medication, and that the claimant was also awaiting intervention from a mental health team to help with his chronic anxiety. He attended another consultation with a different nurse on 16 March 2015. This time no points-scoring descriptors were accepted at all. On 10 June 2015 the decision was made that the claimant was no longer entitled to PIP from that date. The decision-maker's reasoning as set out in the notification letter of the same date was as follows:

> "Taking account of the further consultation with the medical assessor, I have changed the descriptors previously awarded on the grounds of medical evidence received and the decision is effective from today. I have changed the decision from today as you could not be expected to know the evidence received shows you are no longer entitled. I made my decision using information about your illnesses and disabilities including details of any treatment, medication, test results and symptoms. I consider this information is the most suitable available and enough to decide how much help you need."

There then followed a brief statement of the areas where the claimant had not indicated any needs in the PIP2 form of 29 August 2014 and an adoption of the nurse's opinion on the areas where the

claimant had indicated needs.

5. The claimant put in a detailed letter of appeal and request for mandatory reconsideration, which was refused. The Secretary of State's written submission simply supported the decision that the claimant was not entitled to PIP from 10 June 2015, as if it had been a decision on a new claim. Section 1 of the document even gave the date of claim as 8 September 2014. The claimant's then representatives, Shelter, put in a written submission with supporting medical evidence. It was submitted, among other things, that the claimant's condition remained the same as when PIP had been awarded or was possibly getting worse.

6. The claimant attended the tribunal hearing on 7 January 2016 on his own. In accordance with paragraph 4 of the Senior President of Tribunals' practice statement on the composition of tribunals in the Social Entitlement Chamber from 1 August 2013 onwards (made under article 2 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835)), the tribunal had to be made up of a tribunal judge, a tribunal member who is a registered medical practitioner and a tribunal member who has a disability qualification. In this case the record of proceedings show that both members had the title "Dr", but it appears that the tribunal member I shall call Dr HSW was the member from the registered medical practitioner pool. I shall come back to his status later.

7. The tribunal disallowed the appeal. It stated in its decision notice both that the decision made by the Secretary of State on 10 June 2015 was confirmed and that the claimant was not entitled to the daily living component or the mobility component of PIP (scoring no points) from 8 September 2014. Paragraph 2 of the statement of reasons recognised the existence of the initial award of PIP, stating the period it covered, but then said that by a decision dated 10 June 2015 no points were awarded and therefore no award of benefit was made. The statement then went through the evidence and set out why, by reference to what it called the PIP2 claim form and the most recent consultation report, plus the claimant's oral evidence, it concluded that he did not score any points on any descriptors.

8. When giving the claimant permission to appeal after the oral hearing on 20 July 2016, Judge Wright specifically mentioned three issues that might be relevant on appeal. The first was whether the tribunal of 7 January 2016 was properly constituted in the light of the evidence that had been produced of Dr HSW's General Medical Council registration. The second was whether grounds needed to be shown for removing the claimant's initial award from 10 June 2015 and whether the requirements of Commissioner's decision R(M) 1/96 on the giving of an adequate explanation by a tribunal were applicable to the decision confirmed by the tribunal as in effect from 10 June 2015. The third related to the possible effect of a decision in a case yet to be heard by a three-judge panel about the relationship of the rule that claimants are not to be regarded as able to do activities that cannot be done safely and the need for supervision. I shall deal with those issues in that order.

Was the tribunal of 7 January 2016 properly constituted?

9. After the First-tier hearing someone assisting the claimant looked up Dr HSW's registration on the GMC's website, as any member of the public is entitled to do. That produced the information that Dr HSW was registered without a licence to practise. It also produced the information that he had been given a warning for conduct that did not meet the standards required of a doctor, apparently for matters occurring in 2006/2007. The claimant submitted to Judge Wright that Dr HSW therefore could not have been a suitable person to sit on a First-tier Tribunal.

10. The submission of 5 September 2016 by Mr Spencer on behalf of the Secretary of State has very helpfully gone into the legislative background. He points out that the practice statement

mentioned in paragraph 6 above is to do with selection of particular members for a particular tribunal from the panels of appointed tribunal members, so that the crucial question is whether Dr HSW was properly qualified for appointment to the panel of registered medical practitioners. Article 2(2)(a) of the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 (SI 2008/2692) includes in the categories of person eligible for appointment as a member other than a judge "a registered medical practitioner". Then, as set out in the submission, article 1(2), as inserted with effect from 1 September 2009, defines "registered medical practitioner" as "a fully registered person within the meaning of the Medical Act 1983 whether or not they hold a licence to practise under that Act". So the 2008 Order specifically makes it irrelevant to qualification for appointment to a tribunal as a registered medical practitioner that the person does not have a licence to practise, provided that the person is fully registered. The full details on the GMC website make it plain that Dr HSW was fully registered. Therefore he was qualified for appointment. There can then be no doubt that the tribunal of 7 January 2016 was properly constituted (nothing appearing to throw any doubt on the other member's eligibility for appointment under the category of person experienced in dealing with the physical or mental needs of disabled persons (article 2(3) of the 2008 Order)). Accordingly, there is no need to explore what might have been very difficult questions of law that might have arisen if Dr HSW had not met the eligibility criteria at the time of appointment or had ceased to satisfy them at some point during his term of appointment, but had nevertheless actually been appointed for a term that had not expired.

11. Whether Dr HSW was a suitable person in general to sit on any particular First-tier Tribunals (eg because of the warning issued to him by the GMC) was a matter for the President of the Social Entitlement Chamber of the First-tier Tribunal, acting through a Regional Tribunal Judge or District Tribunal Judge as allowed by the practice statement mentioned above in making that selection. In my view, once the selection has been made (and the tribunal has the members from the right panels) the Upper Tribunal cannot go behind that selection on the basis of a claimant's or even its own views about the member's suitability. There is no requirement that the registered medical practitioner member have any specialist knowledge or experience of any medical condition that is likely to be relevant in a particular appeal. It is only if something in the member's background or conduct at the hearing indicates a bias against any party that a question might arise as to the tribunal's decision having involved an error of law in the form of a breach of the principles of natural justice. Here, the claimant did in his application for permission to appeal raise a question of bias based on a letter from Dr HSW published in a national newspaper in 2002. That was not one of the grounds specifically mentioned by Judge Wright when giving permission and was not mentioned in the claimant's reply of 12 October 2016. In my judgment what was said about the contents of the letter on page 208 of the papers falls well short of circumstances in which a fair-minded observer might think that Dr HSW might unfairly favour one side or the other in a PIP appeal. In considering the application of the very specific conditions of entitlement to PIP, fitness or otherwise to return to work, which apparently had been the focus of the letter, is not relevant to entitlement.

Did the tribunal deal adequately with fact that the claimant had an existing award of PIP running to 8 August 2015?

12. A decision on the substance of this issue has very recently (after the completion of the written submissions to the Upper Tribunal) been given by Judge Wikeley in *SF v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 481 (AAC). The Secretary of State will have received a copy of that decision as a party to the proceedings. I am adding a copy to the papers in the present case for the information of the claimant and the guidance of the new tribunal that carries out the rehearing that I have directed.

13. In *SF*, Judge Wikeley considered a submission from Mr Spencer on behalf of the Secretary of State in more or less the same terms as in the present case. He accepted that submission as it related to the grounds of supersession that had to be shown and the date from which any supersession could be effective, but rejected the submission as it related to the relevance of the principles laid down in R(M) 1/96. To save unnecessary repetition, as I agree with Judge Wikeley's conclusions subject to one small qualification, I shall not repeat what is already in his decision.

14. The one respect in which I do not agree with Judge Wikeley, or with Mr Spencer's submission, arises in the following rather complicated way. I agree of course that a decision-maker and a tribunal on any appeal in a case where a claimant had an existing award of benefit that is not subject to revision from the outset must, to exercise the power to take away that award for some period that it covers and substitute some decision less favourable to the claimant for that period, identify a ground of supersession under the legislation, a factual basis for the superseding decision and the date from which the superseding decision is effective. Then I also agree that the potential grounds of supersession in PIP cases in circumstances like those of the present case are relevant change of circumstances under regulation 23(1) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (the 2013 Decisions and Appeals Regulations (SI 2013/381)) and the receipt of medical evidence or the existence of a "negative determination" under regulation 26. The default position under section 10(5) of the Social Security 1998 is that a superseding decision takes effect from the date on which it is made. That does not always apply in PIP cases where the superseding decision under regulation 23(1) is not advantageous to the claimant. If the claimant failed to notify the Department of a change of circumstances they were required to notify and could reasonably have been expected to know that the change of circumstances should be notified, the superseding decision takes effect from the date on which the change ought to have been notified (2013 Decisions and Appeals Regulations, Schedule 1, paragraphs 16 and 17). If in such circumstances the claimant could not reasonably have been expected to know that the change of circumstances should have been notified, no special rule under Schedule 1 applies (by virtue of paragraphs 12 and 13) and the superseding decision takes effect from the date it is made under section 10(5). There are a number of special rules in Schedule 1 about superseding decisions on a relevant change of circumstances that are advantageous to the claimant, but if none apply, the superseding decision takes effect from the date of the change of circumstances (paragraph 12). The 2013 Decisions and Appeals Regulations do not contain any special rule about the effective date of a superseding decision following the application of regulation 26, so that the default rule in section 10(5) applies.

15. Mr Spencer then argues from looking at the circumstances where medical evidence suggests that a superseding decision would be to a claimant's advantage that regulation 26(1)(a) should be understood as allowing a supersession to be carried out only where a relevant change of circumstances cannot be identified, so as to allow the claimant to get the additional benefit back to the date of the change of circumstances (or sometimes the date of notification), rather than be restricted to the date of the superseding decision. He suggests that regulation 26(1)(a) should be regarded as supplying a ground of supersession of last resort for cases where no other ground can be made out. That approach was accepted by Judge Wikeley in *SF*. However, it seems to me that that is to inject an unnecessary degree of complication by adding provisos that are not present in the words of the regulations. In my view, all grounds of supersession can apply in so far as the conditions they contain are made out, without any artificial rules to try to make them mutually exclusive. So far as decisions that are advantageous to the claimant go, there is then no difficulty in applying a general principle that the claimant should be able to take the benefit of whatever ground gives the most advantage. So far as decisions that are not advantageous to the claimant are concerned, which will in the great majority of cases be supersessions carried out at the Secretary of State's own initiative, I do not see why the same

principle cannot apply. The Secretary of State is entitled to rely on whatever of the grounds of supersession that are made out that result in what he says is the correct position being applied for the longest period. But if the Secretary of State chooses to rely on the simpler ground of supersession in regulation 26(1)(a), without going to all the bother of investigating and thinking about what the claimant should or should not have realised needed to be notified in the past, and is content for the superseding decision to take effect from the date on which it is made, I do not see why on appeal a tribunal should be obliged to consider all the elements of and under regulation 23(1) on relevant change of circumstances first. That would seem to be the implication of the rule suggested by Mr Spencer and endorsed by Judge Wikeley, but in my judgment such a course does not have to be followed in all cases. A tribunal would always retain the discretion under section 12(8)(a) of the Social Security Act 1998 to consider regulation 23(1) in a case in which the Secretary of State has relied only on regulation 26(1)(a) if the potential application of regulation 23(1) is clearly apparent from the evidence before it (which may be different from or more extensive than that before the Secretary of State).

16. After that rather long diversion, which I hope will be of at least some assistance to the new tribunal, the identification of errors of law in the decision of the tribunal of 7 January 2016 is relatively straightforward. The terms of the notification letter of 10 June 2015 ([4] above) show that the decision-maker was applying regulation 26(1) of the 2013 Decisions and Appeals Regulations and had indeed considered whether regulation 23(1) was applicable. Though there was a brief explanation of the decision-maker's evaluation of the most recent evidence, there was no explanation of why the evaluation was different from that which had led to the award of PIP for the period from 3 June 2013 to 8 August 2015. However, the written submission to the First-tier Tribunal wrongly omitted any mention of the previous award or of powers of supersession and even included the positively misleading statement that the date of claim was 8 September 2014. The tribunal of 7 January 2016, possibly led astray by that approach, first of all made a decision that was incoherent and internally inconsistent. It stated that the claimant was not entitled to PIP from 8 September 2014 (which could only have been right if it was a case of a new claim from that date) and at the same time that the Secretary of State's decision of 10 June 2015 (effective only from that date) was confirmed. That itself was an error of law.

17. Then, although the tribunal acknowledged the existence of the previous award in its statement of reasons, it failed to grapple with the issue of supersession at all. It needed to do so to have the power to make any decision at all about the period from 10 June 2015, let alone from 8 September 2014. That was a further error of law.

18. If one were to assume that the tribunal had relied on receipt of medical evidence as a ground of supersession under regulation 26(1) of the 2013 Decisions and Appeals Regulations, although identification of that ground does not require the identification of any change of circumstances, there could, by analogy with [70] of *FN v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 670, now reported as [2016] AACR 24, not have been a supersession unless it was found, on consideration of all the relevant evidence, that the conditions of entitlement were not satisfied from 10 June 2015. The tribunal did not show that it has approached the case on that basis. Just as in *FN* where it was said in the case of ESA and IB that there is no rule of law that earlier healthcare professional reports always have to be considered by the tribunal, there is no rule of law in PIP cases such as this that the evidence that led to the award that is being removed on supersession must always be considered. Relevance depends on the circumstances of the particular case. Here, the claimant's representatives had expressly said in the appeal to the First-tier Tribunal that his condition was the same as when the initial award was made or possibly worse. He was thus raising the issue of the potential relevance of how his condition affected him in 2013 and of the evidence that led to the making of the award of PIP, in particular the report of the nurse of 9 August 2013. In those

circumstances, I consider that the tribunal was required at the least to say whether or not it considered the earlier evidence relevant and, if not, why not, and to say what it made of the claimant's contention that his condition had not improved or had worsened.

19. Finally, there was a failure to give reasons that came up to the standard required under paragraphs 15 and 16 of R(M) 1/96. It was said there, in the context of a less favourable decision than previously on a renewal claim for mobility allowance (the predecessor of the mobility component of DLA), that unless the reason for the difference in result between the previous award and the new decision was reasonably obvious from the findings of fact supporting the new decision, in order to avoid a feeling of injustice on the part of the claimant (especially where his case was that his condition had not improved or had worsened) a tribunal would need to give some short explanation of why there was a difference in result. Examples might be that the tribunal considered that the previous award had been mistaken on the evidence available when it was made or that there had been some new source of evidence available that was more persuasive than that originally available or some change of circumstances in the meantime sufficient to explain the difference. I agree with the reasons given by Judge Wikeley in *SF* for applying those principles in circumstances like those of the present case as well as to decisions on renewal claims.

20. For all those reasons, the decision of the tribunal of 7 January 2016 must be set aside as involving an error of law.

21. In his submission of 5 September 2016 Mr Spencer mentioned regulation 11 of the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377)), which had not specifically been raised by Judge Wright when giving permission to appeal. There are problems in working out the relationship between that provision and regulation 26 of the 2013 Decisions and Appeals Regulations, but I do not need to go into those problems to decide this case or give directions to the new tribunal. The issue is discussed in my decision in *KB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 537 (AAC).

The effect of the forthcoming three-judge panel

22. Since the decision of the tribunal of 7 January 2016 has to be set aside on the supersession issues, there is no need to await the decision of the three-judge panel in appeal on file numbers CSPIP/97/2016 and CSPIP/106/2016[*] on the issue of the relationship between asking whether an activity can be done safely and the effects of supervision. The Upper Tribunal hearing in those appeals, and some other associated cases, took place last week. The decision should therefore be available before the rehearing by a new tribunal in the present case takes place.

Conclusion and directions

23. The decision of the tribunal of 7 January 2016 is set aside. The claimant's appeal against the Secretary of State's decision of 10 June 2015 is remitted to a First-tier Tribunal in accordance with the following directions. No-one who was member of the tribunal of 7 January 2016 is to be a member of the new tribunal. There must be a complete rehearing of the appeal on the evidence produced and submissions made to the new tribunal, which will not be bound in any way by any findings made or conclusions expressed by the tribunal of 7 January 2016. The approach of law set out above is to be applied. It might be an advantage for the Secretary of State to produce a fresh written submission before the rehearing dealing properly with the issues of supersession. The salaried First-tier Tribunal

[*] See now [2017] UKUT 105 (AAC)

judge who considers the arrangements for the rehearing is to consider whether to direct such a submission and, if so, within what time limit, and is to ensure that copies of the decision in *SF v SSWP (PIP)* [2016] UKUT 481 (AAC) and of Mr Spencer's submission for the Secretary of State of 5 September 2016 are in the papers for the rehearing. The evaluation of all the evidence will be entirely a matter for the judgment of the new tribunal. The decision on the facts in this case is still open.