

IN THE UPPER TRIBUNAL **Upper Tribunal Case No. CPIP/3000/2017**
ADMINISTRATIVE APPEALS CHAMBER

Before: Ms P Ramshaw, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (SC233/16/00870, South Shields, 3 May 2017) involved the making of an error on a point of law.

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), I set aside the Tribunal's decision. In accordance with section 12(2)(b) of the TCEA I re-make the decision as follows:

1. The Secretary of State's decision of 23 January 2016 is set aside.
2. The deemed date of the claim for PIP in accordance with Regulation 12(1)(c) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) is 14 May 2015.
3. If the appellant wishes to pursue a claim for PIP she has one month from the date that this decision is sent to her to provide to the respondent the information and evidence that the respondent requires to determine whether she has limited or severely limited ability to carry out daily living or mobility activities. This means that she must return the PIP2 form with any evidence she wishes the respondent to consider.

REASONS FOR DECISION

Background

1. This is an appeal against the decision of the First-tier Tribunal dated 3 May 2017.
2. The appellant made a claim for Personal Independence Payment ('PIP'). This was a first claim for PIP. The issue (as set out in the Statement of Reasons) before the First-tier Tribunal was whether or not the appellant failed without good reason to provide required information or evidence. I discuss further below the issues that were in dispute.
3. It will be helpful to set out a brief chronology of relevant events:
 - 14 May 2015 – Letter received by the respondent (letter was dated 11/5/15). The appellant noted that she had been advised that she may be entitled to PIP in conjunction with her Employment Support Allowance

(‘ESA’). She asked, if that was the case, if application form and further information on the benefit could be sent to her.

- 21 May 2015 PIP1 - claim form sent to appellant.
- 9 June 2015 – Letter dated 3/6/15 received by respondent. The appellant notes the PIP claim form was received by her on 1/6/15. She requested more time to fill the form in and asked for confirmation in writing (referring to her 11 May letter) whether she could claim PIP in conjunction with ESA. She said she needed this information before she could complete the claim form. [On receipt by the respondent no action was taken as this was marked as ‘further evidence’]
- 9 July 2015 – a reminder to complete the PIP form was sent to the appellant.
- 20 July 2015 – the respondent received a response dated 16 July 2015. The appellant said she needed time to fill the form in and reminded the respondent that she had asked about claiming PIP in conjunction with ESA and had not yet received a response. She asked again for confirmation in writing that the claim for PIP would not affect in any way her claim for ESA. She said she would await confirmation.
- 21 July 2015 the respondent wrote to the appellant saying more information was needed and asking her to complete the questions on the ‘what we need to know’ page. Information as to where to obtain support from was given by referring to local support organisations whose details could be found online and at a local library. Reference was also made to online information about PIP. The ‘what we need to know’ page that was enclosed contained a table with 2 columns headed ‘what we need to know’ and ‘Your reply’. The table itself was headed ‘office manager’. The column headed ‘what we need to know’ had 4 entries none of which can properly be described as questions warranting a reply. The first 3 entries were statements indicating that advice could not be given on ESA and to contact a local job centre for advice, that the DWP website could be accessed from a local library and that the CAB or similar organisation could assist in completing the PIP1. The 4th entry was ‘Please return your completed PIP1 as soon as possible’.
- 11 December 2015 - completed PIP1 form received.
- 14 December 2015 - PIP 2 form sent to appellant.

- 2 January – reminder sent to appellant to complete PIP2
- 20 January 2016 – letter from appellant (dated 11 January 2016) requesting more time to complete the PIP2 and again asking for confirmation that PIP would not affect entitlement to ESA. [On receipt by the respondent no action was taken as this was marked as 'further evidence']
- 23 January 2016 –decision letter from respondent advising claim disallowed because further information not received
- 25 January 2016 – appellant sent a letter asking for a response to her 11 January letter [this crossed with the 23 January letter]
- 4 February 2016 – letter from appellant who refers to decision letter of 23 January and asks why her letters of 11 January and remainder of 25 January were not answered and asking again for clarification of the position with her claim for ESA
- 10 February 2016 notes of telephone call from respondent - Call was answered but cut off no answer when rang back
- 10 February 2016 – notes of second call from respondent - person answered & said not sure if appellant was in. Person said they were waiting for a telephone call and would have to cut respondent off
- 16 February 2016 notes of telephone call from respondent - tried to speak to appellant, person who answered the phone could not speak very good English, could hear appellant in the background refusing to speak to caller saying she wanted a letter and did not want any phone calls. Letter issued as requested.
- 16 February 2016 - letter from respondent simply saying 'you requested a letter confirming that if you were to be awarded personal independence payment this would not affect any other benefits you may be claiming'.
- 19 February 2016 letter from appellant received by respondent (dated 16 February 2016) referring to previous letters saying that she needed the respondent to address the matters in those letters before she could fill out her application form and stating that she asked for her case to be considered again and afresh from the outset after she had had a chance to consider if she wanted to go ahead with her application after receiving a response to her earlier queries

- 29 February 2016 notes of telephone call from respondent - regarding the appellant's request for a letter that other benefits would not be affected by her claim for PIP. The respondent advised that a letter had already been issued and confirmed verbally that her ESA would not be affected other than possibly better if she were awarded enhanced PIP. Also advised the appellant that the claim been disallowed based on the non-return of PIP2 and a new claim would have to be made. Advised can send letter to confirm the telephone discussion, the appellant stated that she would not be making new claim for the foreseeable future and that she does not need such a letter to be sent.
- 11 March 2016 letter from respondent enclosing a copy of the decision of 23 January 2016
- Further correspondence was sent by the appellant to the respondent and a formal complaint was made. The complaint was not upheld and a letter was sent to the appellant on 28 April 2016 advising her of this outcome.
- A mandatory reconsideration was carried out - the decision of 23 January 2016 was not changed.

The appeal to the First-tier Tribunal

4. The appellant appealed against the respondent's decision to the First-tier Tribunal. The Tribunal dismissed the appellant's appeal finding that the appellant had not shown good reason for not returning the PIP2 form and therefore that the respondent was entitled to issue a 'nil determination' in accordance with Regulation 8 of the Social Security (Personal Independence Payment) Regulations 2013 ('PIP Regulations').
5. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 19 September 2017 District Judge Dooris refused to grant permission to appeal. The appellant renewed her application for permission to the Upper Tribunal and on 28 February 2018, after an oral hearing of the permission to appeal application, Upper Tribunal Judge Rowland granted the appellant permission to appeal.

The Proceedings before the Upper Tribunal

6. Judge Rowland set out in the reasons for his to grant permission to appeal set out the following:

“it is arguable that the First-tier Tribunal ought to have made clearer findings of fact or otherwise given a clearer explanation for finding that the claimant did not have good cause for not submitting her PIP2, including giving consideration of the possible relevance of the claimant’s mental health.”

7. He identified, as part of the reasons for granting permission, that:

“The claimant’s appeal to the First-tier Tribunal arguably raised two issues: whether the time for returning the PIP 1 claim form should have been extended under regulation 12(1)(c) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) and whether a “negative determination” should have been made under regulation 8(3) of the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) because she had failed to return the PIP2 form.”

8. I consider that permission to appeal was given in respect of both issues.

9. Judge Rowland gave directions requiring the respondent to provide a written response to the appeal. The respondent supported the appeal and suggested (in paragraph 6) that, if an error of law were found, as no further findings of fact are required the Upper Tribunal could re-make the decision. The appellant did not make any observations on the issues raised in the grant of permission or on the Secretary of State’s submissions. Neither party requested an oral hearing.

10. The case was transferred to me from Judge Rowland.

Discussion – error of law

11. I have considered the evidence that was before the First-tier Tribunal and the reasons the Tribunal provided for reaching its decision as set out in the Statement of Reasons. As identified by Judge Rowland the appeal to the First-tier Tribunal (arguably) raised two issues – the ‘extension of time’ issue and the ‘negative determination’ issue. The First-tier Tribunal did not consider the ‘extension of time’ issue. The Tribunal were not required to consider whether the appellant might be entitled to an award of PIP because of her medical conditions. No determination has yet been made by the respondent nor can it be unless and until the required information is submitted.

The negative determination issue

12. The First-tier Tribunal set out the background to the appellant’s case including the appellant’s request for confirmation that her claim for ESA would not be

affected by a claim for PIP. The appellant's oral evidence as recorded by the Tribunal was that she persisted with requiring to know the answer right up to the end of the hearing.

13. The Tribunal found:

"12. ... that the letter of 16 February 2016... did not contain any information, but that the information which should have been enclosed had previously been sent to the appellant on 21 July 2015.

13...the appellant had previously been employed by the Inland Revenue, and she appeared to be of good intelligence. She was told by letter of 21 July 2015 that she should contact her local job centre for advise (sic) on ESA but had not done so; she was told that she could access information at a local library; she was told that she could contact the CAB or similar organisation and she said that she had telephone them but not been in to see them; and she was told that she needed to return PIP1 as soon as possible or her claim might be disallowed.

16...that the appellant had determined not to complete the form PIP2 until she had the written confirmation that she had initially asked for.... she initially said that she thought page 11 of the appeal papers was an internal memo, but then confirmed that she had read the covering letter...She said she "wanted it from the horse's mouth".

17 ...that the appellant had not shown good reason for not returning the PIP2."

14. The thrust of the First-tier Tribunal's reasoning is that having been referred to sources of help and having been given the information requested that the appellant's continued insistence on having written confirmation, from the 'horse's mouth' (that if she made a claim for PIP her claim for ESA would not be affected), was not a good reason for the failure to return the PIP2 form. The conclusions reached appear to be based on the 21 July 2015 letter. It is clear (from paragraph 12 of the Tribunal's Statement of Reasons) that it considered that the letter and enclosure of 21 July 2015 answered the appellant's question. There is reference by the Tribunal to the information that should have been enclosed in the letter of 16 February 2016 (which refers specifically to confirmation that a PIP award would not affect any other benefit) having previously been provided in the 21 July 2015 letter. The Tribunal did ask the appellant about the letter and enclosure. As set out above, the Tribunal noted that the appellant confirmed she had read the letter and that the appellant thought the enclosure was an internal memo.

15. The Tribunal made a finding (paragraph 12) that the information had been sent to the appellant in this letter. Neither the letter of 21 July 2015 nor the

enclosure contains the required information. The letter asks the appellant to answer questions on the enclosed 'what we need to know' document, suggests that the appellant may wish to contact a local support organisation and provides a website address for information and help to understand PIP. I agree with the comments of Judge Rowland in his grant of permission to appeal. This is plainly a nonsense document. The four sentences that appear in the first column are statements not questions to be answered. I consider that the Tribunal made an incorrect finding of fact. That error potentially infected the Tribunal's approach to the appellant's evidence and its analysis of the reasonableness of her insistence on obtaining the information in writing from the respondent.

16. The Tribunal have not expressly dealt with the appellant's evidence about the 21 July 2015 letter. The appellant thought it was an internal memo which is understandable as the table is headed "Office Manager". If the statements had been properly set out in a letter the advice to contact the JobCentre for advice about the impact of PIP on entitlement to a claim for ESA would have been clear. The appellant's evidence suggests that she did not realise that the 'advice' was addressed to her, which is understandable, as the covering letter suggested that she contact a "local support organisation" rather than the JobCentre. As no specific conclusion was reached by the Tribunal on the appellant's evidence (there is simply a reference to confirmation that she had read the covering letter) it is difficult to discern the reasoning that was essential to the conclusion that her insistence on written confirmation was not reasonable.
17. Neither the respondent nor the Tribunal considered the state of the appellant's health and the nature of any disability she may have (as required by regulation 10 of the PIP Regulations) when determining if there was a good reason for the failure to complete the PIP2. There was evidence in the bundle that the appellant had 'significant problems with anxiety and depression' (doc 84) and that 'she was diagnosed with anxiety and depression on 21/4/11...takes a regular prescription of Sertraline' (doc 86) along with other physical health problems. This evidence was not available to the respondent at the time that the decision was made but clearly her mental health conditions may have affected her engagement with the respondent and may have contributed to the failure to complete the PIP2 form. The Tribunal was required to take her mental health problems into account. Failure to do so is an error of law.
18. The outcome of the appeal could clearly be different had the Tribunal not erred as set out above. I find that the First-tier Tribunal materially erred in law in its consideration of the 'negative determination' issue.

The extension of time issue

19. Although there were no specific grounds of appeal it is apparent from the letters included in the bundle that the appellant indicated to the respondent that she expected her claim to be considered from the 'outset' meaning from when she first applied. The appellant initially applied in writing on 14 May 2105. The claim was registered on 11 December 2015 (upon receipt of the PIP1 form). The effect of registering the claim on 11 December 2015 is that this is the date from which the benefit (if the claim is successful) would be payable. In this case this is a period of almost 7 months after the initial application. This could have a significant impact on the amount of benefit that was payable if the appellant was successful. The appellant was unrepresented. It is an obvious point that the Tribunal should have considered even if not specifically referred to in the grounds of appeal. The First-tier Tribunal did not make any findings on this issue. The Tribunal is generally required to make findings on all material matters in dispute. It may be the case that the Tribunal, having found against the appellant on the 'negative determination' issue, did not consider that it was necessary to reach a conclusion on this issue. If so it would be expected that this would have been recorded in the Tribunal's decision. The more likely position is that it simply failed to recognise that it was an issue to be decided. The Tribunal erred in failing to deal with this substantive issue. This error might not amount to a material error of law if appellant could not succeed on the negative determination issue. However, as I have decided that the Tribunal materially erred in law on that issue this error could potentially affect the outcome of the appeal and is therefore material.

20. I find that the First-tier Tribunal erred in law for the reasons set out above. The First-tier Tribunal's decision is set aside.

Re-making the decision

21. The appellant did not object to the respondent's invitation to the Upper Tribunal to re-make the decision if I were to find an error of law. The submissions of the respondent refer to re-making both issues in favour of the appellant. Neither party requested an oral hearing.

22. I consider that I can re-make the decision on the papers before me. There is no further substantive fact finding to be undertaken.

23. The appellant's reasons for the delay in completing the PIP1 form and for failing to complete and return the PIP2 form are the same. The two sets of Regulations that apply are not in identical terms and have one significant difference. In the Social Security (Personal Independence Payment)

Regulations 2013 ('PIP Regulations') the state of the claimant's health and nature of any disability must be taken into account when considering if there is a good reason for a failure to comply with any requirement to provide information (Regulations 8 and 10). In the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Claims and Payments) Regulations 2013 there is no **requirement** to consider the state of the claimant's health. Regulation 12 sets out how the date of a claim for PIP is to be determined. Regulation 12(1)(c) applies because the appellant first notified her intention to make a claim in writing. The date of notification will be the date on which the claim is deemed to be made if a claimant properly completes and returns the claim (in this case the PIP1 form) within one month of that date or such longer period as the respondent considers reasonable. The respondent has a discretion to extend the one-month time period to a period that is considered reasonable. There is no definition (unsurprisingly) as to what is considered reasonable. There are no factors identified within the Regulations that might assist the respondent in deciding what is a reasonable period of time is or indeed to assist a claimant in understanding what circumstances may be relevant.

The extension of time issue

24. I will deal with the extension of time issue first. What amounts to a reasonable period of time will vary according to the circumstances of each case and must, to some extent, be fact specific to the claimant. In this case the period of time beyond the default one month is six months. In the context of the default period being one month, that is a lengthy period. The appellant did not simply 'sit on' the PIP1 form. She engaged in extensive correspondence with the respondent. She specifically asked for time to complete the form to be extended - to which she did not receive either an agreement or express disagreement.
25. Her reasons for requesting an extension of time were twofold. Firstly, she said she needed more time and needed to obtain help to complete the form. Nothing specific was cited as a reason as to why getting help was delaying her. If this were her only reason I would have little hesitation, in the circumstances of this case, in finding that 6 months was not a reasonable period of time. Assistance is readily available and the PIP1 form is not complex or lengthy.
26. However, the appellant asked repeatedly, consistently and clearly for confirmation from the respondent that a claim for PIP would not affect her claim for ESA. I consider this to be a reasonable request. If it had the potential to affect her claim for ESA the appellant could suffer financially and potentially in other ways. I therefore also consider that wanting to defer filling in the claim

form until she received the reassurance she requested was reasonable. The respondent does not appear to have been as helpful as it could have been. I have set out in the chronology above the exchange of communication. I have also discussed in some detail the letter of 21 July 2015 so will not repeat my observations. Several errors were made by the respondent by failing to make any response to some letters, by failing to engage with the substance of the correspondence and failing to provide an intelligible answer. It clearly is not the case that the respondent was not competent to provide the information that the appellant sought as in the telephone conversation of 29 February 2016 (after the completion of the PIP1) that information was communicated verbally to her.

27. On the facts of this case it is reasonable to extend the period of time for completing and returning the PIP1 to 11 December 2015. The deemed date of claim in accordance with Regulation 12(1)(c) is therefore 14 May 2015.

The negative determination issue

28. Turning to the second issue - the negative determination – as set out above the same reasons for failing to complete the PIP2 were given. All the reasoning set out above in relation to the first issue applies equally to the negative determination issue. The decision to make a negative determination was made on 23 January 2016. This was prior to the appellant being given the information she had requested verbally on 29 February 2016. As I am considering only circumstances pertaining at the date of the decision I find that there was a good reason for the appellant's non-compliance with the requirement to complete the PIP2 form within a one-month period. The respondent's decision to disallow the claim for PIP on the basis that the required information had not been provided (within the one-month period set out in Regulation 8) is set aside.

29. The appellant's appeal against the respondent's decision of 23 January 2016 is allowed.

What Happens Next?

30. The position now is that the appellant must decide, and in a timely manner, if she wishes to pursue her claim for PIP. The effect of succeeding in this appeal is that the time for completing the PIP2 has been extended and that if her claim is successful (i.e. if an award of PIP is made) the date upon which the claim is deemed to have been made is 14 May 2015. The appellant has been provided with the information she sought, both verbally by the

respondent and in writing by way of Judge Rowland's reasons for granting permission. There is no reason now to delay submitting her PIP2 form and any supporting evidence if she intends to pursue her claim. I can see no reason now why she would require more than the usual one-month period to return the PIP2 form. I emphasise, however, that her success in this appeal is no indicator of her likelihood of succeeding in her claim for PIP. That is to be determined in the usual manner.

(Signed on the Original)

P Ramshaw
Judge of the Upper Tribunal
21/6/18