MB v Secretary of State for Work and Pensions (PIP) **[2018] UKUT 213 (AAC)**
CPIP/2456/2017

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Basildon First-tier Tribunal dated 5 May 2017 involved an error on a point of law and is set aside. It is appropriate for the Upper Tribunal to re-make the decision on the claimant's appeal against the Secretary of State's decision dated 18 January 2017 (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii)). The decision as re-made is that the claimant's appeal is allowed and the decision of 18 January 2017 is set aside (as the conditions for disallowing the claim for personal independence payment made on 5 July 2016 on the ground that a negative determination falls to be made under regulation 9(2) of the Social Security (Personal Independence Payment) Regulations 2013 have not been shown to be satisfied). See paragraph 11 below for where that leaves the case.

REASONS FOR DECISION

1. The claimant appeals against the decision of the First-tier Tribunal of 5 May 2017 with the permission of Upper Tribunal Judge Lloyd-Davies, granted on 25 April 2018. He had initially refused permission to appeal in January 2018, but set that refusal aside because he had not then had before him a copy of a decision of mine in *OM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 458 (AAC). When giving permission the judge suggested that in the light of that decision it was arguable that the provisions of regulation 9 of the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations) had not been followed and that the tribunal might not have properly considered regulation 10. The written submission on behalf of the Secretary of State dated 22 May 2018 did not support the claimant's appeal. The case has now been referred to me for decision following receipt of the claimant's reply dated 25 May 2018 on 30 May 2018. Fortunately, in view of the passage of time since the claim for personal independence payment (PIP) was made on 5 July 2016, I find that I can deal with this appeal relatively shortly.

2. Since a copy of the decision in *OM* is already in the papers I do not need to set out again here all the legislation that is referred to there. But it may help others to set out at least regulation 9 of the PIP Regulations:

> "9.—(1) Where it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities, C may be required to do either or both of the following—
> (a) attend for and participate in a consultation in person;
> (b) participate in a consultation by telephone.
> (2) Subject to paragraph (3), where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination must be made.
> (3) Paragraph (2) does not apply unless—

(a) written notice of the date, time and, where applicable, place for, the consultation is sent to C at least 7 days in advance; or

(b) C agrees, whether in writing or otherwise, to accept a shorter period of notice of those matters.

(4) In paragraph (3), reference to written notice includes notice sent by electronic communication where C has agreed to accept correspondence in that way and "electronic communication" has the meaning given in section 15(1) of the Electronic Communications Act 2000.

(5) In this regulation, a reference to consultation is to a consultation with a person approved by the Secretary of State."

Regulation 10 provides that the matters to be taken into account in determining whether C has good reason under regulation 9(2) must include C's state of health at the relevant time and the nature of any disability that C has. Regulation 2(1) defines "C" as meaning "a person who has made a claim for or, as the case may be, is entitled to personal independence payment".

3. The decision that was under consideration by the tribunal of 5 May 2017 was that made by the Secretary of State on 18 January 2017, on the claim for PIP made on 5 July 2016. The claimant had no previous entitlement to disability living allowance, but was in receipt of employment and support allowance (ESA) with the support component. On the claim form she stated that she was only interested in the standard rate of the mobility component, although she did give information in answering some questions on other elements. No copy of the actual decision is in the papers and the notification letter at page 101 is in very general terms, but it is plain that the decision was that the claimant was not entitled to PIP on the claim of 5 July 2016 because she did not go to the consultation on 22 November 2016 and had no good reason for failing to do so. That description of the decision, as barely added to in the letter notifying refusal of mandatory reconsideration and in the written submission to the First-tier Tribunal, missed out a number of stages. There must first have been a finding that the conditions in regulation 9(2) of the PIP Regulations were met in that the claimant had failed without good reason to attend for or participate in a consultation within the meaning of regulation 9(1). Then regulation 9(2) would have required the making of a "negative determination", which is a determination that the claimant does not meet the basic conditions of entitlement, in terms of limited or severely limited ability to carry out daily living or mobility activities, to either rate of either component of PIP (section 80(6) of the Welfare Reform Act 2012). The effect of a negative determination has to be that a decision is given that the claimant is not entitled to PIP.

4. In the present case it is not in dispute that the claimant was sent a letter by Atos Healthcare on 10 November 2016 with an appointment for 10.30 a.m. on 22 November 2016 at the Bury St Edmunds unit. That emerges from the appointment history and contact history at pages 93 and 94. However, no copy of that letter was in the papers before the tribunal of 5 May 2017, nor was any copy of a standard letter in use at the time. The written submission to the First-tier Tribunal referred to the claimant having been "invited" to attend on 22 November 2016.

5. In paragraph 18 of *OM* I said this:

> "It must be the case that for a requirement to lead to the consequence prescribed in regulation 9 [of the PIP Regulations] in accordance with the powers granted in section 80(4)(c) of the Welfare Reform Act 2012 it must be a requirement to attend and participate in a consultation at a particular date, time and place. Further, the requirement must be communicated as a requirement to the claimant. … On the element of requirement, something worded as a request rather than a creation of a legal obligation may not count (see the House of Lords in *Secretary of State for Social Security and another v Remilien* [1998] 1 All E.R. 129, R(I) 13/98). A question arises whether it is sufficient on appeal merely to provide evidence of the date on which a letter had been sent by Atos, to whom and at what address, and of the date of the appointment given in the letter, without providing a copy of the specific letter or at least a copy of the standard letter in use at the time with something to indicate that that was the form used in the particular case. Only then could a tribunal be satisfied that the claimant had been *required* to attend and participate (see R(S) 1/87, paragraph 12(1), where it was said that notices of a similar kind were to be strictly construed). The severe consequences of a failure to attend and participate would support such a strict construction. In my provisional view (provisional because the point has not been covered in any submissions) it is in general necessary to provide at least a copy of a standard letter with something to indicate that that was the form sent to the claimant."

There could additionally have been reference to section 80(5)(a) of the Welfare Reform Act 2012, which only gives specific power for regulations to provide for a negative determination when there has been a failure to comply with a requirement imposed under regulations authorised by section 80(4). In *OM* I did not need to reach a final conclusion on the point about production of a copy of at least a standard letter, because I was satisfied on the particular evidence in that case that it had been made clear in previous dealings with the claimant there and his appointee that he was required to attend a consultation. In the present case, there is nothing in the evidence beyond the record of appointment letters being sent to indicate a specific notification to the claimant of there being a requirement to attend.

6. I further note that in *Secretary of State for Work and Pensions v DC (JSA)* [2017] UKUT 464 (AAC), a case about whether a proper notice requiring participation in a scheme under regulation 4(2) of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, so as to support a sanction for failing to participate, Judge Rowland held that on any appeal a copy of the appointment letter should be provided by the Secretary of State. Otherwise, unless a tribunal was able from its specialist experience to conclude that the appointment letter contained enough information to make it effective (which would have in my judgment to be carefully spelled out and explained in any statement of reasons), the Secretary of State would have failed to come forward with evidence on a matter on which the burden of proof was on him.

7. The ground for giving permission to appeal to the Upper Tribunal in the present case was the possible relevance of the decision in *OM*. The Secretary of State has thus had the plain opportunity to comment on what I said in paragraph 18 of that decision about the need for

production of a copy of the relevant appointment letter or of a standard form, as set out above. The submission of 22 May 2018 says nothing about that issue. In those circumstances, the view that in *OM* I described as provisional should now be regarded as settled, especially as I consider it is confirmed in principle, perhaps even in a stronger form, by *DC*.

8. The tribunal of 5 May 2017 made no reference to the condition under regulation 9(1) of the claimant having been *required* to attend for and participate in the consultation on 22 November 2016. It simply mentioned in paragraph 10 that the consultation appointment for that date was given on 10 November 2016 and found in paragraph 18 that the appointment letter had been properly sent to the claimant and received in time. It then went on to concentrate on the question of whether the claimant had had a good reason for not attending for that consultation, on which it concluded against her. Accordingly, there was nothing to make good the lack of evidence on a necessary condition for the making of a negative determination under regulation 9(2) of the PIP Regulations, i.e. that the claimant had been *required* to attend for and participate in the consultation on 22 November 2016. The tribunal therefore went wrong in law in confirming the Secretary of State's decision of 18 January 2017 when that necessary evidence was lacking. That is sufficient to require the setting aside of its decision. I come back below to how I should dispose of the case in consequence.

9. In relation to the question of whether the tribunal of 5 May 2017 erred in law at all in concluding that the claimant had not shown a good reason for failing to attend for the consultation on 22 November 2016, the Secretary of State has submitted that there was no error. There are some difficult questions about how far it was relevant that the claimant had declined to take part in a face to face consultation at home on 10 November 2016, how far the tribunal was entitled to conclude from evidence of visits to the GP, to the Post Office and, in the past, to hospitals that she was capable of travelling the 13 miles or so from Thetford to Bury St Edmunds and how far the tribunal properly explained its rejection of the claimant's statements about how her various conditions were affecting her and her ability to cope with face to face consultations in general or to get to the appointment in Bury St Edmunds. That would all require considerable discussion of the history of this case and the evidence available to the tribunal of 5 May 2017. I have concluded that, as the tribunal's decision has to be set aside for the reason already established, it is unnecessary to lengthen this decision (or the time taken to its being issued) by going into all that.

10. The question remains of whether to remit the case for a rehearing or to substitute a decision on the appeal against the decision of 18 January 2018. The first alternative would give the Secretary of State the opportunity to produce a copy of the appointment letter for 22 November 2016 or the best evidence of its contents if a copy of the actual letter is not available (or possibly evidence of notification to the claimant by some other means of a requirement to attend any appointments sent). It is relevant that, according to the submission of 22 May 2018 for the Secretary of State, the claimant made further claims for PIP on 20 October 2016 and 29 June 2017, both of which were disallowed. The submission does not say whether the disallowances were based on failure to attend for a consultation and a negative determination or on an actual assessment of whether the claimant had limited ability to carry out daily living or mobility activities. It may also be relevant that the claimant has several times mentioned not

being able to walk more than 200 yards (no doubt linked to her ESA qualification), whereas to achieve the necessary eight points for the standard rate of the mobility component of PIP the minimum restriction that she would have to show would be that she could (safely, to an acceptable standard, repeatedly and within a reasonable timescale) stand and then move unaided more than 20 metres but no more than 50 metres.

11. In the light of those circumstances, in particular the limited period that would in practice be in issue as a result of the disallowances of subsequent claims, it seems to me that it would be a waste of a good deal of time and effort for all concerned to require the convening of a new tribunal. Accordingly, I substitute ("re-make") the decision on the appeal against the decision of 18 January 2017, as set out at the head of this decision. Because of the lack of evidence that the claimant was required to attend for a consultation on 22 November 2016, that consultation is not one "referred to" in regulation 9(1) of the PIP Regulations, so that there was not a failure to attend for such a consultation that would allow a negative determination to be made under regulation 9(2) leading a decision that the claimant was not entitled to PIP on the claim of 5 July 2016. I am not in a position to be able make any decision on whether the claimant actually satisfies the conditions of entitlement for PIP on that claim or not, so that my substituted decision is limited to setting aside the decision of 18 January 2017. That leaves the claim of 5 July 2016 outstanding and still to be decided by the Secretary of State. It may be that, in the light of all the evidence now available to the Secretary of State, including that from the subsequent claims as well as that generated in the present case, she feels able to carry out the assessment under regulation 4 of the PIP Regulations without the need for a consultation under regulation 9 either in person or by telephone. Whatever decision is made, after whatever evidence gathering, will be open to appeal by the claimant after the mandatory reconsideration process.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 27 June 2018