IN THE UPPER TRIBUNAL **Case No.** CPIP/1094/2019
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made at Durham on 23 January 2019 under reference SC292/17/00022) involved the making of an error of law, it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted tribunal panel.

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS FOR THE REHEARING

A. The tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 27 July 2016.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: *R(DLA)2&3/01*.

D. These directions may be supplemented or amended by later directions by a tribunal judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission from a decision of the First-tier Tribunal (the tribunal) which it made on and following a hearing of 21 January 2019 and which it explained in a statement of reasons for decision (statement of reasons) which it sent to the parties on 26 February 2019. For the reasons set out below I have decided to allow the claimant's appeal, to set aside the tribunal's decision and to remit for a rehearing of the appeal.

2. The claimant was previously in receipt of the highest rate of the care component and the lower rate of the mobility component of disability living allowance (DLA). However, because DLA is being replaced (at least for most claimants) by personal independence payments (PIP) it became necessary for him to make a claim for PIP which, on 27 July 2016, he did. There were a number of postponements before the appeal was heard on 23 January 2019. The tribunal, in fact, allowed the claimant's appeal, concluding that he was entitled to 10 points under the activities

and descriptors relevant to the daily living component of PIP but no points under the activities and descriptors relevant to the mobility component of PIP. That translated into an award of the standard rate of the daily living component of PIP only. The period of the award was from 02 November 2016 to 01 November 2021. But the claimant was dissatisfied with that award and sought permission to appeal to the Upper Tribunal.

3. The grounds of appeal to the Upper Tribunal sought to attack the tribunal's reasoning as to why it thought the claimant was not entitled to any points under any of the descriptors linked to mobility activity 1 (Planning and following journeys). In granting permission I suggested that the tribunal might have erred through seeming to focus solely upon the claimant's ability to follow the route of a journey in a motor car. As to that, the tribunal, in its statement of reasons, had said this:

> '4. [The claimant] has periods of being stable on medication when he can function well then will have periods when he is unwell and cannot function. These can happen equally over a year. At the present time he is currently doing an accountancy course but does it on and off over a long period of time. He has also been able to do a voluntary job one day a week even when he was unwell. When he is well he is able to drive and when he isn't well he is still able to drive. He can drive routes to Newcastle [the claimant lives in Consett] then use a satnav which he can follow to other places. He has not informed the DVLA and he has never been told he is not able to drive.
>
> 5. He has a cyst on the brain. There has been no follow up and they are now monitoring the situation. He believes he is a competent driver and would drive for the majority of the time and has never had an accident or any problems. He has driven to Harrogate on his own. In the light of the evidence that we heard from the appellant, the Tribunal did not accept that he had any problems in planning or following a journey. Even when he was unwell he was still able to drive. He has also been able to go dancing three times a week. He has no problem walking'.

4. The tribunal did not, in that passage nor anywhere else in its quite brief statement of reasons, consider how the claimant might fare if seeking to follow the route of a journey on foot or by using public transport.

5. The representative for the Secretary of State has indicated that the appeal is supported. It is suggested on behalf of the Secretary of State that the tribunal might not have appreciated the range of mental health conditions from which the claimant suffers and the variability of such conditions: had misunderstood the claimant's evidence as to the extent to which variations in his mental health impact upon his ability to drive; and had focused too much upon his ability to drive rather than his ability to use public transport. As to that latter point, the Secretary of State's representative refers me to the guidance contained in the "PIP Assessment Guide Part 2: the assessment criteria", in which it is said, amongst other things, that '*a person should only be considered able to follow an unfamiliar journey if they would be capable of using public transport - the assessment of which should focus on ability rather than choice*'.

6. In the face of the Secretary of State's representative's support for the appeal coupled with the suggestion that I should set aside the tribunal's decision and remit,

the claimant, through his representative and in the circumstances unsurprisingly, provided a 'no comment' reply.

7. Nobody has suggested I should hold an oral hearing of the appeal before the Upper Tribunal and I am satisfied no such hearing is required.

8. There was before the tribunal, though it did not refer to it, a letter of 01 November 2016 written by the claimant's GP and which referred to the claimant suffering from schizo-affective disorder and depression and which indicated that, although he has a driving licence, '*he can only find his way around if somebody is in the car with him or if he is completely able to rely on the satnav'*. It is also fair to say that there was much other written evidence before the tribunal in the form of medical letters, reports and medical records, pointing to significant and longstanding mental health difficulties to which, again, it did not refer. As to the tribunal's findings as to the claimant's ability to drive, even when unwell (it meant unwell from a mental health perspective), it is recorded in its record of proceedings (commendably and helpfully legible) that the claimant gave oral evidence to it to the effect that when he is unwell he does <u>not</u> drive and that there is a three-month period of deterioration prior to his becoming unwell (page 1 of the record of proceedings). The tribunal did not, in its statement of reasons, refer to that evidence and, in terms of illnesses impacting upon his mental health, only referred to his having a 'cyst on the brain' and his having had a struggle '*with anxiety for most of his life*'.

8. Of course, the tribunal was not required to refer to each and every item of medical or other evidence which was before it. It is important to stress that. But nevertheless, the totality of the medical evidence before it including the letter from the GP to which I have specifically referred, suggested a greater range of mental health difficulties than the tribunal appeared to appreciate. The claimant's own evidence to it suggested impairment with respect to driving at a greater level than it found. In those circumstances, in order to adequately explain its findings, the tribunal was required to address the medical evidence concerning mental health and the claimant's own evidence concerning the variability in his mental health and the impact it had upon his driving. That evidence did not, of course, preclude the findings that the tribunal ended up making but without dealing with the evidence it cannot be said that those findings have been shown to be justified. On that basis alone then, I would conclude that the tribunal has erred in law.

9. I would, though, wish to say something, though it is not now essential to my decision, about the tribunal's approach to driving. If a claimant is not able to follow the route of an unfamiliar journey without another person, assistance dog, or orientation aid, then that person will score 10 points under mobility descriptor 1d. If a claimant is not able to do so with respect to a familiar journey, he will score 12 points under mobility descriptor 1f. Nothing is said in the legislation as to the mode of travel. Of course, obvious and common modes of travel are public transport, a motor car or some other private vehicle, or walking. Here, as noted, the tribunal simply considered the claimant's ability to drive a motor car. Its enquiry did not extend to the claimant's ability to follow the route of a journey either on foot or by utilisation of public transport.

10. There is, of course, the reference to public transport in the assessment guide as set out above. The representative for the Secretary of State (on my reading) says that a failure to consider a claimant's ability to use public transport, of itself, amounts to an error of law. It seems to me though, that that erroneously elevates the ability to use public transport to too great a degree. As stated in *SSWP v IV (PIP)* [2016] UKUT 0420 (AAC), entitlement to PIP is governed by the Welfare Reform Act 2012 and regulations made thereunder as opposed to what is said or what is not said in the assessment guide. It is the legislation, not the guide, which has to be interpreted. Having said all of that though, I am in agreement with the Secretary of State's representative that tribunals should not limit themselves to considering, solely, an ability to follow the route of a journey through driving a motor car. Such an ability is not, in my view, determinative with respect to the ability to follow the route of a journey but forms a component of an overall assessment of the claimant's cognitive, mental and sensory abilities in the context of following a route. That approach would seem to be consistent with that taken by the Upper Tribunal in *JC v SSWP (PIP)* [2019] UKUT 181 (AAC) in which it was said (paragraph 11) that, as part of the overall and holistic assessment required, a claimant's ability to plan and follow a journey on foot must be considered. Support for that proposition was, it was noted, to be found in *MH v SSWP (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12 at paragraphs 37 and 44. So, I would say that what is required is an overall and holistic assessment encompassing a claimant's ability to follow the route of a journey through various ways, including driving, travelling on foot and utilising public transport, with neither, of themselves, being determinative. On that basis I would have concluded, therefore, had it been necessary for me to formally decide the point, that the tribunal did err in limiting itself to a consideration of the claimant's ability to follow the route of a journey by driving and going on to determine the matter solely on that basis.

11. I would also add, for completeness, that the tribunal should also have considered the possibility that even if the claimant is capable of following part of a route by driving, there might be parts of a journey (I have in mind the starting point and the end point) which will necessarily have to be undertaken by foot (see *JC* once again and also *JB v SSWP (PIP)* [2019] UKUT 203 (AAC)).

12. So, the tribunal's decision is set aside. Both representatives appear to be content with remittal so that is what I shall do. It follows that there will be a rehearing of the appeal before a differently constituted tribunal. The rehearing will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of all the evidence before it, including any further written or oral evidence it may receive.

13. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **5 September 2019**