IN THE UPPER TRIBUNAL **Appeal No. CPIP/1495/2020**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

SM

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Hemingway

Decision date: 6 June 2021
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 13 February 2020 under number **SC240/18/02661** was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing (which may be a remote hearing).**

2. **The First-tier Tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the issues that are raised by the appeal and, subject to its discretion under section 12(8)(a) of the Social Security Act 1998, any other issues which may merit consideration.**

3. **In undertaking that task, the First-tier Tribunal must not take account of circumstances that were not obtaining at 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*.**

4. **The First-tier Tribunal which considers the case shall not include any of the panel members who considered the case on 13 February 2020.**

5. **These directions may be supplemented, amended or replaced by later directions made 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 which I gave on 3 December 2020, from a decision of the First-tier Tribunal (F-tT) which it made on 13 February 2020 following a hearing of that date. I have decided to allow the appeal and to remit to the F-tT for a re-hearing. My reasons for doing so are set out below. I have also made some obiter comments as to the circumstances in which an apparent inconsistency in the evidence should be put to a claimant before such can be relied upon in drawing adverse conclusions: and as to the extent to which an F-tT is required to demonstrate through its written reasons that it has had regard to the criteria set out at regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013.

2. The claimant was born on 8 November 1972. The F-tT described him as having a "*pelvic tilt"* (his right leg is one inch shorter than his left leg) and being a "*recovering heroin addict*". It appears that at the time he was assessed by a health professional with a view to possible eligibility for a personal independence payment (PIP), which was as long ago as 13 July 2018, he was working in a call centre but that, by the time of the hearing before the F-tT, he was working as a community recovery support worker.

3. The claimant was previously in receipt of a disability living allowance (DLA) comprising the higher rate of the mobility component and the lowest rate of the care component. However, as a result of that benefit being replaced, at least for most claimants by PIP, it became necessary for him to claim PIP which he did. That led to a decision-maker acting on behalf of the Secretary of State deciding, on 4 August 2018 (communicated by letter of 6 August 2018) that payment of DLA would end on 4 September 2018 and that there was no entitlement to PIP from 26 April 2018. Since that decision remained unaltered after a mandatory reconsideration, the claimant appealed to the F-tT.

4. The F-tT held an oral hearing of the appeal. It was a traditional face-to-face hearing. The claimant attended, accompanied by his mother, but without representation. It appears, from the record of proceedings, that he gave quite extensive oral evidence. The F-tT dismissed the appeal and explained why in a statement of reasons for decision (statement of reasons) of 27 March 2020.

5. The F-tT, as is commonly the case in appeals such as this, had quite extensive documentary evidence before it to assist it in its task. That included, on this occasion, paperwork relating to the previous claim for and award made of DLA. That material shows that DLA had been awarded for an indefinite period from and including 14 April 2008. There was some medical evidence in the form of a standard questionnaire completed by the claimant's then GP for the purposes of the DLA assessment, of 25 August 2008. It is fair to say though that in its statement of reasons the F-tT acknowledged neither the fact of the previous award of DLA nor the

presence of material relating to the award in the bundle of documentation which had been before it. In reading the statement of reasons, as the Secretary of State's representative to the Upper Tribunal suggests, it is as if it was dealing with a new claim for PIP rather than a conversion case (by which I mean a case where a claimant seeks an award of PIP to replace a pre-existing award of DLA). It is also fair to say that the F-tT did not make any reference to the criteria set out at regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013. It is, I think, rare to see a statement of reasons which completely omits a reference to that criteria.

6. Something else which is apparent from its statement of reasons is that the F-tT did not consider the claimant to be a credible or reliable witness. It identified a number of instances where it thought his claimed difficulties were inconsistent with activities he would actually perform (such activities included driving his motor car, travelling by train independently, working on a full-time basis and watching Leeds United play football). Further, and I think of more concern to the claimant's representative before the Upper Tribunal, the F-tT identified a number of areas where it thought the claimant's evidence was either internally inconsistent (as the account of the impact of his disabilities had been given at various stages in the assessment and appeal process) or was inconsistent with other evidence which was before it. By way of example, with respect to washing and bathing the F-tT noted that the claimant had told it in his oral evidence that he had to use a seat when taking a shower but that he had not reported such either in his claimant questionnaire or at the assessment which had been conducted by the health professional. By way of further example, he had indicated in his claimant questionnaire that he could not stand for a long period to cook food but had told the health professional he had no problem with preparing and cooking food.

7. Permission to appeal to the Upper Tribunal was sought from the F-tT but was refused. The application was renewed to the Upper Tribunal. By this stage the claimant had obtained representation from an experienced representative who regularly brings cases before the Upper Tribunal. The grounds, in summary, argued that the F-tT had made inadequate findings of fact; that with respect to a range of activities it should have made specific findings with respect to the regulation 4(2A) criteria and had not done so; that it had wrongly identified inconsistencies in the evidence; that it had failed to conduct a sufficiently wide inquiry as to the claimant's ability to engage with others; and that it had failed to adequately question the claimant with respect to what it perceived to be inconsistencies in his account. At one point the grounds went so far as to assert, with respect to the latter point "*it appears that the tribunal was determined to find that the appellant was not credible*".

8. I granted permission, primarily, because I thought the F-tT might have erred in law through failing to explain why it was reaching an outcome on the appeal concerning PIP which, on the face of it, appeared to be inconsistent with the terms of the previous award of DLA. That contention was not raised in the grounds to the Upper Tribunal but, whilst I am sometimes hesitant in taking points not made in grounds which have been professionally drafted, I did consider it was appropriate to take that point here bearing in mind the Upper Tribunal's inquisitorial function. The Secretary of State has not sought to argue that I was wrong to do so. I did not limit the grant of permission. I directed submissions in the usual manner and, in those directions, I raised the possibility that, bearing in mind certain of the matters raised in the grounds and the vigour with which they had been expressed, I might, in my

decision; a) wish to comment on the extent to which an F-tT might (or might not) have to put an inconsistency in the evidence to a claimant before it may legitimately rely upon it in reaching its decision; and b) wish to consider the extent to which a tribunal may have to specifically refer to the regulation 4(2A) criteria and, indeed, whether it can be assumed that such a tribunal has had such criteria in mind in circumstances where it has made no specific reference to it. Each representative has helpfully expressed views as to that.

9. The Secretary of State's representative has, in fact, supported the appeal on the basis that the F-tT erred in the manner in which I had thought it might have done when I gave permission. I agree that it did.

10. As to that, the F-tT had awarded the claimant no points under the descriptors linked to mobility activity 2 (Moving around) against a background of their having been in place an award DLA which included the higher rate of the mobility component for an indefinite period. Thus, there was a stark difference between the previous existing award and the conclusion reached by the F-tT regarding PIP mobility points notwithstanding that the legal tests for the two different benefits do differ. Following what was said by the Upper Tribunal in *CH and KN v SSWP (PIP)*: [2018] UKUT 330 (AAC); [2019] AACR 11, I would conclude that, in this case, the F-tT was required, as a component of its overall duty to give adequate reasons for its decision, to explain that divergence. Further, it did have the DLA evidence before it and given the nature of that evidence it was required, in my judgment, to at least consider that evidence notwithstanding that it was dated, and to demonstrate that it had considered it even if it was concluding it was not particularly probative. Quite possibly a simple statement to that effect would have sufficed. For these reasons I have concluded that the F-tT did err in law and that its decision has, in consequence, to be set aside. I have also decided to remit because that is what the Secretary of State's representative has urged me to do, because the claimant's representative has not urged any other course of action upon me and because since new facts will have to be found that task is best undertaken by the F-tT given its status as the primary fact-finding body in the field and given that it will have available to it, in re-deciding the appeal, a range of expertise through the composition of its panel.

11. Strictly speaking, that disposes of this appeal to the Upper Tribunal. But, as I say, other matters were determinedly argued in the grounds of appeal which I thought I might wish to say something about in this decision (albeit that what I now say is not essential to the decision) and which the representatives have offered views upon.

12. Turning then to those matters, as I have said, the F-tT found the claimant's evidence not to be credible or reliable due to what it regarded as internal inconsistencies and inconsistencies between the evidence offered by the claimant and other evidence. The grounds of appeal to the Upper Tribunal challenge the F-tT's approach to credibility and, in particular, in the grounds of appeal, it was suggested that the F-tT had "*failed to question the appellant on its perceived inconsistencies*". The matter was revisited by the claimant's representative in a post-permission written submission where points were made under the heading "*Inconsistency in evidence must be put to the appellant before credibility is challenged*". That heading and the assertion it embodies, at face value, appears to amount to a contention that an F-tT is debarred from taking an adverse credibility point with respect to any inconsistency it has detected in the evidence unless that inconsistency has been put to the claimant for comment. I am not wholly sure,

however, that the claimant's representative intended to go that far because in referring to what was said in *CIS/4022/2007*, (a decision which I shall say something more about below) the representative observed that the claims process and appeals process "*can lead to perceived inconsistencies which require the tribunal to provide the appellant with the opportunity to address the perceived inconsistencies at his/ her appeal hearing*". That observation, depending on how it is read, might suggest the argument of the representative falls a little (though perhaps not very far) short of asserting there is always a duty to put such inconsistency. It is then contended that the process of making a claim and pursuing an appeal, which might lead to information being given at different points in time, can generate innocent inconsistency as can matters such as a less than perfect memory and the impact of mental health difficulties. I am sure the latter point is true though I would think those dangers are matters which the typical F-tT will be very well aware of.

13. In *CIS/4022/2007*, it was said, amongst very many other things relating to credibility assessments, that subject to the requirements of natural justice, "*there is no obligation on the tribunal to put a finding as to credibility to a party for comment before reaching a decision*". If, contrary to what was said in that decision, the suggestion really is that the F-tT cannot rely on any inconsistency in the evidence at all without its having been put to the claimant for comment (and in my experience such contentions are advanced by those professionally representing claimants with some regularity), then that is requiring a very great deal indeed of an F-tT to the extent that the requirement is simply unrealistic. There will, of course, be some inconsistencies which are so very stark or potentially so very damning, or which might of themselves be determinative of an appeal, where the requirements of natural justice would require an F-tT to specifically put the matter to a claimant for comment. But I think such cases would be rare. I do not purport to lay down any hard and fast rules at all other than to say that I am comfortably satisfied there is not an unvarying or unwavering duty upon an F-tT to put each and every inconsistency it detects or thinks it detects to a claimant, during the hearing, before such can be relied upon as a component of its decision-making process. I appreciate that in the Secretary of State's post-permission written submission it was said "*a judge who believes that a witness is deliberately lying must give that witness a chance to deal with that concern, and if after evaluation, this is still the case; it should be put to the witness with reasons*". But, as I say, it will not always be an error of law for the F-tT to fail to do so even in the clear cut circumstances the Secretary of State's representative seems to have in mind. The key is whether a failure to put such points or concerns would breach the rules of natural justice and that is a matter of fact, degree and evaluation.

14. The other point I raised was the need (or otherwise), bearing in mind the duty upon on an F-tT to give at least adequate reasons for its decision (though of course more than that is to be desired and indeed is often given) to explain in specific detail as to how it has factored in the content of the regulation 4(2A) criteria with respect to its consideration of entitlement to points under each relevant PIP activity. In the grounds of appeal to the Upper Tribunal it was contended that there had been a failure on the part of the F-tT to consider the criteria when undertaking its assessment with respect to daily living activity 1; daily living activity 4; and daily living activity 5. The F-tT, in this case, did not refer to the regulation or make the sort of general statement often seen in an F-tT's statement of reasons to the effect that it had taken the criteria into account. As the claimant's representative says, such a

general statement is often contained within a statement of reasons though he argues that that is not, of itself, enough in any event. It is right to say, though, that the F-tT, when considering the claimant's ability to walk, did reach a conclusion that he could walk in excess of 200 metres "*repeatedly, safely, reliably and in a reasonable manner*" which indicates an awareness of the criteria as well as the application of it. When it was evaluating the claimant's ability to wash and bathe it found that he could "*stand long enough to shower himself safely and in a reasonable manner"* which again suggests an awareness of the criteria even if the terms in the regulation were not entirely accurately replicated.

15. In post-permission submissions, the claimant's representative suggests a single generalised statement evincing an awareness of the criteria and an intention to apply it or an indication that it has been applied is not sufficient because what is important is "*whether it has demonstrated in the statement of reasons that it has made the necessary findings of fact to have enabled it to take the criteria of regulation 4(2A) into account*".

16. Again, I do not wish to seek to lay down any hard and fast rules at all as to what specific findings might be required of the F-tT or as to what it should say, if anything, about the criteria before a statement of reasons which it produces will properly be regarded as at least adequate. But I do think that since the criteria is, generally speaking, of importance and often of real significance in at least some PIP cases, an awareness of the criteria and a statement to the effect that it has been applied, is likely to be good practice in virtually all cases. Most F-tT's do, in my experience, have passages which demonstrate that the criteria is being applied. But a failure to mention the regulation or the criteria at all is not necessarily fatal. The important thing is not that the criteria is mentioned in terms but that the reasoning shows it has been applied in practice. If, for example, an F-tT is finding that a claimant does not have any difficulty of significance in managing the tasks relevant to a specific PIP activity, then there would be little point in it adding, with respect to such activity, that it had asked itself whether such tasks can be accompanied safely, within a reasonable time period, repeatedly, or to an acceptable standard. The finding that there are no difficulties or no difficulties of significance with respect to a particular activity will be comfortably sufficient. Where there is clear evidence of substance that performing tasks relevant to a specific PIP activity might, for example, be dangerous or might only be capable of being accomplished with a significant degree of slowness, then it may be that a specific evaluation as to how the criteria has relevance to the specific activity in issue, might be required. But it seems to me that any such obligation will not be triggered by vague and unpersuasive references to, for example, slowness or risk. In many cases I suspect that where an F-tT has said, in general terms, that it has borne the criteria in mind, it can be taken to have applied it throughout its assessment even if it does not refer to it, once again, with respect to each and every activity which is in issue before it.

17. In view of the above, had I not set aside the decision of the F-tT on other grounds, I would not have done so on the basis of any contention concerning the way in which it dealt with the issue of credibility. Nor would I have done so as to the consideration of matters under the regulation 4(2A) criteria though that is not to say the F-tT's treatment of matters arising under that criteria was perfect. But perfection is not the standard. Finally, as to the suggestion noted above to the effect that the F-tT had appeared to have been determined to find the appellant not to be credible, I did wonder whether this was intended to amount to an assertion of actual bias. If so,

it is a suggestion which seems to me to lack foundation. But upon reflection it seems to me that, in this case, all that was really being suggested was that the F-tT had erred through focusing too much upon credibility rather than upon other matters of potential relevance.

18. 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

6 June 2021