[2019] AACR 11

(CH and KN v Secretary of State for Work and Pensions [2018] UKUT 330 AAC))

Judge Markus QC **CPIP/2386/2017**
CPIP/2307/2017

4 October 2018

DLA − PIP – Transfer case − Evidence relating to previous award

The Appellants had each been in receipt of Disability Living Allowance (DLA) for a number of years. CH had been in receipt of the Higher Rate Mobility Component and the Middle Rate Care Component of DLA. KN had been in receipt of the Lower Rate Mobility Component and the Middle Rate Care Component. Pursuant to the Personal Independence Payment (Transitional Provisions) Regulations 2013 they claimed Personal Independent Payment (PIP). The Secretary of State decided that CH was entitled to the enhanced rate of the daily living component of PIP but not the mobility component, and that KN was not entitled to either component of PIP. On appeal, the First-tier Tribunal (F-tT) confirmed the Secretary of State's decisions.

The appellants appealed to the Upper Tribunal (UT). The issues before the UT were: (1) in an appeal to the F-tT relating to entitlement to PIP of a person who had previously been in receipt of DLA (a "transfer case"), in what circumstances (if at all) should the F-tT obtain evidence relating to the previous award of DLA; and (2) how if at all do the principles in *R(M)1/96* apply to the F-tT's duty to give reasons in transfer cases.

Held, allowing the appeal in CPIP/2307/2017 and dismissing the appeal in CPIP/2386/2017 that:

1. the question for the First-tier Tribunal in a PIP appeal is whether the claimant qualifies for PIP in accordance with the statutory criteria relevant to that benefit. There is no expectation of entitlement based on a previous award, nor of adopting previous findings of fact relating to that award. However, DLA evidence may be relevant to a PIP claim or appeal. In the light of the degree of overlap between the tests for DLA and for PIP, and the overlap between the assessments for both benefits (where there was one for DLA), in many cases DLA evidence will address the same conditions and functional difficulties as are in issue in the PIP claim and may shed light on whether any PIP tests are satisfied, where there has been no change since the date of the DLA evidence. (paragraphs 45 and 46);

2. a tribunal need only consider whether to obtain DLA evidence if it has decided that it is or may be relevant. Even if it decides that DLA evidence would be relevant, it may determine the appeal without obtaining it, but it must consider hitherto do so and take into account the range of relevant considerations. The question is whether the evidence is necessary fairly to determine the appeal. Ultimately it is for the First-tier Tribunal to make its own judgment whether DLA evidence may be relevant and whether to call for it in a PIP appeal. (paragraphs 59, 61 and 69);

3. where the question whether to seek DLA, evidence has arisen and the tribunal decides to proceed without it, the duty on the tribunal to act judicially means that an appropriate explanation should be given. In most cases a brief explanation will suffice (paragraph 69);

4. the principle in *R(M) 1/96* will apply where there is an apparent inconsistency between the PIP award and the previous DLA award. It is for the tribunal to judge in the circumstances of the particular case whether there is an apparent inconsistency such that reasons are called for (paragraphs 77- 80);

5. in CH's case, the DLA medical evidence was not included within the appeal bundle despite CH having asked for it to be taken into account, Nonetheless the F-tT was entitled to proceed without it, taking into account the age of the DLA evidence, that the F-tT had substantial and much more recent evidence and, was satisfied that the HCP report was reliable and was broadly consistent with the medical evidence, and that the F-tT did not believe much of CH's evidence. It was unrealistic to suppose that the DLA evidence could have materially assisted the F-tT. Although there was potential inconsistency between the DLA award and PIP decision, the F-t reasons were adequate because there was nothing more it could have said given the lack of information about the DLA award and the reasons adequately explained any divergence from the DLA award (paragraphs 94 and 96).

6. in KN's case, there was a clear potential overlap between the test for the lower rate of the mobility component of DLA and PIP mobility descriptor 1d. Given the complexity of KN's health issues and that KN had challenge the HCP's assessment, the DLA award may have shed light on the issues and the F-tT should have considered whether to obtain it (paragraph 105-106).

The Judge gave guidance as to the application of the relevant principles, set aside the F-tT decision in KN's case, and remitted that case to another Tribunal for fresh consideration.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The appeal in CPIP/2386/2017 is dismissed.

The appeal in CPIP/2307/2017 is allowed. Under section 12(2)(a) and (b)(i) of the Tribunals Courts and Enforcement Act 2017, the decision of the First-tier Tribunal dated 26 May 2017 under case number SC246/17/00082 is set aside and the case is remitted 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.**

2. **The members of the First-tier Tribunal which reconsiders the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely. This should include the medical evidence in the Secretary of State's possession relating to the previous DLA award or, alternatively, a written explanation as to why it has not been provided.**

4. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. The Appellants had each been in receipt of disability living allowance ('DLA') for a number of years. CH had been in receipt of the higher rate mobility component ('HRMC') and the middle rate care component ('MRCC') of DLA. KN had been in receipt of the lower rate mobility component ('LRMC') and the MRCC. Pursuant to the Personal Independence

Payment (Transitional Provisions) Regulations 2013 they claimed Personal Independent Payment (PIP). The Secretary of State decided that CH was entitled to the enhanced rate of the daily living component of PIP but not the mobility component, and that KN was not entitled to either component of PIP. On appeal, the First-tier Tribunal confirmed the Secretary of State's decisions.

2. In order to decide the individual appeals, I must first determine two important issues of principle. These are:

a) In an appeal to the First-tier Tribunal relating to entitlement to PIP of a person who had previously been in receipt of DLA (a "transfer case"), in what circumstances (if at all) should the First-tier Tribunal obtain evidence relating to the previous award of DLA?

b) How if at all do the principles in *R(M)1/96* apply to the First-tier Tribunal's duty to give reasons in transfer cases?

3. These issues reflect the grounds on which permission to appeal was given in the individual appeals.

4. At the oral hearing of these appeals the appellants were both represented by Mr Martin Williams and the Secretary of State by Ms Zoe Leventhal and Mr Paul Skinner. In addition to the evidence relating to the appellants' individual cases, I was provided with statements from officers within the Department for Work and Pensions (DWP) regarding the background to the replacement of DLA with PIP, the assessment criteria and processes for both benefits and the approach to provision of evidence relating to a DLA claim to the First-tier Tribunal for the purposes of an appeal relating to PIP. On my direction, after the hearing the parties sent further written submissions and evidence addressing certain matters which had arisen during the course of the hearing.

Comparison between DLA and PIP

5. In relation to both of the above issues, the parties rely on comparisons between the substantive criteria for entitlement to DLA and PIP and between the assessment and decision-making processes for each benefit.

6. DLA and PIP are both non-contributory benefits for claimants of working age who, as a result of physical or mental disability, require assistance to lead a normal life or who are unable to walk properly or to walk without guidance and support. Both benefits have two components: one relating to daily living (the care component of DLA and the daily living component of PIP), and one relating to mobility. Both components are available at different rates according to the degree of need or difficulty.

7. In her first witness statement, Kerstin Parker, Deputy Director of Disability Benefits at the DWP, explained the background to the development of PIP to replace DLA. PIP was intended to be a new benefit with new eligibility criteria and a different assessment mechanism designed to address problems which had been identified with DLA. Key objectives of the change were to introduce more objective assessment, to target resources on those with greatest need and to shift the emphasis from indefinite to time-limited awards. The June 2010 Budget Policy Costings document explained that, as the eligibility criteria for PIP would be different from those for DLA, a significant number of claimants who had been entitled to DLA would not be entitled to PIP. The rationale for the design of the PIP eligibility criteria also included that assessment should take a more comprehensive approach to disability than the DLA criteria did, so that it reflected the full range of impairment types and developing criteria which were not based on the type of impairment rather than how

impairment affects individuals' every day lives. These policy considerations informed the design of the PIP criteria and assessment processes.

8. Mr Williams contended that there are considerable similarities between DLA and PIP which support the Appellants' case, but Ms Leventhal contended that, although there are some superficial similarities, there are significant substantive and procedural differences between the two benefits which support the Secretary of State's case on both grounds. It is convenient to deal with those submissions first.

Substantive comparison

9. The parties agreed that there is only one DLA criterion which clearly maps on to a PIP criterion: a double amputee or (person without both legs to similar effect) will be entitled to the HRMC of DLA and will also be entitled to the mobility component of PIP at the enhanced rate. Other than that, the parties agreed that there is no *complete* overlap such that it can be said that a person who was entitled to a particular component of DLA will by reason of that entitlement necessarily satisfy a particular descriptor of the PIP activities. On the other hand, they also agreed that there was some degree of overlap between at least some of the criteria for the two benefits so that some needs which gave rise to a DLA award would also be likely to satisfy certain PIP criteria.

10. In her first witness statement Ms Parker conveniently summarised the areas of potential overlap between the DLA and PIP criteria in this table:

DLA Components	**PIP Overlap**
LOWEST RATE CARE COMPONENT (LRC): (i) Main Meal Test – cannot prepare a main meal	Daily Living 1c, 1d, 1e, 1f, but not 1a and 1b, because ability to cook a meal or the ability to use aids and appliances does not give rise to eligibility for DLA)
LRC: (ii) Attention with bodily functions for a significant portion of day. Bodily functions are close personal activities such as eating, dressing, even walking (all the PIP activities are of this nature)	Overlap with any daily living activity. Could also be relevant to Mobility 2 (Moving around). Can never be an aid descriptor, or a supervision descriptor, but can be a prompting / assistance descriptor.
MIDDLE RATE CARE: DAY (i) Needs frequent attention throughout day	Overlap with any daily living activity or Moving Around. Can never be an aid descriptor, or a supervision descriptor, but can be a prompting / assistance descriptor.
(ii) Needs continual supervision to prevent danger	All the supervision descriptors.
NIGHT (i) Prolonged or repeated attention at night	Probably just activity 3 and 5, as these are the only ones likely to be needed at night (although there is no doubt scope for argument on this)

(ii) Needs another person to be awake for a prolonged period or frequently to watch over them (to avoid danger)	As above, probably just 3 and 5
MOBILITY COMPONENT: LOWER- Although able to walk needs guidance and supervision from another person to walk on unfamiliar routes outdoors.	Planning and following journeys
HIGHER (i) virtually unable to walk (based on manner, distance, speed), (ii) blind, (iii) deaf & blind, (iv) double amputee, or same effect.	Moving Around

11. However, as Ms Leventhal said, the superficial similarities disguise a more complex position as I now explain.

12. The DLA tests largely turn on general descriptions of need in relation to daily living or walking and allow considerable room for judgment by the decision-maker or tribunal. In contrast eligibility for PIP is tested by reference to specified degrees of need and functional ability in relation to a range of prescribed daily living and mobility activities. Unlike the statutory tests for DLA, the PIP Regulations impose defined criteria for assessment of a claimant's ability to carry out the activities (regulation 4(2A). Moreover, regulation 7 imposes a precise arithmetical test in the case of variable conditions which is quite different to the non-arithmetical broad view which is required for the purpose of DLA, as established in *Secretary of State for Work and Pensions v Moyna* [2003] UKHL 44, R(DLA) 7/03 and extended by Judge Hickinbottom in *R (DLA) 5/05*: see *JC v Secretary of State for Work and Pensions* [2015] UKUT 144. The scope for judgment is narrower in PIP cases than in relation to DLA. This is better understood by considering particular potentially overlapping criteria.

13. In *YM v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 16 (AAC) at [12] to [17] Judge Ward discussed potential overlap between the DLA test of being "virtually unable to walk" and some of the PIP mobility descriptors. Both tests are about walking, in practice, inability to walk more than 50 metres is relevant both to entitlement to entitlement to the HRMC of DLA and to the standard rate of the mobility component of PIP. However, entitlement to the HRMC will on its face say nothing about the distance below 50 metres which a person is able to walk, and so gives no indication as to which of the PIP mobility descriptor 2c, d, e or f applies.

14. The flexibility of the DLA test of virtual inability to walk, and the interaction between distance and the other factors of speed, variability and manner of walking have been emphasised in numerous decisions including *CDLA/805/*94, *CDLA/608/94* and *CDLA/4388/1999*. Regulation 4(2A) of the PIP Regulations provides that claimants will be assessed as able to carry out an activity only if they can do so safely, to an acceptable standard, repeatedly and within a reasonable time period, as defined. There are obvious similarities between those and the above DLA factors. For instance, assessment of the manner of walking for both DLA and PIP will involve consideration of pain and discomfort – see *R(M) 1/*81; *CPIP/2377/2015* and *PS v Secretary of State for Work and Pensions* [2016] UKUT 326 (AAC).

15. A significant difference between the mobility conditions is that there was no benchmark of speed for the purposes of DLA, as compared to the "reasonable time" requirement for completion of a PIP activity which is precisely defined in regulation 4(4)(c). Thus someone who can walk only 50 metres but taking one and a half times as long as an able-bodied person might have been entitled to DLA but they will not be considered unable to move the requisite distance for the purposes of PIP because they can do it in a reasonable time period as defined by regulation 4(4)(c) of the PIP Regulations. On the other hand Ms Leventhal accepted that a person who can walk 50 metres but at less than half the normal speed was likely to have been entitled to the HRMC of DLA and would now be entitled to PIP mobility 2c on that basis.

16. Ms Leventhal also submitted that those who were awarded the HRMC of DLA prior to 2004 may well have done so on the basis of a more generous approach to walking distance than has been applied since then. This submission was founded on Ms Parker's first witness statement, but after the hearing, she filed a second statement which revised her evidence the effect of which is that it is likely that the 50 yard rule of thumb would have prevailed since at least June 1995. Of those who benefited from a more generous test prior to that date and were on indefinite awards, few will now be young enough to be transferring to PIP. Therefore I do not consider that this particular submission provides material assistance to determining the issues in this appeal.

17. The DLA main meal test and PIP activity 1 (preparing food) both concern ability to prepare and cook a meal. In some regards it was harder to satisfy the DLA than the PIP test, for example because a person who could cook adequately with the use of aids would not satisfy the DLA test but might satisfy PIP descriptor 1b and because DLA did not require ability to use a "traditional cooker" (*KS v SSWP* [2011] UKUT 29 (AAC)) in contrast to PIP descriptor 1C. In these respects, a person who satisfied the cooking test for DLA purposes may be thought more rather than less likely to satisfy a descriptor under PIP activity 1.

18. Another area of potential overlap, as set out in Ms Parker's table and explained by Judge Ward in *YM*, is between the supervision criteria for the MRCC and LRMC of DLA on the one hand and in PIP daily living activities and PIP mobility descriptor 1d on the other. The overlap is not complete. For example a person may require continual supervision throughout the day, but not in relation to a specific PIP daily living activity. In addition PIP regulation 7 may lead to different outcomes in the case of those with fluctuating needs as might PIP regulation 4(2A), but perhaps less so in the case of supervision needs. There are also other possible areas of overlap, as Ms Parker's table illustrates.

Procedural comparison

19. The second principle area of difference between DLA and PIP relied on by Ms Leventhal, and explained in the witness evidence, relates to the assessment and decision-making processes for each benefit.

20. Entitlement to DLA was based on a self-assessment questionnaire completed by the claimant. Claims were considered by DWP decision-makers, who were not health professionals, by reference to a guide (the A-Z of medical conditions) which described the care and mobility needs likely to arise from the listed illnesses or conditions. Medical evidence was not mandatory, though it could be sought if needed and was in fact sought in around half of DLA cases. A claimant could also be required to be assessed by an examining medical professional ('EMP'). According to data obtained by the DWP for the period April 2012 to March 2013, an EMP report constituted the main source of evidence in around only six per cent of new DLA claims by working age claimants. Around 40 per cent of decisions

used general practitioner reports and the remainder used either the claim form alone or "other" unspecified sources of evidence.

21. A time-limited or indefinite award of DLA could be made. The last published statistics showed that in August 2010 over 70 per cent of the DLA caseload comprised indefinite awards and so, at the time of transfer to PIP, the evidence relating to the existing DLA claim may be of considerable age.

22. All PIP claims are determined on the basis of an assessment report by a trained and independent healthcare professional ('HCP'), who is not necessarily a doctor. The HCP considers a claimant's questionnaire and supporting evidence, decides whether a face-to-face consultation is required, and determines whether any additional evidence is needed. The uncontradicted evidence of Ms Spencer (Senior PIP Reassessment Operational Lead within the Disability Service and Dispute Resolution Directorate of the DWP) was that face-to-face medical assessments occur in the vast majority of cases. Information from one of the two DWP assessment providers was that, for April 2018, 84.8 per cent of assessments were carried out face-to-face and 15.2 per cent on the papers.

23. Ms Leventhal made much of the difference between the EMP and HCP assessments, but in my view the structure of the reports for both benefits shows that the assessments have much in common, in substance. There was considerable detail in the EMP report which was equivalent to the level of detail in an HPC report, albeit differently structured. Both include a medical history and record of the assessor's medical examination and observations. Like the HCP report, the EMP report required the assessor to offer opinions in relation to a range of functional abilities and to identify the medical evidence which supported those opinions. This included an assessment of a range of identified factors relevant to walking ability, including gait, balance, use of aids, discomfort, speed, stopping and distance and the need for guidance or supervision on unfamiliar routes as a result of both physical and mental health factors. It also included an assessment of the claimant's ability to perform safely each of a detailed list of daily living activities, with or without help, also by reference to medical evidence. The activities included a number which are assessed for PIP purposes such as washing, cutting up food, preparing vegetables, using taps and pans, eating and drinking, dressing, bathing, and using the toilet. The DLA assessment included the claimant's ability to complete the tasks safely and whether they needed help or aids. The DLA assessment specifically addressed whether a claimant needed help with medication or treatment, continence, communication.

24. I accept that this comparison is only relevant where a comprehensive assessment was carried out for the DLA claim. Even in those minority of cases in which there was such an EMP report, it would not always address every aspect of a claimant's ability but may have been commissioned by a decision maker to focus on a particular aspect of a claimant's difficulties. Nonetheless the scope and detail of the matters covered by the pro forma EMP report, some of which I have set out above, is instructive because it illustrates the range of functional issues which were taken into account for DLA purposes and their considerable overlap with those relevant to a PIP claim.

25. Ms Leventhal stressed the objective, comprehensive and rigorous nature of the PIP assessment which, she said, meant that claims and appeals could be determined on the basis of the PIP evidence alone without the need to look for evidence elsewhere. This submission presupposes that the process consistently results in assessments which are of a sufficient quality that they can be relied upon to be accurate. The House of Commons Work and Pensions Committee published a report on 14 February 2018[1] which cast doubt on the

[1] "PIP and ESA assessments", Seventh Report of Session 2017-2019.

accuracy of the assessments. The Committee observed that the assessments are dependent on there being sufficient expert evidence available to the assessors who can themselves only gain a partial knowledge of claimants' conditions, and that progress in this regard has been slow. The Committee noted that the contractors who provide PIP assessments have struggled to meet their targets for producing "acceptable" reports and concluded:

> "87. The Department's quality standards for PIP and ESA set a low bar for what are considered acceptable reports. The definition of "acceptable" leaves ample room for reports to be riddle with obvious errors and omissions. Despite this, all three contractors have failed to meet key performance targets for any given period."

26. The Committee noted that, at that time, it was hard to see how the objectives of introducing efficient, consistent and objective eligibility tests had been met.

27. Ms Leventhal referred to the Government's response to that report, published in April 2018, which set out how it was addressing the concerns and recommendations. By the time of the hearing it was too early to say how matters had progressed.

Use and retention of DLA evidence

28. Although it is the Secretary of State's case that DLA evidence is not necessary for a PIP assessment in the majority of cases, she has committed to considering it if a claimant asks for it to be considered. How this is achieved has been the subject of some discussion in previous Upper Tribunal cases, most recently in *AW v Secretary of State for Work and Pensions (PIP*) [2018] UKUT 76 (AAC) in which the Secretary of State explained that a claimant is asked whether they want their DLA medical evidence to be used in the PIP claim. If they do then the evidence forms part of the PIP claim and so will appear in any subsequent appeal bundle, but at that time it did not seem that the tribunal would be told if the claimant had not asked for the DLA evidence to be considered.

29. The Secretary of State has now clarified that PIP claims are made initially by a phone call to the PIP telephony team, in which the call-handlers follow a script and ask claimants whether they want any medical evidence submitted in support of their last DLA application to be used in the PIP disability assessment. If they say that they do, then they are asked to specify which pieces of medical evidence they wish to rely on or they can request that all the DLA evidence is taken into account. The Secretary of State's response to an appeal to the First-tier Tribunal should state whether the claimant accepted or declined the offer of DLA evidence to be considered as part of the PIP claim.

30. As the present appeals illustrate, in the past this system has not worked well in practice. The Appellants in these appeals asked for their DLA evidence to be considered but it was not and the DWP submissions made no reference to the DLA evidence. The Secretary of State accepts that these were not isolated failings. Ms Spencer has explained that recent IT changes mean that the DWP's appeal submission now includes a mandatory field as to whether the claimant has requested that the DLA evidence be considered. If they have done so the DLA evidence will be in the bundle that was used by the decision maker and will be referenced in the Schedule of Evidence provided to the First-tier Tribunal. Otherwise, that evidence will not be put before the First-tier Tribunal unless the claimant asks for it to be. That will be possible in most cases, because the DLA paper file is kept for fourteen months after a DLA claim is terminated.

31. The Secretary of State has explained that, in addition to the above, during the initial call or afterwards claimants can ask that the DLA evidence is sent to them. It is open to them to ask for any of that evidence to be included in their claim at that time or, at any later stage. However, the Secretary of State now acknowledges that this option is not made clear to

claimants and has said that the operating procedures are being looked at in the light of lessons learned as a result of these appeals.

32. Finally, the Secretary of State had told the Upper Tribunal in *AW* that, where the claimant had rejected the offer of DLA evidence being included in the PIP claim, she would provide the tribunal with further details of the DLA decision, in particular the level of award and the date of the last decision. In the present appeals she said that she remained committed to do so but had not implemented the commitment yet because the outcome of these appeals may impact on what she does.

Issue 1: Whether the tribunal is required to obtain DLA evidence

Jurisprudence

33. There is a substantial body of case law addressing the duty of the First-tier Tribunal to obtain relevant or potentially relevant medical evidence relating to a previous award of benefit. There is no need to revisit most of it because it has been reviewed in detail in two important decisions, one of a Tribunal of Commissioners and one of a Three Judge Panel of the Upper Tribunal. These decisions must be followed by me unless there are compelling reasons not to do so: *R(I) 12/75* at [21] and *Dorset Healthcare Trust v MH* [2009] UKUT 4 (AAC) at [37].

34. The first of these is the decision of the Tribunal of Commissioners in *JC v Department for Social Development (IB)* [2011] NI Com 177; [2014] AACR 30. It was concerned with Northern Ireland regulations which permitted supersession of an incapacity benefit decision on receipt of medical evidence. At [50] the Tribunal of Commissioners set out a number of principles as to the duty of a tribunal to obtain evidence of a previous assessment, including the following:

> "(iv) it is no longer necessary **as a matter of law** for an appeal tribunal to have before it and to consider the evidence of the claimant's previous assessments in connection with the all work test or personal capability assessment;
>
> (v) an appeal tribunal is entitled to call for whatever evidence it considers to be relevant to the proper determination of the issues arising in an appeal;
>
> (vi) the requirement for an appeal tribunal to consider the evidence associated with previous favourable assessments in connection with the all work test or personal capability assessment depends entirely on the relevance of the earlier assessments to the determination of the claimant's incapacity for work at the date of the supersession decision;
>
> (vii) an appeal tribunal will be required to consider the evidence associated with previous favourable assessments where an appellant asserts that there has been no change in his medical condition or disablement **and** that the evidence associated with previous assessments is relevant to that continuing medical condition or disablement. In such circumstances the last previous assessment is likely to be of more relevance than earlier ones and the relevance of any particular assessment is likely to diminish with the passage of time;
>
> (viii) details of the basis of the claimant's previous assessments in connection with the all work test or personal capability assessment may be relevant evidence of the claimant's overall capacity, particularly where the claimant has a variable condition.

> Variability may increase the relevance of older assessments carried out before the last previous assessment;
>
> (ix) details of the basis of the claimant's previous assessments in connection with the all work test or personal capability assessment may be of no relevance in a case, for example, where there is evidence that the claimant's condition has changed in a way that renders the details of the earlier assessment irrelevant;…
>
> (xii) an appeal tribunal may call for evidence associated with a previous unfavourable assessment in connection with the all work test or personal capability assessment. It follows that where evidence of previous assessments is of relevance in cases, for example, where the claimant's condition is variable, the evidence may assist in determining the claimant's overall capacity."

35. The second decision is that of the Three Judge Panel of the Upper Tribunal in *FN v Secretary of State for Work and Pensions* [2015] UKUT 670 (AAC), [2016] AACR 24, which applied the above principles not only to an appeal against an employment and support allowance ('ESA') supersession decision made on receipt of a further medical report but also to an appeal against a decision on conversion from incapacity benefit to ESA.

36. The Upper Tribunal considered the decision of Upper Tribunal Judge Wright in *ST v Secretary of State for Work and Pensions* [2012] UKUT 469 (AAC) as to the relevance of evidence of a previous award of ESA in an appeal against a supersession based on a new medical report, where he said at [37] that, in a supersession case, relevant evidence would include medical evidence supporting the previous award in a case where the claimant said that she was no better or was worse than at the time of the earlier decision. The Three Judge Panel also agreed with Judge Wright that it was for the Secretary of State to decide what was relevant but bearing in mind that the tribunal may not know what is in the Secretary of State's possession that may be relevant.

37. However the Three Judge Panel in *FN* disagreed with Judge Wright's conclusion that, if the Secretary of State failed in her duty to provide relevant documents to the tribunal or to explain why relevant documents are not in her possession, the First-tier Tribunal's decision dismissing the appeal without obtaining the evidence would be in error of law. That conclusion was inconsistent with *JC* at [50(iv)]. The Upper Tribunal continued:

> "79. We emphasise that a First-tier Tribunal is entitled to call on whatever evidence it considers relevant to the proper determination of the issues arising in the appeal which is before it – see paragraph 50(v) of the decision in *JC*. It is for the First-tier Tribunal to determine what evidence is relevant to the issues arising in the appeal and whether, accordingly, that evidence should be called for. We can envisage a situation where a First-tier Tribunal considers that it has sufficient relevant evidence before it to determine the issues arising in the appeal without the requirement to call for evidence which is missing because the Secretary of State has failed in his duty to provide it.
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> 80. There are significant practical consequences for the work of a First-tier Tribunal if Judge Wright is correct in stating that its decision will be in error of law if it proceeds to determine an appeal without evidence which the Secretary of State has failed to supply. The temptation will be to adjourn to obtain the evidence in order to avoid error. Our view is that the first choice for the tribunal should not be to adjourn but to get on with the task of determining the issues arising in the appeal when satisfied that it has the necessary relevant evidence before it. It might be the case that having weighed and assessed the appellant's oral evidence, the tribunal might be satisfied that the evidence is credible, should be accepted and the appeal be allowed. It

is our experience that appellants, for the most part, and having waited for their appeal to come to the tribunal, are keen for the tribunal to proceed to determine the appeal.

81. It is also relevant to examine what the consequences are where the Secretary of State has not only failed to provide documentation associated with the adjudication history but also omits to even refer to the existence of such assessments and reports in the response to the appeal. Will a tribunal be obliged to enquire in each and every case about that adjudication history and the possibility of the provision of assessments and reports which might or might not be relevant?

82. It seems to us that the decision in *ST* should be confined to a description of the duties and responsibilities of the Secretary of State in the preparation of a response to an appeal in an ESA supersession appeal. We agree with Judge May QC in *AM*[2], and the Tribunal of Commissioners in *JC*, that it is not necessary, **as a matter of law**, for a tribunal to have before it and consider the evidence of a claimant's previous assessment in connection with the WCA or PCA in each and every case.

83. What, then, is the extent of the duties of the First-tier Tribunal when faced with an appeal against a regulation 6(2)(g), 6(2)(r)(i), or an ESA conversion decision where there are reports of medical examinations associated with the adjudication process which have not been provided or where there may be such reports but the First-tier Tribunal is not aware of them? By way of answer, we accept and endorse the principles set out by the Tribunal of Commissioners in *JC*. We are conscious, of course, that those principles were set out in the context of an appeal against an IB supersession decision. We have no hesitation in confirming that the principles are equally applicable to appeals against ESA supersession decisions where the issues are parallel. In the instant case the appeal was against an IB conversion decision. We consider that the issues are sufficiently parallel to those which arose in *JC* to permit the cross-application of the principles in that case. As will be noted below, we place a great emphasis, as a core principle, on the determination by the First-tier Tribunal of the relevance of reports of medical examinations associated with the adjudication process to the issues arising in the appeal. We accept, however, that in an appeal against an IB conversion decision, such as in the instant case, the adjudication history, and associated assessments and reports, with different substantive tests, might not have the same degree of relevance, though there may still be room for argument, depending on for instance, the provision of the IB regulations a claimant was held to have satisfied and the continuing existence – or not – of that or a similar provision in the ESA regulations. For example – and it is only one such example – there is considerable overlap between regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311) and regulation 29 of the Employment and Support Allowance Regulations 2008 (SI 2008/794).

84. We have set out above that a First-tier Tribunal is entitled to call on whatever evidence it considers relevant to the proper determination of the issues arising in the appeal which is before it and that it is for the First-tier Tribunal to determine what evidence is relevant to the issues arising in the appeal and whether, accordingly, that evidence should be called for. To that we add what was said in paragraph 50(vi) to (xii) by way of a description of the relevant principles on the substantive issue arising in this appeal.

[2] This is a reference to *AM v Secretary of State for Work and Pensions* [2013] UKUT 0458 (AAC)

85. In paragraph 52 of the decision in *JC*, the Tribunal of Commissioners concluded that the previous adjudication history, and the documentation associated with such a history would be relevant:

> "… in a limited class of case, where there is an assertion that there has been no change in the claimant's condition, and where the evidence associated with the previous adjudication history is relevant to that submission or, for example, where the claimant's medical condition, and the evidence associated with the previous adjudication history assists in the assessment of the claimant's overall capacity."

86. Those principles are not out of keeping with what Judge Wright stated in *ST*, in describing the duties of the Secretary of State in preparing the appeal response. He too limited his analysis to cases where there had been an assertion of no change in the appellant's condition and where the previous adjudication history was relevant to that assertion. The difference between the decisions in *JC* and *ST* lies in the description of the consequences for the tribunal where the Secretary of State fails in his duty to set out the relevant adjudication history and/or provide the documentation associated with that adjudication history. The decision in *AM* is also consistent with the principles in *JC*. Indeed it is arguable that the decisions in *ST* and *AM* are not inconsistent in their outcomes. The decision under appeal to the First-tier Tribunal in *AM* was an ESA conversion decision. It is arguable that the adjudication history, and associated assessments and reports, with different substantive tests, might not be as relevant."

38. The Three-Judge Panel repeated the recommendation made at [51] of *JC*, that the details of the previous adjudication history should be set out in the response to the appeal to the extent that this information was available to the Secretary of State. In so doing, the Panel endorsed Judge Wright's observations on the role of the Secretary of State as described by Baroness Hale in *Kerr v. Department of Social Development* [2004] UKHL 23, R 1/04(SF) at [62] and in particular that, in the cooperative process of investigating a person's entitlement to benefit, the Secretary of State was obliged to provide to that investigation all relevant information that she held.

39. The parties also relied on *AP v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 416 (AAC) Upper Tribunal Judge Hemingway addressed, *obiter*, whether a tribunal erred in failing to consider calling for evidence relating to the previous award of DLA in a PIP appeal. He did not refer to *FN* but his decision is consistent with it. He recognised that, despite the different statutory tests for the two benefits, medical evidence for DLA may be of value when considering entitlement to PIP but he thought that it would be rare that the F-tT would be required to seek the DLA evidence in such a case. He continued:

> "17. Nevertheless, it does seem to me that there will be situations where material used in connection with a disability living allowance claim and award will be relevant or potentially so and will be capable of affording assistance to tribunals. That might be so, for example, where it is thought the health professional's report may be unreliable and there is little other medical evidence in the appeal bundle, where on the face of it there appears to be (as here) something of a disparity between the terms of the award of disability living allowance (here the maximum which was available had been awarded) and a refusal to award personal independence payment, where a claimant is relying upon a degenerative condition such that earlier medical evidence might very well be probative (since subsequent improvement would seem unlikely), or where there is good reason to think any undisclosed medical evidence is likely to be recent

and particularly informative. That is not intended to be an exhaustive list and it may well be that it would take a combination of such and/or other factors before it becomes necessary for a tribunal to even turn its mind to the question of an adjournment. Of course, the wishes of the parties and any representatives will also be an important consideration. It may be, in this context, that an appellant will be anxious to proceed notwithstanding the possibility of there being undisclosed relevant evidence and such a wish will often command weight. It may be that a competent representative has not sought to raise the question of such evidence being obtained in which case the tribunal will not normally have to consider the matter any further for itself and may usually assume that representative does not see a need for such evidence. It may be that, conversely, an appellant and/or his/her representative positively asserts such evidence ought to be obtained and can present a persuasive argument as to why that should be so despite the tribunal having the sorts of other evidence referred to above (though it may be in such circumstances a representative will be able to obtain the evidence direct from the Secretary of State or even from a well organised claimant prior to any hearing).

18. So, all I am really saying is that it seems to me where there is something of substance to require a tribunal to at least consider calling for the disability living allowance evidence (and if there is not then it would seem unnecessary for it to even address the matter in its decision) it will have to carry out a balancing exercise based on the above considerations and any other ones it thinks pertinent, and then decide how to proceed. Where it does think the matter merits considering calling for the evidence but despite that it decides not to do so it should be prepared to say something about why it has decided not to do so though what it does say will, absent something exceptional, only need to be brief. Even if it does not say anything at all about the evidence in circumstances where it should have done and even if that is such, on the facts, to amount to legal error, such error will not, in any event, necessarily be material."

The Appellants' case

40. For the appellants, Mr Williams argued that there is considerable substantive overlap between many of the conditions of entitlement for the two benefits and so the evidence which supported a DLA decision is relevant to whether that claimant fulfils comparable PIP descriptors, despite the age of the DLA evidence, particularly where a claimant contended that their condition had either deteriorated or had not improved. Moreover an indefinite award of DLA, particularly if made following a medical assessment, was an indication that the health professional had assessed the condition to be permanent.

41. Mr Williams argued that, as the DLA evidence is invariably relevant, it should be provided to the tribunal by the Secretary of State pursuant to her duty in rule 24(4) of the Tribunal Procedure (First-tier Tribunal) Rules 2008 and in accordance with cooperative approach described in *Kerr*, regardless of whether a claimant (who may not understand its potential relevance) requested it, and in addition that, where the claimant asked for the DLA evidence to be taken into account, it would be unfair not to do so. The test for whether the tribunal should call for the evidence is that in *FN* but with some adaptation to accommodate the context of transfer from DLA to PIP. It is for the tribunal to weight the relevant factors and explain why it has not sought potentially relevant DLA evidence.

The Secretary of State's case

42. Ms Leventhal submitted that the First-tier Tribunal will never be required as a matter of law to call for the DLA evidence by reason *merely* of the claimant having had a previous DLA award, given the differences between the substantive tests, the comprehensive nature of the PIP assessment and the likely age of the DLA evidence. That did not preclude the tribunal from obtaining the evidence as a matter of discretion and the information which the Secretary of State has agreed to provide to tribunals would enable tribunals to decide whether to call for it. Ms Leventhal broadly accepted the analysis of Judge Hemingway in *AP*. She emphasised in particular the following: (i) Only some areas of overlapping criteria would render DLA evidence relevant, though she did not say which; (ii) DLA evidence could not be relevant unless recent (she suggested a cut off of three years); (iii) The tribunal would not need to obtain DLA evidence if it had sufficient evidence to determine the issues in the appeal.

Discussion

43. This issue raises two principal questions. First, when if at all is DLA evidence relevant to consideration of entitlement to PIP? And second, when must or should the First-tier Tribunal obtain DLA evidence?

44. These issues have been considered in the context of conversion from incapacity benefit to ESA, in *FN*. There can be no doubt that the principles also apply in the comparable context of transfer from DLA to PIP. My task is to apply the principles to this context.

Relevance of DLA evidence

45. The question for the First-tier Tribunal in a PIP appeal is whether the claimant qualifies for PIP in accordance with the statutory criteria relevant to that benefit. There is no expectation of entitlement based on a previous award nor of adopting previous findings of fact relating to that award.

46. The First-tier Tribunal must make material findings of fact to determine those issues. Evidence is relevant if directly or indirectly it helps to prove those facts: *R v Greater Birmingham Supplementary Benefit Appeal Tribunal ex parte Khan* [1979] 3 All ER 759 at 763. Medical evidence relating to a DLA claim may be relevant to a PIP claim where, as Judge May QC said in *AM v Secretary of State for Work and Pensions* [2014] UKUT 0458 (AAC), it deals with "diagnosis and function" regarding an issue which calls for consideration in the PIP claim. In the light of the degree of overlap between the tests for DLA and for PIP, and the overlap between the assessments for both benefits (where there was one for DLA) it is obvious that in many cases DLA evidence will address the same conditions and functional difficulties as are in issue in the PIP claim and may shed light on whether any PIP tests are satisfied, where there has been no change since the date of the DLA evidence. This is consistent with *FN* at [83]. I therefore reject Ms Leventhal's principal submission that DLA evidence is irrelevant to a PIP claim or appeal.

47. Ms Leventhal invited the Upper Tribunal to specify relevant areas of overlap. I do not consider that it is appropriate to be more specific than I have been in the foregoing discussion of overlap between the substantive tests. This shows that there is a number of ways in which the criteria may overlap but whether DLA evidence is relevant in any particular case will depend on a variety of factors. Nonetheless, although relevance must

be addressed on a case by case basis, it is possible to give some guidance as to the correct approach.

48. First, although in *FN* at [83] the Upper Tribunal said that overlap between the substantive criteria was only an example of when past evidence might be relevant, it is difficult to envisage in what other circumstances DLA evidence would be relevant. Mr Williams said the DLA evidence would be relevant where the claimant had a variable condition, referring to *JC* at [50(viii)]. I do not understand the Tribunal of Commissioners there to have been saying that the previous evidence would be relevant to variability even if there were no substantive overlap in the conditions of entitlement. The case law to which the Tribunal referred (see in particular [42]) does not suggest that that was what the Tribunal had in mind.

49. Second, as is clear from the case law to which I have referred, DLA evidence will not be relevant where the claimant's condition has since improved.

50. Third, DLA evidence could not assist where the claimant's case in the PIP appeal is inconsistent with the particular PIP descriptor being applicable. Thus, where the evidence of the claimant in the example at paragraph 15 is that he or she is able to walk over 50 metres at one and a half times normal walking speed, DLA evidence relating to a previous award of the HRMC will not be relevant.

51. Fourth, it is highly unlikely that evidence other than the *medical* evidence from the DLA claim could be relevant to a subsequent PIP claim. Other evidence, such as what the claimant said in the DLA claim form, can be repeated for the purpose of the PIP claim if thought relevant. Previous statements by the claimant are unlikely to assist as to credibility as such statements are just as likely to show consistent misrepresentation or exaggeration as they are to show truth or accuracy.

52. Fifth, the age of the evidence is likely to affect its relevance but occasions even quite old evidence may assist, for example where there is reason to doubt the PIP evidence or it is incomplete. Older evidence may also assist where variability is in issue (see *JC* at [50(viii)]). It is not appropriate to specify a particular age beyond which DLA evidence will not assist although, in general, relevance is likely to decrease with age. Whether it does assist in any particular case is a matter for the First-tier Tribunal's judgment.

53. Sixth, an indefinite award of DLA would have been based on the prognosis given at that time but that prognosis is unlikely to provide assistance at the time of a PIP decision when there is a reliable up-to-date assessment of the claimant's actual condition.

54. Finally, PIP assessments may not be as reliable as the Secretary of State would like to have the Tribunal believe (see paragraphs 25-27). It is the tribunal's task to decide what weight to afford the PIP evidence. Medical evidence relating to a previous DLA award may assist in evaluating the quality of the PIP assessment.

When the First-tier Tribunal should obtain DLA evidence

55. Mr Williams accepted that *FN* provides the test for when the First-tier Tribunal should obtain evidence relating to a previous DLA award in an appeal concerning transfer from DLA to PIP.

56. The Upper Tribunal in *FN* drew a clear distinction between the duty of the Secretary of State and that of the First-tier Tribunal. It recommended that the Secretary of State provide details of the previous adjudication history. Although the Tribunal approved the conclusion in *JC* at [52] that the Secretary of State was not required to provide associated paperwork in every case, the clear implication of the earlier part of that paragraph is that there would be some cases in which the paperwork should be provided. The observations of the Upper Tribunal in *FN* at [95], endorsing Judge Wright's description of the role of the Secretary of State, provide a clear indication that in some cases the Secretary of State's duties pursuant to rule 24 and pursuant to the principle in *Kerr* mean that she should provide that evidence.

57. The Secretary of State's practice in PIP cases, as explained to the Upper Tribunal in these appeals, only partially achieves this. The DLA evidence will be included where the claimant has asked for it to be taken into account, but where the claimant has not asked, the appeal submission will inform the tribunal only of that fact and the level and date of the last DLA award. The information provided to the tribunal does not state what DLA evidence is in the Secretary of State's possession including whether there is an EMP report, nor are copies provided. In the light of the decisions in *JC* and *FN,* I consider that, even if the claimant does not ask for the DLA evidence to be taken into account, the Secretary of State's duty means that she should consider whether DLA evidence in her possession is relevant to the PIP appeal, taking into account the guidance in these Reasons, and should provide to the tribunal the relevant evidence which is in her possession. It would usually be sufficient for the Secretary of State to consider the medical evidence that was available for the most recent determination. I do not consider that it would be unduly onerous for the Secretary of State to do this. I acknowledge that it is not my role to mandate the Secretary of State's performance of her duties, but I note that the Secretary of State has indicated that she will be addressing her procedures in the light of this decision and so I suggest that as a matter of good practice she could consider taking on board my observations.

58. My task, as that of the Upper Tribunal in *FN,* is to decide what the First-tier Tribunal should do where DLA evidence has not been provided.

59. As was made clear in *JC* and *FN* the tribunal is not required as a matter of law to consider DLA evidence on a PIP appeal if the evidence is not relevant (*JC* at [50(vi)] and *FN* [79]). Moreover, a tribunal will not always err in law in determining an appeal without all relevant evidence (*FN* at [78] and [79]). The question is whether the evidence is necessary fairly to determine the appeal. Thus, at [84] the Upper Tribunal said:

> "a First-tier Tribunal is entitled to call on what evidence it considers relevant *to the proper determination* of the issues arising in the appeal" (emphasis added)

60. In disability appeals there is frequently relevant evidence, such as GP records, which is not before the tribunal. There is no general requirement on the tribunal to obtain such evidence. It is for the tribunal to decide whether it is proportionate to do so, consistently with the overriding objective. The position has been put succinctly by Judge Nicholas Paines QC in *GC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 0174 (AAC):

> "34. Tribunals are often faced with cases in which categories of information that might be helpful to the tribunal are not in their papers. For example, they may or may not have a claimant's GP records; the claimant may have been to a specialist for treatment, but the papers do not contain any report from the specialist; the claimant may not have been examined on behalf of the DWP by an examining medical practitioner; or, as here, an ability similar to the ability at issue before the tribunal may have been adjudicated on for the purposes of another social security benefit, but the papers are not before the tribunal. Other examples can no doubt be proffered. In all these situations, it seems to me, the tribunal has a discretion, to be exercised judicially, as to whether they adjourn with a view to obtaining the further material.
>
> 35. In exercising that discretion, the tribunal will balance the competing factors, which include: the wishes of the claimant, particularly if represented; the delay to the proceedings before it; the amplitude of the evidence already before it; the likely relevance or helpfulness, so far as it can be judged, of the missing material, etc."

61. Ultimately it is for the First-tier Tribunal to make its own judgment whether DLA evidence may be relevant and whether to call for it in a PIP appeal. In accordance with the decisions in *JC* and *FN*, and without setting down any hard and fast rules, the following guidance should assist in deciding whether to call for the relevant evidence.

62. First and most obviously, it must reasonably be considered that the DLA evidence would be relevant to the PIP decision as discussed above. At a minimum this will depend on there being relevant overlapping criteria in issue and a plausible case that the claimant's condition has not improved.

63. Second, even if the DLA evidence is likely to be relevant on the above basis, the First-tier Tribunal will not be required to obtain that evidence if it is satisfied that the PIP evidence is reliable and sufficient to enable it to determine whether the PIP criteria which are in issue are satisfied.

64. Third, if the First-tier Tribunal considers that the PIP evidence is insufficient or if it has cause to doubt the reliability of the PIP evidence, it should consider obtaining potentially relevant DLA evidence.

65. Fourth, if the First-tier Tribunal decides that the appellant is not credible and so making false or exaggerated claims about their difficulties, that may make it unnecessary to call for the DLA evidence. However, the tribunal might also consider whether the DLA evidence could assist in assessing the appellant's credibility where that is called in to question.

66. Fifth, if the claimant relies on the DLA award, the tribunal must address the argument made - see the discussion in *KW v Secretary of State for Work and Pensions* [2018] UKUT 216 (AAC) – but it is a matter for the tribunal to determine whether to obtain the DLA evidence.

67. If the DWP's processes work, the question whether the tribunal should obtain the DLA evidence should only arise where the claimant did not ask for it to be taken into account and the Secretary of State has decided that it is not relevant. It is not consistent with the tribunal's investigative and enabling role simply to leave matters there. The claimant may not have appreciated that DLA evidence may be relevant, and the Secretary of State does not have the last word on relevance. But how is the First-tier Tribunal to go about the task of deciding whether to call for the DLA evidence where it does not know what DLA

evidence there is? In the light of what the tribunal knows about the level and date of the last DLA award, it will be able to make a judgment as to whether there is any question of DLA evidence being potentially relevant and, in particular, whether any overlapping criteria are likely to be in issue. If they are not, it need not consider further whether to obtain that evidence. But if there is a possibility of the DLA evidence being relevant, then the tribunal ought to consider whether to obtain it.

68. Where an appeal is determined in the absence of the claimant it would only be in very obvious cases that the tribunal might consider obtaining the DLA evidence, for instance where there is a clear and substantial inconsistency between the PIP assessment and a recent DLA award. If the claimant is present, the tribunal can explore matters further if it appears that the DLA evidence may be relevant. It could find out more about the basis for the award, whether there was a medical examination, what other medical evidence there was, and why the claimant did not ask for the DLA evidence to be taken into account. It is for the tribunal to decide what inquiries to make but I give these examples to show that they can be made quickly and easily at a hearing and do not impose an undue burden on the tribunal.

69. In summary, the tribunal need only consider whether to obtain the DLA evidence if it has decided that it is or may be relevant. There is no question of it being required to obtain it simply to see what else there is. Even where the tribunal decides that the DLA evidence would be relevant, it may decide to determine the appeal without obtaining it. But it must consider whether to do so and take into account the range of relevant considerations, as explained in *GC*, and with due regard to the restraint to be exercised as urged by the Upper Tribunal in *FN* at [80]. Finally, where the question whether to seek DLA evidence has arisen and the tribunal decides to proceed without it, the duty on the tribunal to act judicially means that an appropriate explanation should be given. In most cases a brief explanation will suffice.

70. Ms Leventhal told the Upper Tribunal that the Secretary of State was concerned that, following *YM*, the First-tier Tribunal was often adjourning appeals unnecessarily in order to call for DLA evidence. It is apparent from what I say above that there is no question of a tribunal being required to adjourn in all transfer cases where it does not have the DLA evidence. Whether it should do so is for the tribunal's judgment to be exercised in accordance with the above guidance.

Issue 2: Reasons

Jurisprudence

71. The classic analysis of the duty to give reasons where an award of a particular benefit changes is that by Mr Commissioner Howell in *R(M)1/96.* The claimant had been in receipt of mobility allowance. His renewal claim was rejected, even though he contended that his walking ability had got worse since the original award. The Commissioner said this:

> "15. It does however, seem to me to follow from what is said by the Court of Appeal in *Evans, Kitchen & Others* that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant

will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an apparent variation in the treatment of similar **relevant** facts appears from the record of their decision.

16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance) then in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant "not virtually unable to walk" without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law."

72. In that case the two decisions concerned the same benefit. In *YM v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 16 (AAC) Upper Tribunal Judge Ward considered the position where a benefit is changed from incapacity benefit to ESA or, as in *YM* and the present appeals, from DLA to PIP. Judge Ward pointed out at [10] that *R(M)1/96* is based on the need for reasons to explain apparent inconsistencies and went on to consider when two awards may be judged to be inconsistent so that an explanation if called for. He said:

"12. Where a benefit is changed, such as from incapacity benefit to employment and support allowance or, as in this case, from DLA to PIP, in my view for the reasons below it is not enough on the one hand to point to the law having changed and to claim that as a result an earlier decision is of no consequence and need not be addressed. However, nor is it enough to say, in effect, that a claimant was awarded the benefit intended for eg (as here) people with disabilities under a predecessor benefit and so any decision that s/he does not qualify under the successor benefit must necessarily be inconsistent, for there will be many cases when the predecessor benefit is based on an entirely different approach. What is required on the part of the FtT is a degree of analysis as to the potential for a genuine inconsistency."

73. Judge Ward illustrated the position with reference to the potential overlap between certain DLA and PIP tests and which I have discussed above. He said that, where a

claimant whose condition was unchanged had qualified for DLA under a test which overlapped with a PIP test "they might feel some surprise" at being told they did not satisfy the corresponding PIP descriptor. Although apparent inconsistencies may be explicable by the fact that the tests for the two benefits are different including the "variety of subtle nuances around such matters as variability, manner of walking and so on", that "can be set out as part of explaining why the two decisions are different."

74. Judge Ward concluded:

> "21…I am not intending to set own a rule of law beyond that where the conditions on which a previous award of a different benefit was made are reasonably capable of being material to whether the conditions for the award of a subsequent benefit are met, where there is an apparently divergent decision on the subsequent benefit, R(M)1/96 should be applied."

The parties' submissions

75. Mr Williams submitted that *YM* is correct; the principle in *R(M)1/96* requires the First-tier Tribunal to give reasons for a PIP decision which is apparently inconsistent with a previous award of DLA.

76. For the Secretary of State Ms Leventhal submitted that this aspect of the decision in *YM* was *obiter* and, in any event, was wrong. I refer to her more detailed submissions in the discussion below.

Discussion

77. *R(M)1/96* applied general and established principles as to the duty to give reasons It is a decision that has been followed by the First-tier Tribunal and the Upper Tribunal, for over twenty years, and Ms Leventhal did not seek to depart from the underlying principle established there. The essence of her case was that a PIP award is never or rarely genuinely inconsistent with a DLA award and so, contrary to what was said in *YM*, the principle in *R(M)1/96* does not call for explanation in that regard.

78. That aspect of the decision in *YM* was *obiter*, but it contains a careful analysis and considered conclusion. Contrary to Ms Leventhal's submission, Judge Ward addressed not only the areas of potential overlap between the two benefits but also a number of substantive differences, in particular at [14] – [17] and [20]. He did not consider the procedural differences applying to the two benefits, but that does not undermine his reasoning. Differences in the assessment processes might affect their quality and weight in a particular case but that is for a tribunal to evaluate where the issue arises.

79. I reject Ms Leventhal's submission that the procedural and substantive differences between the two benefits mean that any perception of inconsistency between awards is entirely a result of the individual's lack of understanding of those differences. In the light of the areas of overlap between the two benefits it is obvious why in some cases it might be thought that the functional limitations giving rise to an award of DLA at a particular level might, all other things being equal, give rise to an apparently comparable award of PIP. Judge Ward's analysis amply illustrates this. Moreover, this submission fails to grapple with one important aspect of the role of reasons, which is to avoid perceptions of unfairness or feelings of injustice (see *R(M)1/96* at [15]).

80. Ms Leventhal's next submission was that that awards could not be seen as inconsistent unless there is "a very large degree of overlap" such as between the DLA test of being virtually unable to walk and PIP mobility descriptor 2c or higher, and the condition must not have changed or must have deteriorated and must not be a fluctuating one. I agree that

inconsistency will not arise where the relevant condition has improved since the DLA assessment, as was made clear by Commissioner Howell in *R(M)1/96*. Other than that, I do not consider that Ms Leventhal's submission clarifies the application of the principle. The terminology of "a very large degree of overlap" is too imprecise to be meaningful. Nor, is it possible to specify exhaustively which areas of overlap would call for an explanation. Judge Ward identified some areas of potential overlap. I agree with him that there may be others. Ms Parker's table is sufficient to indicate as much. Accordingly, I agree with Judge Ward's approach at [21] of *YM* in setting out the principle but no rule of law beyond that. It is for the tribunal to judge in the circumstances of the particular case whether there is an apparent inconsistency such that reasons are called for.

81. The principle in *R(M)1/9*6, and Judge Ward's application of it to cases of transfer from one benefit to another, does not place an undue burden on the tribunal. Judge Ward did not say that the tribunal must engage in comparative reasoning for the difference between DLA and PIP awards. The analysis which he said, at [12], was required was as to the *potential* for inconsistency created by the statutory provisions for the benefits and without which there is no further issue as to the application of *R(M)1/96* in that regard. This was in contrast with the over-simplified approaches which he had identified earlier in that paragraph as being insufficient. As he said at [17], deciding whether there is a duty to provide the explanation does not call for a sophisticated approach.

82. The position is well illustrated by two recent decisions of Upper Tribunal Judge May: *CSPIP/171/2018* in which there was no potential overlap between PIP mobility descriptor 1f and a previous finding of virtual inability to walk; and *CSPIP/193/2018* in which a previous finding of virtual inability to walk could not be relevant to the selection of PIP mobility descriptor 2d rather than 2e. In each case it followed that there was no call for reasons to explain the PIP decision in the light of the previous DLA award. I simply add that, if the claimant had relied on the previous DLA award in either of these cases, it would have been desirable for the tribunal to explain the position in one sentence as above. But I agree with Judge May that failure to do so would not be an error of law.

83. Ms Leventhal submitted that the tribunal's findings of fact which deal with relevant DLA evidence will be sufficient to explain any perceived inconsistency but, where there is no DLA evidence or the DLA evidence does not address a material aspect of the PIP criteria, it would be sufficient to explain that. This does not materially add to Commissioner Howell's analysis at [15], to which Ms Leventhal referred by way of preface to these submissions, and I do not consider it to be either necessary or desirable either to qualify or reformulate the very clear guidance found in his decision. The circumstances referred to by Ms Leventhal illustrate that it will not always be possible for a tribunal to say much, if anything, meaningful about the previous DLA award. In many cases, although the tribunal knows what DLA award had previously been made and when, it will not know on what factual or evidential basis it was made and so will be unable to address it specifically. In other cases, even if the DLA evidence is available, it may shed little light on matters relevant to the PIP claim. Those factors are clearly relevant to what can be said by way of reasons in a particular case, but do not dilute the underlying principle in *R(M)1/96.*

84. Finally, Ms Leventhal submitted that in the majority of cases it will be sufficient to say that the criteria differ. It follows from all that I have said already, and what Judge Ward said in *YM* in particular at [12], that this will not be sufficient in cases where there is a potential for genuine inconsistency.

85. I am satisfied that this approach, which endorses that of Judge Ward, does not impose an unduly onerous burden on tribunals. In all cases tribunals will review the evidence, make material findings of fact and apply the statutory tests to the facts found. A tribunal which carries out those fundamental tasks adequately should find it straight-forward to explain any apparent inconsistency with the DLA award.

The individual cases

CH

86. Before transferring to PIP, CH had an indefinite award of the HRMC and MRCC of DLA. He had been in receipt of DLA since 1999 and the most recent decision was made on 1 April 2004.

87. In the initial telephone call to make the PIP claim, CH's wife told the DWP operator that CH wanted the DLA medical evidence be taken into account and the operator said that the DLA file would be obtained. As things turned out, the DLA file was not obtained and so was not included within the appeal bundle. CH said nothing about this in his appeal. The Upper Tribunal was shown evidence that CH was assessed by an EMP in 1999, but the EMP report was not available.

88. CH claimed difficulties arising from a knee and back condition. The Secretary of State decided that CH was entitled to the PIP daily living component at the standard rate (increased to the enhanced rate on mandatory reconsideration) and that he was not entitled to the mobility component, in respect of which he was awarded 4 points for mobility descriptor 2b. Only the mobility component was in issue before the First-tier Tribunal. In his notice of appeal to the First-tier Tribunal CH said "I was awarded top mobility for life" and that his condition had since deteriorated.

89. The First-tier Tribunal dismissed the appeal after an oral hearing. It had before it a number of documents provided by CH including: a letter from his GP written in May 2016 which described spine degeneration and a worsening of his joint pain; reports of an MRI of his left knee in 2011 and 2012, following an injury in 2011, and an MRI of his lumbosacral spine in 2011, none of which resulted in any recommendations; xrays on both knees in 2016 suggesting osteoarthritis; and a print-out of the GP records showing a chronology of recorded conditions over many years and GP attendances since 2005.

90. In the statement of reasons the tribunal referred to CH's reliance on the previous DLA award, his claim that his condition had since deteriorated, and that he challenged the accuracy of the HCP assessment. The tribunal noted that, at the hearing, CH had walked well with two crutches, at a modest pace and with stable gait, and that he said he had been worse at the date of the hearing than at the date of decision.

91. In relation to moving around, the First-tier Tribunal relied not only on the documentary evidence but also in particular on CH's oral evidence. It found that he had given inconsistent accounts of his walking ability and that he gave evidence to the tribunal in an evasive manner. His evidence as to how long it took him to walk from the car park to the hearing centre, which equated to two and a half metres per minute, was implausible. There was no evidence to support his claim that, because of a learning disability, he had not been able to explain himself properly to the health professional.

92. Mr Williams submitted that, if information or medical evidence about the DLA award had been available to the tribunal, it may have reached a different conclusion. Ms Leventhal accepted that, because CH had requested it, the DLA evidence should have been included in the PIP papers and should have been before the tribunal. She did not

know what the DLA evidence comprised, save that there was an EMP report prepared in 1999, but submitted it would not have made any material difference if it had been provided. Mr Williams did not press for the DLA evidence to be put before me and I am satisfied that I can determine this appeal without it.

93. What happened in this case was not ideal. The hearing file should have contained whatever DLA material was available or an explanation if it could not be provided. In the light of the current procedures for preparing tribunal submissions, such a situation should no longer occur.

94. The question which I have to decide is whether the tribunal materially erred in law in failing to consider whether to call for the DLA evidence. It is a fair assumption that the DLA mobility award would have been based on the 50 yard or metre rule of thumb, and moreover that that would have been supported by the EMP report. Moreover, CH contended that his condition had got worse and there was evidence before the tribunal that his condition was deteriorating. On the other hand, any DLA evidence would have been at least twelve years old and the tribunal had substantial and much more recent evidence. CH did not query the absence of DLA evidence. The tribunal was satisfied, having specifically addressed the matter, that the HCP report was reliable. It found that that report was broadly consistent with the medical evidence and rejected CH's claim that he had not been able to explain himself to the HCP. The tribunal heard detailed oral evidence from CH and did not believe much of it as a result of the way in which he gave his evidence, its inherent implausibility and his inconsistency. It is unrealistic to suppose, in these particular circumstances, that the old DLA evidence could have materially assisted the tribunal. In all the circumstances it was entirely proper for the tribunal to determine the claim without seeking further evidence.

95. For completeness, I am satisfied that, even had the tribunal decided to explore whether to seek such DLA evidence as there might have been, it would not have been likely to have approached the case any differently. The transcript of the initial telephone call between CH and his wife with the DWP operator shows that they did not know what DLA evidence there was. They would not have been able to provide any information to the tribunal to indicate that the DLA evidence might have been of assistance and, as I have explained, there was no other good reason for the tribunal to seek it.

96. I am also satisfied that the reasons given by the tribunal for the decision on the appeal were adequate. Although there was potential inconsistency between the DLA award and the PIP decision, there was nothing more of substance that the tribunal could have said by way of explanation given the lack of any further information about the DLA award. The tribunal explained how it evaluated the evidence and explained why it rejected CH's evidence. This explanation made it clear why the tribunal had reached its decision and, in the circumstances of this case, that was sufficient to explain any divergence from the previous DLA award. As CH had relied on the DLA award, it would have been better practice if the tribunal had provided some brief explanation as to why the DLA award did not translate into the equivalent PIP award, perhaps simply explaining that the DLA award carried little weight given its age, that there was substantial up-to-date evidence, and that the tribunal had rejected CH's evidence. Doing so would have dispelled any concerns by CH that the tribunal had simply failed to heed the previous DLA award, but the failure to give such an explanation does not in the circumstances render this decision unlawful.

KN

97. KN had been in receipt of the LRMC and MRCC of DLA since 2008, and the latest DLA decision was made in 2011. On 20 October 2016 the Secretary of State decided that KN satisfied no PIP descriptors and so was not entitled to either component of PIP. KN appealed to the First-tier Tribunal.

98. During the initial telephone call to make her PIP claim, KN had asked for all of her DLA file to be used. It was not. The Secretary of State's submission to the First-tier Tribunal noted the previous DLA award but the tribunal was not provided with any documents from KN's DLA file. In her appeal to the First-tier Tribunal KN challenged the HCP assessment underlying the decision and said

> "I do not understand how I was previously given a life time award of DLA. Both awards at the standard rate before and suddenly I score no points for the same questions."

99. The tribunal had the PIP claim form in which KN relied principally on what she said were the very limiting effects of anxiety and depression. She claimed to have difficulties in relation to several daily living activities and with going out. KN had provided a number of doctors' letters written in 1998 and 1999 supporting her early retirement at that time on grounds of anxiety and depression, and a letter from a Dr Lichfield of 15 May 2000 reviewing the earlier medical reports and expressing some doubt about the previous medical opinions.

100. The HCP assessment report included KN's account of having suffered from mental health problems for over twenty years which she said had remained the same during that time, and that if she reduced her medication she was unstable. KN's account of her ability to plan and follow journeys was set out as follows:

> "She drives and she goes out locally on her own. She does not have panic attacks when she is out and she had one at the doctors surgery and this was 3 months ago and she started crying and cannot function and she is not safe to drive when this happens and she had to sit in the car for around 40 minutes and it took her around 4 days to fully recover. She would ask for help if she was out and she got lost."

101. KN provided detailed written grounds of appeal and further written submissions to the tribunal. She provided a detailed rebuttal of the HCP's conclusion in relation to her mental health generally and the assessment of her abilities in relation to many of the daily living and mobility activities. She said that the assessor had failed to record her answers accurately or her difficulty in coping with the interview. She explained that some of her difficulty in following journeys was due to a poor sense of direction, but also that she found it very stressful to make unfamiliar journeys. She explained that she panicked when she did not know where she was going. She disputed that her last panic attack had been three months previously. She claimed that what she had told the HCP was that she last spoke to the crisis team about three months earlier when she had a serious panic attack, but that that was not her most recent panic attack. She submitted a letter from her GP dated 11 November 2016 which stated that she had chronic depression which was "kept more or less stable" on medication, but that she had frequent relapsing episodes of low mood, tended to be very reclusive and rarely went out.

102. KN gave evidence at the tribunal hearing. The tribunal awarded 4 points for activity 9c ("needs social support to be able to engage with other people") but no other daily living points and no mobility points. In the statement of reasons the tribunal noted the previous award of DLA. It referred to some of the medical evidence. The tribunal accepted the

opinion of the HCP that KN's mental state was essentially normal, which the tribunal said was no different from the GP's evidence that her mental health was stable on medication, and with the fact that she undertook a range of daily activities. It did not mention what the GP said about frequent relapsing episodes. The tribunal concluded that any difficulties in planning and following a route were not due to a mental health condition but were because of a poor sense of direction.

103. The first question I must address is whether the First-tier Tribunal should have adjourned, or considered adjourning, in order to obtain the medical evidence relating to the previous DLA claim.

104. The MRCC of DLA would have been awarded on the basis that KN required frequent attention in connection with her bodily functions or continual supervision throughout the day (there was no suggestion that she had ever satisfied the night time conditions for the award). KN's PIP claim was based largely on her need for prompting to undertake daily living activities. Although there may have been some overlap with a need for attention, there was nothing before the tribunal to suggest how if at all the criteria for the specific PIP daily living activities which were in issue overlapped with the basis on which KN had previously satisfied the criteria for the MRCC. The tribunal had substantial up-to-date evidence including the claimant's oral and written evidence. As I set out below, there were some complexities relating to the fluctuating nature of KN's mental health issues. I do not say that the DLA evidence was irrelevant but, had this appeal been concerned only with the tribunal's conclusion regarding daily living and in the light of the considerations which I set out in this paragraph, I would not have found that the tribunal was in error of law for failing to obtain DLA evidence before determining the appeal.

105. I reach a different conclusion, however, in relation to the mobility decision. There was clear potential overlap between the test for the LRMC of DLA and that for PIP mobility descriptor 1d. Whether KN's ability in this regard was affected by her mental health was directly in issue in the appeal. KN had challenged the HCP's assessment of the state of her mental health. The evidence before the tribunal painted a more complex and uncertain picture of her difficulties than the tribunal acknowledged, particularly in relation to the fluctuating nature of her mental health difficulties. This was put in issue by the GP's evidence and KN's criticism of the way in which the HCP had recorded what she said about panic attacks which was specifically about her ability to follow a route. KN made lengthy written submissions to the tribunal which indicated that the mental health issues were complex and, in the light of which, it is hard to see how the tribunal could have concluded that KN's case was that her only difficulty was her poor sense of direction. The tribunal's reasons gave no indication that it had an adequate appreciation of these matters. That in itself undermines the tribunal's decision. More particularly, if the tribunal had understood or acknowledged the complexity of the relevant issues, it would also have appreciated that evidence relating to the award of the LRMC may have shed light on the issues. KN's evidence was that her mental health was unchanged since the award of DLA, and there was no evidence to suggest otherwise.

106. Therefore I am satisfied that in the circumstances of this case the tribunal should have considered whether to obtain, the DLA evidence. It may have made a difference. The tribunal was in error of law for failing to address these matters and I allow KN's appeal, set aside the tribunal's decision and remit it to another tribunal for fresh consideration. I have directed that relevant DLA evidence is provided. That evidence will need to be addressed to the extent that it is relevant to any of the issues in the appeal. I should make

it clear that I am making no finding about nor expressing a view on KN's entitlement to PIP. That is for the new tribunal to decide.