



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

UPPER TRIBUNAL CASE NO: UA-2023-001476-PIP

NCN: [2024] UKUT 282 (AAC)

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

Between:

TL

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Judith Butler

Decided without a hearing.

Representation:

Appellant: Benefitanswers

Respondent: Mrs H. Hawley, DMA, Department for Work and Pensions

DECISION

As the decision of the First-tier Tribunal involved the making of an error of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the First-tier Tribunal for rehearing by a fresh tribunal.

DIRECTIONS

- A. The case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- B. The new tribunal should not involve any of the panel members previously involved in considering this appeal on 06 July 2023.**

- C. The new tribunal must not take account of circumstances that were not obtaining at the time the (then) Secretary of State made his decision not to award TL personal independence payment on 03 January 2023: see section 12(8)(b) of the Social Security Act 1998 and *R(IB) 2/04* at paragraph 188. Later evidence is admissible, provided it relates to the circumstances at the time of the decision: see *R(DLA) 2/01* and *R(DLA) 3/01*.
- D. If the parties have any further written evidence to put before the tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.
- E. The tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome from the previous tribunal.
- F. Copies of this decision, the permission to appeal decision and the submission of the Secretary of State dated 07 March 2024 shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.

These Directions may be supplemented by later directions by a tribunal judge, registrar, or case worker, in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

What this appeal is about

1. On 11 October 2022, TL made a claim for personal independence payment (“PIP”). TL wrote in her PIP2 questionnaire that she experienced lower back pain, deformity of her knees, arthritis in both hands and knees, glaucoma, achalasia, stress, and was deaf in her right ear and partially deaf in her left ear.
2. Having received her PIP claim, the Department for Work and Pensions (“DWP”), acting on behalf of the Secretary of State for Work and Pensions, asked TL to take part in a telephone medical assessment on 09 December 2022. Having received advice from the healthcare professional who carried out the assessment, on 03 January 2023, DWP decided to award TL 4 points for PIP daily living activities (descriptors 4.b and 7.b) and no points for PIP mobility activities. This meant DWP refused TL’s PIP claim. TL appealed against that decision.
3. In section 3 of its Response to the Appeal (page D of appeal bundle), the DWP response writer wrote:

“Due to the evidence under the heading Achalasia above, I recommend changing the original descriptors awarded for taking nutrition and managing therapy or monitoring a health condition to B as the new

evidence suggests [TL] needs supervision to manage these activities safely on the majority of days.

The recommended changes to the activities of taking nutrition and managing therapy or monitoring a health condition would provide a total of 7 points for the daily living component, therefore the award would remain the same.”

4. The wording “*heading Achalasia*” referred to a list of functional restrictions DWP decided TL had as a result of her achalasia. This is a rare swallowing disorder that affects muscles in the oesophagus (tube between the throat and the stomach). The symptoms can include difficulty swallowing and food sticking in the oesophagus, regurgitation of food, weight loss, chest pain and cough (details taken from the John Hopkins Medicine website). The DWP response writer referred to the following evidence: TL was on a modified diet due to swallowing difficulties, had been advised to have a soft diet, had been referred to ensure she had a safe swallow, food could get stuck, had experienced choking incidents, and was provided with liquid form medication.

5. On 06 July 2023, a First-tier Tribunal (the “**tribunal**”) decided TL’s appeal at Doncaster, on the basis of the documents in the appeal bundle. The tribunal decided TL met the requirements to score descriptor 5.b (2 points) in addition to descriptors 4.b (2 points) and 7.b (2 points), which DWP had already awarded TL in its decision dated 03 January 2023. The tribunal decided TL did not score any other points for daily living activities. The tribunal awarded TL a total of 7 points for daily living activities. As the threshold for an award of PIP is 8 points, it refused TL’s appeal.

6. In a decision dated 15 January 2024, I gave TL permission to appeal against the tribunal’s decision, on the basis it was arguable with a realistic (as opposed to fanciful) prospect of success that the tribunal made an error of law in one or more ways. I wrote:

“8. Your representative has argued that the tribunal recorded in the Statement of Reasons that it took time for you to put on your socks and shoes, but has not adequately addressed the time taken to complete this activity. Your representative argues that paragraph 46 of the Statement of Reasons does not demonstrate the tribunal made adequate findings of fact to support its conclusion you could do this within a “reasonable time period”, an assessment required by regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013. What constitutes a reasonable time period is defined in regulation 4(4)(c) of those regulations. I agree with your representative that the tribunal may not have made adequate findings of fact about the amount of time taken to complete this activity, what constituted a reasonable time period and how the two compared to each other. Alternatively, it is arguable the

tribunal's reasons for awarding you descriptor 6.a (no points) do not provide adequate reasons in relation to this issue.

Matters that were no longer in issue between the parties:

9. In the Response to the Appeal, the representative for the Secretary of State for Work and Pensions ("SSWP") recommended that given the effects of your Achalasia, the tribunal should award you descriptor 2.b (2 points) for the activity of taking nutrition and descriptor 3.b (1 point) for the activity of managing therapy. The tribunal stated it was not bound by the recommendations and proceeded to award no points for those activities (paragraphs 38 and 42 of Statement of Reasons).

*10. In **DO v SSWP (PIP) [2021] UKUT 161 (AAC)**, Upper Tribunal Judge Wright held that where the SSWP had offered to revise a PIP entitlement decision in a claimant's favour if the benefit claimant accepted that offer and the appeal did not go ahead, the position was that the SSWP was no longer seeking to uphold the decision being appealed. This meant the points that had been offered were no longer issues in the appeal.*

*11. Although the tribunal states it was not bound by the SSWP's recommendations, it is not clear from the Statement of Reasons that it considered whether and if so, how, the principles set out in **DO** applied to your appeal. In particular, the Statement of Reasons does not address what was, or remained, in issue between the parties at the date when the tribunal determined your appeal. The tribunal may therefore have misdirected itself in law about this issue."*

7. Mrs Hawley is the Secretary of State's representative in these proceedings. She supports the appeal to the Upper Tribunal in her detailed and helpful written submission dated 07 March 2024. Mrs Hawley invites the Upper Tribunal to set aside the decision of the First-tier Tribunal as containing material errors of law and to remit the appeal for rehearing by a differently constituted tribunal with appropriate directions for redetermination.

8. I apologise to the parties for the delay in issuing this determination, which relates to delays in me being sent notification that it was ready to be decided.

9. Mrs Hawley supports the appeal for the reasons set out below.

10. **Adequacy of the tribunal's factual findings and reasoning regarding dressing and undressing:** Mrs Hawley submits that the tribunal provided limited reasoning for how it assessed TL's functional abilities to carry out this activity. She submits that the reasoning about this activity in paragraphs 45 to 46 of the Statement

of Reasons appears to be no more than a rehearsal of part of the evidence before the tribunal and a conclusion without an adequate explanation.

11. At paragraphs 4.5 to 4.11 of her submissions, Mrs Hawley cites specific evidence in the appeal bundle describing TL struggling to put on socks and shoes due to her lower back pain, knee deformity and osteoarthritis in her hands. This includes TL stating it took her longer to put on shoes and socks and her GP describing TL experiencing shooting pains up and down her spine as well as her right leg, leading to a referral to the MSK Service on 06 September 2022.

12. Mrs Hawley submits that given the evidence in the appeal bundle, it was incumbent on the tribunal to use its inquisitorial duty to determine the reasons why TL had to take her time when putting on her socks and shoes, and whether she could do it in accordance with regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 (which includes consideration of whether an activity can be performed within a reasonable timescale).

13. **Dealing with the additional descriptors recommended by DWP's Response writer when responding to the appeal:** At paragraph 4.12 of her submissions, Mrs Hawley submits that in the appeal response, the Secretary of State recommended the claimant should have been awarded descriptor 2.b(ii) (taking nutrition) and descriptor 3.b(ii) (managing therapy). Mrs Hawley proceeds to submit:

"The act of the Secretary of State offering TL a partial revision of the decision made on 03 January 2023, showed that the Secretary of State believed this part of the decision was no longer correct and suggests they were no longer seeking to uphold that decision."

14. Mrs Hawley submits that Upper Tribunal Judge Wright's decision in **DO v SSWP [2021] UKUT 161 (AAC) ("DO")** addresses a similar situation where (after lodging his appeal) the claimant turned down an offer of an award of the enhanced rate of the daily living component and the standard rate of the mobility component. Mrs Hawley quotes to the following part of Judge Wright's reasoning (paragraph 46):

"...[the] tribunal was therefore wrong in law, in my judgment, to approach the appeal before it, as it did at the start of the appeal hearing before it, as if entitlement to the enhanced rate of the daily living component or the standard rate of the mobility component were still in issue on the appeal."

15. Mrs Hawley submits the tribunal should have approached TL's appeal on the basis that her entitlement to daily living descriptors 2.b(ii) and 3.b(ii) would not be an issue and to use these points as a starting point. Mrs Hawley argues the tribunal failed to explain adequately whether it considered the principles set out in **DO** and if so, why it considered that daily living descriptors 2.b(ii) and 3.b(ii) were still an issue in the appeal.

16. Mrs Hawley submits that the tribunal therefore made an error of law by not applying the principles set out in **DO** and that had the tribunal considered awarding

points for activities 2 and 3, this would likely have amounted to an award of the PIP daily living component for TL.

Why there was no oral hearing of this appeal

17. Neither party asked for an oral hearing. Having considered the electronic file and given the level of agreement between the parties, I saw no compelling reason to hold an oral hearing. The interests of justice did not require one. I therefore determined the appeal on the papers.

My decision

18. At the permission stage, I only needed to be persuaded that it was arguable with a realistic (as opposed to fanciful) prospect of success that the tribunal had made an error of law in a way that was material.

19. At this substantive stage, I need to be satisfied on the balance of probabilities that the tribunal did make one or more errors of law that were material.

20. **The application of *DO* to TL's circumstances:** certain elements of the Secretary of State's decision-making and stated position in ***DO*** differed from TL's circumstances. For example:

- (a) DWP's initial entitlement decision for ***DO*** was to award him the standard rate of the PIP daily living component. He appealed with an existing award;
- (b) After ***DO*** lodged his appeal, DWP sent him a letter in May 2019. This referred to DWP awarding ***DO*** the PIP daily living component at the enhanced rate and the mobility component at the standard rate, although DWP did not proceed to make a fresh decision in those terms, which would have lapsed the appeal and given ***DO*** fresh appeal rights;
- (c) In section 4 of DWP's written response to ***DO***'s appeal, under the heading: "*Issues in the appeal*", a DWP response writer asked the tribunal to consider awarding ***DO*** mobility descriptor 1.d (10 points) for planning and following a journey. In the conclusion section of the response, the response writer asked the tribunal to confirm DWP's decision on some activities but supported changing two activities, stating "*recommendations have been provided (above)*", which was a reference to the recommendations in section 4; and
- (d) By contrast, in TL's appeal, DWP did not award her PIP at any rate. Instead of using similar language to that used in ***DO***, the appeal response stated: "*I recommend changing the original descriptors awarded*". In the conclusions section, the response writer wrote: "*I've considered all the available evidence and considered which descriptors apply for each activity, taking into account TL's functional ability. This includes the activities TL has disputed and those which she hasn't. I agree with all descriptors selected.*".

21. In my assessment, the most significant of these differences is that had DWP implemented its changed position in ***DO***, this would have resulted in (increased) PIP

entitlement. By comparison, had DWP implemented its changed position for TL, she would still have fallen short of the points required for a PIP award, although she would have scored a higher number of points for PIP daily living activities.

22. In my assessment, however, Judge Wright's analysis in paragraphs 45 and 46 of **DO** remains directly relevant and applicable to TL's appeal. Judge Wright dealt with the tribunal's inquisitorial duty and what remained in issue between the parties at the time the tribunal made its decision.

23. When TL lodged her appeal, the issues between the parties included whether she should *also* have been awarded point-scoring descriptors for PIP activities 1, 2, 3, 5 and 6 and mobility activity 2 (reflecting the mandatory reconsideration request on page 84 of appeal bundle). TL argued she should be awarded point-scoring descriptors for those activities. By leaving its decision unchanged at mandatory reconsideration stage, the Secretary of State did not agree with TL's position.

24. By the time the then Secretary of State responded to TL's appeal, he no longer disagreed with her assertion that she should be awarded point-scoring descriptors for activities 2 and 3. Instead, the Secretary of State now considered that TL should score 7 points for daily living activities instead of 4 points, but maintained his position that she was not entitled to an award of PIP overall.

25. In my view, the reference to "*any issue raised by the appeal*" in section 12(8) (a) of the Social Security Act 1998 ("the 1998 Act) extends to the individual descriptor(s) awarded for PIP daily living activities and / or PIP mobility activities. This includes the number of points awarded and also what the descriptor denotes (e.g., when preparing food, that a claimant needs prompting rather than aids).

26. Had the Secretary of State awarded TL 7 points for PIP daily living activities in the initial entitlement decision dated 03 January 2023, it would have been straightforward (and arguably uncontroversial) for the tribunal's starting point to be that the Secretary of State considered TL should score at least 7 points for PIP daily living activities. This was not the Secretary of State's initial position regarding TL, but he had reached that position by the time her appeal reached the tribunal for decision. In both scenarios, by the time the tribunal was asked to decide TL's appeal, the parties agreed she should score at least 7 points for PIP daily living activities.

27. In my assessment, this places TL clearly within the analysis Judge Wright set out at paragraphs 45 and 46 of **DO**. I agree with Mrs Hawley's submission that the tribunal should have approached TL's appeal on the basis that the award of daily living descriptors 2.b(ii) and 3.b(ii) was not an issue in the appeal and used this as its starting point.

28. Section 12(8)(a) of the 1998 Act does not prevent a tribunal from itself identifying an issue in an appeal that the parties have not raised, or no longer pursue. In **R(IB)2/04**, the Tribunal of Commissioners confirmed the discretion is one to be exercised judicially, taking into account all the circumstances of the particular case.

29. In **DO**, Judge Wright explained the tribunal was required as a matter of law and considerations of fairness underpinning that law, to put DO on notice if an issue was, or became, clearly apparent from the evidence about his entitlement to the daily living component at the enhanced rate or the mobility component at the standard rate. Although the specific facts in TL were different, once the tribunal considered whether to exercise its discretion not to award TL the two descriptors the Secretary of State now considered also applied, it should have considered what was required as a matter of fairness. For example, the tribunal was deciding the appeal on the paper evidence. Applying rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008, the requirement to determine TL's appeal fairly and justly in this situation might have included it adjourning and inviting her to take part in an oral hearing and explaining the risk those additional descriptors might not be awarded.

30. The tribunal explained at paragraphs 38 and 42 of its Statement of Reasons that it was aware of DWP's recommendation to award descriptors 2.b and 3.b but was not bound by that recommendation. It explained its disagreement by referring to its reasoning in paragraphs 30 to 37 and 39 to 41.

31. Mrs Hawley submits that while the tribunal addressed why it considered TL was not entitled to descriptors 2.b and 3.b, it failed to explain whether it had considered the principles set out in **DO** and if so, why it they were still an issue in this appeal. This reflects the requirement on the tribunal to apply relevant binding case law (**DO**) and, if choosing to exercise the discretion in section 12(8)(a) of the 1998 Act, doing so consciously, including providing an adequate explanation of its reasoning. I agree with Mrs Hawley's analysis and with her submission that by failing to take the steps she has identified, the tribunal made an error of law.

32. I find that the tribunal made material errors of law for the reasons set out at paragraphs 10 to 16 and 20 to 31 above. The errors were material because had the tribunal decided those matters differently, it might have awarded TL at least 1 more point, which would have meant awarding her the PIP daily living component.

Disposal

33. It is appropriate to exercise my discretion to set aside the tribunal's decision dated 06 July 2023 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having done so, section 12(2)(b) of that Act provides that I must either remit the case to the First-tier Tribunal with directions for its reconsideration or remake the decision.

34. Neither party has asked me to remake the decision. In any event, it is necessary for further facts to be found. The First-tier Tribunal is best placed to evaluate the evidence and to make appropriate findings of fact.

35. I therefore remit the appeal for rehearing before a new tribunal. It will make a fresh decision about whether TL should be entitled to PIP.

36. Although I have set aside the tribunal's decision of 06 July 2023, I am not making any findings, or expressing any view, about whether TL should be entitled to PIP. The next tribunal will need to hear evidence and make its own findings of fact.

Judith Butler
Judge of the Upper Tribunal

Authorised for issue: 11 September 2024