IN THE UPPER TRIBUNAL **Appeal No.** CPIP/2851/2019
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-Tier Tribunal (Social Entitlement Chamber)

Between:

LG

Appellant

V

SECRETARY OF STATE

Respondent

Before: Upper Tribunal Judge Hemingway

Decided on consideration of the papers.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 24 September 2019 under number SC067/18/00317 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and I remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing. The form that oral hearing shall take will be decided by the First-tier Tribunal in its discretion.**

2. **In undertaking its reconsideration, the First-tier Tribunal must not take account of circumstances not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible so long as it relates to circumstances as at the date of that decision.**

3. **These directions may be varied amended or replaced by a Tribunal Judge of the First-tier Tribunal in the Social Entitlement Chamber.**

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (the tribunal) which it made following a hearing of 24 September 2019. I have decided to allow this appeal to the Upper Tribunal; to set aside the

decision of the tribunal; and to remit to the tribunal for a complete rehearing to be undertaken by a different tribunal panel. I shall explain why I have done so below.

2. On 14 September 2017 the claimant applied for a personal independence payment (PIP). As part of the process of making that claim she completed a standard questionnaire and attended a face-to-face consultation with a health professional who then produced a report of 24 October 2107. Thereafter, on 6 November 2017, a decision-maker acting on behalf of the Secretary of State decided that the claimant did not qualify for any points under any of the activities and descriptors relevant to either the daily living component or the mobility component of PIP and was, therefore, not entitled to that benefit. Since a request for a mandatory reconsideration did not produce a different result, the claimant appealed to the tribunal.

3. The tribunal held a face-to-face oral hearing of the appeal on 24 September 2019. It dismissed the appeal but did (unlike the Secretary of State's decision-maker) award some points. In fact, 6 daily living points and 4 mobility points were awarded. As to mobility, those points were awarded under mobility descriptor 2b on the basis that the claimant "Can stand and then move more than 50 metres but no more than 200 metres either aided or unaided".

4. In evaluating the claimant's ability to walk, the tribunal accepted that she suffered from leg pain and back pain following a spinal injury (see paragraph 14 of its statement of reasons of 3 November 2019). It noted that she had made three relatively recent trips to Egypt having travelled there and back by air. As to those trips, the tribunal said this:

> "19. The tribunal accepted the appellant's evidence that:
>
> (a) She had travelled to Egypt three times since 1/17 without any companions.
>
> (b) This involved a stop in Turkey where she had to deplane to the airport.
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> (c) She had a wheelchair and assistance at Manchester but not in Turkey or Egypt
>
> (d) She stayed with friends in Egypt for 3-5 weeks each time.
>
> (e) She did not take her Tramadol to Egypt as it was illegal there.
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> 20. A claim for points under daily living descriptor 9 and mobility descriptor 1 [the tribunal may have intended to refer to mobility descriptor 2] was inconsistent with this evidence. On the balance of probabilities, the appellant walked more than 50m in the Turkish and Egyptian airports.
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> 21. The tribunal found that the overall effect of the medical and oral evidence was that the appellant could stand and move more than 50m but not more than 200m either aided or unaided. This was supported by her oral evidence that she could walk around ASDA for up to ten minutes".

5. The claimant asked for permission to appeal to the Upper Tribunal. Such was refused by a District Tribunal Judge of the First-tier Tribunal but I granted permission on 22 October 2020. In doing so, having expressed the view that certain grounds advance by the claimant were unarguable, I said this:

> "Having said the above, I consider that the F-tT arguably erred in its assessment of the claimant's ability to "stand and then move" through an over-reliance upon walking she had done when going to and returning from Egypt, without carrying out a sufficiently detailed analysis of the nature of the walking she had undertaken. As to that, I have in mind what was said by the Upper Tribunal in *JT v SSWP (DLA)* [2013] UKUT 0221 (AAC) and in particular, the passage running from paragraph 8 to paragraph 11. I appreciate that, in *JT*, the Upper Tribunal was dealing with entitlement to disability living allowance but it seems to me that what was said at paragraph 29 probably translates, in the context of PIP, into a

> requirement to adequately consider whether any walking was undertaken safely, to an acceptable standard, within a reasonable time scale and repeatedly. I also appreciate that the F-tT did find the claimant's ability to work was limited anyway. But had it taken the approach suggested in *JT* it may have found a greater level of restriction".

6. The Secretary of State, in a helpful submission of 17 November 2020, has supported the appeal and has, in consequence, invited me to set aside the tribunal's decision and to remit for a rehearing. The Secretary of State's representative, in fact, took the view that the tribunal had erred in law in the manner in which I had suggested it might have done. It was also accepted that the approach set out in *JT v SSWP (DLA)* [2013] UKUT 0221 (AAC) was readily transferable from disability living allowance to PIP. It was pointed out that the claimant had made a fresh claim for PIP and had, as a result, been awarded the standard rate of each component from 13 May 2020 to 5 October 2023.

7. There was a time when it was really quite common, in the context of disability living allowance, to see findings and reasoning with respect to entitlement to the mobility component of that benefit based, at least in part, upon walking which had been undertaken at airports. My perception is that, with respect to PIP, that is somewhat less common but I may be wrong. In any event, it is important to stress that any walking undertaken in consequence of air travel abroad can, in principle, inform as to possible entitlement to the mobility component of PIP under mobility activity 2, and so can, therefore, be taken into account in making relevant findings and reaching relevant conclusions as to entitlement to that component. But care has to be taken in doing so and a degree of caution may often be appropriate. With respect to such walking in the context of possible entitlement to the mobility component of disability living allowance, Upper Tribunal Judge Wright, in the case of *JT*, said this:

> *"8. Reliance on a one-off trip abroad and the related "walking" at the airports on either side of the flight abroad as good evidence on the virtually inability to walk test under section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 and regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations 1991 is notoriously prone to difficulties.*
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> *9. To start with, even if walking is done in an airport (as the tribunal found here), due allowance has to be made for the fact that this is walking indoors whereas the statutory test looks at walking outdoors, and consideration still has to be given to how far the person walked in the airport, how long that took him, whether he had any halts, and, crucially, how much of that walking was done without severe discomfort (CDLA/3165/1998 at paragraph 12); and appropriate findings of fact have to be made (CDLA/331/2006 at paragraph 3). No such analysis of the appellant's walking in the Greek airport was carried out by the tribunal here, nor did it asses [sic] how far he walked (contrary to the appellant's case) at Manchester airport. As the Secretary of State's representative helpfully points out, there are 15 international airports in Greece, but the tribunal here took no steps to identify which one the appellant flew to or how far he had to walk in that airport in order to get to passport control (or indeed what he did after he had passed passport control). These investigative failures and the resultant failure to make appropriate findings of fact mean the tribunal erred in law.*
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> *10. In addition, there was evidence that the appellant had pain on walking (page 55) and some evidence of difficulties with pain management (bottom of record of proceedings on page 69 – Naproxen upset appellant and taken off Ibuprofen). In these circumstances, I consider, first, that the tribunal ought to have investigated with the appellant why he was taken off Ibuprofen and when this occurred and said why, despite this evidence, it accepted the GP's evidence that he was (only) on Ibuprofen. Second, the tribunal needed to explain why the pain which it accepted the appellant was in when walking did not amount to severe discomfort.*

> *11. Moreover, tribunals need to be astute to examine the reasons why a walk through an airport may have been undertaken despite the pain it may have brought on (e.g. to get to a wedding or visit a sick relative – see CDLA/2108/2010), and to bear in mind that it is in most, if not all, cases walking that is not normally undertaken. This is important because if, as here, the walking at the airport is a key aspect of the evidence relied on by the tribunal, it needs to be able to explain why this one-off walking is demonstrative of the claimant's overall walking ability. In addition, the airport walking was done here in July 2012, which is a date and a circumstance obtaining after the date of the decision under appeal (19.12.11), and so ought to have been ignored as relevant evidence under section 12(8)(b) of the Social Security Act 1998 unless an adequate explanation was given about why such walking was relevant to the appellant's ability to walk in December 2011: CDLA/3351/2007".*

8. Whilst the statutory test for the higher rate of the mobility component of disability living allowance is not identical to that which relates to the mobility component for PIP as contained within mobility activity 2, the similarities are such as to enable me to readily conclude that the reasoning in *JT* is transferable to PIP and ought to be treated as appropriate and relevant guidance when walking at airports is being considered with respect to entitlement to its mobility component. So, in this case, the tribunal was required to apply that helpful and comprehensive guidance.

9. The tribunal either did not apply that guidance, or did not make it clear, in its reasoning, that it had done. It does not appear to have made detailed enquiry as to the nature of the walking which was undertaken during the course of the three trips to Egypt. It did not explain why the walking on those relatively isolated occasions might be demonstrative of the claimant's overall walking ability. It might have been, for example, that the claimant was making additional effort or was prepared to walk through pain, on those occasions, in circumstances where she would not normally have done so.

10. It does appear that the tribunal accorded significant weight to the walking undertaken on the trips to Egypt even if that was not the only consideration it took into account when making its findings as to the ability to walk. Had it made more detailed enquiries it may (I do not say would) have reached different conclusions on the claimant's ability to walk in the context of the criteria set out at regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013. In the circumstances I have concluded that the tribunal did err in law and that its decision ought to be set aside

11. I have also concluded it is appropriate to remit. I appreciate that matters have been outstanding for some time and that the delay in reaching a final resolution with respect to the claim for PIP, made as long ago as 14 September 2017, might point to the desirability of my remaking the decision myself on the basis that doing so would be more expeditious. However, it seems to me that further findings, at least with respect to mobility, are required and that such findings ought to be made by a tribunal panel which will have available to it a range of expertise through its composition.

12. It follows from the above that there will be a rehearing of the appeal before a differently constituted tribunal panel within the First-tier Tribunal. The rehearing will not be limited to the basis on which I have set aside the previous tribunal's decision. All matters of fact and law will be considered afresh. Further, the tribunal which rehears the appeal will not be limited to a consideration of the material available when the previous tribunal decided the appeal. It will consider all of the evidence before it, including any new documentary or oral evidence it may receive. As to the period over which it has jurisdiction, I would draw the tribunal's attention to the information given by the Secretary of State's

representative and referred to above regarding the claimant's successful fresh claim for PIP.

13. The claimant may be surprised that I have decided this appeal without inviting her to reply to the Secretary of State's submission of 17 November 2020. However, I have considered it just to decide the appeal on the basis of the material currently before me. That is because the Secretary of State has supported the appeal; because since there is a need for further factual findings I cannot see that I would have felt able to do anything other than set aside the tribunal's decision and remit; and because my deciding the appeal now rather than waiting will save some time. If, however, the claimant feels sufficiently aggrieved by my deciding the appeal without obtaining a reply, it is open to her to apply to have my decision set aside under rule 43 of the Tribunal Procedure (Upper Tribunal Rules 2008). That rule does permit the setting aside of decisions such as this in certain limited circumstances. I will consider any such application the claimant might make but will not necessarily grant it.

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

(Signed on the original)
M R Hemingway
Judge of the Upper Tribunal
2 December 2020