



**IN THE UPPER TRIBUNAL
PIP
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2024-000529-
[2024] UKUT 308 (AAC)**

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

Between:

S.R.

Appellant

- v -

Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 26 September 2024
Decided on consideration of the papers

Representation:

Appellant: Mr Larry Dance
Respondent: Ms Yasmin Elhakim, Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to allow the appeal.

The decision of the First-tier Tribunal made on 1 June 2023 under digital case number 1678702478155666 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that

decision aside and re-make the decision originally under appeal. I substitute the following decision for that of the First-tier Tribunal:

(1) The appeal is allowed.

(2) The decision made by the Secretary of State on 08/11/2022 is set aside.

(3) The Appellant is entitled to the PIP daily living component at the enhanced rate from 30/09/2020 to 30/10/2028.

(4) The Appellant has severely limited ability to carry out the following activities of daily living, which score 23 points (for descriptors 1d, 2d, 3b, 4c, 5b, 6c, 9d and 10b).

(5) The Appellant is entitled to the PIP mobility component at the enhanced rate from 30/09/2020 to 30/10/2028.

(6) The Appellant is severely limited in their ability to mobilise, scoring 22 points (for descriptors 1e and 2e).

(7) The effective start date for the PIP award, applying regulation 13(2) and regulation 17(2)(b) of the Personal Independence Payment (Transitional Provisions) Regulations 2013, is 30 September 2020.

REASONS FOR DECISION**Introduction**

1. This appeal is about identifying the correct start date for an award of Personal Independence Payment (PIP) following a claimant's transfer from Disability Living Allowance (DLA). It is concerned with a particular and narrow sub-set of such cases, namely those that have been subject to a negative determination which has subsequently been overturned. The appeal involves consideration of the proper application of regulations 13 and 17 of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387).
2. The general rule in DLA transfer cases is that the start date for entitlement to PIP is determined by reference to the date of the Secretary of State's entitlement decision, and not the date of the PIP claim (see regulation 17(1)(b) and 17(2)(a) and *RS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 85 (AAC)). However, there is an exception for cases in which the claimant has been subject to a negative determination which is then reversed on revision or appeal. In these cases the start date for PIP entitlement is determined by reference to the original date on which the DLA claim was terminated following the negative determination (see regulations 13 and 17(2)(b)).
3. In the instant case the First-tier Tribunal erred in law because it applied the general rule rather than the exception to that general rule.

The nub of the issue

4. The Appellant was previously entitled to the middle rate of the DLA care component and the lower rate of the DLA mobility component. The Department for Work and Pensions (DWP) invited her to make the transition from DLA to PIP. However, on 29 September 2020 the DWP stopped payment of her DLA, and also refused her PIP claim by way of a negative determination, on the basis that she did not have good reason for failing to attend a consultation with a health care professional (HCP). That DWP decision was subsequently set aside on appeal by a First-tier Tribunal (FTT), but not until February 2022. That FTT decision is not the one currently under appeal. Eventually, on 8 November 2022, the DWP reinstated payment of DLA as from 30 September 2020 up to and including 6 December 2022 and then awarded PIP for the period going forward from 7 December 2022 until 30 October 2028. The new PIP award comprised the enhanced rate of both the daily living and the mobility components.
5. As a 'winner' in the transition from DLA to PIP, it was obviously in the Appellant's interests for her PIP award to start at the earliest possible date. In short, the Appellant argues that the start date for the new PIP award should have been 30 September 2020, when payment of her DLA had stopped. The Secretary of State's position is that the correct commencement date for the PIP award was 7 December 2022, being the day after the end of the period for which her DLA was (belatedly) reinstated.

The financial implications of the start date for the PIP award

6. In September 2020 the Appellant's DLA award would have been £83.30 a week (£59.70 DLA middle rate care + £23.60 lower rate mobility). Had PIP been in payment at that time instead, the new award would have been nearly twice as

much (£89.15 enhanced rate daily living + £62.25 enhanced mobility = £151.40 a week). The difference between the two awards would therefore have been £68.10 a week. The aggregate differential over the entire period between September 2020 and December 2022 would accordingly have been (very roughly) a sum in the order of £7,700. That ballpark figure takes no account of the annual benefit up-ratings in April 2021 and 2022 and nor does it reflect the fact that the Appellant was 'kept out of her money' for a period of just over two years.

The Secretary of State's decision

7. The mandatory reconsideration notice dated 14 February 2023 set out the Secretary of State's reasons for finding the Appellant was entitled to PIP with effect from 7 December 2022:

In the mandatory reconsideration request it was reported that you disagree with the date that PIP commenced. Your appeal for failing to attend the PIP assessment was accepted and a payment for DLA was sent to cover the period 30/09/2020 to 06/12/2022. Personal Independence Payment regulations specify that Disability Living Allowance will continue to be paid for 4 weeks after the decision has been made on PIP. Any award of PIP will start after the 4 week period. This happens in all cases no matter the outcome of the decision. We cannot award PIP from an earlier date and we cannot change the level of your entitlement to Disability Living Allowance. Your award for PIP cannot be paid until your DLA has ended. Your DLA ended on 06/12/2022 and PIP started on 07/12/2022. This is the correct date for your PIP award to start.

8. The statement in that extract that "Personal Independence Payment regulations specify that Disability Living Allowance will continue to be paid for 4 weeks after the decision has been made on PIP. Any award of PIP will start after the 4 week period" is an accurate paraphrase (so far as it goes) of the rule in regulation 17(1)(b)(ii) and 17(2)(a) of the Personal Independence Payment (Transitional Provisions) Regulations 2013. However, the result of this appeal shows that it is not true to state baldly, as does the mandatory reconsideration notice, that "This happens in all cases no matter the outcome of the decision".

The decision of the First-tier Tribunal

9. The Appellant appealed to the FTT against the DWP's decision dated 8 November 2022. The FTT confirmed that the Appellant scored 23 points for PIP daily living activities and 22 points for mobility activities. The FTT also confirmed the length of the PIP award from 7 December 2022 to 30 October 2028. Throughout the only point in issue on the appeal has been the start date for the PIP award, which the FTT, agreeing with the Secretary of State, affirmed as being 7 December 2022.

The factual background to this appeal

10. There is no real dispute as to the background facts, which were helpfully found by the FTT to be as follows:

6. In its findings of fact, the Tribunal found the Appellant, aged 61 years at the time of the appeal hearing had been in receipt of Disability Living Allowance (DLA), since 2004. The Respondent initiated a transition to PIP

in 2019, and the Appellant completed a PIP2 form early in 2019, claiming difficulties with daily living activities and mobility, due to severe mental health conditions as well as physical issues. She was invited to attend an assessment in connection with her claim for PIP on the 4.9.19, and a letter with details of the date time and place of assessment was sent to the Appellant on the 21.8.19.

7. The Appellant failed to attend this assessment, and the Respondent sent her a further letter inviting her to submit evidence of her agoraphobia from her GP with a view to arranging a home assessment. Due to her failure to respond, the Respondent subsequently sent a decision letter dated the 22.10.19 advising the Appellant that her DLA would end on the 19.11.19. and that due to her failure to attend the assessment on the 4.9.19, she would not qualify for PIP. In response, the Appellant confirmed her intention to appeal, and further advised that she had been unable to obtain the relevant evidence from her GP, as home visits had been stopped by her surgery. The Respondent subsequently accepted that the Appellant had shown good cause for failing to attend the assessment and confirmed this by letter of the 31.1.20 (page 51 of the Schedule of Evidence). It confirmed that her DLA would continue to be paid every 4 weeks provided there were no changes that would affect her entitlement.

8. A further appointment to attend an assessment by telephone was arranged for the 8.6.20 which was rescheduled for the 18.6.20; three unsuccessful attempts by telephone were made on the 17.6.20 to remind the Appellant of the following day's assessment.

9. In the event, the assessor could only communicate with the Appellant's mother on the appointed day, i.e., 18.6.20, but was unable to proceed with the assessment as it appeared the Appellant was asleep and unable to come to the phone.

10. A negative determination decision letter was sent to the Appellant dated the 15.9.20 advising her that her DLA benefit would end on the 29.9.20 and no PIP would be awarded due to her failure to attend the assessment on the 18.6.20 - a decision which the Appellant appealed on the 12.11.21 (page 65 of the Schedule of Evidence).

11. A Tribunal adjudicated the matter on the 25.2.22 (page 121 of the Scheule of Evidence), allowing the appeal, having found good cause for nonattendance at assessments and lack of proper notice. Its decision directed the Appellant be given full opportunity to proceed with her PIP claim and that she participate in a future assessment.

12. In the event, further problems were encountered regarding future assessments, and a paper-based review, with the benefit of the Appellant's GP report dated the 24.10.22, was undertaken on the 31.10.22. Following this, a decision was made on the 8.11.22 (the decision under appeal), awarding the Appellant the enhanced rates of both the daily living and mobility components of PIP. The Respondent subsequently made outstanding DLA payments to cover the period from 30.9.20-6.12.22 (both dates included).

The First-tier Tribunal's decision

11. In dismissing the Appellant's appeal, and in doing so agreeing with the Secretary of State's position as to the start date for the PIP award, the FTT reasoned as follows:

13. In reaching its unanimous decision as to the start date of the PIP award, the Tribunal reminded itself that PIP transfer awards have effect from a date determined by the Secretary of State's entitlement decision, and not the date of the transfer claim. In this case, the Respondent decided that the Appellant's entitlement took effect approximately one month after the PIP award decision of 8.11.22.

14. It also reminded itself that the Respondent does not have an express duty to carry out a PIP assessment, in response to a PIP claim, and there is also no express statutory requirement for a PIP assessment to be carried out, or a PIP claim to be decided, by any specified date.

15. The PIP (Transitional Provisions) Regulations 2013 set out the provisions for DLA recipients who go on to claim PIP. Regulation 13 deals with failure to provide information and Regulation 17 with the procedure following, and consequences of, a determination of a claim for PIP; both these were relied upon in the Representative's submission as well as case law.

16. In the request for mandatory reconsideration (page 184 of the Schedule of Evidence), the Appellant's representative submitted that Regulation 13(2) applied, in that, in short, an assessment determination had been made on a transfer claim and PIP had been awarded to the claimant, the claimant should be entitled to PIP payment in accordance with Regulation 17(2)(b). This latter provision states that where an outcome of an assessment determination results in an award of both components of PIP, entitlement allowance to PIP should commence from the day immediately following the day on which the claimant's entitlement to DLA terminated under Regulation 13(1).

17. It was argued on behalf of the Appellant that her PIP should be backdated immediately after her DLA was terminated. We found that the Respondent, having accepted the Appellant's failure to attend a PIP assessment had actually paid to the Appellant a sum equivalent to her DLA entitlement representing a period from the 30.9.20 – 6.12.22 (albeit not immediately after the 29.9.20). We determined that this showed a clear indication that the Respondent accepted that the Appellant continued to be entitled to this benefit. There followed unsuccessful efforts to rearrange further assessments, attempts which we considered reflected the Respondent's awareness of and efforts to accommodate the Appellant's mental health issues. With a view to processing the Appellant's PIP claim, the Respondent eventually resolved the matter by means of a paper determination assisted by evidence from her GP. A decision was subsequently made as to her entitlement to PIP as referred to above and entitlement commenced in accordance with the relevant legislation.

18. Whilst the Appellant's representative had referred to the case of *OM v SSWP (PIP)* [2017] UKUT 458 (AAC) where the main issue was that the First-tier Tribunal should have considered whether a telephone assessment should have been considered, we placed more reliance upon the case of *RS v SSWP* [2016] UKUT 0085 (AAC). This case deals specifically with the workings of Regulation 17 of the PIP (Transitional Provisions) Regulations. In this case, Upper Tribunal Judge Mitchell approved the First-tier Tribunal's striking out the Appellant's appeal against the effective date when transferring from DLA to PIP giving detailed reasons in his judgment for doing so. Having regard to this, we determined the Tribunal has no discretion or power to change the effective date in this case, as Regulation 17(2) makes it clear that an award of PIP cannot start until the 29th day after the date of the entitlement decision.

19. We found that under the PIP Transitional legislation and case law quoted above, the Respondent had correctly fixed the start date of the Appellant's award by reference to her PIP award date, and that no error of law had been made. The start date is fixed by Regulation 17 by reference to the date of the PIP award decision. Having accepted good cause for failing to attend an assessment, the award of DLA continued and was paid to cover the period from 30.9.20-6.12.22 and PIP entitlement correctly commenced on the 7.12.22, namely, 4 weeks after the PIP entitlement decision.

20. For the above reasons, the appeal fails.

The proceedings in the Upper Tribunal

12. Mr Larry Dance, the Appellant's friend and her assiduous representative in these proceedings, has submitted a carefully drafted notice of appeal on her behalf. In summary, he argues that the FTT was wrong to rely on the Upper Tribunal decision in *RS v Secretary of State for Work and Pensions (SSWP) (PIP)* [2016] UKUT 85 (AAC), as that case was dealing with a different situation. He contends instead that on a proper reading of regulation 13(2) and 17(2)(b) of the Personal Independence Payment (Transitional Provisions) Regulations 2013 the Appellant's award of PIP should have commenced on 30 September 2020 and not 7 December 2022. I intend Mr Dance no disrespect by leaving my summary of his detailed submissions there – the reason being that I accept the broad thrust of his arguments, as will be evident from the discussion that follows later.
13. Ms Yasmin Elhakim, the Secretary of State's representative, has provided a written submission resisting the Appellant's appeal. She submits that the FTT's approach is consistent with the decision of Upper Tribunal Judge Mesher in *OM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 458 (AAC):

20 ... it is my submission that following the *OM* judgment the Tribunal's decision regarding the start date of PIP was correct. Upper Tribunal Judge Mesher in *OM* held that where there is no longer a negative determination in existence, DLA should be reinstated to await the outcome of the PIP assessment determination:

"37. Since the decision disallowing entitlement to PIP has been set aside, the basis for the application of regulation 13(1)(a) of the

Personal Independence Payment (Transitional Provisions) Regulations 2013 (see paragraph 10 above) falls away, because there is no longer a negative determination under regulation 9(2) of the PIP Regulations in existence. It is perfectly clear from the terms of the notification letter of 22 July 2016 that the Secretary of State's decision covered both PIP entitlement and the termination of entitlement to DLA. The claimant's appeal against that decision must therefore be regarded as covering both those aspects of the decision. Accordingly, my substituted decision sets aside the termination of entitlement to DLA after 9 August 2016. Payment of the amount due under the existing award of DLA from 10 August 2016 onwards must now be made unless and until either that award terminates under its own terms or is brought to an end by supersession, a PIP assessment determination is made (regulation 17 of the Transitional Regulations), another negative determination is made or there is a failure to comply with some other requirements (regulation 13(1))."

21. This is what has happened in the present case, albeit late on behalf of the DWP. When the Tribunal on 25/02/2022 allowed the claimant's appeal and found she had good reason for not attending the PIP consultation, the negative determination in effect was no longer in existence and, as per OM, the DLA should have been reinstated and paid pending the outcome of the PIP assessment determination. Unfortunately, due to an administrative error the DLA wasn't put back into payment until 08/11/2022, but on that date the error was rectified and the claimant was paid DLA for the period 30/09/2020 to 06/12/2022. This was the correct action following the guidance provided in OM. Furthermore, as per Regulation 17(1)(b)(ii) of the Personal Independence Payment (Transitional Provisions) Regulations 2013, upon reinstating DLA and finding that the claimant satisfied the conditions of entitlement for an award of the enhanced rate of the daily living and mobility component of PIP, the DLA should have then run on for a period of 28 days starting with the first pay day after making the PIP determination. This is what has correctly happened in this case – the DLA continued for 28 days after the PIP decision made on 08/11/2022 and therefore DLA was correctly terminated on 06/12/2022 and PIP subsequently put into payment from 07/12/2022.

22. I therefore submit that the entitlement date provided by DWP and confirmed by the Tribunal is correct and therefore holds no error of law. The Tribunal have provided adequate reasons for reaching their decision as set out above in this submission and outstanding payments of DLA were paid for the period specified above until PIP payments correctly commenced, 28 days later following the PIP decision letter issued on 08/11/2022. As such I respectfully submit that the appeal be dismissed.

14. Mr Dance makes no further substantive submissions in reply to the Secretary of State's submission, other than to observe that Ms Elhakim has essentially reiterated the DWP's position as it has been throughout these proceedings and

has not actually addressed his detailed submissions about the proper application of regulations 13(2) and 17(2).

The relevant legislation

15. This case therefore turns on the proper interpretation and application of regulations 13 and 17 of the Personal Independence Payment (Transitional Provisions) Regulations 2013. Those two regulations use several terms which are defined as follows by regulation 2(1).
16. An “assessment determination” means “the determination, under regulation 4 (assessment of ability to carry out activities) of the PIP Regulations, of a claim for personal independence payment made by a transfer claimant”.
17. The “PIP Regulations” mean the (main or substantive) Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377).
18. Finally, at least by way of relevant definitions, regulation 2(1) provides that:
 - “transfer claimant” means a person who is either—
 - (a) a notified person who has claimed personal independence payment in response to a notification sent by the Secretary of State under regulation 3(1), or
 - (b) a voluntary transfer claimant.
19. For these purposes a “notified person” is “a DLA entitled person who has been sent a notification by the Secretary of State under regulation 3(1)” while a “voluntary transfer claimant” means “a DLA entitled person who has claimed personal independence payment under regulation 4.” Continuing the set of Russian doll definitions, a “DLA entitled person” in turn means, rather predictably, “a person aged 16 or over who is entitled to either component or both components of disability living allowance.”
20. Regulation 13 then provides as follows:

Failure to provide information etc.

13.—(1) Where, in relation to a claim for personal independence payment made by a transfer claimant—

(a) a negative determination is made in relation to both components under regulation 8 (information or evidence required for determining limited or severely limited ability to carry out activities) of the PIP Regulations or paragraph (2) of regulation 9 (claimant may be called for consultation to determine whether the claimant has limited or severely limited ability to carry out activities) of the PIP Regulations, or

(b) there is a determination by the Secretary of State that the transfer claimant has—

(i) unreasonably failed to comply with a requirement imposed on the claimant by the Secretary of State under regulation 35 (attendance in person) of the Claims and Payments Regulations, or

(ii) failed to comply with a requirement imposed on the claimant by the Secretary of State under regulation 37 (evidence and information in connection with a claim) of the Claims and Payments Regulations,

the transfer claimant's entitlement to disability living allowance shall terminate with effect from the last day of the period of 14 days starting with the first pay day after the day on which the determination is made.

(2) Where—

(a) for any reason an assessment determination is made on a claim by a transfer claimant in respect of which there has been a determination referred to in paragraph (1)(a) or (b) (for example, because the determination is revised by the Secretary of State under section 9 of the 1998 Act or there is a successful appeal in respect of the determination under section 12 of that Act), and

(b) personal independence payment is awarded to the transfer claimant,

the transfer claimant shall be entitled to personal independence payment in accordance with regulation 17(2)(b).

21. Regulation 17 further provides as follows (omitting paragraphs (4) and (5), which apply only in circumstances where a person's claim for DLA has been refused):

Procedure following and consequences of determination of claim for personal independence payment

17.—(1) Upon an assessment determination being made on a claim by a transfer claimant—

(a) the Secretary of State must, as soon as practicable, send the claimant written notification of the outcome of the determination, and

(b) except where paragraph (2) of regulation 13 applies to the claimant, the claimant's entitlement to disability living allowance shall terminate—

(i) where paragraph (1B) applies, on the earlier of—

(aa) the last day of the payment period during which the assessment determination is made, or

(bb) the first Tuesday after the making of the assessment determination;

(ii) in any other case, on the last day of the period of 28 days starting with the first pay day after the making of the assessment determination.

(1A) In paragraph (1), "payment period" means a period in respect of which disability living allowance is paid to the claimant in accordance with regulation 22 of the 1987 Regulations.

(1B) This paragraph applies if—

(a) the transfer claimant is terminally ill for the purposes of section 82 of the Act,

(b) the outcome of an assessment determination in respect of that claimant is an award of personal independence payment, and

(c) the total weekly rate of personal independence payment payable by virtue of that award is greater than the total weekly rate of disability living allowance payable by virtue of that claimant's existing award of disability living allowance.

(2) Where the outcome of an assessment determination is an award in respect of either or both components of personal independence payment, the claimant's entitlement to personal independence payment starts with effect from the day immediately following—

(a) the day on which the claimant's entitlement to disability living allowance terminates in accordance with paragraph (1)(b) of this regulation,

(b) where paragraph (2) of regulation 13 applies to the claimant, the day ... on which the claimant's entitlement to disability living allowance terminated under regulation 13(1).

(3) The notification referred to in paragraph (1) must state—

(a) except where paragraph (2) of regulation 13 applies to the claimant, the day on which the claimant's entitlement to disability living allowance will terminate in accordance with paragraph (1)(b), and

(b) if personal independence payment is awarded, the day on which the claimant's entitlement to personal independence payment starts in accordance with paragraph (2).

Analysis

22. The general rule in social security law is that entitlement to benefit starts with the date of claim. This is, however, the *general* rule and not a *universal* rule. So, and again as a general rule, the usual start date for an award of PIP is the date when the relevant claim for benefit is made (see section 88(1) of the Welfare Reform Act 2012). However, the position for claimants transferring from DLA to PIP is – again, as a general rule – different. Thus, in *RS v SSWP (PIP)* Upper Tribunal Judge Mitchell posed the question “what is the start date of an award of Personal Independence Payment (PIP) granted to a transfer claimant (a person who was previously entitled to Disability Living Allowance (DLA))?” (paragraph 1). The answer, the judge found, was that “PIP transfer awards have effect from a date determined by reference to the Secretary of State's entitlement decision, not the date of the transfer claim” (paragraph 2; see also paragraphs 38 and 39(d)). The FTT in the present case relied on this conclusion at paragraph 13 of its reasons.
23. Judge Mitchell further explained (at paragraph 35 of *RS v SSWP (PIP)*) that making the assessment determination – what the judge referred to as “a mainstream PIP assessment” – has two consequences:
- (a) the determination activates regulation 17(1)(b) of the PIP transitional regulations. This provides, subject to an immaterial exception, that “the claimant's entitlement to disability living allowance shall terminate...on the last day of the period of 28 days starting with the first pay day after the

making of the determination". "Pay day" means the claimant's DLA pay day (regulation 2(1));

(b) in conjunction with DLA's termination, entitlement to PIP commences (if that is the outcome of the assessment determination) because regulation 17(2) provides:

"Where the outcome of an assessment determination is an award in respect of either or both components of personal independence payment, the claimant's entitlement to personal independence payment starts with effect from the day immediately following the day referred to in paragraph (1)(b)."

24. There are three points to note about this passage in Judge Mitchell's decision.
25. The first is that Judge Mitchell was concerned with the original version of regulation 17, before its amendment with effect from 4 April 2016 by the Personal Independence Payment (Transitional Provisions) (Amendment) Regulations 2016 (SI 2016/189). These amending regulations modified the requirement for a terminally ill claimant transferring from DLA to (a higher rate of) PIP to wait a minimum of 28 days after the first pay day following the decision to award PIP (see now regulation 17(1)(b)(i) and 17(1B)). These amendments have no bearing on the present appeal.
26. The second is that the indented extract from the regulations at paragraph (b) in the passage at paragraph 23 above reflects the text (to be more precise) of regulation 7(2)(a) and not any other part of regulation 17(2).
27. The third (and related) point is that Judge Mitchell was laying down the general rule embodied in regulation 17. Judge Mitchell was not purporting to lay down a universal rule. At that time (and so before the terminally ill amendments) regulation 17(1)(b) in its entirety provided that "the claimant's entitlement to disability living allowance shall terminate, except where paragraph (2) of regulation 13 applies to the claimant, on the last day of the period of 28 days starting with the first pay day after the making of the determination". In citing regulation 17(1)(b), Judge Mitchell observed that it was "subject to an immaterial exception", that immaterial exception being the phrase "where paragraph (2) of regulation 13 applies to the claimant". That exception was immaterial in *RS v SSWP (PIP)* simply because that situation did not arise on the facts of that case.
28. We must then turn to regulation 13(2) to understand the circumstances in which an exception is carved out of regulation 17(1). One must start with regulation 13(1). This applies where a transfer claimant has made a claim for PIP and has been made the subject of a negative determination (being, in effect, a determination that a person does not meet the PIP eligibility criteria because they have failed without good reason to comply with a requirement to provide evidence or to attend at and participate in a HCP consultation: see Welfare Reform Act 2012 section 80(5) and (6)). Regulation 13(1) further provides that in such circumstances "the transfer claimant's entitlement to disability living allowance shall terminate with effect from the last day of the period of 14 days starting with the first pay day after the day on which the determination is made". Thus, in the present case, the DWP sent the Appellant a decision letter on 15

September 2020 informing her that her DLA award would end 14 days later on 29 September 2020.

29. Regulation 13(2) then covers the scenario where, notwithstanding the negative determination, there has subsequently been a substantive assessment determination made in respect of a claim by a transfer claimant, e.g. because the negative determination has been revised by the Secretary of State or successfully overturned on appeal by a First-tier Tribunal. The Appellant's case satisfied that criterion. In those circumstances, if an award of PIP has been made, then "the transfer claimant shall be entitled to personal independence payment in accordance with regulation 17(2)(b)." The precise cross-reference, as underlined, is important. It means that in a regulation 13(2) case the end date of a DLA award and the start date of the transfer claimant's PIP award are not governed by the general rule in regulation 17(1)(b) and 17(2)(a), i.e. the changeover does not take place (as it usually does) "on the last day of the period of 28 days starting with the first pay day after the making of the assessment determination".
30. Instead, the transfer claimant's entitlement to PIP is governed by regulation 17(2)(b). Thus, omitting the usual rule in regulation 7(2)(a):
- (2) Where the outcome of an assessment determination is an award in respect of either or both components of personal independence payment, the claimant's entitlement to personal independence payment starts with effect from the day immediately following—
 - (a) [omitted]
 - (b) where paragraph (2) of regulation 13 applies to the claimant, the day ... on which the claimant's entitlement to disability living allowance terminated under regulation 13(1).
31. In the instant case the outcome of the Appellant's assessment determination was an award of both components of PIP, so the opening words of regulation 17(2) are satisfied. Regulation 13(2) also applied to the Appellant, as her original negative determination had been reversed on appeal by the First-tier Tribunal. Accordingly, by virtue of regulation 17(2)(b), her award of PIP should have started with effect from the day immediately following the day "on which the claimant's entitlement to disability living allowance terminated under regulation 13(1)", namely 30 September 2020.
32. Although they are not technically an aid to construction, this reading is consistent with the Explanatory Notes to the Personal Independence Payment (Transitional Provisions) Regulations 2013, which explain as follows:
- Regulation 13 has the effect that where a DLA entitled person claiming PIP is required to provide information or attend a meeting about the person's claim, and the Secretary of State determines that the person has failed to do so, the person's entitlement to DLA ends 14 days after the first DLA pay day falling after the date of the determination. Taken with regulation 17, it also has the effect that if the Secretary of State's determination is reversed as a result of legal proceedings, and PIP is awarded, entitlement to PIP starts on the first day after entitlement to DLA terminated under the regulation.

33. This reading of regulations 13 and 17 is not inconsistent with the passage from Judge Mesher's decision in *OM v SSWP (PIP)* relied upon by the Secretary of State's representative. Judge Mesher was making the general point that once there was no longer a negative determination in existence, the basis for the application of regulation 13(1) fell away and so DLA should go back into payment. Judge Mesher referred to regulation 13(1) and 17 but not to the exceptional case provided for by regulation 13(2) and 17(2)(b).
34. Stepping back from this close textual analysis of regulations 13 and 17, one can understand the reasons for the differential treatment of transfer claimants who fall under regulation 13(2). The starting point, as Judge Mitchell observed in *RS v SSWP (PIP)*, was that the transition from DLA to PIP was "a significant legislative change, affecting millions of DLA recipients" (at paragraph 18). This necessitated appropriate phasing-in arrangements for DLA claimants (where they met the new eligibility criteria) to transfer from the old to the new disability benefits scheme. Fixing entitlement for transfer claimants by reference to the date of the decision awarding PIP, rather than the original date of claim for PIP, meant that the DWP had greater control over the take-up of the new benefit. In particular, it gave it more control over caseloads and costs.
35. This choice of the PIP start date for entitlement in transfer cases inevitably involved an element of rough justice. Those DLA claimants transferring to a higher rate of PIP would lose out in the short-term as they would have to wait for the new benefit rate to become payable. However, the Court of Appeal has held that this disadvantage did not amount to unlawful discrimination contrary to Article 14 of the ECHR (*Worley v Secretary of State for Work and Pensions*) [2019] EWCA Civ 15; [2019] AACR 15). In contrast, other DLA claimants, namely those who were transferring to a lower rate of PIP, were in one sense short-term gainers as they were able to stay on their higher DLA rate of benefit for a longer period than they might otherwise have expected (as Judge Mitchell noted at paragraph 30 of *RS v SSWP (PIP)*).
36. Accordingly, and as a general rule, claimants transferring from DLA to PIP have effect from a date determined by reference to the Secretary of State's entitlement decision, not the date of the transfer claim for PIP. However, this is not a universal rule. An exception has been carved out for those claimants who have received an award of PIP after successfully overturning a negative determination on revision or on appeal. Otherwise, such claimants would be doubly disadvantaged.
37. First, like all transfer claimants, they are reliant on the Secretary of State making an assessment determination, when there is no statutory requirement either to carry out an HCP assessment or to decide a PIP claim by any specified date. Rather, there is at best a weak public law duty to determine PIP claims within a reasonable time (*R (C & Another) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin)).
38. Secondly, and uniquely, this group of claimants face further and often lengthy delays before they can successfully challenge a DWP decision-maker's negative determination. In the instant case this delay ran to nearly 18 months, the negative determination being notified in September 2020 and not being set aside until the FTT hearing in February 2022. It would hardly be fair in effect to lay that lengthy delay at the Appellant's door, when all she was doing was

trying, with Mr Dance's able assistance, to assert her rights (and in respect of which she was duly vindicated).

39. The start date for a PIP award in such circumstances could have been fixed as at the date of claim, but presumably policy-makers considered that a fair compromise (given the provisions governing the standard type of transfer case) was to commence PIP entitlement by reference to the date when DLA originally terminated as a result of the negative determination.
40. I therefore conclude that the First-tier Tribunal erred in law. It treated the Appellant's case as if it were an ordinary transfer case with the commencement date for PIP entitlement being subject to regulation 17(1)(b)(ii) and regulation 17(2)(a). However, the Appellant's case was an exception to the general rule that the start date for a PIP award is determined by reference to the Secretary of State's entitlement decision. Rather, her case involved a PIP award being made following a successful appeal against a negative determination, and so it fell within regulation 13(2). As such the start date for her PIP award was determined by regulation 17(2)(b), not regulation 17(2)(a). This means in turn that her entitlement to PIP "starts with effect from the day immediately following ... the day ... on which the claimant's entitlement to disability living allowance terminated under regulation 13(1)." That day was 30 September 2020 and I find accordingly.
41. A consequence of this Upper Tribunal decision is that the Appellant is entitled to the payment of arrears of PIP for the period from 30 September 2020 to 6 December 2022. Obviously that payment of arrears of PIP is subject to an offset to reflect the payment of DLA that has already been made in respect of the same period (see regulation 5 of the Social Security (Payments, Overpayments and Recovery) Regulations 1988 (SI 1988/664)).
42. In all other respects (e.g. as to the Appellant's entitlement to the enhanced rates of both components and the duration of award) I adopt and endorse the decision of the First-tier Tribunal.

Conclusion

43. The First-tier Tribunal in this case erred in law in its application of regulations 13 and 17 of the Personal Independence Payment (Transitional Provisions) Regulations 2013. Accordingly, I allow the Appellant's appeal to the Upper Tribunal, set aside the First-tier Tribunal's decision and remake the decision under appeal as follows (section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007):
 - (1) *The appeal is allowed.*
 - (2) *The decision made by the Secretary of State on 08/11/2022 is set aside.*
 - (3) *The Appellant is entitled to the PIP daily living component at the enhanced rate from 30/09/2020 to 30/10/2028.*
 - (4) *The Appellant has severely limited ability to carry out the following activities of daily living, which score 23 points (for descriptors 1d, 2d, 3b, 4c, 5b, 6c, 9d and 10b).*

(5) The Appellant is entitled to the PIP mobility component at the enhanced rate from 30/09/2020 to 30/10/2028.

(6) The Appellant is severely limited in their ability to mobilise, scoring 22 points (for descriptors 1e and 2e).

(7) The effective start date for the PIP award, applying regulation 13(2) and regulation 17(2)(b) of the Personal Independence Payment (Transitional Provisions) Regulations 2013, is 30 September 2020.

**Nicholas Wikeley
Judge of the Upper Tribunal**

Authorised for issue on 26 September 2024