

Benefits Bulletin

PIP Mobility Rule Change Unlawful...

23rd January 2018

Issue **11**

The history...

The High Court in **RF v SSWP** (dated 21st December 2017) has found that the recent changes to the qualifying rules for the Personal Independence Payment (PIP) mobility component were unlawful.

In Benefits Bulletin 5 (dated 27th March 2017) we reported that the Department for Work and Pensions (DWP) had made some changes to the qualifying rules for Personal Independence Payment (PIP). The changes were introduced from **16th March 2017** and surrounded both the 'daily living component' (managing therapy or monitoring a health condition) and the 'mobility component' (planning and following journeys).

We reported that the DWP explained that the changes were made to reverse the effect of a ruling by the Upper Tribunal in **MH v SSWP** ([2016] 0531 (AAC) - CPIP/1347/ 2016). This Three-Judge Panel judgement held that, whilst not directly stated, matters of 'overwhelming psychological distress' could be taken into account when assessing a person's ability to either plan the route of a journey or follow the route of a familiar or unfamiliar journey.



Landmark judgement rules in favour of people with mental health conditions, learning disability and cognitive impairment. The DWP have said that those affected will have their entitlement to Personal Independence Payment reassessed.

However, it was the view of the DWP that the finding in **MH v SSWP** went against what had originally been intended. In consequence the DWP changed the rules which it was said reverted the legislation back to what had been originally intended when PIP was first introduced in 2013. At the time, many commentators consider that at the rule changes were unfair not least because they created inequality between people with physical disabilities and people with mental health conditions.

Prior to the rule change (i.e. prior to 16th March 2017) Activity 1 of the Social Security (Personal Independence Payment) Regulations 2013 read:

PIP Mobility: Prior to 16th March 2017 Activity 1: Planning + Following Journeys

- A. Can plan and follow the route of a journey unaided. (scores 0 points)
- B. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant (scores 4 points)
- C. Cannot plan the route of a journey (scores 8 points)
- D. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid (scores 10 points)
- E. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant (scores 10 points)
- F. Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid (score 12 points)

The PIP regulations provide that ‘**psychological distress**’ means ‘distress related to an enduring mental health condition or an intellectual or cognitive impairment’.

However, from **16th March 2017** the words ‘For reasons other than psychological distress...’ were inserted at the beginning of Activity 1 - Descriptors 1C, 1D and 1F of the provision. The rule change prevented many people with mental health conditions, learning difficulties and cognitive impairments from being able to qualify for financial support for the mobility component where stress and anxiety impacted on their ability to plan and/or undertake journeys.

The High Court...

The High Court ruled in **RF v SSWP** that the changes the DWP made to the mobility component were unlawful for three reasons:

1. There was no evidence to suggest that the original intention was to treat those who could only leave their homes with considerable support due to psychological distress would be treated less favourably than others who are similarly affected but for different reasons.

2. That in the DWP’s own equality assessment in reversing the finding in **MH v SSWP** found that the changes would adversely affect tens of thousands of people and that could not be justified.

3. The DWP did not consult over the changes.

The High Court ultimately ruled that the 16th March 2017 rule changes to the mobility component should be squashed.



The DWP View...

Esther McVey (Secretary of State for Work and Pensions) confirmed (on 19th January 2018) that after careful consideration the DWP had decided not to appeal against the High Court judgment.

In doing so she confirmed that the DWP would now take all steps necessary to implement the principles laid out in judgment by the Upper Tribunal (in **MH v SSWP**) in the best interests of claimants and stakeholders over the coming months.

In a written ministerial statement, Esther McVey said that the DWP would be seeking to write to those individuals thought to be affected who are getting PIP and reassess their cases. She said that in cases where it was established that someone should have been awarded the mobility component they would get that payment plus any backdated arrears payment due to them.

Moving forward...

At first there was some confusion on how the law should be applied following **RF v SSWP** - Should the old rules or new revised rules be applied? It was our understanding that First-tier Tribunals had been advised to continue to apply the new post 16th March 2017 rules at least until the DWP had decided not to appeal the High Court judgement or until an outcome had been settled one way or another following any appeal to the Court of Appeal and thereafter possibly the Supreme Court.

However, given the DWP's decision not to challenge the High Court judgement, it is now clear that both DWP Decision Makers and First-tier Tribunals (and Upper Tribunal Judges) must now assess entitlement to the mobility component using the original construction. They must apply the rules as they were before the changes - as set out on page 5. Further, in doing so they would be obliged to follow the guidance provided in **MH v SSWP** (see below) in relation to this.

The people who are most likely to have been adversely affected by all this are those:

- who have a mental health condition, learning disability and/or a cognitive impairment; and
- who have either claimed PIP after **16th March 2017** (or who claimed PIP shortly before this date but did not get a decision on their claim until after the date) or had an existing award of PIP reassessed after this date; and
- who have NOT been awarded either the 'enhanced rate' or 'standard rate' of the PIP mobility component because the DWP has paid no regard to the impact of any 'psychological distress' when assessing their ability to plan and/or follow the route of a (familiar or unfamiliar) journey.

In such cases, anyone now living in Wolverhampton who believes that they have been wrongly refused the mobility component should write to the DWP. See address below.

Department for Work and Pensions
Personal Independence Payment
Post Handling Site B
Wolverhampton
WV99 1AG

In doing so they should ask that their entitlement to the PIP mobility component be reassessed in light of the decision of the Upper Tribunal in **MH v SSWP** and the High Court in **RF v SSWP**. If the DWP reassess the case but refuse to award the mobility component then the normal 'mandatory reconsideration' and appeal rules would apply to that decision. Do seek further information and advice should this be the case.

Anyone contemplating contacting the DWP should first be aware that should some information or evidence arise which casts doubt on any existing award of the 'daily living' component then the DWP could use this to consider afresh the matter of their entitlement to this component.

Decision Made by First-tier Tribunal:

It gets a bit more complicated if the decision to refuse the mobility component was made by a First-tier Tribunal applying the post 16th March 2017 rules.

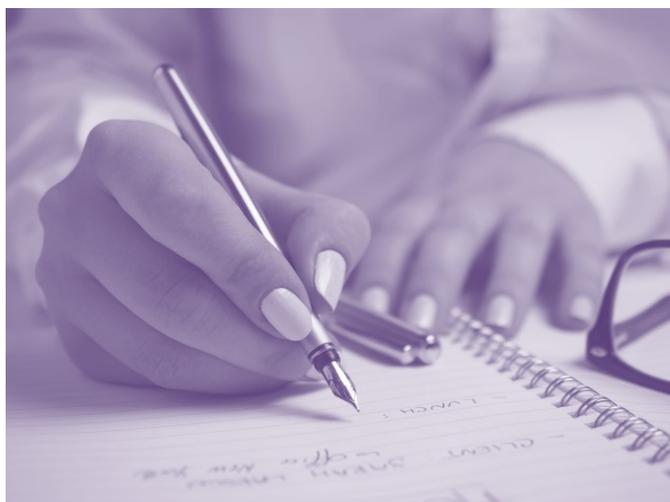
In such cases the only way of getting the decision of the First-tier Tribunal overturned would be by writing to the Tribunal Service (see address below) and asking for 'permission to appeal' to the Upper Tribunal against the decision of the First-tier Tribunal.

In this instance the person would need to attach a copy of the original Decision Notice (or Full Statement of Reasons if one was obtained) provided by the First-tier Tribunal after the appeal hearing and this would need to show on balance that the First-tier Tribunal applied the law incorrectly by applying the new post 16th March 2017 rules. The person will need to ask that the decision of the First-tier Tribunal be set aside and for the appeal to be heard again by a new First-tier Tribunal, this time applying the correct legislation.

If it has been more than **one month** since the person received notification of the decision of the First-tier Tribunal then it should be explained that the request has been made late for good reason (i.e. the fact that the decision of the High Court and the DWP's position has only recently been made known) and that for 'fair and just' reasons the normal time limit for such requests should be extended.

**HM Courts & Tribunal Service
Administrative Support Centre
PO Box 14620
Birmingham
B16 6RF**

Anyone contemplating contacting the Tribunal Service should be aware that any new First-tier Tribunal could consider afresh the matter of an entitlement to the 'daily living component' should some information or evidence arise in the course of any new appeal which casts doubt on any existing award of the 'daily living' component.



Wait...

If a person does not wish to go through the above rigmarole and/or risk putting their award of the 'daily living component' in jeopardy then they can simply wait until their existing award of PIP comes to an end and argue entitlement to the mobility component when making their renewal claim.



MH v SSWP...

The Upper Tribunal, in ruling that 'overwhelming psychological distress' was a relevant issue in the consideration of entitlement to the PIP mobility component, held:

- That whilst acknowledging that there is different terminology in Descriptors 1B and 1E on the one hand and Descriptors 1D and 1F on the other, this did not mean that the term 'overwhelming psychological distress' is not relevant to all - a person who cannot follow the route (familiar or unfamiliar) of a journey without another person due to 'overwhelming psychological distress' may score points under Descriptors 1D or 1F.

(paragraph 35)

- That the phrase 'follow the route' includes an ability to navigate but is not limited to just that, whereas the phrase 'navigation' can involve making one's way along a route which could involve more than just navigation.

(paragraph 36)

- That 'navigating' around road works or the effects of an accident was part of being able to follow the route of a journey.

(paragraph 39)

- That Descriptor 1B applies where ‘prompting’ encourages a person to embark on a journey (i.e. prompting given before the journey commences) and where ‘prompting’ encourages a person to continue to follow the route of a journey (i.e. prompting during the course of a journey).

(paragraph 44)

- That a person’s ability to undertake a journey or follow a route must be considered in light of any ‘overwhelming psychological distress’ not simply mild or moderate distress.

(paragraph 48)

- That although regulation 4(2A) (Social Security (Personal Independence Payment) Regulations 2013) enables people to be treated as though they are unable to undertake a particular Descriptor if they cannot do so safely and to an acceptable standard, it will not be the case that a person who suffers ‘psychological distress’ that is less than ‘overwhelming’ can be treated as not being able to follow a route ‘safely’ or to an ‘acceptable standard’.

(paragraph 48)

- Whilst regulation does not restrict the mobility component Activity 1 to the effect of mental health problems and Activity 2 to the effect of physical disablement, it is nonetheless clear from the wording of the Descriptors that Activity 1 is designed to relate to those who have limitations resulting from mental health and/or sensory problems and Activity 2 to those who have physical limitations.

(paragraph 51)

- Whilst the terms ‘prompting’ and ‘overwhelming psychological distress’ may be found in both Activity 9 (Engaging with other people face to face) and Activity 1 (Planning and following journeys) there is no link between them in the sense that an award under one would necessarily indicate an award under the other.

(paragraph 54)

- That an inability to ask for directions due to a lack of ability to engage with other people face to face when lost is not part of the test of assessing an inability to follow the route of a journey.

(paragraphs 53 and 54)

- That any difficulty engaging with other people face to face is not material to the consideration of descriptors 1D and 1F.

(paragraph 54)

If you would like to see the full Upper Tribunal judgement in **MH v SSWP** then go to:

https://assets.publishing.service.gov.uk/media/585104b5e5274a13070000a6/CPIP_1347_2015-00.pdf

What is Personal Independence Payment?

Personal Independence Payment (PIP) was introduced in April 2013 as a replacement for Disability Living Allowance for people of ‘working age’ (aged 16 to 64). PIP is intended to provide a “cash contribution towards the additional costs faced by disabled people” (PIP Assessment Guide - 22 January 2013). PIP has a ‘daily living component’ for those who need help with their personal care and a ‘mobility component’ for those who have limited mobility. How much money is actually payable is determined by a point scoring system. A person needs to score at least 8 points to get any money for ‘daily living’ and/or at least 8 points to get any money for ‘mobility’ needs.

Do seek further information and advice as necessary.

**Welfare Rights Service
Specialist Support Team
City of Wolverhampton Council
A&C.WRS@wolverhampton.gov.uk**