ADM Memo 15/18

PIP – THE MEANING OF "SAFELY" - AMENDED VERSION

Please be aware that this Memo replaces the previous Memo on the same subject, ADM Memo 29/17. The significant changes from that Memo are marked in bold black text below.

Contents

INTRODUCTION

1 This memo is to advise decision makers about a recent three judge panel Upper Tribunal ("UT") decision[1] ("RJ") that deals with the definition of "safely" and the linked term "supervision," and the measurement of risk to assess those terms.

1 RJ, GMcL and CS v SSWP (PIP) [2017] UKUT 0105 (AAC)

2 This memo explains how to apply the terms of the decision and to make the descriptor choice. For the practical steps to take to get the effective dates of the decision correct please see Memo 16/18 (the MH Memo).

UPPER TRIBUNAL DECISION

Background

3 Two of the cases before the UT concerned claimants with epilepsy and the other case concerned a deaf claimant with cochlear implants. The issue before the UT was how to determine what is meant by "safely"[1] and when there is a need for "supervision"[2].

1 reg 4 (4)(a); 2 SS (PIP) Regs, sch 1 part1

The decision

4 The UT concluded that:

> "In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision."[1]

1 RJ, GMcL and CS v SSWP (PIP) [2017]UKUT 0105 (AAC), para 56

APPLICATION OF THE DECISION

5 For a descriptor to apply, a claimant must be able to carry out the activity "safely", defined as "in a manner unlikely to cause harm to the claimant or to another person, either during or after completion of the activity"[1]. Where someone is unsafe doing an activity on the majority of days, but by being aided (by the use of an aid, or by prompting, supervision or assistance[2]) the completion of the activity would be made safe, they satisfy the appropriate descriptor. Safety refers to both the safety of the claimant and other people.[3]

1 SS PIP Regs, reg 4(4)(a) and (c)); 2 reg 2 (a); 3 RJ para 27

6 The pre-RJ guidance when assessing whether a task could be done "safely", was that any harm had to be *likely* to occur, which we said meant "more likely than not" to occur – essentially that the event which created the risk had to happen on the majority of days. However, this approach can no longer be applied. The UT found that when assessing whether a person can carry out an activity safely consideration must be given to whether there is a "real possibility that cannot be ignored of harm occurring", and confirmed this applied "even

though the harmful event which triggers the risk actually occurs on less than 50% of the days"[1]. Factors to be considered are the nature and gravity of the potential harm in each case.

1 RJ Para 55

7 The question to be asked is whether there is a real possibility of harm to the claimant or another person when completing the activity. When asking this question both the severity of harm and the likelihood of harm should be considered. If there is a real possibility of harm that cannot be ignored, then a secondary question is can the activity be carried out safely if the claimant uses an aid, or has prompting, supervision or assistance. The answer to this question will determine the descriptor choice.

8 In cases where the effect of the condition occurs on the majority of days (e.g. where a claimant has total sight loss) there may be no significant change to how the decision maker considers safety. The type of cases where the approach will most differ is where the effect (or as the UT termed it, the "event") of the condition does not occur on the majority of days. Examples of the kind of conditions which may have intermittent symptoms are epilepsy or mini-strokes.

9 We would not expect claimants to be awarded lower scoring descriptors following the UT decision when compared to the descriptors that would have been chosen prior to the UT decision.

HOW TO ASSESS WHETHER AN ACTIVITY CAN BE PERFORMED SAFELY

10 All of the following factors should be considered:

1. the **frequency** of the incident is such that there is a real possibility that harm would occur.

2. the **severity of harm** caused by the incident whilst performing the activity should be considered.

3. the extent to which the condition is **predictable, controlled** or risk can be **mitigated**. If the incidents are predictable, for example if they only happen at certain times (e.g. when sleeping), have certain triggers or warning symptoms before they occur, it may be that the claimant can reasonably avoid or minimise any risk of harm.

11 The UT stated “both the likelihood of the harm occurring and the severity of the consequences are relevant”. The assessment must be based on a consideration of both the frequency of the event which means that a claimant might not be able to complete an activity safely **and** the severity of harm that might occur.

12 If the severity of harm is very high then an activity might be considered unsafe, even if the frequency of occurrence is quite low. If the frequency of occurrence is high, then an activity might still be considered safe if the harm is only minor.

13 When assessing the severity of harm a decision maker must take into account not just the nature of the event, but also the nature of the activity. The activities will create different risks for each claimant depending on their condition. For example, Activity 1, preparing and cooking food, involves sharp objects and hot items, but in some circumstances this risk can be mitigated by carrying out the activity whilst sat down, or using aids, or by using a microwave and microwave-safe dishes, or having another person present to supervise.

14 It is important to remember that the severity of a condition can differ from person to person. Details will be required about the nature, frequency and duration of incident or symptoms, in order to understand the severity of the harm that might occur.

15 Some conditions may mean that a claimant has a recovery period after the initial incident. Recovery periods will vary between different individuals and conditions, but usually recovery periods would not cause a risk to safety as the person would be able to make themself safe, even if they have not fully recovered from the incident. It is unlikely that a claimant will satisfy scoring descriptors on the basis of risk to safety during a recovery period, although this will depend on the nature of the condition. **One must also consider that the risk during recovery will be greater if the person is outside rather than inside, in the safety of the home – i.e. such risk may be greater for the mobility descriptors than for the daily living activities**. Decision makers should explore the length and impact of the recovery phase. For example, people with hypoglycaemic events will usually recover a few minutes after taking sugar, whereas some people with epilepsy may feel tired and need to rest after a seizure, but would not be at significant risk during this time.

16 When considering the frequency of incidents that could impact safety it is important to consider not just the number of days that incidents occur but also the likelihood that this happens at the exact moment when an individual is undertaking an activity that could cause harm. If an activity takes little time it is

less likely that the intermittent incident may occur when the claimant is carrying out that activity.

17 For individuals who experience altered or loss of consciousness there is a risk that they may fall and in doing so come to harm whilst undertaking an activity. To assess whether this risk means that an individual cannot undertake the activity safely the decision maker should gather evidence about the ways in which the claimant is at risk of harm and the type of harm, as well as the likelihood of that harm occurring. The decision maker should also consider how the individual minimises this risk in other situations.

18 The decision maker may find it helpful to consider the whole picture of how the claimant's condition affects them. For example, there might be relevant evidence which may help demonstrate a real possibility of risk, such as that a claimant has seizure alarms, or has adapted their house to reduce the harm of potential falls. As always it is important to assess the consistency of the evidence. Key pieces of information could include whether they see specialists or have medical input which would support the frequency or severity of incident. It may also be helpful to consider if the claimant is able to undertake activities (such as cycling, swimming, working in a hazardous environment or taking young children out of the house alone), where the severity of harm could be grave. For example, any claimant with a valid driving licence would be very unlikely to score points due to experiencing symptoms of altered or loss of consciousness, because if they are considered safe to drive, they usually should also be considered safe to carry out the descriptors.

EXAMPLES

19 The following examples are for illustration only. They are not designed to provide any guidance on specific conditions but to show the approach and thought processes involved. It is up to decision makers to consider the balance of risk for each individual case.

Example 1

The claimant has severe learning disabilities and does not have an awareness of danger. They attend a specialist day centre during the week and are cared for at home by their parents. They are supervised at all times due to their learning disability. On the grounds of safety, the decision maker awards 1e

because the claimant would be unable to determine whether food is safe to eat, for example, that meat is properly cooked; 3b because the claimant would be at risk of accidental overdose when taking medication; 4c because the claimant would not think to check whether the water was too hot before bathing; and mobility 1f because the claimant would not be able to work out where to go, follow directions or deal with unexpected changes to a familiar journey. In this case, the descriptors are the same as those that would have been awarded before the UT decision. The claimant also scores on other descriptors, but not on grounds of safety.

Example 2

The claimant has diabetes with hypoglycaemic events which at their most severe can cause them to lose consciousness. However, they receive warning symptoms of profuse sweating. This warning is sufficient to allow them time to reduce the likelihood of harm. For instance, if an incident did occur when they were cooking then claimant would be able to turn off the cooker and find a place to sit or lie down and have something to eat or drink. Due to this warning, it is reasonable to find that for this claimant the risk of harm is too remote to satisfy any scoring descriptors on the grounds of safety in any of the relevant activities.

Example 3

The claimant has narcolepsy events which cause them to lose consciousness. They previously struggled to manage their condition. Now they have better control over the incidents by having a strict sleep routine, changes to their diet, exercise and medications. The claimant has their condition under control and has not had any events for 3 months. As such it is reasonable to find that the risk of harm is too remote for the claimant to satisfy any of the scoring descriptors in any of the relevant activities.

Example 4

The claimant has absence seizures, without warning, trigger or pattern, up to a few of times a day, which involve them losing focus and entering a trance like state. Usually the trance only lasts for a few seconds or up to half a minute. If they are holding items at the time of the absence they wont drop them, they would not fall or make any other movements. The claimant takes reasonable precautions by using safe crossings when making journeys. The claimant reports no injuries or incidents occurring as a result of these absences. Although the frequency of the incidents is common, no harm is likely to come as

a result of these absences so it is reasonable to find that that the claimant satisfies no aids and appliances or supervision descriptors.

Example 5

The claimant has seizures, for which they receive a brief warning. Although they do not result in falls, during and after the seizure the claimant is in an extremely disorientated state for a significant period of time. The claimant is able to make themself safe when in the home and rest whilst the episode subsides. The decision maker decides that there is not sufficient risk of harm for the daily living activities. However, when outside the home the claimant cannot make themselves safe and is deemed so vulnerable during the seizure and recovery period that they would be at risk of harm. Balancing the frequency of the events and the severity of harm that could occur the decision maker decides to award mobility descriptor 1f, as the claimant would need accompaniment on all journeys in order to do them safely.

Example 6

The claimant has had episodes of status epilepticus. This is a life-threatening condition for the claimant where if their seizure lasts longer than five minutes the claimant needs emergency treatment. Their partner has been trained to administer the treatment when necessary in accordance with the claimant's epilepsy care plan. The last time this happened was 6 months ago, and before that about 12 months ago. Although the episodes occur infrequently, the claimant is at risk of severe harm if it occurs. A decision is made that there is a sufficient risk during all relevant activities - someone is always to be supervising in order to administer emergency treatment if necessary. The claimant scores 1e, 2b(ii), 3b (iii) (supervision to monitor their health condition), 4c, 5c and mobility descriptor 1f. The decision maker awards standard rate daily living component (11 points) and enhanced rate mobility component (12 points).

Example 7

The claimant has epilepsy with tonic-clonic seizures. There are no warning symptoms or triggers and the incidents can happen at any time of the day. When the clamant has a seizure their body will become stiff and then their arms and legs will start twitching. They may drop any items they are holding and will fall from a standing position. Incidents happen once per week on average. A

decision is made with regard to each activity where there may be a safety risk for this claimant.

Activity 1 – Preparing food

The claimant is able to reduce the risk related to preparing food by using food choppers, slicers and dicers rather than knives. They are able to further reduce the risk by using the microwave rather than a hob, and by using microwave-safe dishes (dishes with lids and valves, that do not heat up in the microwave or break if dropped). They sit to prepare meals, and whilst waiting for them to cook. Therefore the decision maker reasonably concludes that the claimant can minimise the risk associated with cooking by using aids and appliances and a microwave and decides on descriptor 1c.

Activity 2 – Taking Nutrition

This activity is undertaken sitting down, so any risk of falling from standing is removed. The claimant is not at risk when cutting up food and conveying it to their mouth because if they had a seizure when undertaking these parts of the activity they would simply drop the cutlery causing some spillage, but would be highly unlikely to cause any harm to them. However, the last part of the activity, chewing and swallowing food, may be relevant. **During a seizure or event often the mouth will clench and people bite their tongue, any food in the mouth would remain there and the person having the seizure breathes through their nose. Alternatively, depending on the nature of the seizure, the swallowing reflex may be maintained so that the person swallows the food, even whilst semi-conscious. Also the length of time spent swallowing is short. The claimant has never choked in the past nor mentioned that risk**. The decision maker reasonably concludes that there is no risk of harm sufficient to satisfy any scoring descriptor and chooses descriptor 2a.

Activity 3 – Managing therapy or monitoring a health condition

It is highly unlikely that the claimant would need supervision at the time of taking medication due to the risk of choking as this is a momentary action. The claimant requires some time to recover after a seizure, however, the claimant simply takes their medication later, once they have recovered, and no harm occurs as a result. The decision maker considers whether an incident could cause harm by delaying any medications but reasonably concludes that because a delay will not harm the claimant, and chooses descriptor 3a.

Activity 4 – Washing and bathing

With this activity there is a risk of drowning, even though the likelihood of a seizure happening at the time of washing and bathing is low, the severity of the consequences are high. The decision maker concludes that the claimant requires supervision to bathe, so decides on descriptor 4c.

Activity 5 – Managing toilet needs or incontinence

This activity does not take into account mobilising to and from the toilet and there is a very low risk of harm in this activity if the claimant falls from the toilet. The likelihood of an event occurring at the time of toileting is also low. The decision maker decides on descriptor 5a.

Mobility Activity 1 – Planning and following journeys

The claimant falls during their seizures. This is deemed to count under mobility activity 1 rather than mobility activity 2 as it is on account of their cognitive impairment (the losing of consciousness), not their physical ability to stand and move. The claimant has experienced injuries as a result of these falls. The decision maker considers the frequency of incidents and the severity of harm that could occur and finds that the risk is sufficient so that the person reasonably needs another person with them to make those journeys safely. The decision maker deems that descriptor 1f is the correct choice.

CONTACTS

20 If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 1S25, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in Memo DMG 03/13 - Obtaining legal advice and guidance on the Law.

DMA Leeds: June 2018