



## PIP DAILY LIVING ACTIVITY 3 – EFFECT OF UT DECISION

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### INTRODUCTION

1. The purpose of this memo is to inform Case Managers about a decision of the Upper Tribunal (UT), *SSWP V SSWP v LB* [2016] UKUT 0530 (AAC) UKUT 530 (AAC)(“*LB*”)<sup>1</sup>, which deals with the interpretation of the descriptors under daily living activity 3. The relevant determination date of this decision is 28.11.16 (meaning this decision only applies from that date forwards). This decision is the subject of an administrative exercise (AE). This means that as an ordinary decision maker you will only apply the *LB* decision from the effective date **that would normally apply to the decision in the course of business as usual**. Any period prior to that ‘usual’ effective date **shall** be dealt with by the specialist AE decision makers.

*1* [SSWP v LB \[2016\] UKUT 530 \(AAC\)\(CPIP/721/2016\)](#)

2. Please note that the daily living activity descriptor of 3(b) referred to in this memo is taken from Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 as at the date of decision, 28 November 2016, prior to the



regulation change that came into force on 16 March 2017<sup>1</sup> which changed that descriptor (and some definitions). Please see the appendix for the differences between the Schedules following that regulation change. **Please note that the descriptors and definitions must be applied to the correct time periods.**

*1 [Social Security \(Personal Independence Payment\) \(Amendment\) Regulations 2017](#)*

## THE UT DECISION

### Background

3. The appeal concerned a claimant with type 1 diabetes who stated she required assistance from her partner to constantly monitor her blood sugar levels and help her with her sugar and insulin intake. The main issues before the UT were (i) whether the help the claimant received from her partner fell under monitoring a health condition and managing medication thus satisfying descriptor 3(b)(ii) or whether it was therapy so that the claimant satisfied a higher scoring descriptor, and (ii) whether actions taken by another person to help the person with managing a special diet could come under the definition of therapy.

### What the UT decided

4. There are **two elements** to the UT's decision:

- i. The UT decided that in certain circumstances a combination of the two limbs of descriptor 3(b)(ii) (managing medication, and monitoring a health condition) could be classed as therapy (and move the claimant to descriptors 3(c) to 3(f), or to a higher scoring descriptor if already at 3(c) to 3(e)). From now on, this is referred to as the "**MAM element**" (medication and monitoring)
- ii. The UT decided that supervision, prompting or assistance with the management of a special diet could be classed as part of managing therapy. From now on, this is referred to as the "**DAT element**" (diet as therapy).

## APPLICATION OF THE DECISION

5. Please take particular note that the **MAM** and **DAT** elements of this decision are to be applied differently. The effect of the **MAM element** was reversed by the Social Security (Personal Independence Payment) (Amendment) Regulations 2017, which came into force on 16 March 2017. This means that it only has effect from 28 November 2016 until 15 March 2017. **However, the DAT element was not affected by that regulation change** so applies from 28 November 2016 onwards.



6. Please also note that there may be an interaction between this decision and that of the decision in RJ, GMcL and CS v SSWP [2017] UKUT 0105 (AAC) (now reported as [2017] AACR 32). RJ had a relevant determination date of 9 March 2017. This means that RJ did not apply at the time of the relevant determination in LB (28 November 2016). There may be circumstances where the award you give on account of this LB decision will change once one reaches 9 March 2017, and one applies RJ, rather than the pre-RJ interpretation - see Memo ADM 15/18 for those differing interpretations - and may change again effective from 16/03/2017 due to the change in law which cancelled-out the MAM element of LB. Please see example 5, paragraph 9, and example 4, paragraph 10 for illustration.

7. For the **MAM element** (for the period between 28 November 2016 to 15 March 2017), the combination of managing medication **and** monitoring a health condition would apply as follows:

7.1 if the claimant requires supervision, prompting or assistance with **only one limb** of descriptor 3(b)(ii) (i.e. only managing medication, or only monitoring a health condition) on over 50% of the days in the required period then they should continue to satisfy descriptor 3(b)(ii);

7.2 descriptors 3(c) – 3(f) can be satisfied where a claimant meets **both** limbs of the descriptor (i.e. they require supervision, prompting or assistance to be able to manage medication **and** supervision, prompting or assistance to monitor a health condition) in combination on over 50% of the days in the required period (NB – overlapping days, where they satisfy both limbs on the same day, count as one day, not two days, in the majority of day calculations), and

7.3 where both limbs (i.e. managing medication **and** monitoring a health condition) are present on the majority of *weeks* in the required period. In order for descriptors 3(c) to 3(f) to be satisfied the help with the therapy must be required on the majority of weeks (rather than the usual majority of days). Therefore, if help with either limb is required for less than the majority of weeks, then it could not contribute to the satisfaction of descriptors 3(c) to 3(f). The correct descriptor choice would then be 3(b)(ii), rather than 3(c);

7.4 where in combination the two limbs of descriptor 3(b)(ii) occur on the majority of days, and also both limbs are present on the majority of weeks, the claimant should be considered as receiving help to manage therapy (and the time taken for the supervision, prompting or assistance must be measured in hours per week in order to decide which descriptor



from 3(c) - 3(f) applies, added together with any time already measured for therapy using the regular definitions);

7.5 where a claimant receives medication as part of the 'take action' aspect of monitoring a health condition that will be considered as satisfying both monitoring a health condition and also managing medication, and therefore will be classed as therapy (if that takes place on the majority of days, and also the majority of weeks).

NB – When measuring the time taken to monitor a health condition one only counts the time taken to detect a significant change (not all the monitoring time), and then the time taken to take the action to prevent the deterioration. The definition of 'monitor health/monitor a health condition' is "*(a) detect significant changes in C's health condition which are likely to lead to a deterioration in C's health; and (b) take action advised by a-(i) registered doctor; (ii) registered nurse; or (iii) health professional who is regulated by the Health Professional Council, without which C's health is likely to deteriorate*".

8 For the **DAT element** (for periods from and including 28 November 2016), supervision, prompting or assistance with the management of a special diet, this could be classed as part of managing therapy where;

8.1 the diet has been prescribed or recommended by a health professional (a registered doctor, nurse or other health professional regulated by the Health and Care Professions Council), and

8.2 managing the requirements of the special diet means it is necessary to pay attention to both the nature and timing of food and/or drink (i.e. if the special diet concerns only the nature of the food that is not enough); and

8.3 failing to adhere to the special diet would result in a deterioration of the condition within an immediate or short period of time. This requirement is so that general dietary advice, which any person may receive from their doctor (e.g. lose weight, eat healthier meals), and which may prevent deterioration in general health over a longer term, is not classed as being part of a special diet. Whether such a deterioration is deemed to occur within an immediate or short period of time will be a matter for the judgement of the decision maker in the circumstances of each case.



Only the time required for supervision, prompting or assistance with the management of the special diet will count towards therapy time, not time spent preparing & cooking food (measured within Daily Living Activity 1) or eating the food (measured within Daily Living Activity 2). Instead, it is the additional time to undertake the additional actions necessary to manage the special diet. This could include weighing out food or checking food to ensure the correct nutritional content is prepared correctly. The time spent on the special diet would be added together with any other time designated as therapy in order to ascertain which descriptor from 3c to 3f would apply.

## **EXAMPLES**

### **9. For the MAM element (a combination of medication and monitoring a health condition being classed as managing therapy)**

#### **Example 1**

The claimant needed assistance with managing medication every day. They also needed assistance with monitoring a health condition one day a week. Previously they would have satisfied 3(b)(ii) as they needed assistance to manage medication on the majority of days. However, post-LB (for the closed period of 28 November 2016 to 15 March 2017) the combination of needing both medication and monitoring a health condition, on the majority of days in combination, and with both limbs occurring on the majority of weeks, means they are counted as needing supervision, prompting or assistance with therapy. The claimant moves to descriptors 3(c) to 3(f). The DM counts the time taken for the help needed to manage medication and the time taken for the help with monitoring health (which means the time taken to detect the significant change and time taken to help take the action which prevents the deterioration), in order to decide which descriptor from 3(c) to 3(f) applies (up to 15 March 2017).

#### **Example 2**

The claimant needs help to manage medication on a daily basis. They also need help with monitoring a health condition once every three weeks. Although in combination the need for help occurs on the majority of days, as help with monitoring a health condition does not occur on the majority of weeks, that is not frequent enough for MAM to become therapy. The DM selects descriptor 3(b)(ii).

#### **Example 3**

The claimant took medication on three specific days a week, and needed assistance each time. They also needed to monitor a health condition on three specific days a



week, and needed assistance each time. It turns out that these are the same individual days. The DM then concludes that as they do not satisfy the medication and monitoring a health condition on the majority of days in combination they cannot move to the therapy descriptors, and indeed they cannot satisfy descriptor 3b neither for the same reason. The DM scores them descriptor 3a.

#### **Example 4**

The claimant needs another person to monitor their health, in the form of checking their blood with a test. On the majority of days that blood test reveals a deterioration in their condition which can then be remedied by helping the claimant take a drug (as the claimant cannot do this themselves). As the method by which the remedy occurs involves the taking of medication, following LB it is considered as simultaneously being managing medication and monitoring a health condition and is therefore classed as therapy. The DM counts the time taken for the help needed to manage medication and the time taken for the help with monitoring health (which means the time taken to detect the significant change and time taken to help take the action which prevents the deterioration), in order to decide which descriptor from 3(c) to 3(f) applies (for the closed period of 28 November 2016 to 15 March 2017).

#### **Example 5 – RJ applies**

The DM decides that the claimant does not require help to manage medication nor to monitor a health condition on the definition prior to RJ. However, following RJ (from 9 March 2017 onwards) the claimant would need help with both limbs of descriptor 3b(ii). After working out that 6 hours per week are required the DM gives the claimant descriptor 3d. However, that only applies from 9 March 2017 until 15 March 2017, when the regulation change takes effect. From 16 March 2017 the MAM element no longer has effect, meaning that the award level is reduced back to descriptor 3(b)(ii).

#### **10. For the DAT element (supervision, prompting or assistance with the management of a special diet)**

##### **Example 1**

The claimant states they need help to deal with a special diet which involves avoiding certain foodstuffs. However, the diet was not prescribed or recommended by any of their medical professionals, rather it is something they found on the internet. As such it does not meet the definition of therapy so the DM decides that any time spent helping the claimant with that diet is excluded from any therapy duration calculation.



### **Example 2**

The claimant states they need help to deal with their diet. Their GP has recommended they lose some weight and eat a healthier diet. As this diet does not involve any immediate deterioration in the claimant's condition should the claimant fail to adhere to it, the DM decides that it does not meet the guidance for being a special diet as therapy, and any time spent helping the claimant with that diet is excluded from any therapy duration calculation.

### **Example 3**

The claimant states they need help to deal with their diet (and the DM accepts that they are unable to manage this themselves). Due to their condition the claimant has been instructed by a health professional to eat regularly through the day, and to avoid certain foods. The DM determines that failure to comply with this would result in an immediate deterioration. Someone must prompt the claimant to eat at the right times, and must also check their meals to ensure they contain the correct content. As the help is with the nature and timing of the claimant's diet the DM adds together the time spent prompting the claimant and the time spent checking each meal in order to determine which therapy descriptor (3c to 3f) applies.

### **Example 4 – RJ applies**

The DM decides that the claimant does not require diet as therapy as they do not require help using the pre-RJ interpretation of risk. However, as at 9 March 2017, following RJ relevant determination, the claimant would require that help with diet as therapy. 2 hours help per week are required so the DM gives them descriptor 3(c) from 9 March 2017 onwards.

### **Example 5 – MAM and DAT at same time**

The claimant is deemed to have a special diet which requires 2 hours per week of help to manage. The claimant is also deemed to require help with managing medication and help with monitoring a health condition, in combination on the majority of days, which is therefore treated as therapy. That requires 3 hours per week of help from another person, so 5 hours in total in combination with the DAT element time. For the period of 28 November 2016 to 15 March 2017 the claimant is awarded descriptor 3(d), for needing more than 3.5 but less than 7 hours of help per week. Then, from 16 March 2017 onwards, removing the MAM element from consideration, the claimant is moved to descriptor 3(c), as only 2 hours of help remain.



**APPENDIX – SCHEDULE 1 OF THE SOCIAL SECURITY  
(PERSONAL INDEPENDENCE PAYMENT) REGULATIONS 2013 –  
BEFORE AND AFTER REGULATION CHANGE DATED 16 MARCH  
2017**

APPLIES UP TO AND INCLUDING 15 MARCH 2017	APPLIES FROM 16 MARCH 2017 ONWARDS
Schedule 1 - Part 1 Interpretation	Schedule 1 – Part 1 Interpretation
“therapy” means therapy to be undertaken at home which is prescribed or recommended by a – (a) registered – (i) doctor (ii) nurse; or (iii) pharmacist; or (iv) health professional regulated by the Health Professions Council	“therapy” means therapy to be undertaken at home which is prescribed or recommended by a – (a) registered – (i) doctor (ii) nurse; or (iii) pharmacist; or (iv) health professional regulated by the Health Professions Council; but does not include taking or applying, or otherwise receiving or administering, medication (whether orally, topically or by any other means) or any action which, in C’s case, falls within the definition of “monitor a health condition”
Part 2 – Daily Living Activities	Part 2 – Daily Living Activities
3b. Needs either-  (i) to use an aid or appliance to be able to manage medication; <b>or</b>  (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition	3b. Needs any one or more of the following-  (i) to use an aid or appliance to be able to manage medication;  (ii) supervision, prompting or assistance to be able to manage medication.  (iii) supervision, prompting or assistance to be able to monitor a health condition.





## CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E Zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo 07/19](#) - Requesting case guidance from DMA Leeds for all benefits.

**DMA Leeds: October 2019**

**The content of the examples in this document (including use of imagery) is for illustrative purposes only**