

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/2559/2015

Before: A. Rowley, Judge of the Upper Tribunal

Attendances:

For the Appellant: Ms. Zoe Leventhal of Counsel (instructed by The National Deaf Children's Society on behalf of the Appellant)

For the Respondent: Mr. Simon Pritchard of Counsel (instructed by the Solicitor, Department for Work and Pensions)

Decision:

I allow the appeal. As the decision of the First-tier Tribunal (made on 2 April 2015 at Kidderminster under reference SC014/14/00210) involved the making of an error in point of law, it is **set aside** under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is **remitted** to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

1. I held an oral hearing of the appeal to the Upper Tribunal on 8 March 2016. The claimant was represented by Ms. Leventhal of Counsel, and the Secretary of State by Mr. Simon Pritchard of Counsel. I am grateful to them both for their helpful submissions.
2. The claimant was 16 years old at the time of the decision under appeal. She has permanent and severe bilateral hearing loss. She lip-reads and wears bilateral hearing aids. Her application for a Personal Independence Payment ("PIP") was refused on 24 September 2014, the decision maker having awarded only 6 points (4 points under descriptor 7c ("needs communication support to be able to express or understand complex verbal information"), and 2 points under descriptor 9b ("needs prompting to be able to engage with other people")). The total points scored were insufficient to meet the statutory threshold.
3. The claimant appealed to the First-tier Tribunal ("the tribunal"). She argued that she satisfied the criteria of descriptor 9c ("needs social support to be able to engage with other people"). The tribunal refused the appeal and confirmed the decision of 24 September 2014. I have allowed the appeal because the tribunal's reasons were inadequate.
4. However, during the course of the hearing a number of other issues were considered. In particular, in giving permission to appeal to the Upper Tribunal the District Tribunal Judge made these observations:

"It is arguable that ... if support from another person is reasonably required to understand multiple or complicated sentences, it must also be required to interact in a contextually appropriate manner. In other words, if communication support is reasonably required, does that automatically lead to the conclusion that social support is also reasonably required, with particular reference to the situation of a claimant with hearing impairment?"

5. In my judgment the answer to the question posed by the District Tribunal Judge is “no.” It does not necessarily follow that a claimant who falls within the terms of descriptor 7c will automatically satisfy descriptor 9c.
6. The criteria for potential entitlement to PIP are set out in section 77 of the Welfare Reform Act 2012 (“the Act”). The daily living component at the standard rate is the one under consideration in this appeal. By section 78(1)(a) a person is entitled to the daily living component at the standard rate if their ability to carry out daily living activities is limited by their “physical or mental condition.” Section 80(1)(a) provides that the question of whether a person’s ability to carry out daily living activities is limited by their physical or mental condition is to be determined in accordance with regulations. Those regulations are the Social Security (Personal Independence Payment) Regulations 2013 (“the Regulations”).
7. Regulation 3(1) provides that Part 2 of Schedule 1 to the Regulations defines the daily living activities. Regulation 5 sets out how points are established. The score a claimant obtains in relation to the daily living activities is determined by adding together the number of points (if any) awarded for each activity listed in column 1 of the table in Part 2 of Schedule 1.
8. Activities 7 and 9 are relevant to the issues before me.

Column 1 Activity	Column 2 Descriptors	Column 3 Points
7. Communicating verbally	a. Can express and understand verbal information unaided.	0
	b. Needs to use an aid or appliance to be able to speak or hear.	2
	c. Needs communication support to be able to express or understand complex verbal information.	4
	d. Needs communication support to be able to express or understand basic verbal information.	8
	e. Cannot express or understand verbal information at all even with communication support.	12

9. “**Communication support**” means “support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into a non-verbal form and vice versa” (paragraph 1 of Part 1 of Schedule 1 to the Regulations).

Column 1 Activity	Column 2 Descriptors	Column 3 Points
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9. Engaging with other people face to face	a. Can engage with other people unaided	0
	b. Needs prompting to be able to engage with other people.	2
	c. Needs social support to be able to engage with other people	4
	d. Cannot engage with other people due to such engagement causing either- (i) overwhelming psychological distress to the claimant; or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	8

10. Again, paragraph 1 of Part 1 of Schedule 1 to the Regulations contains some relevant definitions:

“Engage socially” means: “(a) interact with others in a contextually and socially appropriate manner; (b) understand body language; and (c) establish relationships.”

“Prompting” means: “reminding, encouraging or explaining by another person.”

“Social support” means: “support from a person trained or experienced in assisting people to engage in social situations.”

11. For completeness, I should add that the descriptors must be read together with regulation 4 and 7 of the Regulations. That means that a claimant can only be taken as satisfying a descriptor of an activity if they are able to carry out the activity safely, to an acceptable standard, repeatedly, within a reasonable period of time on over 50% of the days of the required period. By regulation 4(2A)(4) “safely” means “in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity”; “repeatedly” means as often as the activity being assessed is reasonably required to be completed”; and “reasonable time period” means “no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person’s ability to carry out the activity in question would normally take to complete that activity.”

12. I have set out, at paragraph 10 above, the definition of “engage socially.” I am not the first to have been somewhat puzzled to note that there is no definition of “engage” in Part 1 of Schedule 1 to the Regulations, but there is a definition of “engage socially.” This may well be because, as originally drafted, what is now activity 9 was named “engaging socially.” Be that as it may, I concur with the observations of Upper Tribunal Judge Mark in *Secretary of State v AM* [2015] UKUT 0215 (AAC), that “the factors set out in the surplus definition of ‘engage socially’ are relevant considerations even if the definition itself lacks meaning because the expression ‘engage socially’ is to be found nowhere else in the Schedule.” Neither Mr. Pritchard nor Ms. Leventhal sought to argue otherwise.

13. The Secretary of State's advice on who the "other people" envisaged by activity 9 are is set out in the "PIP Assessment Guide: A DWP guidance document for providers carrying out assessments for Personal Independence Payment" :

"When considering whether claimants can engage with others, consideration should be given to whether they can engage with people generally, not just those people they know well."

14. This is not strictly binding upon me, but I can see no reason not to endorse it. It is, in my view, in engaging with people generally where the "social" element of engaging face to face becomes significant. Neither party disputed this interpretation.

15. The parties were also in agreement that nowhere in the Act, Regulations or elsewhere is it suggested that there is any limit to the type of impairment which limits a person's ability to engage with other people face to face. Section 78 simply provides that a person's ability to carry out the daily living activities must be limited by their "physical or mental condition."

16. I was referred to "The Government's response to the consultation on the Personal Independence Payment assessment criteria and regulations" dated 13 December 2012. The parties agreed with what is set out at paragraphs 5.94 and 5.98 in relation to what was then called the "engaging socially" activity¹.

"5.94 This activity was included to allow an assessment of the barriers that some individuals can face to the mental and cognitive elements of engaging with other people, such as not being able to understand body language, tone or social cues..."

*5.98 We received some comments that this activity focuses too much on cognitive impairments and mental health conditions. As above, the activity was designed to focus on mental and cognitive ability and, as such, may apply **primarily** to individuals with mental, intellectual and cognitive impairments. We do not consider this inappropriate because barriers to participation caused by an inability to engage with others can be significant, and it is important that these are taken into account. **We also consider that, as a whole, the assessment does take account of the full range of barriers that individuals face, regardless of impairment type**" (my emphases).*

17. Of course, I bear in mind that this simply indicates the view of the Secretary of State and his advisers; it is not law and it is not binding on me. Nevertheless, I see no reason to depart from what is said in those paragraphs. There is, in my judgment, no limit to the type of impairment which limits a person's ability to engage with other people face to face.

18. Thus, for example, activity 9 may fall to be considered in respect of a claimant whose physical impairment (hearing loss) causes communication difficulties, and who is, as a result, anxious about meeting other people and being in social situations. In general terms, those were the circumstances in this case. This

¹ Whilst the terms of the activity have been amended since then, the amendments are not relevant to this issue.

leads conveniently to the next issue, namely what, if any, is the overlap between descriptors 7 and 9?

19. This issue was considered by Upper Tribunal Hemingway in *Secretary of State for Work and Pensions v GJ* [2016] UKUT 0008 (AAC) albeit in the context of whether a claimant whose mental health difficulties and functional loss associated with such difficulties meant that they satisfied activity 9 could also, in an appropriate case, come within the terms of activity 7 (thus dealing with the matter from the other side of the coin to the circumstances in this appeal).
20. The Secretary of State submitted in that case, and on this appeal, that the tasks covered by the two activities are different, and it is important to delineate those differences. It is self-evident that generally when someone communicates verbally with another person they are doing so whilst also engaging with them face to face. It is crucial, therefore, to distinguish between the two activities and the two very different types of functional limitation. Activity 7 measures an ability to vocalise and understand information. In contrast, activity 9 measures an ability to function in a social environment.
21. Although the issue was not essential to his decision, Judge Hemingway indicated in passing (obiter) that he agreed with the Secretary of State's submissions. The parties invited me to follow the same line of reasoning, and I do so. There is nothing in the legislation to suggest that an individual who is having difficulty when in conversation with others, and who is simultaneously "communicating verbally" and "engaging with others face to face", is unable to score under both activity 7 and activity 9. In each case the decision maker or tribunal will have to investigate the nature and occurrences of the difficulties in order to establish the difference.
22. With reference to the question posed by the District Tribunal Judge on giving permission to appeal to the Upper Tribunal (set out at paragraph 4 above), the parties were in agreement that there is no *automatic* link between scoring under descriptor 7c and descriptor 9c. A claimant will not necessarily always score under 9c as a result of scoring under 7c. Nonetheless, scoring under activity 7c is capable of being relevant to scoring under 9c. An individual who needs "communication support" may well need "social support" to engage face to face. But not always.
23. By way of example, a claimant may be a deaf person who needs a sign language interpreter with them in order to communicate. They accordingly need "communication support" under activity 7. However, they are completely comfortable in a social environment, and are able to make friends and lead an active social life. They do not satisfy 9c, for they are able to engage with others more than adequately. Indeed, they would not score any points under activity 9. The fact that they need someone to provide "communication support" does not mean that the other person is necessarily providing support with "engagement." Rather, that person is purely helping with the ability to "communicate verbally."
24. However, on any view the claimant did not fall into that category. Her case was that she found social situations very difficult, as there was usually more than one person and there was a lot of background noise. Indeed the Health Professional, having recorded that social situations could be difficult due to background noise,

and this could be very stressful, stated that “this is supported with the informal observations of the face to face consultation.” In those circumstances the parties agree that, whilst the tribunal’s finding that she satisfied descriptor 7c did not *automatically* lead to the conclusion that she also satisfied descriptor 9c, it was nevertheless incumbent on the tribunal to consider whether descriptor 9c applied, and to give adequate reasons for its decision.

25. The statutory definitions of “social support” and “prompting” are set out at paragraph 10 above. If a claimant needs “social support” to be able to engage with other people they will score 4 points, whilst if they need “prompting” to be able to engage with other people they will only score 2. It follows that something over and above “reminding, encouraging or explaining by another person” is required for “social support.”
26. It was not in dispute that those who provide “social support” may include friends and family who know the claimant well and can provide support (see the comments of Upper Tribunal Judge Mark in *PR v Secretary of State* [2015] UKUT 0584 at [29], endorsed in *SL v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0147 (AAC) which was decided after the oral hearing on this appeal).
27. Mr. Pritchard submitted that “social support” has an element of an active role, where the person providing the support is providing actual assistance in the engaging. And the person from whom the support is required must either be “trained or experienced in assisting people to engage in social situations.” In contrast, Mr. Pritchard submitted that “prompting” involved a less active role in the engagement itself. And the person from whom the prompting is required is not limited by statutory definition. It can simply come from “another person.” Ms. Leventhal did not take issue with Mr. Pritchard’s submissions. Nor do I.
28. How did the tribunal approach matters? There was evidence before the tribunal that the claimant would often miss things, and it took her time to understand someone’s lip patterns. She would often need sentences repeated, rephrased and broken down. She struggled when there was background noise, as her hearing aids amplified all sounds. That made listening very difficult. This was supported by the Health Professional. It was why the tribunal found that she satisfied descriptor 7c.
29. The evidence was that these difficulties had an effect on the claimant’s ability to engage with other people face to face. She said that social situations could be very difficult as there was usually more than one person and there was background noise; she found this very stressful. Her difficulties would cause her to become frustrated, stressed and angry on a daily basis. It was the claimant’s case that she would not take part in any social activity without the support of her family or a friend (who, as I have said, *may* fall within the definition of those providing “social support”).
30. The tribunal’s explanation for its decision that the claimant satisfied descriptor 9b was that: “She lacks some confidence due to her condition and therefore some encouragement and prompting is reasonable, particularly in dealing with new people, but we do not accept that what is required amounts to social support.”

31. Were the tribunal's reasons adequate? Ms. Leventhal and Mr. Pritchard parted company on this issue.
32. Ms. Leventhal submitted that the tribunal failed properly to tackle the issue of whether the claimant needed "social support" to be able to engage with other people, in particular those people whom she did not know well, especially in groups of more than one person or if there was background noise (common social occurrences). The tribunal should have investigated the nature of the support that was needed by the claimant from her friends or family such situations, and determined whether or not that amounted to "social support."
33. In contrast, Mr. Pritchard submitted that it was apparent from the tribunal's admittedly sparsely explained conclusion that the tribunal had turned its mind to what was required, and had concluded that "prompting" rather than "social support" was needed.
34. On balance I prefer Ms. Leventhal's submission. In my judgment the tribunal failed to ascertain or consider the nature and extent of the support which the claimant reasonably required when interacting with others and establishing relationships. It did not explain what the claimant needed, and why that could only be regarded as "prompting." Accordingly, the tribunal erred in law, and I set its decision aside.
35. Despite Ms. Leventhal's valiant attempts to persuade me to re-make the decision, I agree with Mr. Pritchard that fresh findings of fact are required, and I am not in a position to make them. In the circumstances, in the exercise of my discretion under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remit the matter to be re-heard by a new First-tier Tribunal, an expert fact-finding body with specialist members.
36. I do not need to deal with any other error on a point of law that the tribunal may have made. Any that were made will be subsumed by the re-hearing.
37. The new tribunal should not involve any judge or other member who has previously been a member of a tribunal involved in this appeal. It must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. Whilst the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to those, but must consider all aspects of the case entirely afresh.
38. I should make it clear that although I am setting aside the tribunal's decision, I am making no finding, nor indeed expressing any view, on whether or not the claimant satisfies descriptor 9c. That is a matter for the new tribunal, which must review all the relevant evidence and make its own findings of fact.
39. The new tribunal must not take account of circumstances that were not obtaining at the time of the decision: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision.
40. If the claimant has any further written evidence to put before the new tribunal, this should be sent to the new tribunal within one month of the date of the letter sending out this decision. This direction may be added to or amended by a District Tribunal Judge.

A. Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 4 April 2016