

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CPIP/3603/2015

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made on 17 September 2015 at Darlington under reference SC262/15/00476) involved the making of an error 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.

Directions:

- A. The tribunal 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.
- B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim which was refused on 23 April 2015.
- C. In so doing, the tribunal must not take account of circumstances that were not obtaining at that time: 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: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

What this decision is about

1. The primary issue which I have considered in this decision and the only one which may be of wider interest to persons other than the parties, is whether or not "social support" for the purposes of descriptor 9(c) relates only to assistance provided by a person who has relevant training or specific expertise (perhaps obtained professionally) or whether the requirements of the descriptor may be met, in appropriate circumstances and on appropriate findings, if the social support received is from friends or family. I have concluded, for reasons which are set out below, that the concept of "social support" is not limited to support provided by persons with particular training or expertise or which is provided professionally and that the descriptor may, indeed be satisfied on appropriate findings where the support is provided by family or friends.

The background

2. The appellant unfortunately suffers from a range of health problems including what her GP has described as "significant mixed anxiety and depressive disorder" and "significant irritable bowel syndrome". Accordingly, she decided to apply for a personal independence

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payment and, on 12 May 2014, she completed standard form PIP2. In so doing she indicated that, in addition to the above conditions, she also suffers from thyroid cancer and “trigger finger”. On 21 April 2015 she attended a “face to face” assessment with a healthcare professional who subsequently prepared and produced a medical report. Thereafter, on 23 April 2015, the respondent decided that the appellant was not entitled to a personal independence payment. In fact the respondent concluded, seemingly on the basis of the content of the healthcare professional’s report, that no points were scored in relation to any of the descriptors concerned with either the daily living component or the mobility component of personal independence payment. Although the appellant sought mandatory reconsideration the decision was not altered, by that process, in any way.

The relevant descriptors

3. In my reasoning I have made reference to the descriptors linked to the activities of planning and following journeys, washing and bathing, managing toilet needs or incontinence, and engaging with other people face to face. It is, however, only necessary for me to set out the latter. That appears in this form:

Activity	Descriptors	Points
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 –	8
	(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.	

The appeal to the First-tier Tribunal

4. The appellant, having been entirely unsuccessful with her mandatory reconsideration request, appealed to the First-tier Tribunal (hereinafter “F-tT”). In pursuing that appeal she had (and still has) the assistance of Durham Welfare Rights (a specialist unit within Durham County Council). They provided, for the purposes of the appeal, a written submission on her behalf and also obtained some further medical evidence consisting of a report written by her GP. Mr D Wall, of Durham Welfare Rights, represented her at the oral hearing of her appeal. It is clear from the record of proceedings that the appellant gave quite lengthy oral evidence.

Mr Wall urged it to award points under descriptor 4(c) which relates to the activity of washing and bathing, 5(e) which relates to managing toilet needs or incontinence, 9(c) or 9(d) which relate to engaging with other people face to face and either 11(c) or 11(f) which relate to planning and following journeys.

5. The F-tT, in fact, allowed the appellant's appeal concluding that she met the requirements of descriptor 11(e), a descriptor linked to the activity of planning and following journeys, and that she therefore scored 10 points, thus establishing entitlement to the standard rate of the mobility component. However, it decided, as had the respondent, that she scored no points at all under the daily living component.

6. Having issued a decision notice, the F-tT went on to produce, upon request, its statement of reasons for decision (hereinafter "statement of reasons"). It is clear from that document that it did not find the appellant's evidence to be reliable, its concluding that she had what it described as "a tendency to exaggerate her difficulties" though it thought that was as a consequence of her depression rather than due to any deliberate intention to deceive. It did not place weight upon the report of the healthcare professional but did place substantial weight upon the report of her GP provided by Durham Welfare Rights but which it thought suggested, in large measure, that most of the difficulties she claimed to have which were relevant to daily living were only experienced "on occasions". As to the descriptors linked to the activity of engaging with other people face to face and in particular as to the possible applicability of descriptor 9(c), it said this:

“ 22. Mr Wall has urged the Tribunal to consider that [the appellant] satisfies the conditions of activity 9(c) or 9(d). It is the view of the Tribunal that Dr. Bowron's report of 7 July 2015 is not supportive of an award of points under these activities. Dr. Bowron states in relation to 9(c) 'given her significant anxiety state she would need assistance and support in engaging with other people' and in relation to 9(d) he states, 'she would find it significantly stressful to engage with other people, but would not exhibit harmful behaviour to themselves or another person.'

23. The view of the Tribunal is that 9(c) refers to 'social support' which means help from a person who is trained or experienced in assisting people to engage in social situations. Assistance and support from friends or family would not be sufficient to satisfy this activity.”

7. Hence, no award of the daily living component was made.

The permission stage

8. The appellant, through his representatives, applied to the F-tT for permission to appeal to the Upper Tribunal. The main ground was that the F-tT had erred in concluding that "social support" was to be interpreted in a way which would exclude support given by family or friends. It was said that such a view was "not sustainable or supported within the legislation or the regulations", that had Parliament intended to adopt such a restrictive approach it would have made that clear (and it hadn't) and that to adopt such a restrictive interpretation would effectively exclude many claimants from entitlement to points under that descriptor. It was suggested that the issue is "a point of interest that requires clarification by the Upper Tribunal". The further ground of appeal was to the effect that the F-tT had erred in failing to sufficiently enquire into the frequency of the manifestations of the various other difficulties which the appellant claimed to have and had, thus, failed in its inquisitorial function.

9. Permission was granted by a district tribunal judge of the First-tier Tribunal, it seems to me, principally upon the basis of the first ground of appeal though the grant of permission was not limited.

The proceedings before the Upper Tribunal

10. Permission having been granted, I issued case management directions to the parties requiring written submissions. I did observe in so doing that if the appellant was only able to succeed on the first ground then such error would not be material given that it could only lead to the scoring of 4 points under descriptor 9(c) in relation to the daily living component and would not, therefore, be sufficient to establish entitlement to that component. I also suggested that support for the appellant's contentions regarding 9(c) might be derived from the content of the Government's response to the consultation on the personal independence payment assessment criteria and from what is said in *PR v Secretary of State* [2015] UKUT 0584 (AAC).

11. Ms S Pepper, who now acts on behalf of the respondent in connection with this appeal to the Upper Tribunal, has provided a helpful written submission of 18 February 2016. She indicates that the appellant's appeal is supported. As to the first ground, she takes me to the above Government response, which was published on 13 December 2012. She points out that that was the final response prior to the drafting of the regulations concerning personal independence payment. She quotes from it as follows:

“Some respondents were concerned that our definition of social support excludes friends and family. This is not the case, we recognise the importance of friends and family and that is why our definition of social support is: ‘support from persons trained or experienced in assisting people to engage in social situations’. By referring to ‘experienced’ we mean both people such as friends and family who know the individual well and can offer support, or those who do not know them but are more generally used to providing social support for individuals with health conditions or impairments.”

12. She argues that the above passage “clarifies the issue” and adds:

“Anyone who has a significant degree of experience (or training) in dealing with people with that particular condition, or a significant degree of experience with dealing with that particular person can qualify. I must therefore agree with the ground of appeal concerning this matter.”

13. Ms Pepper then makes reference to certain other considerations regarding “social support” which are not matters directly raised by this appeal and which it is not necessary for me to decide or express a view upon. As to the second ground, though, she accepts that there is “a lack of findings regarding the frequency of the claimant's difficulties to undertake the activities for which points are sought”. She refers, erroneously, I think, to certain descriptors not raised by this appeal but what is important is her general view regarding what she says is a lack of relevant findings on the part of the F-tT.

14. Ms Pepper did not seek a hearing of the appeal before the Upper Tribunal. She urged me to set aside the F-tT's decision and to remit to a new and differently constituted F-tT so that the decision could be remade. She said she did not consent to a decision without reasons, presumably, because she wished me to say something specific about the issue raised in the first ground.

15. Mr Wall of Durham Welfare Rights submitted a written reply which was, unsurprisingly in the circumstances, brief. He too urged me to provide a decision with reasons in order to clarify the point raised in the first ground and agreed with Ms Pepper's contention that I should set aside the decision of the F-tT and remit. He did not seek a hearing before the Upper Tribunal either.

Discussion

16. The first thing I must consider is whether or not to hold a hearing before the Upper Tribunal. That, though, is an easy matter to resolve. I remind myself of the content of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. However, as indicated, neither party has sought an oral hearing and it seems to me that the issues I have to decide have been sufficiently addressed in the documents before me. Accordingly, I have determined the appeal on the basis of what is contained in those documents.

17. As to the first ground, I have set out above the precise wording of descriptor 9(c). It is also very relevant to note that "social support" is defined in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. The definition is in this form:

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

18. The issue in ground 1 is whether the "person trained or experienced in assisting people to engage in social situations" has to be a person who has some relevant training or specific expertise or perhaps particular qualifications or specialist knowledge, such that support from friends or family is excluded. Clearly, in this case, the F-tT thought that to be the case. I have concluded that, in so thinking, the F-tT did err in law.

19. The descriptor itself, on a plain reading, does not give a clue as to who it is envisaged will be supplying the social support. The definition within Schedule 1 refers to "a person trained or experienced in assisting people to engage in social situations". The use of the word "or" makes it entirely clear that such a person does not have to be trained and that experience without training will do. There is nothing in that definition to suggest that the experience necessary has to be derived from any sort of professional work and there is nothing in the wording to point to lay persons, such as family or friends, being excluded so long as they do, as a matter of fact, have the requisite experience. I did wonder whether the words "assisting people" (my underlining) might point to the provider of the social support having to have experience of providing support for more than one person, which might be thought to support the proposition that the provider has to be engaged in providing support in some professional capacity as opposed to a person whose experience is simply derived from supporting one person close to him or her (perhaps a partner). However, I think the word "people" is probably simply there to indicate that the person providing the support does not have to be providing it only to one person. So a reading of the relevant definition when taken alongside the wording in the descriptor itself points to it being perfectly permissible for the support to come from a lay person who has derived experience simply from assisting an individual close to him or her. That is, in my view, of itself sufficient to resolve the matter in favour of the appellant.

20. Additionally and in any event, there is the Government's response to the consultation on the personal independence payment assessment criteria. As Ms Pepper points out, the part of that document from which she quotes is entirely supportive of the contentions made on behalf of the appellant to the Upper Tribunal. It clearly and strongly supports the contention that it was the intention, when the relevant definition and the descriptor were drafted, that the support could be provided by a friend or family member who had derived experience of providing such support to a single individual on an informal basis. I would not go so far as to say that the content of the Government's response will always be determinative of this sort of interpretation issue as Ms Pepper appears to suggest, but it is certainly, in my view, relevant to interpretation because it demonstrates the intention behind the definition. So, if it is necessary to take a purposive view that too leads to the appellant succeeding on ground 1.

21. Finally, on this point, there is the decision of the Upper Tribunal in *PR*, cited above. In that decision Judge Mark, said this:

“ 29. On this appeal, both the representative of the claimant and the representative of the Secretary of State have drawn my attention to p.38 of the Government's response to the consultation on PIP assessment criteria where it is stated ‘some respondents were concerned that our definition of social support excludes friends and family. This is not the case, we recognise the importance of friends and family and that is why our definition of social support is: ‘support from a person trained or experienced in assisting people to engage in social situations’. By referring to ‘experienced’ we mean both people such as friends and family who know the individual well and can offer support, or those who do not know them but are more generally used to providing social support for individuals with health conditions or impairment.’ The representative of the Secretary of State states that this represents the present position of the Secretary of State and supports the contention made on behalf of the claimant that the tribunal failed to take into account support available from members of the claimant's family, such as her sister-in-law.

30. The problem with this in the present case is that almost all the evidence indicated that the claimant was getting very little support from members of her family who seem to have lacked any empathy with her. On the evidence before the tribunal, I can see nothing to indicate that there was any member of her family who could be described as experienced in assisting people to engage in social situations, or at any rate if they were so experienced they do not appear to have deployed that experience very much to assist the claimant.

31. That, however, is not the end of the matter. There is nothing in the descriptor to suggest that the social support has to be provided at the moment when the claimant might be expected to engage face-to-face with other people. The claimant was clearly receiving social support from at least a support worker and a social worker, as I have described them, throughout the period in question. The tribunal needed to ask not ‘were they there at the time of the engagement?’ but ‘would the claimant have been able to engage with other people without the social support she received?’ the tribunal erred in failing to ask the right questions.”

22. It is not necessary, for the purposes of this appeal, for me to express any opinion at all as to whether Judge Mark was correct in his view that a person providing the social support did not have to be doing so at the point of engagement for the requirements of the descriptor to be met. That has not been raised as an issue in this appeal to the Upper Tribunal. It does seem to me, though, that Judge Mark was not definitively deciding that social support could come from family or friends because, on the facts he did not have to, he having concluded that there was no evidence to indicate any meaningful support had ever been provided by such

persons. That is probably why the parties seem keen for me to rule on the point. It does seem to me to be very likely that had he had to decide the issue he would have resolved it in the same way I have. Certainly, there is nothing at all in what he had to say which would preclude the interpretation that the appellant's representatives and, indeed, the representative of the Secretary of State urge upon me.

23. Putting everything together I am satisfied that on appropriate findings a friend, a family member or some other type of lay person can provide the requisite "social support" thus, enabling a claimant, on the right facts, to satisfy descriptor 9(c) without any form of professional or specialist input. I so decide. It is worth pointing out though that the requirement for such a person to be "experienced" should not be ignored and evidence about the length of time a friend, family member or other lay person has been providing support and the frequency with which it is provided might well have to be evidenced before decision makers and first instance tribunals.

24. Despite my identification of the above error of law that is not yet sufficient to justify remittal. However, as indicated, Ms Pepper does take the view that the F-tT made insufficient findings regarding the frequency of difficulties the appellant had with respect to tasks falling within the scope of other activities and descriptors relevant to daily living. Since she takes that view, which means of course that all parties are now in agreement on the point, I shall accept that the F-tT erred in that regard too. Thus, had it not made errors, the F-tT might have awarded sufficient points to establish entitlement to the daily living component and, therefore, those errors when taken together are material. I shall remit for matters to be considered afresh.

What happens next?

25. There will, therefore, be a fresh hearing before a new and entirely differently constituted F-tT. The new F-tT will not be bound in any way by the findings and conclusions of the first-F-tT. It will have to reach its own findings and conclusions on the basis of the evidence before it including any further written or oral evidence it may receive. It should apply the approach set out in this decision of the Upper Tribunal with respect to descriptor 9(c).

Conclusion

26. The appellant's appeal to the Upper Tribunal is allowed. The F-tT's decision of 17 September 2015 is set aside. The case is remitted to a new and differently constituted F-tT so that the decision may be remade.

(Signed on the original)

Dated:

M R Hemingway
Judge of the Upper Tribunal
17 March 2016