IN THE UPPER TRIBUNAL **Case No.** CDLA/3612/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: **M R Hemingway: Judge of the Upper Tribunal**

Decision: **The decision of the First-tier Tribunal made when sitting at Hull on 11 September 2015 under reference SC950/15/00508 involved an error of law and is set aside.**

I remake the decision in these terms:

The appellant is entitled to the care component of disability living allowance at the middle rate only with effect from 14 October 2014 to 13 October 2016. There is no entitlement to the mobility component.

REASONS FOR DECISION

1. The claimant, in this appeal, is a child who was born on 10 February 2009. At the date of the decision under appeal he was aged five years. His mother has been his appointee with respect to the appeal to the First-tier Tribunal (hereinafter "the tribunal") and the appeal to the Upper Tribunal.

2. The claimant suffers from a condition known as hyper-extensive mobility expandable joints. This has the consequence of him suffering what appears to be, on any view, quite intrusive joint pain. An application for disability living allowance was made on his behalf by his mother. In completing a claim pack she said that, amongst other things, he experiences pain during the night, he lacks strength and co-ordination and he suffers from joint stiffness in the morning. She indicated that she had to provide him with assistance with a range of functions. In particular, at night-time, she referred to him often waking with leg and hip pain.

3. The application was made on 25 November 2014 but treated as having been made on 14 October 2014. However, on 19 January 2015, the respondent decided that there was no entitlement to disability living allowance. Ultimately, after an unsuccessful application for a mandatory reconsideration, this led to the lodging of an appeal to the tribunal.

4. There was an oral hearing of the appeal which was attended by the claimant's mother. The claimant was represented by one Jenny Baldwin who is from an organisation known as Hull Advice. There was no attendance on behalf of the respondent. It is clear that the claimant's mother gave quite extensive oral evidence and, indeed, the tribunal found that evidence to be persuasive in part. Hence, it allowed the appeal to the extent that it decided there was entitlement to the care component of disability living allowance only, at the lowest rate, from 14 October 2014 to 13 October 2016. That was in consequence of its finding that he required attention for a significant portion of the day. The tribunal was subsequently asked to, and did, provide its statement of reasons for decision ("statement of reasons").

5. The statement of reasons is a careful and thorough document which demonstrates that the First-tier Tribunal went about its task with obvious care. It explained, in some detail, why it considered the tests for the mobility component of disability living allowance not to be met. It also explained why it thought the test for the middle rate of the care component on the basis

of daytime conditions was not met. As to the night-time conditions it accepted that there were difficulties at night but not such as to establish any entitlement on that basis. By way of explanation it said this:

> " 13. With regard to night-time care the tribunal again has to look at whether the criteria of prolonged or repeated attention is met as well as the extra criteria concerning the need to be substantially in excess than other children of a similar age as explained above. The evidence is that [the claimant] has four good nights a week when he is awake and needing attention for 30-60 minutes. This would not be unusual for some five year olds. On the other three nights which are bad nights he is awake on several occasions that can total five or six hours. He has however never missed any school as a result of being too tired. Five or six hours may be substantially in excess to care needed by children of a similar age who have no mental or physical health problems but this is not for most of the time which is the test. For most of the time therefore [the claimant] does not require prolonged or repeated attention during the night and does not therefore fulfil the criteria for any award of the care component at night-time."

6. Section 72 of the Social Security Contributions and Benefits Act 1992, insofar as it is relevant to this appeal to the Upper Tribunal, provides as follows:

The care component

72. - (1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which –

(a) he is so severely disabled physically or mentally that –

(i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients; or

(b) he is so severely disabled physically or mentally that, by day, he requires from another person –

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or;

(c) he is so severely disabled physically or mentally that, at night, -

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.

(1A) In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, subsection (1) has effect subject to the following modifications –

(a) the condition mentioned in subsection (1)(a)(ii) shall not apply, and

(b) none of the other conditions mentioned in subsection (1) shall be taken to be satisfied unless –

(i) he has requirements of a description mentioned in the condition substantially in excess of the normal requirements of persons of his age, or

(ii) he has substantial requirements of such a description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have."

7. It follows, from the above, that in deciding as it did with respect to the situation at night-time the First-tier Tribunal had in mind, in particular, the content of section 72(c) and section (1A)(b)(i). I also note, at this stage, that where a claimant meets the night time test as set out above but does not meet the day time test for the care component as set out in section 72(1)(b) (frequent attention or continual supervision throughout the day) he establishes entitlement to the middle rate of the care component subject to the "significantly in excess" test in 72(1A)(b).

8. The claimant's representative applied for permission to appeal to the Upper Tribunal. The grounds did not take issue with the parts of the tribunal's decision which were to the effect that there was no entitlement to the mobility component and no entitlement to the middle rate of the care component on the basis of daytime needs. The attack was upon the tribunal's treatment of the test relating to night-time needs. It was noted that the findings were to the effect that the claimant had four "good nights" a week when he would need attention for 30 to 60 minutes and three "bad nights" a week when he would need more attention. It was said, in effect, that the First-tier Tribunal had concluded without any evidence that it would not be unusual for some five year old children to be awake and needing attention at night for 30 to 60 minutes. It was further said that, on its findings, it had been wrong to conclude that the requirement at section 72(1A)(b)(i) operated to prevent the satisfaction of the test relating to night-time care as contained in section 72(1)(c).

9. I granted permission to appeal to the Upper Tribunal on those grounds. I also observed, when so doing, that I thought the tribunal might have erred, in light of what is said in *R(A) 2/74* in adopting an arithmetical approach based on counting the good nights and bad nights rather than taking a broad overall approach to night-time difficulties.

10. I have subsequently received a submission prepared by Ms S Suttenstall, who now acts on behalf of the respondent in connection with this appeal to the Upper Tribunal. She says that she agrees that the First-tier Tribunal did err in law in the ways suggested in the grounds and my grant of permission. She urges me to set aside the F-tT's decision and suggests that further findings of fact will be necessary in order to properly decide the appeal so that the proper course of action will be remittal to a new and differently constituted First-tier Tribunal. I have also received a submission from Ms Baldwin on behalf of the claimant. She takes no issue with the suggested set aside and, indeed, it would be most surprising if she did. However, she urges me to remake the decision myself because, in her view, the facts are sufficiently well established on the basis of the findings of the First-tier Tribunal for me to properly do so.

11. Neither party has requested an oral hearing before the Upper Tribunal and I have decided not to hold one. There is nothing to suggest that one would assist or take matters further in any way.

12. I have concluded, as is now agreed by the parties, that the First-tier Tribunal did err in law. It did so in my judgment, first of all, by failing to explain its view, which does not seem to me to be sufficiently obvious to be assumed, that it would not be unusual for some five year old children to require attention for 30 to 60 minutes per night. Further, and perhaps more importantly, it seems to have lost sight of the point which was made clear in *CSDLA/3737/2000* that what is under consideration is whether any attention received by a child claimant is substantially in excess of that which would be required normally by a child of the claimant's age. Additionally, and on the same theme, it was said in *CA/92/92*;

> "It seems to me that the legislation contemplates a yardstick of an average child, neither particularly bright or well behaved nor particularly dull or badly behaved, and then the attention or supervision required by the child whose case is being considered must be judged to decide whether it is "substantially" more than would normally be required by the average child".

I agree with that reasoning which seems to me to be perfectly obvious. It means, though, that the tribunal should have been asking itself whether the claimant had needs significantly beyond those which a normal child of his age would have. The reference the First-tier Tribunal made to the needs of "some five year olds" (my underlining) points to it having lost sight of that. It did not in fact make any finding as to what needs a child of the claimant's age could normally be expected to have at night time and so did not ask itself the right question. The mere fact that some 5 year olds might need attention at night for 30 to 60 minutes did not mean that was the normal situation. Accordingly its reasoning and findings did not provide a proper basis for its conclusion that the appellant did not have night-time needs in consequence of the "substantially in excess of the normal requirements" test. I set its decision aside.

13. Having set the decision aside, with of course the agreement of the parties, I now have to consider whether to remake the decision or to remit. I appreciate that remittal will lead to further consideration by a tribunal which will have available to it a range of expertise. That range will not be available to me. I also note the respondent's view that remittal is the appropriate course to take. However, it does seem to me that clear and relevant findings of fact have already been made by the tribunal. There has been no challenge to those factual findings regarding the amount of attention the appellant requires at night-time. I also note that it has now been some time since the original decision was made, indeed in excess of a year, so

that there is something to be said for avoiding further delay. Putting all of that together I have decided to remake the decision myself.

14. By way of reminder, the tribunal found that the appellant would, on four nights a week, require attention for 30 to 60 minutes. It found that on the remaining three nights, the bad nights, he would be awake on several occasions, seemingly needing attention, for something in the region of five to six hours each night.

15. It seems to me quite obvious that, even taking into account the "substantially in excess" requirement which relates to those under 16 years of age, the test under section 72(1)(c)(i) is comfortably met on the basis that prolonged or repeated attention is required. Indeed, the First-tier Tribunal appeared to accept that without real difficulty. As to the remaining four nights, an important question for me to resolve in remaking the decision is whether the need for attention for 30 to 60 minutes will satisfy the test relating to prolonged attention (I say prolonged rather than repeated because it appears that on those nights attention was normally needed only once) when one factors in the "significantly in excess" aspect.

16. As Ms Baldwin noted in her grounds, the word "prolonged" is not defined in the legislation but an assumption has come to be adopted that 20 minutes continuous attention will normally suffice. I do not think it can be said that there is any fixed rule about this but neither does it seem to me, in broad terms, that that sort of assumption is, for the most part at least, unreasonable. I note that the tribunal accepted that, even on these good nights, the need for attention might last 60 minutes which is, of course, significantly greater than a 20 minute period. Further, and seeking to apply commonsense to the situation as best I can, it does not seem to me right to say that many children of the age of five (as the appellant was at the material times) will require or are likely to require that sort of attention on anything approaching a regular basis. Rather it seems to me entirely reasonable to conclude that the attention this claimant receives even on the good nights is substantially in excess of that which would be required by a typical child of a similar age.

17. In light of the above, therefore, I have concluded that, on the facts, that the appellant does require from another person prolonged or repeated attention in connection with his bodily functions and that those requirements are substantially in excess of the normal requirements of a person of his age. I have, therefore, remade the decision on that basis. I have not interfered with the period of the award since that has not been challenged at any stage.

18. The above does mean it is not necessary for me to definitively decide whether the tribunal also erred in taking an incorrect arithmetical approach when seeming to base its decision simply upon the question of whether, if one assesses the situation on each particular night in isolation, the relevant test is or is not met on a majority of nights. Anything I do say about that is not necessary to my decision and is, strictly speaking, obiter. However, the matter was looked at in *R(A) 1/74* where it was decided that a rigid mathematical approach would not be appropriate and that it was not necessary to consider each night separately. Indeed it seems to me that an overall consideration encompassing the nature and extent of the needs which were identified on the good nights as well as on the bad nights and including, though not as a decisive aspect, the balance between the two might well have been the correct course. That would have meant the needs which were identified on the good nights, albeit that the tribunal found they were sufficient to meet the test for those particular nighst, would not have had to have been ignored in the overall conclusion reached and nor would the

considerable extent of the needs on the bad nights which went significantly beyond the requirements of the test. As I say, though, I do not regard myself as deciding the point.

19. The appeal to the Upper Tribunal, therefore, is allowed. The decision of the First-tier Tribunal is remade by the Upper Tribunal in the terms set out above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **6 April 2016**