

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Before: Upper Tribunal Judge Paula Gray

CPIP/1418/2015

Decision

This appeal by the claimant succeeds. Permission to appeal having been given by me on 12 June 2015 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Manchester and made on 26 February 2015 under reference SC 946/14/02479. I re-make the decision as follows:

The appellant is entitled to a Personal Independence Payment in respect of his claim made on 9 September 2013. The daily living allowance is payable at the enhanced rate for a 5 year period from 9 September 2013 to 8 September 2018.

Reasons

The appeal before the FTT

1. The case concerned the appellant's entitlement to a Personal Independence Payment (PIP). The Secretary of State's decision made on 13 August 2014 awarded no points to the appellant under either the daily living or mobility activities. The FTT, however, awarded him 7 points for problems in daily living and 4 points for mobility difficulties having heard evidence from him and from his mother. This was insufficient for an award of either component, however, so the FTT upheld the decision under appeal that the appellant had no entitlement.
2. The appellant, who is fortunate to have been represented throughout by Mr White of the Salford CAB, applied for permission to appeal, in the first instance to the FTT.

The appeal to the Upper Tribunal

3. A District Tribunal Judge having refused permission to appeal, the application was renewed before me.

4. In a statement of the facts that they found and the reasons for their decision the FTT accepted that the appellant had significant physical and mental health consequences from a road traffic accident which had occurred about 6 years prior to the date of the decision under appeal. The details, in so far as they are relevant, will appear below.
5. The grounds of appeal concerned the findings of fact in relation to dressing and undressing. They suggested that the findings were inadequate to show that these activities could be carried out safely, to an acceptable standard, repeatedly and within a reasonable timescale, requirements under regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013. These are the relevant regulations, and all references to regulations in this decision related to them, unless otherwise stated. I granted permission, raising additional arguable matters. This is a new benefit and therefore many aspects are as yet untested as to their legal effect.

My concerns

6. I added to the matters which should be considered the justification for the 2 point award under activity 1, preparing food, given the difficulties in relation to cutting cooked food that the tribunal identified, and as to activity 9, why descriptor 9b had been chosen over 9c, querying what the difference was between prompting and social support. I directed submissions.

The position of the Secretary of State

7. The Secretary of State has made his response; his representative Ms Pepper answering my questions in a submission which supports the appeal, advocating remission for a further hearing by the FTT. In fact I am able to make a decision myself rather than remit.
8. The Secretary of State agrees that, given the provisions of regulations 4 and 7, the reasoning of the FTT falls somewhat short. The issues as to dressing, she says, were insufficiently explored, but she submits that, given that the appellant is prone to wear casual pull-up and pull-over clothes rather than shirts with buttons and trousers with zips, it would only be if he requires help for over 50% of the days with fastening buttons and zips that he could achieve points that this activity. As with the cooking activity my initial concerns as expressed in the grant of permission are accepted. In answer to the issue that I raised in relation to the difference between prompting and social support some arguments are put forward, but bearing in mind the ultimate recommendation of remission for fresh fact-finding, no particular conclusion is contended for.

The position of the appellant

9. Mr White's grounds of appeal related to the activity of dressing and undressing (activity number 6). Whilst the statement indicated that the tribunal accepted the activity would take the appellant longer than those without his disability, they failed to indicate how long it would take him, or whether he carried out the activity to a reasonable standard, or could do so repeatedly. In effect he questions the application by the FTT of the provisions of regulation 4(2A). He has not added to those arguments following the Secretary of State's response.

The broad background

10. The appellant is a young man, aged just 24 at the date of the decision under appeal. In about 2008 he suffered significant injuries when he was a passenger in a car involved in a road traffic accident. He spent some months in hospital and underwent a number of operations. His residual problems relate to his left side, and in particular his left arm and hand. His problems with his left hand are described by the FTT as resulting from a fused wrist, and the 'freezing' into a set position of 3 fingers. His thumb and index finger can function in a pincer movement.
11. In addition to the physical limitations he has also been left with psychological effects, and suffers from social anxiety and depression.

Should I remit or re-decide the appeal?

12. If I feel that I am able fairly to make a decision then I should do so. A first-tier tribunal hearing PIP appeals comprises a judge, a medical member and a member with experience of disability. It is important for me to consider whether any decision that I make will be deficient in some way for the lack of that expertise. The FTT, of course, is the fact-finding body and it is in that aspect that the expertise of the members is so valuable. I feel that I am able to make this decision without the benefit of that expertise because in general terms the FTT in this case, using the expertise of the judge and the members made sufficient findings of fact; it went wrong its application of the legal tests to the facts found.
13. In relation to certain discrete issues I am able to supplement the fact-finding set out in the statement of reasons with the evidence of the appellant as set out in the record of proceedings, because the statement of reasons makes it clear that this was a case in which his credibility was not in issue and states that the facts found were in large part based upon his evidence.

The relevant regulations

14.I set out the relevant parts of the regulations and the descriptors which are of relevance to this appeal below.

Regulation 4 "Assessment of ability to carry out activities".

4(2A) where C's ability to carry out an activity is assessed, C is to be assessed as satisfying descriptor only if he can do so-

- (a) safely
- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period;

(3) omitted

(4) in this regulation-

(a) "safely" means in a manner likely to cause harm to see or to another person, either during or after completion of the activity;

(b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and

(c) "reasonable time period" means no more than twice as long as the maximum period that 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.

Regulation 7

Scoring.

7-(1) the descriptor which applies to see in relation to each activity in the tables referred to in regulations 5 and 6 is-

(a) where one descriptor is satisfied on over 50% of the days of the required period, that is descriptors;

(b) where 2 or more descriptors that each satisfied on over 50% of the days of the required period, the descriptor which scores were higher or highest number of points; and

(c) when they descriptor is satisfied on over 50% of the days of the required period but 2 or more descriptors (other than a descriptor which scores zero points) are satisfied her periods which, when added together, amount to over 50% of the date of the required period-

() be descriptor which are satisfied with a greater or greatest proportion of days of the required period; or,

(ii) where both or all descriptors are satisfied to the same proportion, the descriptor which scores the higher or highest number of points.

(2) for the purposes of paragraph (1) the descriptor is satisfied on a day in the required period of it is likely that, if she had been assessed on that date, but it would have satisfied that descriptor.

Regulation 7 (3) refers to the required period and is not relevant.

The relevant Activities and their Descriptors set out in Part 2 of the Schedule

Daily Living Activities

Activity 1

Preparing Food

a can prepare and cook a simple meal are needed 0 points

b needs to use an aid or appliance to be able to either prepare or cook a simple meal 2 points

c cannot cook a simple meal using a conventional cooker but is able to do so using a microwave 2 points

d need prompting to be able to either prepare or cook a simple meal 2 points

e need supervision or assistance to either prepare or cook a simple meal 4 points

f cannot prepare and cook food 8 points

Activity 2

Taking Nutrition

a can take nutrition unaided 0 points

b needs- 2 points

(i) to use an aid or appliance to be able to take nutrition; or

(ii) supervision to be able to take nutrition; or

(iii) assistance to be able to cut up food

No other parts of that activity are relevant.

Activity 6

Dressing and Undressing

a can dress and undress unaided 0 points

b needs to use an aid or appliance to be able to dress or undress 2 points

c needs either – 2 points

(i) prompting to be able to dress, undress or determine appropriate circumstances the remaining clothed; or

(ii) prompting or assistance to be able to select appropriate clothing

d needs assistance to be able to dress or undress their lower body 2 points

e needs assistance to be able to dress or undress their upper body 4 points

f cannot dress or undress at all 8 points

Activity 9

Engaging with other people face-to-face

a can engage with other people unaided 0 points

b need prompting to be able to engage with other people 2 points

c needs social support to be able to engage with other people 4 points

d cannot engage with other people due to such engagement causing either- 8 points

(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

My approach

15. I set aside the FTT decision for the reasons set out by Mr White in the grounds of appeal concerning activity 6, and those which I identified in my grant of permission concerning activities 1 and 2. These latter matters are conceded as errors of law by the Secretary of State.

16. As to my re-deciding the issues, I base my history above and my assessment below on the findings of the FTT supplemented where required from the evidence of the appellant as I have explained above.

17. I accept the findings and point scoring of the FTT as to the appellant needing reminding to take medication under activity 3 although that one point cannot really add anything of practical significance. I also accept the lack of any point scoring for activity 4 relating to washing and bathing; this was not challenged and was not in my view legally contentious. The mobility activities, under

which some difficulties were identified but at a level insufficient to found an award, have also not been criticised, and I do not consider them again.

18. I turn to the matters in contention before me.

Preparing Food and Taking nutrition- Activities 1 and 2

19. The FTT found that the appellant could eat with his right hand, but that finding was in respect of food which had already been cooked and cut up; he had what were described as 'significant difficulties in cutting up food'. The 2 point descriptor chosen in relation to taking nutrition, 2b (iii), reflected that.

20. As to preparing food the FTT had looked at the difficulties the appellant would have in using a conventional cooker. It was said that he would have problems, using one hand only, taking a hot tray out of a conventional oven, but could use a microwave to 'cook a simple meal' [24]. Earlier in the decision [12], appearing to quote the appellant, it is said that he is 'fully able to deal with a microwave meal'. It is unclear what is meant by a microwave meal, but bearing in mind the problems identified cutting cooked food I discern that the meaning is a pre-prepared microwave meal.

21. In terms of the activity concerning food preparation and cooking the FTT have fallen into error in two ways.

22. Firstly the observation as to difficulties taking things out of a conventional oven is not pertinent; to cook food is defined in the Schedule as 'heat food at or above waist height. The use of an oven is not necessary; this provision replicates the position following the case law in DLA where the cooking of a meal on the hob was sufficient. Heating in a frying pan, saucepan or a combination of those things is envisaged, and there is no need to take a hot cooking tray- which I accept may not be a safe process using one hand only- from an oven. Similarly the carrying of hot pans need not form part of the cooking process for this descriptor, since the cooked ingredients can be lifted from a pan with slotted spoon or similar normal cooking implement.

23. The mention of microwave cooking in descriptor 1c does not mean the heating of ready prepared microwave meals. It is still necessary for the claimant to be able to prepare and cook the food from fresh ingredients, the definition in the Schedule of a 'simple meal' being 'a cooked one-course meal for one using fresh ingredients'. His inability to cut up fresh food in order to cook is evident from the finding that he cannot cut up cooked food; it means that he satisfies descriptor 1e "needs supervision or assistance to be able to either prepare or cook a simple meal". This scores 4 points.

24. As to activity 2, which is entitled 'Taking nutrition', that phrase is defined in the Schedule, and the relevant part in the circumstances of this case is

"take nutrition" means-

(a) 'cut food into pieces, convey food and drink to one's mouth and chew and swallow food or drink';

25. All three parts of that definition must be achievable to the safe and acceptable standards set out in regulation 4; if not points will be scored under the applicable descriptor.

26. The ability to convey already cut food to one's mouth, and then chew and swallow it is insufficient; the ability to cut cooked food first is required. That the food in contemplation in activity 2 is cooked is, in my view implicit from the place of that activity following that which refers to the preparation and cooking of food. The food contemplated in the taking nutrition activity is the cooked simple meal envisaged under activity 1, preparing food. So the inability to chop an apple into pieces would not be relevant under activity 2, although it would be relevant under activity 1, as the inability to cut up an apple may suggest similar inability in cutting an onion, carrot or other vegetable likely to form part of the ingredients to be cooked in the simple meal made from fresh ingredients. Similarly the inability safely to swallow pieces of apple or other uncooked food is not relevant where the swallowing would not be problematic were the food cooked.

27. The FTT findings as to the appellant's difficulty cutting food apply here; the finding made it clear that the appellant could eat with his right hand only if the food was cut up; the tribunal correctly identified that he needs assistance to be able to cut up food under 2b(iii) and he scores 2 points.

28. The score under those two activities is therefore 6.

Activity 6 Dressing and Undressing

31. The appellant's physical limitations give him some problems with dressing and undressing which were recognised by the FTT [16], but assessed as insufficient to score points under any of the descriptors.

32. The FTT found he could dress and undress unaided 'albeit taking time with buttons and wearing unlaced shoes'. The Secretary of State agrees with the FTT assessment that the appellant was able to manage the activity.

[2016] UKUT 0150(AAC)

33. Upper Tribunal Judge Jacobs has set out useful guidance in the case of PE-v-SSWP [2015] UKUT 309 (AAC), (PE) which is referred to in the submission of the Secretary of State.
34. He has pointed out that the type of clothing actually worn by a claimant is irrelevant unless the choice is due to their disability. To assess an appellant only on the basis that they wear limited clothing types is to lower the standard upon which satisfaction of the descriptor is met. A balance must be struck between allowing a claimant to effectively generate entitlement by using particular clothing with, for example, tiny buttons, and the converse, which is in effect using a claimant's disability against them by assessing them only in respect of clothing that is easy to put on and take off. He says at [15] for example, a claimant who cannot manage buttons or laces cannot be tested by their ability to dress in clothes fastened by Velcro. That seems to me to be what the FTT has done here. In Judge Jacob's words (at [21]) it identified the clothing that the appellant tended to wear, shoes with their laces removed, tops without buttons and pull on track-suit bottoms, in a way that defined away the effects of the claimant's disability.
35. Perhaps because of this the FTT did not engage in the exercise to determine whether his difficulties would render the tasks in dressing otherwise sufficiently time consuming, or happen sufficiently frequently to satisfy the tests set out in regulations 4 and 7.
36. Using Judge Jacob's guide in PE at [19] and based upon the FTT's assessment of the appellant's functional abilities and limitations together with his own evidence as set out in the record of proceedings I find the following.

Facts

37. The appellant's condition is static; there is no variability as to the use of his left arm and hand, although his pain is variable, which may create additional difficulties from time to time. The tenor of the evidence and the findings of the tribunal is that certain difficulties are ever present. Accordingly whatever difficulty he has manifests itself whenever he is called upon to engage in the activity. I remind myself that under regulation 4 (2A) (c) a person's ability in relation to an activity is examined on the basis that they must be able to do so repeatedly; under 4(4)(b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed.
38. The functions involved in dressing with which the appellant would have difficulty are those which involve bilateral manual dexterity, such as buttons, zips and laces. Activities involving bi-lateral gripping generally are problematic. Putting on socks is likely to be a problem given the limitations in the dexterity of the left hand, as manipulation of, rather than just holding on to the sock is required, and the inability easily to fasten a coat is significant.

[2016] UKUT 0150(AAC)

39. Dealing with socks and shoes is likely to take markedly longer than usual, and must be specifically considered because dressing and undressing as defined in the Schedule, includes putting on and taking off socks and shoes. It is likely that the appellant cannot tie laces without assistance; he has taken them out of his shoes, which indicates either that, or that he can tie them himself only with very significant difficulty.
40. His evidence to the FTT as to buttoning a shirt was that he could do it, but it would take him 15 minutes. Buttoning a shirt is an activity which would take a person without disabilities less than a minute. Even allowing for the difficulties that many people have in estimating time he is likely to take considerably more than twice that time. He is therefore unable to accomplish this activity to the standard set out in regulation 4(4)(c). Similarly, zipped or buttoned jackets or coats are likely to take over twice the standard time without assistance.
41. I disagree with the argument in paragraph 5 of the Secretary of State's submission to the effect that as that the appellant is prone to wear casual clothes rather than shirts with buttons and trousers with zips, it would only be if he requires help for over 50% of the days with fastening buttons and zips that he could achieve points that this activity. That approach ignores the fact that it is apparent from the evidence that the appellant adopts certain clothing, in particular tracksuit bottoms, because of his disability, (for example he says 'I only have one pair of jeans as pull up track suit is better'). As Judge Jacobs points out, where the choice of clothing is dictated by the disability, to use the easy clothing chosen as the yardstick is to misunderstand the functional nature of the test.
42. He requires help with the activity for which he lacks function whenever he is called upon to do it. Zips and buttons can be avoided up to a point on trousers and shirts, but most outer clothing demands one or other type of fastening, and doing up outerwear is something which can be necessary on a number of occasions during the course of the day; there can be no de minimis argument. In relation to the required period set out in regulation 7 the appellant satisfies the relevant descriptors for over 50% of the days.
43. The problems are such that assistance is required with both top and lower clothing, the problems relating both to shoes and buttoned or zipped jackets, so the appropriate descriptor is 6e, needs assistance to be able to dress or undress the upper body, as it scores more highly than 6d. 4 points are scored.
44. The running total is 11. I move on to consider social engagement.

Activity 9 Engaging with other people face to face.

45. The appellant has psychological problems as well as the physical effects of the accident. He used to be sociable, with a large group of friends. The FTT found that the appellant had 'lost the ability to be comfortable with those outside his immediate family unit'....he isolates himself' [18].
46. The FTT awarded 9b, at 2 points, as he needed prompting to be able to engage with other people. This brings the total to 13 points and an award of the enhanced rate is reached. Accordingly I need not go on to consider the issue of prompting versus social support, as if further points were added it would not affect the award; this interesting point will no doubt crop up in other cases, and it would be better to have it argued, preferably at an oral hearing, in a case in which it may make a difference.

Conclusion

47. In the final analysis the award is one of the enhanced rate of the daily living component only. I move on to the period of award. The accident occurred some 8 years ago, and the effects remain; some seem likely to be permanent, although the ability to cope may improve. There could well, given time and treatment, be significant psychological improvement in particular. It seems to me proper to find a balance between the award providing some security for the appellant and the likelihood of improvement. The appropriate period is 5 years. Should things improve functionally to any material extent during that period, that must be reported to the DWP. The period of award is subject to the power of the Secretary of State in section 11 of the regulations to determine entitlement afresh.
48. Overall the statement of reasons, although in many ways full and comprehensive, did lack fact-finding in important aspects. This was, I think, caused by a failure to engage with the critical issues such as the time taken to perform activities. I do not criticise the tribunal; it is difficult where there is a new benefit, as yet little legal guidance, and legislation which is not easy to operate.

Upper Tribunal Judge Paula Gray

Signed on the original on 17 February 2016