

**[2016] AACR 43**  
**(SP v Secretary of State for Work and Pensions (PIP))**  
**[2016] UKUT 190 (AAC))**

**Judge Rowley**  
**CPIP/2094/2015**  
**13 April 2016**

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**Personal independence payment – daily living activity 4: washing and bathing – “or” in descriptor 4e is disjunctive – reference is to an unadapted bath or shower**

The claimant claimed personal independence payment (PIP) because he suffered from degenerative disc disease, chronic fatigue syndrome and depression and anxiety. Following an examination by a healthcare professional the Secretary of State rejected his claim. The claimant was awarded a total of six points for descriptor 1b (needs to use an aid or appliance to be able to either prepare or cook a simple meal), 4b (needs to use an aid or appliance to be able to wash or bathe), and 6b (needs to use an aid or appliance to be able to dress or undress). The First-tier Tribunal (F-tT) awarded him another point under descriptor 3b (needs to use an aid to be able to manage his medication) and a further four points under mobility descriptor 2b but these were insufficient to meet the statutory threshold for either the daily living or mobility components. On appeal to the Upper Tribunal (UT) the main issues were whether the word “or” in the phrase “bath or shower” was used in the disjunctive sense in descriptor 4e and whether the assessment should be for an unadapted bath or shower.

*Held*, allowing the appeal, that:

1. the word “or” is used in descriptor 4e in the disjunctive sense. Accordingly, if a claimant cannot do one of the activities of (i) getting in or out of a bath or (ii) getting in or out of a shower, they will satisfy descriptor 4e. The questions must be asked through the prism of regulation 4(2A). The issue of safety (regulation 4(2A)(a) and 4(4)(a)), in particular, may be relevant (paragraphs 15 and 29);
2. whether or not the claimant satisfies descriptor 4e must be determined by reference to an unadapted bath or shower (paragraphs 20 to 21 and 30);
3. if a claimant in fact has and uses an adapted bath or shower, questions should be asked as to the reasons why he or she does so and what links it had to their lack of functional ability. Installation following an occupational therapy assessment may, self-evidently, be a powerful indicator (paragraphs 23 to 24 and 31);

The judge set aside the decision of the F-tT and remitted the appeal to a differently constituted tribunal to be re-decided in accordance with her directions.

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

**Decision:**

I allow the appeal. As the decision of the First-tier Tribunal (made on 29 April 2015 at Southampton under reference SC950/14/00850) 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 re-hearing by a differently constituted panel.

**REASONS FOR DECISION**

**The issues on this appeal**

1. The main issue on this appeal is the interpretation of daily living descriptor 4e: “Needs assistance to be able to get in or out of a bath or shower.” My conclusion is that the word “or” in the phrase “bath or shower” is used in the disjunctive sense. In other words, if a claimant cannot

do one of the activities of (i) getting in or out of a bath or (ii) getting in or out of a shower, they will satisfy the descriptor. I also decide it is a claimant’s ability to get in or out of an *unadapted* bath or shower that is being assessed.

2. The First-tier Tribunal’s decision is also set aside on another ground. It did not give adequate reasons for its consideration of activity 6 (“dressing and undressing”).

### Background

3. The claimant has degenerative disc disease, chronic fatigue syndrome and depression and anxiety. He had a face-to-face assessment with a Health Professional, who observed that he had a good range of movements in his upper and lower limbs. The Health Professional was of the view that the pain which the claimant said he experienced in his joints and back on the majority of days was consistent with the musculoskeletal overview and the levels of prescribed pain relief. She expressed the opinion that the claimant came within daily living descriptors 1b (“needs to use an aid or appliance to be able to either prepare or cook a simple meal”), 4b (“needs to use an aid or appliance to be able to wash or bathe”), and 6b (“needs to use an aid or appliance to be able to dress or undress”). The Health Professional also thought that the claimant did not score points under any of the mobility descriptors.

4. The decision-maker agreed, and in a decision dated 21 May 2014 the claimant was accordingly awarded six points under the daily living activities. As this was fewer than the eight points needed to meet the statutory threshold, the claimant was not entitled to an award of the daily living component. With a score of nought under the mobility activities, nor was he entitled to an award of the mobility component.

5. The claimant appealed to the First-tier Tribunal (the tribunal). His appeal was heard on 29 April 2015. The tribunal varied the decision of the decision-maker to the extent that it found that the claimant was also entitled to one point under daily living descriptor 3b, as he needed an aid to be able to manage his medication. In addition, the tribunal found that the claimant scored four points under mobility descriptor 2b. However, the increased number of points was insufficient to meet the statutory threshold for either the daily living or mobility components, and the claimant’s appeal was refused.

6. The claimant appeals to the Upper Tribunal with my permission. The Secretary of State supports the appeal. The matter has not had a straightforward procedural history either before the First-tier Tribunal or the Upper Tribunal. It is not necessary for me to go into the details here, but it explains the delays which have arisen.

7. The Secretary of State’s representatives, Ms Gilfoyle and Ms Walker, have made written submissions. The claimant has represented himself throughout the proceedings as, of course, he is entitled to do. That means, however, that the legal issues on this appeal have not been fully argued by both sides.

### Descriptor 4e: “Needs assistance to be able to get in or out of a bath or shower.”

8. Activity 4 is in the following terms.

<i>Activity</i>	<i>Descriptors</i>	<i>Points</i>
4. Washing and bathing	a. Can wash and bathe unaided.	0
	b. Needs to use an aid or appliance to be able to wash or bathe.	2

	c. Needs supervision or prompting to be able to wash or bathe.	2
	d. Needs assistance to be able to wash either their hair or body below the waist.	2
	e. Needs assistance to be able to get in or out of a bath or shower.	3
	f. Needs assistance to be able to wash their body between the shoulders and waist.	4
	g. Cannot wash and bathe at all and needs another person to wash their entire body.	8

9. A number of issues fall to be considered in interpreting descriptor 4e. I will deal with each in turn.

**Disjunctive or conjunctive?**

10. This is not the first time the Upper Tribunal (or its predecessors, the Social Security Commissioners) has had to grapple with the word “or” in the benefits legislation. Two common themes emerge from the cases. First, descriptors are to be “read in a reasonable everyday sense, and are not to be approached as a work of over-refined legal draftsmanship which they are not” (R(IB) 3/02 at [20]). Secondly, the meaning to be attached to “or” is very much context specific (see, for example, *WC v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 304 (AAC); [2016] AACR 1 at [12]).

11. The issue in this case may be put in this way. If the word “or” is used in the disjunctive sense, then if a claimant needs assistance to get in or out of just one of a bath or shower, descriptor 4e will be satisfied. In tabular form it would be expressed thus:

Does the claimant need assistance to get in or out of a <b>bath</b> ?	Does the claimant need assistance to get in or out of a <b>shower</b> ?	Does the claimant score points under descriptor 4e?
YES	YES	YES
YES	NO	YES
NO	YES	YES

12. On the other hand, if the word “or” is used in the conjunctive sense, “or” would effectively mean “and.” In those circumstances a claimant would come within the terms of descriptor 4e only if they needed assistance to be able to get in or out of a bath, *and* needed assistance to be able to get in or out of a shower. If they could do one of these, they would not qualify. In tabular form it would be expressed thus:

Does the claimant need assistance to get in or out of a <b>bath</b> ?	Does the claimant need assistance to get in or out of a <b>shower</b> ?	Does the claimant score points under descriptor 4e?
YES	YES	YES

YES	NO	NO
NO	YES	NO

13. The starting point is to look at the actual words used. Ms Walker submits that the word “or” is not ambiguous in the context of descriptor 4e. It is, she submits, clearly being used in the disjunctive sense.

14. I agree. As a matter of plain English the word “or” is disjunctive. Without more, it is a word ordinarily used to join alternatives. The position may be different if, say, words appearing on either side of “or” render the word capable of also meaning “and”. This may be the case in the context of, for example, a negative: “To say that a person cannot do A or B means, if I may be forgiven a statement of the obvious, that he cannot do either of those things; in other words he can do neither.” (R(IB) 3/02 at [23]). That is not the case here.

15. I accordingly conclude that the word “or” is used in descriptor 4e in the disjunctive sense. Accordingly, if a claimant cannot do one of the activities of (i) getting in or out of a bath or (ii) getting in or out of a shower, they will satisfy descriptor 4e.

16. I should, perhaps, add that whilst I have not relied on the DWP’s “*Guidance document for providers carrying out assessments for Personal Independence Payments*”, I nevertheless note that my interpretation of “or” in the context of descriptor 4e is consistent with what is said in it.

**Unadapted bath or shower?**

17. There is no express indication in descriptor 4e as to whether the assessment should be of a claimant’s ability to get in or out of an unadapted bath or shower.

18. The version of the descriptors which appears in the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) was not that which was originally drafted. The activity in the draft immediately preceding the regulations was headed “bathing and grooming,” and the concomitant descriptor to what is now 4e was in these terms: “needs assistance to bathe”. Following consultation, the structure and title of the activity and its descriptors were changed to the way in which they appear in the Regulations. In particular, the word “bathe” does not appear in descriptor 4e.

19. That history may serve to explain why “bathe” is defined in Schedule 1 as: “includes get into or out of an unadapted bath or shower;” but there no reference in descriptor 4e as to whether the bath or shower is an unadapted one. Rather, the descriptor simply asserts that claimant must need assistance to be able to get in or out of “a” bath or shower.

20. Be that as it may, Ms Walker submits that, in line with the spirit of the activity, the bath or shower referred to in descriptor 4e must be an unadapted one. It is, she says, clear from the description of the activity and definition of “bathe” that the activity in general is assessing the actions involved in a standard bathroom.

21. Adopting a purposive approach, I accept Ms. Walker’s submission. A claimant’s functional abilities should be considered in relation to whether they need assistance to be able to get in or out of an unadapted bath or shower.

22. In passing, I note that my conclusion is again consistent with the DWP’s guidance document, referred to above, which expressly makes it clear that descriptor 4e is intended to apply to the use of a standard bath or shower.

What if the claimant has an adapted bath or shower?

23. How should a decision-maker or tribunal approach a case in which a claimant has an adapted bath or shower? For obvious reasons, the presence and use of such bathroom furniture may well be an indication that the claimant's lack of functional ability means that they need assistance to be able to get in or out of a bath or shower. But it does not necessarily follow that the presence of, and use by, the claimant of an adapted bath or shower will always mean that the claimant will satisfy descriptor 4e. After all, a claimant may choose to have an adapted bath or shower installed simply to make it easier for them to get in or out of it, but their functional limitation is not such they reasonably need it. Or, as in this case, the adapted bath or shower may have been installed by a previous occupier of the claimant's home. It is, therefore, incumbent on a tribunal to explore the reasons why a claimant has the adapted bath or shower, and what, if any, its link is to their lack of functional ability.

24. Such issues will have a bearing on the issue which the tribunal will have to decide. That question is, in my judgment, whether a claimant who has an adapted bath or shower needs assistance to be able to get in or out of an unadapted bath or shower. I have concluded that this is the appropriate question for two main reasons.

25. First, I bear in mind that a personal independence payment (PIP) assessment focuses on the functions involved in getting in or out of an unadapted bath or shower, and on the claimant's ability to perform those functions. It was, surely, Parliament's intention that the nature of the assessment for PIP must be the same for all claimants.

26. Secondly, an analogy may be drawn with the circumstances envisaged by Upper Tribunal Judge Jacobs in *PE v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 309 (AAC); [2016] AACR 10 where, in the context of activity 6 ("dressing and undressing") he said that "the limitations on what clothing a claimant can cope with cannot be used to lower [the] standard. For example: a claimant who cannot manage buttons or laces cannot be tested by reference to their ability to dress in clothes fastened by Velcro. That would mean that the more disabled the claimant is in respect of an activity, the more difficult it would be to satisfy the descriptors."

27. Similarly, in my judgment, a claimant who is unable safely to get in or out of an unadapted bath or shower should not be tested by reference to their ability safely to get in or out of an adapted one which they reasonably need, for that, too, would mean that the greater the functional limitation, the harder it would be to come within descriptor 4e.

28. I accordingly conclude that a tribunal should measure a claimant who has an adapted bath or shower against a hypothetical test of an unadapted one.

### Summary

29. Pulling together what I have said above, when considering whether a claimant satisfies descriptor 4e, a tribunal must decide whether he or she needs assistance to be able to get in or out of a bath or shower. The need for assistance to get in or out of only one of these will do. Of course, the questions must be asked through the prism of regulation 4(2A). The issue of safety (regulation 4(2A)(a) and 4(4)(a)), in particular, may be relevant.

30. Whether or not the claimant satisfies descriptor 4e must be determined by reference to an unadapted bath or shower.

31. If a claimant in fact has and uses an adapted bath or shower, questions should be asked as to the reasons why he or she does so. Installation following an occupational therapy assessment may, self-evidently, be a powerful indicator.

### The evidence before the tribunal and its decision

32. The evidence before the tribunal was that the claimant used a walk-in bath with a shower above. This would, of course, fall into the category of an adapted bath. It was, in fact, installed by a previous occupant of his home. The claimant explained on his PIP2 form that he could not get in and out of a “normal” bath, because of what he described as the problems with his back, and the pain involved in raising his leg over the side of the bath. He explained that he did not often take a bath in his walk-in bath, as it meant he would have to sit in cold water until the bath emptied and he was able open the door to get out. On the face of it, this suggests that he may have needed assistance to get in or out of an unadapted bath.

33. The Health Professional noted that the claimant could get in and out of his walk-in bath independently and so, in her opinion, he did not score any points under descriptor 4e. In his explanation for his decision to award only two points under activity 4 (for descriptor 4b) the decision-maker also relied upon the fact that the claimant had a walk-in bath.

34. In relation to the washing and bathing activity, the tribunal awarded the claimant two points. Its reasons for its findings on activity 4 were these:

“20. The Secretary of State decided that [the claimant] needed an aid or appliance to wash or bathe. He argued that he needed assistance from another person to wash either his hair or his body below the waist. In a sense this is academic, as both descriptors carry 2 points. However, [the Health Professional] found that he had a good range of movements. In particular, he had 140° abduction, whereas one needs only 90° in order to wash one’s hair. He has the benefit of a walk-in bath (left by a previous tenant) and we would expect him to be able to bend to wash his lower body most of the time. If we are wrong about this, he can use an aid such as the long-handled sponge recommended by [the Health Professional].”

35. Having noted that the claimant had a walk-in (adapted) bath, the tribunal did not explore with him whether he needed assistance to be able to get in or out of an unadapted one. It will be recalled that the claimant had raised the issue on his PIP2 form. He did not appear to pursue it further before the tribunal, perhaps because the indication from the Health Professional’s report and decision-maker’s decision was that he would be assessed on his ability to get in or out of his walk-in bath. Be that as it may, pursuant to its inquisitorial function the tribunal should have investigated whether the claimant needed assistance to be able to get in or out of an unadapted bath. Its failure to do so amounted to an error of law.

36. Was the error a material one? If, contrary to my view, the word “or” in descriptor 4e had been used in the conjunctive sense, the claimant’s undoubted ability to get in or out of an unadapted *shower* would have meant that the tribunal’s error in its reasoning for its decision in relation to his ability to get in or out of a *bath* would not have affected the outcome of the appeal. However, as I have decided that “or” is used in the disjunctive sense, the tribunal’s error was a material one, for if the claimant needed assistance to be able to get in or out of, an unadapted bath (irrespective of his ability to get in or out of an unadapted shower), he would have scored the vital extra point to take his total to eight.

#### **Activity 6: “Dressing and undressing”**

37. I can deal with this issue more briefly. The tribunal clearly accepted that chronic fatigue syndrome limited the claimant’s ability to carry out certain daily living activities. It found that it would cause the claimant fatigue to the extent that he would need the use of a perching stool to be able to prepare or cook a simple meal. It was also of the view that he exhibited some confusion about his medications, which it found to be genuine and consistent with his chronic fatigue, and so

he needed to use a dosette box or a reminder on Galaxy Note to be able to manage his medication.

38. Given those findings, one would have expected the tribunal to have addressed the impact of chronic fatigue syndrome on the claimant's ability to dress and undress both his upper body and lower body, especially in the light of the statement on his PIP2 that any dressing he did himself took longer than normal and made him "tired beyond exhaustion". That evidence raised the issue whether the claimant could dress and undress in a reasonable time period without assistance – see regulation 4(2A)(d) and 4(4)(c) of the Social Security (Personal Independence Payment) Regulations 2013. The tribunal's failure to make findings on this matter amounted to a further error of law.

### **Conclusion**

39. For the reasons set out above the tribunal's decision involved the making of an error in point of law, and I set aside its decision. As fresh findings of fact are required I remit the matter to be re-heard by a new tribunal.

### **Directions**

40. Subject to any later directions by a District Tribunal Judge, I direct as follows.

41. 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. Depending on the findings of fact it makes, the new tribunal may reach the same or a different conclusion to that of the previous tribunal.

42. 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-maker's decision. In other words, the new tribunal will be looking at the claimant's health problems as at the date of decision under appeal. For any further evidence or medical information to be of assistance, it will need to shed light on the claimant's health problems at that time.

43. 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.

44. Although I am setting aside the tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the claimant is entitled to an award of PIP under either component. That is a matter for the new tribunal, which must review all the relevant evidence and make its own findings of fact.

45. The claimant may find it helpful to get assistance from a law centre, neighbourhood advice centre or Citizens Advice Bureau (CAB) in relation to the new tribunal's re-hearing of the appeal.