IN THE UPPER TRIBUNAL **Case No.** CPIP/181/2016
ADMINISTRATIVE APPEALS CHAMBER

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

Decision: **The appeal is allowed. The decision of the First-tier Tribunal sitting at Barnsley on 10 September 2015 under reference SC001/15/00113 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out below.**

DIRECTIONS

(1) The new tribunal must conduct a complete rehearing 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. While the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to these but must consider all aspects of the case, both fact and law, entirely afresh. The tribunal must not take into account any circumstances that were not obtaining at the date of the decision appealed against – see section 12(8)(b) of the Social Security Act 1998 – but may into account evidence that came into existence after the decision was made and evidence of events after the decision was made, insofar as it is relevant to the circumstances obtaining at the date of decision: R(DLA) 2/01 and 3/01.

(2) These directions may be amended or supplemented by further directions made by a district tribunal judge of the First-tier Tribunal in the Social Entitlement Chamber.

REASONS FOR DECISION

1. Both the claimant's representative and the Secretary of State have expressed the view that the decision of the First-tier Tribunal (the "tribunal") involved the making of an error on a point of law. The Secretary of State has invited me to remit for a rehearing before a new tribunal. The claimant's representative has not raised any objections to that course of action. All of that makes it unnecessary for me to set out the history of the case in full or to analyse the whole of the evidence or arguments in detail. However, I will say something about the background and something about the key issues. If there is anything in this decision which is of wider interest it only relates to what I have to say about the descriptors which contain the word "prompting".

2. The claimant has been dependent upon alcohol for many years, suffers from anxiety and depression and has what appears to be quite intrusive neuro-dermatitis. Additionally, he has anaemia and sometimes experiences bleeding in his stomach. There is a history of his having suffered a head injury after an assault in 1981. He says that one of the ways in which his health problems impact upon him is to significantly lower his motivation though he also claims difficulty with concentration, memory functions and nervousness in certain social situations. In

light of these conditions he made a claim for a personal independence payment, which was treated as having been made on 11 June 2014, but on 11 November 2014 the respondent decided that he scored no points in relation to any of the activities and descriptors relating to the daily living component and the mobility component such that he had no entitlement.

3. The claimant appealed to the tribunal and his former representatives provided a written submission on his behalf. The claimant also provided some medical evidence, in particular a letter of 22 April 2015 from a "recovery navigator" at Phoenix Futures, an organisation which helps with addiction and one of 4 September 2015 written by a psychotherapist who had been involved in his treatment. The evidence suggested, in very broad terms, that the claimant was having some success in addressing his alcohol dependency but that some ongoing psychological difficulties remained. The claimant attended the tribunal hearing and gave oral evidence.

4. The appeal was successful in part, the tribunal concluding that there was no entitlement to the daily living component but that, on the basis that he satisfied descriptor 1(d) concerned with mobility activities, he was entitled to 10 points and, hence, the standard rate of the mobility component. Not satisfied with that, and having obtained the services of his current representatives at the Kirklees Citizens Advice and Law Centre, he sought permission to appeal to the Upper Tribunal. I granted permission because I thought the tribunal might have erred in failing to adequately consider the medical evidence and in failing to properly consider whether or not he required prompting in relation to a range of activities relevant to the daily living component. I subsequently received written submissions from the claimant's representative and the Secretary of State.

5. The claimant had, before the tribunal, relied upon the claimed lack of motivation in relation to the descriptors linked to the activities of preparing food, washing and bathing and dressing and undressing. The tribunal did not, though, award any points in relation to any of that. As to preparing food, it observed that he might simply "put food in the microwave" but said that was a choice he was making (paragraph 16 of its statement of reasons for decision). As to motivation more generally and particularly in relation to his hygiene needs, it observed that although drinking heavily at the date of the decision under appeal he was able to respond to priorities and obligations such as appointments, visits to his father and trips to the shop and that he would self-motivate, with respect to personal hygiene, "on the occasions when he felt it was necessary" (paragraph 17 of the statement of reasons for decision).

6. As to prompting, the Secretary of State's representative reminds me that, in CPIP/1534/15, I said, I think uncontroversially, that with respect to any need for prompting:

> "The need must be reasonable in the sense that the aid, appliance or supervision, prompting or assistance is genuinely needed such that the mere fact it is used or received does not mean it is needed and the mere fact that it is not received or used does not mean that it is not needed …"

7. Further, regulation 7(1)(a) of the Social Security (Personal Independence Payment) Regulations 2013 indicates that a particular descriptor is satisfied in circumstances where a claimant is unable to perform the relevant function on over 50% of the days of the period under consideration. The tribunal appeared to accept that around the time of the decision, though it seems matters may have subsequently improved, the claimant did not normally attend to his hygiene needs adequately and, perhaps by implication, did not always dress himself

either. However, it appears to have taken the view that prompting was not needed for the majority of the time because when there was an imperative he was capable of acting. That seems to me to be too simplistic an approach. The mere fact that a claimant might be sufficiently motivated to perform a task when there is specific or unusual impetus to do so does not, of itself, inform as to the overall position and the generality of the situation. So it is not appropriate to limit the scope of the enquiry to such days. True an ability to perform a task without prompting when there is particular pressure to do so might be indicative of a claimant simply exercising a choice not to perform such a task on impetus absent days but that will not necessarily follow. What has to be undertaken is a more general and all encompassing consideration. So, there needs to be an assessment, in such cases, of why it is that, on days when a claimant does not perform certain tasks, he/she does not do so. If it is because, without any specific impetus, he/she is not motivated to do so as a result of health difficulties and that such days exist for more than 50% of the time in the relevant assessment period, then absent other pertinent considerations, the relevant descriptor or descriptors will apply. That was not this tribunal's approach and I conclude that, in consequence, it did err in law. Of course, though, and obviously, mere indolence will not lead to a genuine need for prompting being established.

8. I would like to add something further with respect to the motivation issue in the specific context of the descriptors linked to preparing food. The tribunal noted that, around the decision date, the claimant would normally simply "put a ready meal in a microwave". It thought he would eat "when he was hungry enough", presumably after heating such a ready meal by the means indicated. However, as was indicated by the Upper Tribunal in *LC v The Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0150 (AAC) in order to "prepare and cook a simple meal" it is:

> "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'."

9. I also note that Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (that is the "Schedule" referred to in the words of the Upper Tribunal I have quoted from above) contains a definition of "prepare" which, in the context of food "means make food ready for cooking or eating". So, in looking at descriptor 1(d) in relation to daily living activities, which reads as follows:

> " (d) Needs prompting to be able to either prepare or cook a simple meal."

10. It is clear that the prompting envisaged by the descriptor is such as will enable a claimant to prepare and cook the food from fresh ingredients. It is also clear that if the prompting is needed in relation to either the preparing or the cooking element that will suffice to enable the appropriate number of points to be scored. I cannot read the descriptor any other way because the two aspects are concerned with the one overall process of producing a meal which is ready to eat. An ability, therefore, to simply put a ready meal in a microwave without prompting will not, of itself, mean that descriptor 1(d) is not met. Again, that was not the approach followed by this tribunal.

11. The above errors, though, would still not have been sufficient to justify the setting aside of the tribunal's decision, absent over errors, because even if two points had been scored in

respect of preparing food, washing and bathing and dressing and undressing on the basis of lack of motivation and a resulting need for prompting, that would only have led to the scoring of 6 points. However, the parties are also agreed that the tribunal erred in failing to have proper regard to the documentary medical evidence which was before it. I do note that, in this context, it did say it had considered all of the documents in the appeal bundle as well as the letter from the psychotherapist of 4 September 2015 which seems to have been handed in on the day of the hearing (paragraph 6 of its statement of reasons for decision) and that it made a reference to the involvement of Phoenix Futures (paragraph 13). Of course, a tribunal is not required to refer to each and every item of evidence nor is it required to refer to each and every aspect of a particular item of evidence. Here, though, the letter of 22 April 2015 did contain some specific information to the effect that although the claimant was "working towards becoming alcohol free" it had become apparent that he was also experiencing "a number of physical and psychological health problems" that he would often present as being low in mood and anxious, that there may have been a link between the worsening of the neuro-dermatitis and an increase in anxiety and that there was concern resulting from his "picking/scratching at his skin wounds". The letter from the psychotherapist of 4 September 2015, also made reference to anxiety, stress and trauma and what it referred to as a "compulsive skin picking problem". It suggested that the claimant had a history of complex trauma which "impacts significantly on his day-to-day functioning" and suggested that, as I understand it notwithstanding his reducing his alcohol intake it was likely that he would continue to have "some psychological problems".

12. In my judgment and the parties are in agreement, that sort of specific information merited some further consideration over and above what the tribunal gave it. In particular, the reference to mental health difficulties might have had some relevance to the tribunal's assessment of the activities and descriptors linked to engaging with other people face-to-face and, conceivably, those linked to making budgeting decisions. As to the neuro-dermatitis, that appeared to be an ongoing and possibly worsening difficulty and he had said, as part of the assessment process for a personal independence payment, that he had been referred to a dermatologist. The apparent tendency to "pick" at the affected areas of his body might have indicated a need to use such as ointments, dressings or creams. So, that might have meant the descriptors linked to managing therapy or monitoring a health condition could have had some relevance albeit not necessarily so. The tribunal, though, did not appear to properly investigate that or to be alert to the possibility.

13. I do conclude, therefore, that the tribunal did err in a number of ways and that, as a consequence, although the statement of reasons for decision does demonstrate careful thought about a number of aspects of the appeal, its decision cannot stand.

14. I have, therefore, decided to set aside the decision and to remit to a new and differently constituted tribunal.

15. The new tribunal will hear the case entirely afresh and will reach its own findings and conclusions on the basis of the totality of the evidence before it. It should approach the issue of prompting in the way I have indicated above. It should take into account the various items of medical evidence before it though, so long as it does that, what weight it attaches to those items of evidence will be a matter for it to decide. Given the indications of improvement with respect to alcohol consumption and dependency but bearing in mind that the suggestion that there remain other psychological problems, it will have to carefully consider how things were

during the relevant assessment period being that of three months proceeding the claim and nine months after the claim. Depending upon its findings it may also have to give careful consideration to the length of any award which it may make.

16. Finally, although I am sure his representative will have alerted him to this, I would point out to the claimant that as a consequence of my setting aside the tribunal's decision, the original decision of the Secretary of State to the effect that there is no entitlement to either component of personal independence payment is, for the moment at least, restored. That then will be the starting point though, of course, not necessarily the end point for the new tribunal.

17. The appeal, then, to the extent explained above and on the bases explained above is allowed. The decision will now be remade by a new tribunal.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **19 April 2016**