IN THE UPPER TRIBUNAL **Case No.** CPIP/3573/2015
ADMINISTRATIVE APPEALS CHAMBER

Before E A L BANO

Decision: My decision is that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and remit the case for hearing before a differently constituted tribunal.

REASONS FOR DECISION

1. The claimant is a 24 year old woman who experiences non-epileptic seizures, memory loss and recurrent ear infections. On 5 August 2014 she made a claim for personal independence payment, asserting problems with preparing food, taking nutrition, washing and bathing, dressing and undressing, communicating verbally, reading and understanding, engaging with other people face to face, making budgeting decisions, planning and following journeys and moving around. At a face to face consultation on 13 October 2014 a Health Professional assessed the claimant as being able to cook a simple meal using a microwave, needing supervision to wash or bathe, needing prompting or assistance to make budgeting decisions and needing prompting to undertake a journey to avoid overwhelming psychological distress, resulting in a score of 4 points for daily living activities and 4 points for mobility activities. On the basis of that assessment, the claim for personal independence payment was refused on 17 October 2014.

2. The claimant requested a reconsideration, stating that she needed supervision to prepare food even when using a microwave, that she had absences six days a week, and that as a result of incontinence she needed help to manage her toilet needs and to dress. However, the decision was maintained and the claimant appealed against it on 1 April 2015.

3. Following a hearing at which the claimant was accompanied, but not represented, the tribunal upheld the decision under appeal. The tribunal's findings in relation to the activity of preparing food (Activity 1) were as follows:

> "Whilst [the claimant] had reported requiring supervision in the kitchen, she had then indicated that she was able to look after her daughter's needs unaided, including ensuring she had breakfast. Further we were satisfied from her oral evidence that whilst she may experience difficulties preparing and cooking a simple meal using fresh ingredients due to her condition, this would not prevent her using a microwave to cook. Not only was her assertion that she wouldn't use a microwave inconsistent with what she had stated at her PIP assessment, her explanation as to why she would not be able to do so today, due to hot bowls and plates, did not, in our view, provide a reason as to why she could not use a microwave to cook or heat food, despite her seizures, and particularly if taking her own simple precautions in respect of heat. In reaching this conclusion we also noted the medical evidence provided, and dated shortly before the decision, which suggested that the seizures had significantly reduced in frequency to around one or two a week,

> together with the advice that [the claimant] continue to build up her independence."

In relation to washing and bathing (Activity 4) and dressing and undressing (Activity 6) the tribunal found:

> "In relation to her ability to wash and bathe herself, and also to dress and undress herself, the Tribunal noted that she had stated in her claim pack that she would have to use a shower after a seizure, her whole body was weak, she couldn't physically stand up for long and she was wobbly on her feet. She indicated that she would sometimes urinate during a large seizure and would require a wash then, although she then stated that this depended on who was with her. In respect of dressing and undressing herself, [the claimant] stated that she would need reminding when to get dressed after a seizure and would sometimes need changing. In her PIP assessment she stated that she needed assistance with the shower and assistance to change her clothes if she had urinated. In her oral evidence [the claimant] again indicated that she needed assistance with a wash after a seizure and someone would get her dressed and undressed as if they didn't, she would get sores. When questioned further about what happened following a seizure, [the claimant] stated that her muscles would ache and she would want a shower. She indicated that when not having one, she was able to dress and undress but assistance with washing was required due to the unexpected nature of them.
>
> We found on the evidence that the points awarded by the Department in respect of her ability to wash and bathe herself were accurate. We accepted that following a seizure, [the claimant] required supervision and assistance with washing an bathing herself due to her condition afterwards. We noted from the evidence that her seizures would often occur in her sleep, they sometimes only lasted between a few seconds and a few minutes and when not repeated one after the other, she would then go into a deep sleep and would shower after this.
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> In respect of dressing and undressing however, we found on the evidence that she would be able to do this herself, and without prompting, for the majority of the time. {The claimant] indicated that she sometimes urinated during a large seizure, however this was not every time and the medical evidence suggested this was not often. Whilst the Tribunal accepted, as stated, that she regularly required assistance to shower after a seizure due to the effects and her condition after one, help was only required to change clothes when she had urinated. Despite her seizures she did not physically experience difficulties such as the need to use an aid or appliance to be able to dress or undress. Further, whilst she stated that she required prompting to dress or undress, we noted from both her oral evidence and the medical evidence produced, that she regularly gets her daughter up and dressed and would then take her to school. We therefore agreed with the decision maker that 2 points in respect of washing and bathing and 0 points in respect of dressing and undressing were correct."

4. The claimant then instructed her present representative, who applied for permission to appeal on the grounds that the tribunal had made insufficient findings of fact in relation to the activities of washing and bathing and preparing food, arguing also that the tribunals findings in relation to washing and bathing and in relation to dressing and undressing were inconsistent. In giving permission to appeal on 12 January 2016, Judge Jacobs, observed:

> "With regard to preparing food, the tribunal appears to have concentrated on the cooking of the meal to the exclusion of preparation, which might satisfy descriptor e (or the claimant's representative says, f). With regard to washing and bathing and dressing and undressing, given their close connection with seizures the tribunal appears to have been inconsistent in finding the 50% rule was not satisfied for dressing, but finding it satisfied for washing."

The Secretary of State has however opposed the appeal in a submission dated 29 February 2016.

5. Regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013, as in force from 8 April 2013, provides:

> "For the purposes of section 77(2) and section 78 or 79, as the case may be of the Act, whether [the claimant] has limited or severely limited ability to carry out daily living or mobility activities, as a result of [the claimant's] physical or mental condition, is to be determined on the basis of an assessment.
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> (2) [The claimant's] ability to carry out an activity is to be assessed-
> (a) on the basis of [the claimant's] ability whilst wearing or using any aid or appliance which [the claimant] normally wears or uses; or
> (b) as if [the claimant] were wearing or using any aid or appliance which [the claimant] could reasonably be expected to wear or use.
>
> (2A) Where [the claimant's] ability to carry out an activity is assessed, [the claimant] is to be assessed as satisfying a descriptor only if [the claimant] can do so-
> (a) safely;
> (b) to an acceptable standard;
> (c) repeatedly; and
> (d) within a reasonable time period; and
>
> (3) Where [the claimant] has been assessed as having severely limited ability to carry out activities, [the claimant] is not to be treated as also having limited ability in relation to the same activities.
>
> (4) In this regulation-
> (a) "safely" means in a manner unlikely to cause harm to [the claimant] 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 a 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."

Regulations 7(1) and (2) provide:

"(1) The descriptor which applies to [the claimant] 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 descriptor;

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

(c) where no descriptor is satisfied on over 50% of the days of the required period but two or more descriptors (other than a descriptor which scores 0 points) are satisfied for periods which, when added together, amount to over 50% of the days of the required period–

(i) the descriptor which is satisfied for the greater or greatest proportion of days of the required period; or,

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

(2) For the purposes of paragraph (1), a descriptor is satisfied on a day in the required period if it is likely that, if [the claimant] had been assessed on that day, [the claimant] would have satisfied that descriptor."

Activity 1 in Part 2 of Schedule 1 to the 2013 PIP Regulations is as follows:

1. Preparing food.	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8

6. In *CE v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 0643 (AAC) Judge Hemingway held that the concept of safety in regulation 4 is related solely to the likelihood of a harmful event occurring and not to the seriousness of the consequences of such an event if it takes place. On the basis of evidence that at the date of her claim the claimant was experiencing seizures of a maximum duration of three minutes about twice a week, the Secretary of State has submitted that the tribunal was entitled to find that the claimant could prepare and cook a simple meal using a microwave safely more than 50% of the time (see regulation 7(1) of the 2013 PIP Regulations).

7. *CE* was a Secretary of State's appeal in a case in which the claimant had intractable nocturnal grand mal seizures. The tribunal held that regulation 4 of the 2013 PIP Regulations was consistent with *Moran v Secretary of State for Social Services* (reported as an Appendix to *R(A) 1/88*), in which the Court of Appeal held that the risk of a claimant choking during a nocturnal epileptic fit (which occurred about twelve times over a nine month period) could give rise to a requirement for continual supervision throughout the night. Judge Hemingway held:

> "It seems to me abundantly clear that the intention [of regulation 4] is to relate the concept of safety to the likelihood of an event occurring. Hence, the intention is that a claimant will not succeed in the event of there being a dire risk which is not likely to occur. That legislative intention is clearly reflected in the actual definition. The focus of decision makers and tribunals, therefore, must be on the likelihood of an event occurring not the degree of harm likely to be caused if it does. That means that the F-tT erred in embarking upon a consideration encompassing remoteness of risk and the potential seriousness of the harm which might be caused. It was simply required to focus on the likelihood or otherwise of an adverse event occurring. I appreciate that this interpretation might be thought, from some perspectives, to be unfortunate but that cannot be a consideration for me. Parliament's intention is clear and that intention is achieved by the wording of the appropriate definition."

8. While I must admit to being among those who are surprised that a definition of whether an activity can be performed 'safely' should leave out of account the extent of the harm which may ensue if an untoward event takes place, I respectfully agree with the construction of regulation 4 of the 2013 PIP Regulations adopted by Judge Hemingway. Where I part company from the Secretary of State's representative is with regard to her submission that it follows from that construction of regulation 4 that a finding that a claimant can prepare food 'safely' for the purposes of that regulation necessarily means that the claimant does not need supervision for the purposes of descriptor 1e. The submission says:

> "Having regard to the fact that the claimant was at the time of the claim and entitlement decision only experiencing a couple of seizures a week, I submit the evidence indicates regulation 7 of the PIP regulations fails to be satisfied, as seizures were not occurring on over 50% of the days of the required period. It therefore cannot be said that, on over 50% of the days, the claimant is unable to safely undertake the activities that are required to prepare and

> cook a simple meal. There is no evidence to show that the claimant would need supervision or assistance to prepare and cook a meal, as she can undertake the necessary tasks. Thus descriptor 1e cannot be satisfied and neither can descriptor 1c or any of the other descriptors within descriptor 1." (para 17).

9. Activities 6, 7, 8, 9 and 10 (dressing and undressing, communicating verbally, reading and understanding signs, symbols and words, engaging with people face to face and making budgeting decisions) are activities which, in the normal way, do not give rise to any risk of harm. However for claimants with some physical or mental conditions, activities which are normally innocuous may present hazards; for example, a claimant with severely impaired limb function may risk falling while getting dressed or undressed. In such cases, the effect of regulations 4 and 7 of the 2013 PIP Regulations is that the claimant can only be held to be unable to carry out the activity in question if the claimant cannot perform the activity without a likelihood of harm (to the claimant or to another person) on more than 50% of the days of the required period, as defined in regulations 7, 14 and 15 of the 2013 PIP Regulations. Since regulation 4 of the Regulations is concerned with the likelihood of harm and not its seriousness, a claimant may be able to show that he or she is unable to carry out an activity safely, even if the seriousness of the harm likely to result from carrying out the activity is insufficient to justify supervision.

10. On the other hand, Activities 1, 2 3, 4, 5 (preparing food, taking nutrition, managing therapy or monitoring a health condition, washing and bathing, and managing toilet needs or incontinence) are all activities where supervision may be needed, either to enable a claimant to carry out the activity at all, or to prevent a claimant from coming to serious harm if supervision is not provided, and those activities include descriptors relating to a need for supervision. In the case of Activity 1, preparing and cooking food presents risks even to people without any relevant physical or mental medical conditions because of the need to use sharp knives, the presence of boiling water, the risk of fire and the other hazards associated with cooking. In some cases, a claimant may be able to satisfy descriptor 1f (cannot prepare and cook food) on the basis that he or she cannot carry out the activity safely under regulation 4 of the 2013 PIP Regulations, for example, if the claimant has dermatitis or urticaria brought on each time the claimant comes into contact with raw food. In such cases, provided that the consequences of carrying out an activity are sufficiently serious to amount to 'harm', a claimant may be found to be unable to carry out an activity under regulation 4 on the basis that he or she cannot carry out the activity safely, even if the consequences of doing so are not so serious as to create a need for supervision.

11. In *CE* the tribunal had applied descriptor 1f on the basis of what was held to be an erroneous construction of regulation 4 of the 2013 PIP Regulations, but descriptor 1e was not specifically considered. I regard it as inconceivable that the legislation intended that claimants who might be at risk of serious harm if left to prepare and cook a meal unsupervised, such as those with epilepsy and similar conditions, could only qualify for points under Activity 1 if they could establish that they were likely to come to some form of harm, serious or otherwise, on more than half the days in the required period. Regulation 4 applies to all activities, but only

some activities include descriptors relating to a need for supervision. In my judgment, where there is such a descriptor the question of whether a claimant needs supervision to carry out the activity concerned must be considered separately from whether the claimant can carry out the activity 'safely' under regulation 4 of the 2013 PIP regulations, since otherwise the inclusion of a 'supervision' descriptor in the activities where they occur would serve no useful purpose. Regulation 4 and 'supervision' descriptors may in many cases raise common or overlapping issues of fact, but they are in my view analytically and conceptually distinct.

12. The terms 'needs' and 'requires' (with the implication of the word 'reasonably') in relation to supervision used in the 2013 PIP Regulations and in section 72(1)(b) of the Social Security Contributions and Benefits Act 1992 respectively seem to me to connote more or less the same degree of necessity. Although there is of course no requirement in the 2013 PIP Regulations for supervision to be continual, in deciding whether a claimant needs supervision in order to carry out a task safely, I therefore see no reason to depart from the well-established approach taken in disability living allowance cases for deciding whether supervision is reasonably required, including the making of an assessment where necessary of the possible seriousness of the consequences if supervision is not provided-see *R(A) 2/89.*

13. I also agree with the claimant's representative that the tribunal erred in law in failing to take into account the full range of tasks required to prepare and cook a meal. The tribunal applied descriptor 1c (cannot cook a simple meal using a conventional cooker but is able to do so using a microwave), although they did not specifically refer to regulation 4 of the 2013 PIP Regulations. However. that descriptor would not be applicable if a higher scoring descriptor applied-see regulation 7(1)(b) of the 2013 PIP Regulations. In considering descriptor 1(e), the definition in Schedule 1 to the 2013 PIP Regulations was relevant, providing that ""prepare", in the context of food, means make food ready for cooking or eating". In the light of the medical evidence that the claimant was experiencing seizures twice a week, the tribunal therefore had to consider the risks to the claimant of all the tasks needed to prepare food and to make it ready for eating, including any risks associated with taking hot food out of a microwave and getting it ready to eat. The risk that the claimant might suffer burns or scalds if she lost consciousness when carrying hot food while unsupervised was particularly relevant.

14. I am not however satisfied that there is an unexplained inconsistency between the tribunal's findings on washing and bathing and their findings on dressing and undressing. The tribunal seems to have come to the conclusion that the claimant needed assistance to bathe and shower more frequently than she did to get dressed and undressed. That seems to me to have been a conclusion that was open to the tribunal on the evidence, and I therefore reject this ground of appeal.

15. For the reasons I have given, I have however concluded that the tribunal erred in their approach to Activity 1 by failing to consider whether, having regard to the risk of seizures and the claimant's condition after such seizures occurred, the claimant needed supervision in order to prepare and cook a simple meal safely, taking into account the full range of tasks needed to prepare food for cooking, cooking it in a

microwave, and getting it out of a microwave and ready to eat. I therefore allow the appeal and set the tribunal's decision aside.

16. I am not in a position to make the findings necessary to decide the claimant's entitlement to benefit and I therefore refer the case to the First-tier Tribunal for rehearing before a differently constituted tribunal. The new tribunal will have to consider all activities afresh and should approach Activity 1 in the way I have described.

E A L BANO
27 April 2016