IN THE UPPER TRIBUNAL **Case No.** CPIP/1534/2015
ADMINISTRATIVE APPEALS CHAMBER

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

Decision: **The decision of the First-tier Tribunal made when sitting at Leicester on 3 February 2015 under reference SC038/14/01595 involved an error of law and is set aside.**

The appeal is remitted for determination at an oral hearing before a completely differently constituted tribunal.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

Subject to any later directions by a district tribunal judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The appeal shall be considered at an oral hearing at a venue convenient for the appellant.

(2) The new First-tier Tribunal should not involve the tribunal judge or either of the other tribunal members previously involved in considering this appeal on 3 February 2015.

(3) The appellant is reminded that the new tribunal can only deal with his situation as it was down to 12 September 2014 (the date of the original decision of the Secretary of State under appeal) and cannot deal with any changes after that date.

(4) If the parties have further written material to put before the tribunal this should be sent to the appropriate tribunal office within one month of the issuing of this decision. To be relevant any such further evidence will have to relate to the circumstances as they were as at the date of the original decision of the Secretary of State under appeal (see above).

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

REASONS FOR DECISION

The decision in summary

1. This is the appellant's appeal to the Upper Tribunal against the decision of the First-tier Tribunal (F-tT) dated 3 February 2015. My decision is that the F-tT's decision involved an error of law. I allow the appeal to the Upper Tribunal and set aside the F-tT's

decision. The appeal against the Secretary of State's decision dated 12 September 2014 will have to be re-heard by a new tribunal.

The background to this appeal

2. The appellant was born on 3 October 1960. He suffers from various health difficulties including depression, chronic rhinitis, immune deficiency, vitamin D deficiency and ocular hypertension. On 9 May 2013 a Dr. R J Moriarty, a GP at the practice where the appellant is registered as a patient, certified him as being "severely mentally impaired". He has a support worker and is assisted in looking after himself by two friends. He is in receipt of employment and support allowance (consequent upon a revision decision having been made in response to his lodging an appeal against an original unfavourable decision) and has been placed in the "support group" on the basis that he has limited capability for work-related activity.

3. The appellant made a new claim for a personal independence payment. A standard form PIP2 was completed on 15 April 2014. It bears the appellant's signature, though he says it had been completed by his support worker and that he had not verified the contents prior to signing it. On 8 September 2014 he attended a consultation with a healthcare professional for assessment purposes. Thereafter, on 12 September 2014, the respondent concluded that he was not entitled to either the daily living component or the mobility component of personal independence payment and a decision to that effect was issued. He was not awarded any points under the activities and descriptors relating to either component. There was a subsequent mandatory reconsideration but the decision was not altered in any way. Dissatisfied, the appellant appealed to the F-tT.

The appeal to the First-tier Tribunal

4. There was an oral hearing which the appellant attended accompanied by a representative and two friends. He and his friends gave evidence. There was no attendance on behalf of the respondent. A letter written by his GP, Dr. L Levene and dated 15 January 2015 was handed to the F-tT just prior to the commencement of the hearing.

5. The F-tT dismissed the appeal. It did decide that the appellant was entitled to 2 points (rather than no points at all as had been the respondent's position) on the basis that he would need prompting to be able to read or understand complex written information but found that he was not entitled to any further points.

6. In its subsequently produced statement of reasons for decision (statement of reasons) the F-tT said it accepted that the appellant had a mixture of mental and physical health problems and noted his own contention that the main difficulty was with a lack of motivation. As to the help it was told he received from friends it said this:

> " 6. The Tribunal accepts that he does receive the support from his friends that we were told about at the hearing. However, the test for PIP is not whether the support is actually received, but whether that support is reasonably required. The Tribunal finds that [the appellant] does not reasonably require the level of support that he receives. Whilst there is no doubt that [the appellant's] friends genuinely believe that [the appellant] does require the level of support that they are giving him, the evidence does not support that."

7. The F-tT went on to explain that it disbelieved what it found to be the appellant's extreme claims regarding a lack of motivation noting, amongst other things, that he would normally be on his own during the day, that he is able to make his way to a friend's home every Saturday to get a hot meal and collect some prepared meals, that he does not use a dosette box for his medication despite claiming to have a bad memory, that he was able to accurately recall certain past events and that his dosage of anti-depressant medication had recently been reduced.

The proceedings before the Upper Tribunal

8. The appellant sought permission to appeal. The grounds, in summary, were to the effect that the F-tT had erred in failing to appreciate that the appellant did, in fact, use a dosette box; in failing to consider the written evidence of Dr. Levene and Dr. Moriarty; in failing to address the significance of the placing of the appellant in the "support group" in relation to his award of employment and support allowance; in failing to make clear findings of fact as to the variability of his conditions and in assuming he was able to travel to his friend's house every Saturday without properly investigating the matter.

9. Permission was granted by a district tribunal judge of the First-tier Tribunal. He explained that he was persuaded that all of the points made were arguable and added a further one of his own in these terms:

> "In addition I note that the Tribunal has made reference in the statement of reasons to the help that [the appellant] receives from his friends and that they proceeded on the basis that they had to determine whether the help was reasonably required. I am not entirely sure that that approach is correct although it was generally accepted as being so when determining an entitlement to Disability Living Allowance, the predecessor benefit to Personal Independence Payment which is in issue here. Perhaps I am making too much of that."

10. The appeal was duly lodged with the Upper Tribunal and I issued case management directions requiring written submissions.

11. Ms S Pepper, who now acts on behalf of the respondent in connection with this appeal to the Upper Tribunal, has indicated that the appeal is supported. Indeed, in a thorough and helpful submission, she accepts that the F-tT erred in all of the ways it was suggested it had done in the grounds of application. With respect to the district tribunal judge's additional basis for granting permission she contended that, whilst an assessment as to entitlement to personal independence payment focuses on the particular activities and descriptors set out in the legislation, it was still necessary to consider whether any help received by a claimant in undertaking the prescribed activities was "reasonably required".

The legislation in brief

12. Personal independence payments were introduced by the Welfare Reform Act 2012 to replace disability living allowance. They consist of two components: the daily living component and the mobility component. It is possible to qualify for each component either at " the standard rate" or "the enhanced rate". Entitlement, at either rate and with respect to both components depends upon a claimant's ability to satisfy descriptors which appear at Part 2 (the daily living component) and Part 3 (the mobility component) of Schedule 1 to the Social

Security (Personal Independence Payment) Regulations 2013. An inability to perform tasks set out in the descriptors leads to the scoring of points. All of the point scoring descriptors start with one of the following:

> " 'Needs', 'Cannot' or 'Can'".

So the descriptors, as is apparent from a consideration of their precise wording, test whether a claimant is or is not able to perform a particular function, such as for example engaging with other people unaided or being able to dress and undress unaided (the can and cannot descriptors) and whether there is a need for an aid or appliance to be used or for assistance, supervision or prompting to enable that claimant to carry out a particular task or function (the needs descriptors). Further, regulation 4 indicates that a claimant is to be assessed as satisfying a descriptor only if he can do so safely, to an acceptable standard, repeatedly and within a reasonable time period. There are definitions within regulation 4 for the terms "safely", "repeatedly" and "reasonable time period".

Discussion

13. Neither party has requested an oral hearing before the Upper Tribunal and it is not apparent that one would advance matters. I have, therefore, resolved to decide this appeal on the basis of the documents and written arguments before me.

14. As indicated, the appeal is supported on all of the grounds advanced on behalf of the appellant and that helps to make my task a straightforward one. The F-tT did have documentary evidence in the form of Dr. Levene's letter and the certification issued by Dr. Moriarty. Dr. Levene, in his letter, had indicated that he had been seeing and treating the appellant "for numerous years", that he had been suffering from depression since 1998, that that condition manifested itself with anxiety, that he had had frequent thoughts of deliberate self-harm up to suicide, that he has poor motivation and self-esteem to the extent that he requires considerable emotional and social support and that the various medications he has to take for all of his health problems, including the physical ones, have had an impact upon his mental health. It was said that he struggles with normal activities of daily living. Dr. Levene added the comment "I do understand that he would require help, including people accompanying him to unfamiliar places as he would struggle in crowded places and also with uncertainties". Dr. Moriarty's certificate, as indicated, confirmed his view that the appellant is severely mentally impaired.

15. The F-tT said, in its statement of reasons, that it had read the appeal bundle and the letter written by Dr. Levene. It did not, though, make any further reference to it nor any reference at all to the certificate signed by Dr Moriarty. Was that sufficient? I have decided it was not. A tribunal does not have to refer to each and every item of evidence before it and is certainly not required to undertake a thorough analysis of each and every such item. However, the letter from Dr. Levene was, on the face of it, a significant piece of evidence because the doctor appeared to be familiar with the appellant's problems on the basis of long-term dealings with him and had made some quite specific comments regarding his view of the appellant's difficulties. Of course, the F-tT was not obliged to accept what Dr. Levene had to say nor, indeed, what Dr. Moriarty had to say but, in my judgment, given the specific information contained, in particular within Dr. Levene's letter it was required to say more than it did about this evidence. I agree with the view now taken by each representative that the F-tT's

treatment of the medical evidence before it was inadequate such that its decision falls to be set aside.

16. It is also apparent that the F-tT made an error in failing to appreciate that there was evidence before it to the effect that the appellant did use a dosette box. The F-tT simply said about this that if his memory was as bad as he claimed he would use such a dosette box to assist him in taking his medication and took a credibility point against him on the basis that he was not using one. However, in completing his PIP2 form, he commented that he needed to be prompted to take his medication by friends and family and added "my medication is now in a dosage box", which I take to be an intended reference to a dosette box. It was also noted by the healthcare professional that he had said he will sometimes pre-fill a dosette box himself and that sometimes that is done for him by his family. Whether the dosette box is or is not needed such as to lead to the scoring of 1 point under descriptor 3(b) might be a different question but it is clear that the F-tT erred by concluding he was not using one in circumstances where there was clear evidence that he was and in then going on to take an adverse credibility point against him. It appears to have simply missed the evidence that he was using one.

17. It does not seem to me to be profitable to say anything further about the other suggested errors of law contained in the appellant's representative's grounds. This is because any other errors which the F-tT may have made will be subsumed by the fresh hearing which will now follow as a consequence of my identifying errors of law and setting the F-tT's decision aside. I would, though, like to say something further about the question of help which is "reasonably required".

18. Under section 72 of the Social Security Contributions and Benefits Act 1992, a claimant could establish entitlement to the various rates of the care component of disability living allowance for any period through which he "requires" various levels of help in connection with such as attention, supervision or watching over.

19. In *Mallinson v Secretary of State for Social Security* [1994] 1 WLR 630 it was held that the term "requires" means reasonably requires rather than medically requires. In *R(DLA) 10/02* it was said that the test was what help is reasonably required as opposed to what help is actually provided or what help a claimant would like to have. So, it did not have to be shown that required care was in fact provided though if care was provided that might be strong evidence (though not conclusive) of the requirement.

20. The legislative scheme relating to personal independence payments does not use the word "requires" in the context of entitlement. In terms of the "can" and "cannot" descriptors, the question is simply one of whether a claimant is able or is not able to perform those tasks bearing in mind the requirement that he will only be capable of performing them if he can do so safely, to an acceptable standard, repeatedly and within a reasonable time period as those are defined. Either a claimant will or will not be able to perform those functions within those four criteria and there is no scope, it seems to me, for any consideration as to whether any help he may need to perform such functions is or is not reasonably required. As to the "needs" descriptors, they ask about a need for the use of an aid or appliance, supervision or prompting or assistance in order to perform specified tasks. Clearly, the need envisaged is a reasonable need as opposed to a medical need. Equally clearly, the need must be reasonable in the sense that the aid, appliance, 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 does not mean it is not needed. There is, in that limited sense, a similarity between certain of the descriptors and the disability living allowance test concerning the requirement for attention, continual supervision throughout the day, prolonged or repeated attention at night or watching over at night.

21. I do not think it can be said that the F-tT erred with respect to its comments at paragraph 6 of its statement of reasons and which I have set out above. I think all it was seeking to say was that, in this case, the appellant actually received support from friends but that, whilst evidence of support might be evidence of difficulty such as enable points to be scored under the relevant descriptors, it was not conclusive.

22. Nevertheless, as indicated, the F-tT did err with respect to other matters such that its decision must be set aside.

What happens next?

23. There are further facts to be found and I consider that this is best done by a new and differently constituted F-tT bearing in mind the F-tT status as an expert fact-finding body and the fact that it will have specialist members. I also note that Ms Pepper's contention that remittal is the right cause has not been opposed by the appellant's representative. That then is what I shall do. This does mean that there will be a fresh hearing before the new F-tT. The new F-tT will start afresh and will reach its own findings of fact and its own conclusions.

Conclusion

24. This appeal to the Upper Tribunal is allowed to the extent and on the basis explained above.

(**Signed on the original)**

M R Hemingway
Judge of the Upper Tribunal

Dated: **11 September 2015**