

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/139/2016

Before: A. Rowley, Judge of the Upper Tribunal

Decision:

I allow the appeal. As the decision of the First-tier Tribunal (made on 29 September 2015 at Poole under reference SC158/15/00200) 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 rehearing by a differently constituted panel.

REASONS FOR DECISION

1. This appeal concerns the interpretation of the moving around activity in Part 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. In summary, I have decided that the activity should be judged in relation to the type of surface normally expected for pedestrian use out of doors, on reasonably flat pavements and road surfaces, taking into account an ability to negotiate kerbs, but disregarding any inability to climb steps or slopes.
2. Neither party has requested an oral hearing of the appeal to the Upper Tribunal. Mindful of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I am of the view that it is fair and just to determine the appeal on the papers. The legal issues in this case have been adequately set out in the written submissions, and I am not satisfied that further oral legal argument will assist in any material way. I am able to decide the case in the claimant's favour without a hearing.
3. The claimant has (amongst other things) a lower back problem, with a long history of back pain, which refers into her left hip and leg. The pain continued despite spinal fusion surgery in 2014.
4. The claimant had an existing award of the standard rate of the daily living component of PIP. On 20 April 2015 she completed form PIP2(UI). She highlighted that she had problems stepping off kerbs and walking on uneven ground. She said that her consultant had advised her not to use a back brace or crutches, as they would cause her to lean forwards, and she had to stand upright.
5. The claimant was interviewed and examined by a Health Professional on 1 May 2015. The Health Professional was of the view that the claimant satisfied mobility descriptor 2b. In other words she was able to "stand and then move more than 50 metres but no more than 200 metres, either aided or unaided." The Health Professional was also of the view that the claimant satisfied daily living descriptors 1e, 4e, 5b and 6d.
6. A decision maker agreed and, in a decision dated 3 June 2015, decided that the claimant scored 11 points under the daily living activities, and 4 under the mobility activities. That meant that she remained entitled to an award of the standard rate of the daily living component, and continued not to be entitled to an award of the mobility component.

7. The claimant appealed to the First-tier Tribunal. The issue before the tribunal was whether the claimant should have scored 8 points under the “moving around” activity. It was the claimant’s case that she could only stand and then move unaided more than 20 metres but no more than 50 metres. The tribunal refused the claimant’s appeal, and confirmed the decision of 3 June 2015.
8. On giving permission to appeal I asked the Secretary of State to make a submission as to the type of surface upon which the “moving around” activity is to be assessed. I am grateful to the Secretary of State’s representative, Ms Powell, for her helpful written submission.
9. Ms Powell concedes that the “moving around” activity should be judged in relation to the type of surface normally expected for pedestrian use out of doors. I accept this concession.
10. To move around outdoors one must generally walk along pavements and roads. It is a rare pavement which is as level as a bowling green. To my mind, the decision maker or tribunal must contemplate a reasonably flat pavement or road surface, taking into account the usual rise and fall one would normally encounter. As in the case of the higher rate mobility component of DLA, the test should not be “as to whether the claimant could walk on unploughed land or over unmade-up roads or over pavements under repair by the Council.” (*R(M) 1/91* at para 8).
11. I agree with Ms Powell’s submission that when assessing a claimant’s ability to move around, regard must be had to his or her ability to cope with kerbs. After all, a person would normally expect to have to step up and down from the pavement during the course of moving around out of doors.
12. Further, I share Ms Powell’s view that an inability to climb steps or slopes (other than the usual inclines found on pavements and roads) is not to be regarded. Activity 2 concerns the ability to move around, and relates to the physical aspect of walking. It does not make any reference to climbing, which uses a different set of muscles and is, in general, a more difficult function than walking.
13. In this case the claimant expressly put in issue the question of her ability to step off kerbs, but the tribunal did not specifically refer to it in its Statement of Reasons. Given that the claimant had raised it as an issue, in my judgment the tribunal should have done so. Its failure to do so, and to make findings on it, amounted to an error of law.
14. I have considered whether the error would have affected the outcome of the decision. On balance I have decided that it may have done, and so it is appropriate for me to remit the appeal to a new tribunal for a rehearing.
15. I give the following directions to the new tribunal. They may be added to or amended by a District Tribunal Judge.
16. 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. It 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 conclusion to that of the previous tribunal.

17. 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. In other words, the new tribunal will be looking at the claimant's health problems as at the date of decision under appeal (3 June 2015). 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.
18. 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.
19. The re-hearing will be an oral hearing. While it is not a matter for me to direct, it is suggested that the claimant should attend the re-hearing.
20. 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.
21. For the sake of completeness I should add that the fact that this appeal has succeeded on a point of law says nothing one way or the other about whether the claimant's appeal will succeed on the facts before the new tribunal.

A. Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 16 May 2016