IN THE UPPER TRIBUNAL **Case No.** CPIP/193/2016
ADMINISTRATIVE APPEALS CHAMBER

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

Decision: **As the decision of the First-tier Tribunal (made on 17 August 2015 at Worcester under reference SC180/15/00114) involved the making of an error on a 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.**

DIRECTIONS:

A. The tribunal 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.

B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 6 August 2014 and refused on 1 December 2014.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at the time: 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: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

1. This is the appellant's appeal to the Upper Tribunal, brought with my permission, against a decision of the First-tier Tribunal (hereinafter "the tribunal") which it made on 17 August 2015, to the effect that she is not entitled to a personal independence payment. For reasons which are set out below the appellant's appeal succeeds and the decision of the tribunal is set aside. The case is remitted so that there will have to be a complete rehearing before a differently constituted panel.

2. The appellant has multiple sclerosis and depression. She describes a range of symptoms but, with respect to walking, says that she experiences difficulties with her balance, unsteadiness in her lower limbs, stiffness and pain. She applied for a personal independence payment but, after she had completed standard Form PIP2 and after she had been examined by a health professional, the Secretary of State refused the claim concluding she did not score any points at all under the activities and descriptors concerned with entitlement to the daily living component or the mobility component. Since a subsequent application for a mandatory reconsideration was unsuccessful, she appealed to the tribunal.

3. At this point I shall set out some of the relevant legislation which the tribunal had to consider. I have not set out any of the activities and descriptors relating to the daily living component though because, although the appellant had sought an award of that component in addition to an award of the mobility component, the tribunal's treatment of it has not been a

factor in the appeal to the Upper Tribunal. The activities and descriptors relevant to a claimant's ability to move around are as follows:

Activity	Descriptors	Points
2. Moving around.	a. Can stand and then move more than 200 metres, either aided or unaided.	0
	b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.	4
	c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
	d. Can stand and then move using an aid or appliance for more than 20 metres but no more than 50 metres.	10
	e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
	f. Cannot, either aided or unaided – (i) stand; or (ii) move more than 1 metre.	12

4. In assessing a claimant's ability to perform a relevant function decision makers, including tribunals, must apply regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013. This reads as follows:

> " (2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so –
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> (a) safely;
>
> (b) to an acceptable standard;
>
> (c) repeatedly;
>
> (d) within a reasonable time period; …"

5. Regulation 4(4) defines three of the above as follows:

> " (4) In this regulation –

(a) 'safely' means in a manner unlikely to cause harm to C 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."

but there is no definition of "to an acceptable standard".

6. The tribunal held an oral hearing of the appeal which was attended by the appellant. She was not represented though she was accompanied by her mother. There was no attendance on behalf of the Secretary of State. It appears, from the tribunal's record of proceedings, that she gave quite extensive oral evidence. That evidence touched upon the nature and extent of her conditions and upon variability, in particular, with respect to the multiple sclerosis.

7. Although the tribunal dismissed the appeal it did, unlike the Secretary of State, conclude that the appellant was entitled to some points. As to the daily living component it decided she was entitled to 2 points under the descriptors linked to the activity of washing and bathing. As to the descriptors linked to the activity of moving around, it selected descriptor 2(b) as set out above and so awarded 4 points. Since, with respect to each component, a claimant must achieve at least 8 points in order to establish entitlement to the standard rate for that component, this meant the appeal failed.

8. In granting the appellant permission to appeal to the Upper Tribunal I wondered whether the tribunal's findings as to the appellant's ability to walk were unclear such as to render its decision unsafe. I also wondered whether, if a claimant was able to achieve a prescribed distance but had to pause (a word used by the tribunal at one point in its statement of reasons for decision) prior to reaching that distance, that meant the distance had not been achieved for the purpose of satisfaction of the descriptors.

9. It is perhaps, at this point, appropriate to set out certain of the tribunal's findings and reasoning as contained in its statement of reasons for decision ("statement of reasons").

10. Under the heading "findings of fact" the tribunal, initially, said this concerning the distance it thought the appellant was able to achieve and the manner in which she might do so:

> " 15. [The appellant] walks unaided. [The appellant] is able to walk distances of 700 metres. She walks in excess of 200 metres but walks slowly and can drag her leg. She usually stops after about a minute of walking and will then continue.
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> 16. [The appellant] is able to walk a distance of 50 metres before needing to pause. She is able to walk a distance of, for example a third of a mile, taking about 15 minutes and pausing every 50-100 metres."

11. At a later point the tribunal said this:

> " 40. The General Practitioner had described her limitation as 100 metres before needing to rest. Our view was that all the evidence before us indicated that [the appellant] was limited to walking the distance that she herself had described in her form which was between 50-200 metres. We were satisfied that she was able to walk around 50 metres on a reasonably reliable and repeated basis and on days could walk longer distances, nearer 200 metres again reliably and repeatedly …"

12. The Secretary of State, now represented by Ms S Suttenstall, has indicated that the appeal is supported. She accepts that the tribunal's findings concerning the distance the appellant was able to achieve were not sufficiently precise to properly underpin its decision. As to the question of 'pausing' when moving around, she simply, but helpfully, refers me to a decision of Upper Tribunal Judge Parker in *CPIP/2377/2015*. The appellant, who is not represented, has replied to Ms Suttenstall's written submission by expressing disquiet about the whole assessment process.

13. I do think that there is some lack of clarity in what the tribunal had to say about how far it thought the appellant could walk without coming to an initial halt. It did not use that word but rather, at paragraph 15 of the statement of reasons it used the word "stops" and at paragraph 16 it said "pause". However, whilst on one view it might be thought that a stop is final or is likely to be lengthier than a pause, which sounds rather more fleeting to me, I think, in context, it is clear the tribunal was using the words interchangeably. In the opening sentence of paragraph 16, and taking what it said literally, it seemed to find the appellant could achieve 50 metres, but no more, without coming to an initial halt whereas in the second sentence it seemed to be finding she would pause at some point between 50 to 100 metres with, I think, the implication that she could usually manage more than 50. At paragraph 40 it said she could manage "around" 50 metres. Of course, precise findings can only be made where the quality of evidence permits it and, in any event, even if there is no significant variation in symptoms it is inconceivable that there will not be some degree of variation as to how far a person might manage to walk on different occasions even if that is only a matter of a few metres. Nevertheless, because of the precise wording of mobility descriptor 2(c), if the appellant could manage 50 metres but no more taking account of the assessment criteria within regulation 4(2A) and the matter of variation as catered for by regulation 7, she would score 8 points and establish entitlement to the standard rate of the mobility component. Looked at from that perspective the question of whether the distances prescribed by the descriptors had to be managed in one go, which does seem to have been the approach taken by the tribunal, loomed large. Indeed, if that approach is right the tribunal's finding here as to how far she could manage would probably be determinative as to which descriptor applied. If that was not the correct approach though, the question of pausing after a minute of walking, as the tribunal found the appellant would do, was not rendered irrelevant but its relevance would lie in relation to what it meant for the regulation 4(2A) considerations. So, which approach to take appeared to be of particular importance in this appeal.

14. It seems to me there are two rather different ways of looking at this. It might be said that the words in the relevant descriptors "can stand and then move" imply a need for continuous movement such that, leaving aside for the moment the regulation 4(2A) factors and variability, once that movement has come to an end, even momentarily, the distance achieved prior to cessation is the one which will determine which descriptor applies and how many points are scored. That approach certainly has the attraction of simplicity. On the other hand,

it might be thought that the approach should be to consider more broadly the question of how far a claimant is able to move in conjunction with the regulation 4(2A) considerations so that any halts will not automatically dictate the distance achieved but, rather, will feed into a consideration of whether the prescribed distances can be accomplished repeatedly, within a reasonable time period, to an acceptable standard and safely. That was certainly the approach of Upper Tribunal Judge Parker in the case cited above. Having reminded herself of the content of regulations 4(2A) and 4(4) she said this:

> " 6. It is not wholly apparent that the tribunal adequately considered all the above factors; the new tribunal must do so. Matters such as pain, and its severity, and the frequency and nature, including extent, of any rests required by a claimant, are relevant to the question of whether a claimant can complete a mobility activity descriptor 'to an acceptable standard'. I do not agree with the comment at page 771 of Volume I of the 2015/16 annotated Social Security Legislation that arguably ' … the test should envisage a single unbroken progress to the requisite distance'. Such might provide a simpler scheme but, in my view, does not accord with reality. A stop may amount to a mere one second or, alternatively, extend to one hour; such rests may be required once in an appropriate distance or several times. Given the potential vast disparity in circumstances, it is then a matter of judgment, and thus for the good sense of a tribunal, whether a claimant falls within a particular descriptor, having regard to the approach mandated under regulation 4; provided a tribunal's analysis is rational, even if it takes account of the claimant's necessity to stop on occasion to rest and includes those in the required distance, this is not prohibited as a matter of law.
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> 7. Whether a claimant can stand and then move to a particular distance 'to an acceptable standard', inevitably links with two of the further relevant matters under regulation 4(2A): 'repeatedly' and 'within a reasonable time period'. As these terms are statutorily defined, unlike the phrase 'to an acceptable standard', then if a claimant fails to satisfy that statutory test in either respect, it is unnecessary to give consideration to 'an acceptable standard'; however, it might still technically be possible for a claimant, who is unable to show that he cannot carry out an activity repeatedly or within a reasonable time period, yet notwithstanding to establish that he is unable to do so 'to an acceptable standard'. Such instances must be rare but may exist; for example a claimant who forces himself to walk quickly and repeatedly, through stoicism, despite a very high level of difficulty caused by matters such as pain, breathlessness, nausea or cramp."

15. I agree with that approach. It does seem to me that there might well be situations where a claimant who has some difficulty with respect to aspects of walking might pause, albeit momentarily, prior to continuing to walk. An example might be a claimant who has some difficulty with respect to balance and will wish to pause before avoiding a small obstacle or stepping up onto a kerb. Another might be a claimant who suffers from some shortness of breath and who might pause to take a gulp of air prior to embarking upon a slight incline. It does seem to me that it would be losing touch with reality to suggest that such limited punctuations in a claimant's walking would mean that his or her bout of moving, for the purposes of the activity and descriptors, had come to an end at that point. So, the approach should be to ask which of the prescribed distances, if any, can be achieved in light of the regulation 4 (2A) factors and the relevance of any pauses or halts (or whichever word one chooses to use), will be in relation to what they say about those factors. That is not to say, though, that the cause of any halt will not have relevance. It seems to me that if, for example, it was found that a claimant had to pause because of fatigue, such that there was a need to recover before recommencing walking, or was to halt for a period to enable pain which had

built up whilst walking to recede, then that might well, depending on the circumstances, suggest that such halts were likely to be for a period of some length thus bringing into play the four (2A) factors and perhaps, in particular, the "reasonable time period" requirement. I would also add, in looking at the words I have quoted from Judge Parker's decision, that there will be times when a halt has persisted for such length that it cannot realistically be said any resumption is part of the same period of walking but is a new period so that the distance achieved in the second period is not to be added to that of the first period. The example of a stop for one hour given at paragraph 6 of Judge Parker's decision, for instance, would seem to be comfortably sufficient to end an initial period of walking. Whether such a period has been brought to an end will be a matter for a tribunal to decide applying good judgment and commonsense but it may well be the case that such lengthy stops would, in any event, mean that a prescribed distance has not been accomplished within a reasonable time period or is unlikely to be achieved repeatedly so the point may be largely academic.

16. In view of the above, I would conclude that whilst the tribunal did appear to err in thinking that a cessation of movement, however fleeting, would automatically end a period of movement, that error was not, of itself, a material one. So I do not set aside its decision on that basis. I have, though, set it aside on another related basis which I will now explain.

17. Returning to the tribunal's findings as set out at paragraph 15 and 16 of its statement of reasons, it said that the appellant would walk slowly, would at least sometimes as I understand it drag one of her legs, would stop walking after a period of one minute before resuming and would take about 15 minutes to accomplish a third of a mile. The tribunal did say, at paragraph 40, that she could walk around 50 metres, sometimes more, "on a reasonably reliable and repeated basis" but did not say anything specific about whether that sort of distance could be achieved within "a reasonable time period" as defined. In my view given, in particular its finding it would take her 15 minutes to manage a third of a mile, it was incumbent upon it to consider whether this meant that her walking was not being accomplished within a reasonable time period and, if nonetheless it thought it was, to explain why. The matter of the pace of walking was important despite the fairly considerable distances it thought she could walk overall. That is because, following the wording of regulation 4(2A), it seems to me that if a claimant cannot walk a distance prescribed in the descriptors within a reasonable time period then that person is not to be treated as being able to walk that distance at all for the purposes of entitlement to a personal independence payment. So, whilst the tribunal had awarded her 4 points under mobility descriptor 2(b) on the basis of the distance it thought she could manage before halting, had it specifically considered the speed of her walking and had it decided that, for example, she was not able to walk 20 metres within a reasonable time period as defined, it would have had to have awarded 12 points under descriptor 2 (e) even if she could manage, as it seems to have found, an overall distance of a third of a mile. Indeed, this is perhaps an interesting illustration of how personal independence payment is a different benefit from its predecessor (disability living allowance) with different tests and how there will inevitably be some winners and some losers consequent upon the transition. A person able to walk a lengthy distance might not have been considered to be virtually unable to walk, a test relevant to disability living allowance, despite extreme slowness and dependent on other factors too, but such a person if sufficiently slow as to fail the speed standard set by regulation 4(4)(c) from the inception of walking would seem to qualify for the enhanced rate. Of course, the situation is likely to be more complex in the case of a person, and this would probably be quite common, who would walk initially at a reasonable pace but would slow down the more distance was covered and there might even be cases of persons who would start slowly and speed up though

that is likely to be much rarer. This does, though, illustrate the importance of careful fact finding.

18. So, on the facts of this case the tribunal did err in failing to address the matter of the appellant's speed of walking and, therefore, did not correctly apply regulation 4(2A) or, at least, did not show that it had correctly done so. The error was material because, for the reasons I have explained, and dependent upon the findings, the result might have been different had it not so erred. Accordingly the appeal succeeds and I set aside the decision of the tribunal. Since there are further facts to be found and since that task is best undertaken by an expert fact finding tribunal which will have a range of skills and knowledge available to it ion its panel, I shall remit so that the decision may be re-made by a new and differently constituted tribunal in accordance with the directions I have set out above. The new tribunal will have to consider possible entitlement to the daily living component as well as the mobility component and should bear the above comments in mind and make findings as to all of the regulation 4(2A) factors and as to variability in the context of regulation 7.

(Signed on the Original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **1 June 2016**