

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UK/5352/2014

Before Judge S M Lane

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

The decision of the tribunal heard on 1 September 2016 under reference SC198/14/00071 involves the making of an error of law. It is **SET ASIDE** and **REMADE**.

The appellant is not entitled to Personal Independence Payment from and including 18 July 2013. This is because he scores insufficient points from the daily living and mobility components of Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013. He therefore does not satisfy the conditions of entitlement.

He scores 2 points in respect of daily living activity 4 descriptor 4c (washing and bathing), 2 points for daily living activity 5, descriptor 5b (managing incontinence) and, 2 points for daily living activity 6, descriptor 6b (dressing and undressing). In respect of the mobility component, he scores 4 points for activity 2, descriptor 2b.

REASONS FOR DECISION

1 I held an oral hearing of this appeal on 10 February 2016 at Field House in London. Mr T Evans of the Isle of Wight CAB represented the appellant. The respondent was represented by Mr J Heath. I thank them both for their submissions and apologise for the delay in issuing these Reasons.

2 The appeal raises two issues relating to Personal Independence Payment ('PIP'), one of which is a difficult point of interpretation.

3 The first point involves Activity 5, 'managing toilet needs or incontinence'. The second point involves adequacy of fact finding and reasons based on an asserted inconsistency between the facts found and the activities for which points were awarded. It arises because the F-tT found that the appellant required supervision while washing and bathing (because leg cramps caused his legs to give way, p.83, representative's submission)(Activity 4) but did not require supervision to cook a simple meal (Activity 1). The appellant's representative submitted that, since balance was necessary to cook a meal safely, it was inconsistent to award points for one activity but not for the other.

4 For the purposes of this decision, it is necessary to remember that an award of Personal Independence Payment depends on scoring a minimum number of points from activities set out in Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013 ('the Regulations'). The DWP decision maker did not

award the claimant sufficient points for an award following a Work Capability Assessment report from a health professional. The F-tT changed the points awarded. It took away 2 points given by the decision maker for Activity 5 (toileting needs/incontinence), but gave further points in respect of Activity 4 (washing/bathing). The appellant still did not score sufficient points for an award, but the approach taken by the F-tT to managing incontinence within Activity 5 was not correct and needed to be put right for future tribunals.

Activity 5 - Toilet needs and incontinence

Background Facts

5 The appellant uses a colostomy bag to manage his toilet needs following surgery for bowel cancer. His evidence was that he was able to manage his colostomy bag on his own. A colostomy bag is a device which collects faeces involuntarily discharged from the intestines. It needs to be attached to a stoma (an artificial opening to the intestines) and changed periodically.

Activity 5 - the parts in issue

6 Activity 5 of Schedule 1 sets out a series of individual descriptors relating to a claimant's ('C's') toilet needs or incontinence which, if satisfied, give points towards the necessary minimum score for an award.

5. Managing toilet needs or incontinence.

- | | |
|--|---|
| a. Can manage toilet needs or incontinence ¹ unaided. | 0 |
| b. Needs to use an aid or appliance to be able to manage toilet needs or incontinence. | 2 |
| c. Needs supervision or prompting to be able to manage toilet needs. | 2 |
| d. Needs assistance to be able to manage toilet needs. | 4 |
| e. Needs assistance to be able to manage incontinence of either bladder or bowel. | 6 |
| f. Needs assistance to be able to manage incontinence of both bladder and bowel. | 8 |

7 The following terms are defined in the interpretation provisions of paragraph 1, Part 1 of Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013.

'aided' means with

- (a) the use of an aid or appliance; or
- (b) supervision, prompting or assistance

¹ There is no definition of incontinence as a term in and of itself in the Regulations. Its meaning can, however, be extrapolated from the definition of managing incontinence in paragraph 1, Part 1 of Schedule 1.

'manage incontinence' means manage involuntary evacuation of the bowel or bladder, *including use of a collecting device* or self-catheterisation, and clean oneself afterwards (italics added)

'supervision' means the continuous presence of another person for the purpose of ensuring C's safety

'toilet needs' mean

- (a) getting on and off an unadapted toilet
- (b) evacuating the bladder and bowel; and
- (c) cleaning oneself afterwards; and

'unaided' means *without (a) the use of an aid or appliance*; or (b) supervision, prompting or assistance (Schedule 1, Part 1, Paragraph 1). (italics added)

In regulation 2,

'aid or appliance' means (a) any device which improves, provides or replaces C's impaired physical or mental function; and (b) includes a prosthesis.

8 The DWP's view as shown in the PIP Assessment Guide issued by the DWP to health professional's ('HP's) carrying out PIP assessments is that claimant who has a stoma and uses a colostomy bag for the evacuation of the bowel is incontinent within the meaning of Activity 5. The advice is as follows:

'Activity 5 – Managing toilet needs or incontinence'

This activity considers a claimant's ability to get on and off the toilet, to clean afterwards and to manage evacuation of the bladder and/or bowel, including the use of collecting devices. This activity does **not** consider the ability to manage clothing, climb stairs or mobilise to the toilet.

Notes:

Toilet needs means the ability to get on and off the toilet, evacuation of the bladder and bowel and clean oneself afterwards.

Managing incontinence means the ability to manage involuntary evacuation of the bladder and/or bowel including self catheterisation, incontinence pads, using collecting devices and clean oneself afterwards.

Claimants with indwelling (permanent) catheters or stoma are considered incontinent for the purposes of this activity.

Descriptor A may be appropriate for claimants who use a commode due to limited mobility (to the toilet) but can manage their toilet needs or incontinence. If the urinary tract is normal there will be little risk of incontinence no matter how long it takes to mobilise to the toilet. If there is, for example, a bladder problem and the claimant will be incontinent before they reach the toilet, then the commode is being used as aid for the bladder condition (toilet needs) not the mobility problem (mobility needs). Urinary tract conditions that cause urgency of micturition will be relevant, other urinary tract conditions may not be relevant.

When considering whether a claimant requires an aid or appliance, HPs should distinguish between:

- an aid or appliance that a claimant must use or could reasonably be expected to use, in order to carry out the activity safely, reliably, repeatedly and in a timely manner; and
- an aid or appliance that a claimant may be using or wish to use because it makes it easier to carry out the activity safely, reliably, repeatedly and in a timely manner.

Descriptor advice in favour of an aid or appliance should only be given in the former case. An aid or appliance is not required in the latter.

Where a claimant chooses not to use an aid or appliance that he or she could reasonably be expected to use and would enable them to carry out the activity without assistance, they should be assessed as needing an aid or appliance rather than a higher level of support.

| | |
|---|--|
| A | Can manage toilet needs or incontinence unaided. |
| B | Needs to use an aid or appliance to be able to manage toilet needs or incontinence. |
| | <i>For example: suitable aids could include commodes, raised toilet seats, bottom wipers, incontinence pads or a stoma bag</i> |
| C | Needs supervision or prompting to be able to manage toilet needs. ‘ |

9 Further guidance on some of the terms is given in later paragraphs of the guide:

Aids and appliances

3.2.18. The assessment takes into account where individuals need aids and appliances to complete activities. In this context:

- **Aids** are devices that help a performance of a function, for example, walking sticks or spectacles.
- **Appliances** are devices that provide or replace a missing function, for example artificial limbs, collecting devices (stomas) and wheelchairs.

3.2.22. Claimants who use or could reasonably be expected to use aids to carry out an activity will generally receive a higher scoring descriptor than those who can carry out the activity unaided.

10Based on the advice in the guide, the HP who conducted the face to face interview with the appellant awarded him 2 points for descriptor 5b.

11The DWP’s advice is of persuasive value, but it is not law, and the F-tT took chose to depart from their view by taking away the 2 points. The question it asked itself was whether the stoma/bag combination constituted an ‘aid or appliance’ which automatically invoked descriptor 5b (‘You need an aid or appliance to manage your toilet needs or incontinence’). It decided that it did not. Instead, it decided that the combination constituted an artificial extension or bypass of the bowel, which did not

of itself need either special equipment or third party assistance to empty. The F-tT conceded that this interpretation was arguable and that it might be wrong.

Discussion of Activity 5

12The descriptors the F-tT had to deal with are convoluted. It is understandable that a F-tT dealing with a complex matter such as the one underpinning this appeal would not have got to the heart of the problems arising from the definition of managing incontinence in paragraph 1, Part 1 of Schedule 1 and what the activity was meant to achieve.

13I shall confine the discussion to bowel problems unless it is necessary to do otherwise.

14The definition envisages needs arising from the functioning of the bowel (evacuation) over which the claimant has no control '*including* use of a collecting device'. A colostomy bag is undoubtedly a collecting device. It is also undoubtedly a device falling within the meaning of an aid or appliance in regulation 2. If the descriptor means that a claimant who can manage his incontinence including the colostomy bag on his own (and clean himself after) scores nil points, how does this fit with descriptor 5b which is aimed at those who need an aid or appliance to manage incontinence? Arguably, if the colostomy bag is included within the function in 5a (resulting in nil points), it logically should be excluded as an aid or appliance for managing incontinence under 5b. This would mean that this important class of claimants suffering significant condition requiring the use of an undoubted medical appliance, cannot score points for a disabling condition which is specifically envisaged by the definition. In other words, it is possible that the only way a claimant in the appellant's position could qualify for points under 5b would be by squeezing into the definitions of toilet needs instead of incontinence. That is not necessarily easy, as will be explained.

15Other sources have come to the same conclusion as the F-tT, albeit for different reasons. The learned authors of Sweet and Maxwell's Social Security Legislation, Volume 1, 2015/16 [4.232, page 767] came to the conclusion that since 'managing incontinence involves dealing with involuntary evacuation of the bowel or bladder and includes doing so with the use of devices such as colostomy bags and a catheter – so if the claimant can manage those devices unaided he scores no points.'

16I granted permission to appeal to the appellant pointing out the difficulties in the definitions in Activity 5a and 5b and the interaction between them. The more the parties and I considered the language of the descriptors, the clearer it became that Activity 5b was intended to apply to claimants in the appellant's position. The question was how this could be achieved on the language used.

17Both parties made thoughtful submissions in an attempt to unravel the problem but I did not consider that their submissions satisfactorily resolved the difficulties in the relevant provisions. This led to a discussion of whether the principles in *Pepper v Hart* [1992] UKHL 3 could be applied to cut the Gordian knot. The Secretary of State produced evidence that persuaded me that this was the way forward. I do not, therefore, propose to lengthen this decision overly by setting out in detail the very

interesting submissions by the parties. I shall, however, briefly summarise some of the arguments and their drawbacks.

18The permutations within Activity 5a after the definitions in section 2 and paragraph 1 of Schedule 1 are inserted

5a Can manage toilet needs or incontinence unaided – 0 points

Toilet needs:

- a Can manage the toilet need of getting on and off an unadapted toilet without the use of any device which improves, provides or replaces C's impaired physical or mental function;
- b Can manage the toilet needs of evacuating the bladder and bowel without any device which improves, provides or replaces C's impaired physical or mental function; and
- c Can manage the toilet need of cleaning oneself afterward without any device which improves, provides or replaces C's impaired physical or mental function

As an alternative, the claimant will also score nil points if he has incontinence which he can manage unaided, but no toilet needs as defined.

'Can manage involuntary evacuation of the bowel or bladder, *including* use of a collecting device or self-catheterisation, and clean oneself afterwards *without* any device which improves, provides or replaces C's impaired physical or mental function.'

19The permutations within Activity 5b (2 points) after the definitions in section 2 and paragraph 1 of Schedule 1 are inserted

Descriptor 5b - needs to use an aid or appliance to be able to manage toilet needs or incontinence.

Toilet needs:

- a Needs to use [any] device which improves, provides or replaces C's impaired physical or mental function for getting on and off an unadapted toilet;
- b Needs to use [any] device which improves, provides or replaces C's impaired physical or mental function to manage the toilet needs of evacuating the bladder and bowel; and
- c Needs to use [any] device which improves, provides or replaces C's impaired physical or mental function to manage the toilet need of cleaning oneself afterward.

Managing incontinence:

[C] needs to use a[ny] device which improves, provides or replaces C's impaired physical ... function to be able to manage involuntary evacuation of the bowel or bladder, including use of a collecting device or self-catheterisation and clean oneself afterwards.

The problems in the definitions relating to managing incontinence

20Descriptor 5a in respect of managing incontinence envisages that the claimant can manage the composite concept of involuntary-evacuation-of-the-bowel-by-using-a-collecting-device-and-clean-himself-without-use-of-an-aid-appliance). 'Unaided' modifies the entire concept of 'incontinence', and not just cleaning up afterwards.

21The simplest reading of this descriptor, which is reflected in Volume 1 of Social Security Legislation 2015/16 as cited above, is that a claimant who can independently manage his incontinence by using a colostomy bag and independently clean himself afterwards in the usual way scores nil points under 5a. This treats the word 'and' as conjunctive. It is only if there is some *further* piece of equipment, or assistance which he requires to evacuate his bowel and clean himself that he even begins to step up to the plate of other descriptors.

22Another way to read it is that the claimant uses and does not use an appliance at the same time, but that is absurd. The Secretary of State's submission is that it is also at odds with the intended effect of the descriptor.

Could descriptor 5b be applicable instead?

23The appellant's representative submitted that descriptor 5b could apply instead on the basis that the appellant fulfilled one of the alternative forms of toilet needs.

24Although an attractive submission, I did not accept it. The problem is with the use of the word 'and', particularly in alternative (b) of toilet needs. Alternative (b) relates to evacuating the bladder *and* bowel. That contrasts sharply with the use of the definition of managing incontinence, where the draftsman uses the disjunctive 'or' in relation to evacuating the bowel *or* bladder. Since the draftsman was dealing with the same bodily functions within one activity with graded alternatives, I am not satisfied that the use of the word 'and' within alternative (b) was used other than in its usual conjunctive sense. Giving 'and' its ordinary conjunctive meaning in this context does not create ambiguity, nor would it deprive the descriptor of meaning, nor would it be absurd.

25I have also considered alternative (a) in coming to this conclusion. Like (b), this descriptor uses the word 'and' – i.e. getting on *and* off an unadapted toilet. The two descriptors adopt the same usage and I am not persuaded that there is any reason to treat the word as disjunctive.

26Mr Evans also argued that, because each one of the alternatives (a) (b) and (c) comprised in the definition of toilet needs was disjunctive, as held by the Upper Tribunal in *GW v Secretary of State for Work and Pensions* [2015] UKUT 570 (AAC) (*CPIP/1787/2015*), then each one of the individual needs within each of the alternatives must also be disjunctive. That proposition does not form part of the

reasoning in *GW v Secretary of State for Work and Pensions* [2015] UKUT 570 (AAC). Neither does it follow logically from that case or at all.

27I stress at once that I agree with *GW v Secretary of State for Work and Pensions* at [13] – [15] that alternatives (a) (b) and (c) are disjunctive. It seems to me that that conclusion also follows grammatically from the use of semi-colons in that definition. These stop the word ‘and’ from acting as a conjunctive which makes (a) (b) and (c) cumulative. But the internal dynamic of a provision may differ from the dynamics of the surrounding provisions and require different interpretive techniques.

28Of course, meaning often depends on context and the purpose to be served by using the words chosen. In everyday English usage, however, ‘and’ is conjunctive, rather than disjunctive. It binds one thing to another. ‘Or’, on the other hand, normally indicates a choice between or among alternatives.

29Mr Heath’s submissions explained the ways in which ‘or’ may mean ‘and’. So, for example, ‘or’ can mean ‘and/or’, as in ‘(a) and/or (b)’. This is called ‘the weak disjunctive; or it might be only (a) or only (b), but in another context it might be both (a) and (b). On the other hand, sometimes it may mean (a) or (b), but not both. This is called ‘the strong disjunctive’. Sometimes, the word ‘or’ may be the weak disjunctive in one part of a sentence and the strong disjunctive in another part of the sentence. But where Parliament chooses to express itself so ambiguously, the likely result is delay and hardship for claimants who find that their entitlement depends on the vagaries of English usage.²

30My conclusion is that descriptor 5b does not assist the appellant. Since the scope of descriptor 5b arises in a great many Personal Independence Payment cases, the Secretary of State may wish to consider amending (b) of the definition of toilet needs to cover bladder or bowel.

Pepper v Hart

31Even if I am wrong about this, I consider that I am entitled to apply the case of *Pepper v Hart* [1992] UKHL 3 find a solution. This applies in cases where a legislative provision is ambiguous, obscure or its literal meaning leads to an absurdity and allows a court or tribunal to consider a statement made by or on behalf of a Minister or other person who is the promoter of the Bill (or in this case, Regulations) which is considered to disclose the mischief aimed at by the enactment or the legislative intention underlying its words, and it is clear.

32The Secretary of State summarises the ambiguity or obscurity in paragraph 17 of his Submission: -

² Compare the decision in *M C v Secretary of State for Work and Pensions (ESA)* [2012] UKUT 324 (AAC) with the Northern Irish decision in *MM v Department for Social Development (ESA)* [2014] NI Com 48. The Upper Tribunal and the Northern Irish Commissioners came to opposite conclusions on the meaning of an either/or descriptor concerning standing or sitting which was common to both jurisdictions prior to January 2013. The problem was finally solved by redrafting the descriptor to make it plain that the claimant only scored points if he could not either stand or sit or combination of both for a particular period of time.

17. For example, does 'any device' exclude 'a collecting device'? If a person can manage involuntary evacuation of the bowel when using a collecting device, but that collecting device is needed to improve his impaired physical function, does he fall within descriptor 5a or 5b? Such persons need to use the device to improve their impaired physical function to enable them to manage involuntary evacuation of the bowel, so a plain reading of descriptor 5b should arguably apply, unless what is meant by 'any device' excludes a 'collecting device'. If it excludes a 'collecting device', is it sufficient that this result is achieved by implication not by express provision?

33The Secretary of State is also concerned that an absurdity arises for the reason I pointed to in my Observations: - can Parliament have intended to exclude from 5b a major type of aid/appliance necessary to handle a difficult medical condition such as the appellant's whilst considering a simple dosette box or adapted fork (for example) to be a sufficient aid/appliance for activity 2 or 3?

34The courts give wide meaning to the concept of absurdity –

'... using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter-mischief' (*Bennion on Statutory Interpretation* (6th edition, 2013, section 217, footnote 152, p571)

35Without looking at ministerial material, I would be driven to a result which is anomalous, illogical and which produces a disproportionate counter-mischief.

36The principle in *Pepper v Hart* [1992] UKHL 3 is no longer confined to considering statements made orally in Parliament or in committee. The material need not be found in Hansard.

In *Gow v Grant* [2012] UKSC 29 [29] Lord Hope observed that 'the rather strict rules that were laid down in *Pepper v Hart* have gradually become more relaxed' to enable the court to establish the intention of the legislator. In *Gow v Grant* the remarks relied upon were contained in a letter from a Deputy Minister.

In *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 [5] Lord Steyn went so far as to say that 'there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates' and admitted Explanatory Notes in order to 'cast light on the objective setting or contextual scene of the statute and the mischief at which it was aimed'. In his view such materials were always admissible aides to construction though their logical value had to be assessed by the court.

In *Chief constable of Cumbria v Wright* [2006] EWHC 3574 Lloyd Jones J considered that in general, official statements by government departments administering an Act, or by another authority concerned with an Act, could be taken into account as persuasive on its legal meaning.

37The principle in *Pepper v Hart* encompasses secondary as well as primary legislation - *Bennion on Statutory Interpretation* (section 60, p237).

38The explanatory memorandum to Regulations prepared by the sponsoring government department serves the same purpose as explanatory notes for a Bill and

is laid before Parliament. In these circumstances, I consider that they may be considered in determining Parliamentary intention.

39The explanatory memorandum accompanying the Personal Independence Payment Regulations refers specifically to the consultation preceding those Regulations. In my view, it can be taken as incorporated by reference. Paragraph 8.2 refers to the Government's published response of 13 December 2012:

The definition of an appliance on page 59 reads 'Appliances are devices that provide or replace a missing function, for example artificial limbs, *collecting devises (stomas)* and wheelchairs; and

The examples given in respect of descriptor b on page 67 reads 'For example: suitable aids could include commodes, raised toilet seats, bottom wipers, bidets, incontinence pads or a stoma bag'. (italics added)

40Mr Heath submitted that this material provided an aid to construction which clarified the ambiguity or prevented absurdity from arising.

41I accept the submissions made on behalf of the Secretary of State. A literal interpretation of the definition of 'manage incontinence' combined with the wording of descriptor 5b results in a contradiction or anomaly, and in view of the greater medical need of a person requiring a stoma and colostomy bag, it appears to be an absurdity. The materials produced resolve these problems and, in my view, provides a surer basis for the decision than a simple purposive interpretation.

42Using these materials I conclude that the appellant falls within descriptor 5b on the basis of managing incontinence.

43Issue 2 – Is there an inconsistency in awarding the appellant points because he required supervision to be safe while washing and bathing [Activity 4, descriptor (c)] but not awarding points for preparing food because he required supervision to cook a simple meal [Activity 1, descriptor (e)]?

44The answer to this question is 'it depends'. There is no doubt that findings in relation to one activity may be relevant to another activity. But the extent to which findings on one activity actually impact on another activity depends on why those facts were found.

45Activity 4 – Washing and Bathing: The descriptor for which the F-tT awarded points was 4c-

c– Needs supervision...to be able to wash or bathe.

Activity 1 – Preparing food: - The descriptor for which F-tT did not award points is (e) needs supervision or assistance to either prepare or cook a simple meal.

The further provisions apply:

Supervision (paragraph 1, Part 1 of Schedule 1) means the continuous presence of another person for the purpose of ensure C's safety.

Regulation 4(2A) requires that when assessing C's ability to carry out an activity, C is to be assessed as satisfying a descriptor only if C can do so
(a) safely.

Regulation 4(4) defines 'safely' as meaning

(a) in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

The findings on the evidence

46In [2] [6] (and [7]) of its Statement of Reasons, the F-tT made findings of fact, that the appellant has been able to wash and dress himself, adapting appropriately his techniques for those tasks, to eat and drink independently including making himself a cup of tea. His wife had always done the cooking so he never needed to acquire that skill. If his wife was unavoidably away, he would rely on takeaways and could probably make himself a bacon sandwich. He used a dosette box to keep track of medication, but if he forgot to take it, he would remember later on and take it, no ill effects. The medical conditions that caused him problems [6] were the bowel cancer which led to his need for a stoma and colostomy bag, and a cardiac problem which required the insertion of stents and medication. He also had a history of back pain. He had no cognitive impairment or mental health disorder.

47The F-tT notes that his GP reported (some 5 months after the decision of 17/1/14) that the appellant gets leg cramps which affect his mobility. The GP confined this to stairs and hills. He was guarded in the way he dealt with the appellant's other complaints about leg cramps, saying the appellant 'reported [some] difficulty on level ground' (p85) and the appellant 'report(s) that he gets leg cramps which make his legs give way'. The F-tT is equally guarded about the problems preceded by the words 'reported'.

48As regards washing and bathing [10], the F-tT noted that the appellant denied needing either aids or assistance to wash and bathe in his Personal Independence Payment self assessment questionnaire (14/8/13) and he told the health professional (18/10/13) that he could manage to strip wash at the sink and shower independently. The F-tT finds that 'the appellant's wife is on hand and may help'. It concludes 'Given the intermittent incidence of cramps, their main relationship to walking on stairs and hills, what he told the health professional as late as 18/10/13 about showering independently, 'we have taken the view that the presence of his wife was a reasonable precaution but physical assistance was not actually necessary' and awarded 2 points, without further explanation, for supervision.

49The problem here is, as a precaution' for what? The appellant's evidence at the hearing as recorded in the Record of Proceedings was merely that wife merely 'steadies him as he get in and out' of the bath (over which is the shower). There is no discussion of why he needed steadying, and I am unable to find evidence to suggest that he gets leg cramps in the shower. Although the representative says that his leg cramps are unpredictable, that is not the case. The circumstances in which he gets cramps are confirmed by the GP as being when he is walking on stairs and

hills. The GP does not confirm the 'reported' problems about walking on level ground or that his legs give way in other circumstances and the F-tT did not, either. In addition, there is certainly nothing from which it can reasonably be concluded that the appellant needed supervision which must be continuous. There does not appear to be any medical evidence of unsteadiness and insofar as the appellant claimed to have his wife's assistance, the reason given did not tally with the asserted reason of leg cramps.

50The evidence on washing and bathing was deeply flawed and does not support the F-tT's conclusion on washing and bathing. I did not, however, remove the points since I have decided not to remit the matter. It is obvious that the F-tT's conclusion can only bear the slightest weight.

51In respect of preparing food, the F-tT again affirmed that the main relationship of the leg cramps was to walking on stairs and hills (see also [13]). It was clearly not persuaded by the GP's report, describing his position on the appellant's legs giving way as 'guarded'. At [9], the F-tT specifically rejects the argument that the appellant would be likely to fall, and therefore to be at danger in the kitchen, because 'he told us that he has had occasional falls while walking, but if that is so we find it odd that he has not even considered supporting himself with a stick or similar aid. We have taken the view that the risk of him falling in his kitchen for this reason is remote and we have not awarded any points'.

52It is possible to argue at length about the jurisprudential ramifications of the word 'remote' in Personal Independence Payment, but in relation to the facts as found here, it would be pointless. It is plain on reading the decision that the F-tT's considered the likelihood of falling from a leg cramp fanciful. In the circumstances, even if there was an error, I have no hesitation in so finding.

[Signed on original]

[Date]

**S M Lane
Judge of the Upper Tribunal
27 June 2016**