IN THE UPPER TRIBUNAL **Appeal No. CPIP/665/2016**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 18 December 2015 under number SC227/15/00976 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**

4. **The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is the 13 May 2015. Any further evidence, to be relevant, should shed light on the position at that time.**

5. **The new First-tier Tribunal will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. This appeal relates to a decision of the First-tier Tribunal dated 18 December 2015 that the Appellant was not entitled to either component of Personal Independence Payment (PIP). The Appellant suffered from lumbar spinal stenosis. He had pain in his back, neck, shoulders and legs. He also suffered from diabetes, anxiety and depression. He had claimed to satisfy a number of descriptors in relation to the daily living component and the mobility component of PIP, but this appeal is concerned only with the mobility component.

2. Mobility Activity 2 in Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013 reads as follows:

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

3. Regulation 4 of the 2013 Regulations provides:

> "(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 –
>
> (a) safely;
>
> (b) to an acceptable standard;
>
> (c) repeatedly;
>
> (d) within a reasonable time period; … …
>
> (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."

4. There is no definition of "to an acceptable standard".

5. The First-tier Tribunal had decided that the Appellant satisfied mobility descriptor 2b, and awarded him 4 points.

6. The tribunal's reasons, in so far as relevant, were as follows:

> "10. We accepted Mr [S's] evidence that he had constant pain in his neck, left shoulder and back and this affected his walking. However, he was not consistent in the distance he could walk before having to stop; in the claim form at page 36 he indicated that it was less than 20 metres, whilst at page 82 he said "I think it is fair to say that I cannot walk fifty yards". …
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> 11. In evidence, Mr [S] told us that … he thought he could walk between 30 and 60 seconds at a slow pace before having to stop, but we consider this an underestimate. He told us that he had walked from the waiting room to the Tribunal room – a distance known to the Tribunal to be 33 metres – without needing to stop and he thought that he would have been able to turn around immediately and return to the waiting room without stopping. He said that when he had to stop, he would sit down if he could, but otherwise stand for a few minutes and would then be able to do a similar distance again.
>
> 12. In our view, most of the time the appellant could walk for about 2 minutes at a slower than average pace before having to stop and he could do this safely, repeatedly and within a reasonable time scale. We considered mobility descriptor 2(b) was properly awarded."

7. The Appellant appealed against the decision in relation to the mobility component. I gave permission to appeal. The main basis on which I did so was that it was arguable that the tribunal had failed to address whether the Appellant could mobilise the distance which it found he could walk to an acceptable standard, taking into account the pain that he said that he suffered. I also identified a possible error as to the tribunal's treatment of his ability to mobilise the distance repeatedly, and asked whether the tribunal should have addressed the proportion of days on which the Applicant satisfied any of the descriptors in accordance with regulation 7.

8. By written submissions dated 11 May 2016 the Secretary of State does not support the appeal. The Appellant has not made further comment on the Secretary of State's submissions. Both parties have stated that they do not request an oral hearing. I am satisfied that I can fairly determine this appeal on consideration of the papers.

Discussion

9. On the main issue, Mr Whitaker (who has made the written submissions of behalf of the Secretary of State) says that it is a matter for the tribunal whether pain is significant enough to mean that a person cannot mobilise to an acceptable standard. Mr Whitaker says that the Appellant did not explicitly state that he could not walk to an acceptable standard. His evidence was that his pain increased as he walked and that after a short distance the pain stopped him. Mr Whitaker says that this meant that the pain was not significant enough to prevent him walking up to that point, and so it was at that point at which the pain meant that walking was to an unacceptable standard. He asks, rhetorically, "Why would the claimant continue to walk through significant pain when he didn't have to?"

10. I do not agree with these submissions. The Appellant's case had consistently been that his ability to walk was limited as to distance and speed, and that he suffered pain throughout. Thus, in his claim form he said at page 37 "I walk slowly with a slight limp, I have pain at the base of my spine, shoulder (leftside) and neck which increases as I walk and envelops my whole torso. My right leg often gives way – very few steps and my right arm has started to shake a lot with spasms, my right arm sometimes flails around when my right leg gives way as I try to stay balanced". His pain management doctor had written (page 45) that the Appellant "felt that his pain was present continuously and walking was aggravating his symptoms…He could that his walking was very impaired due to the back pain and could only walk for less than 10 minutes". In his request for mandatory reconsideration the Appellant described constant pain and then said "I would rather push through the pain and stay as active and independent as I can, for as long as I can. I dread the thought of being in a wheel-chair or living in some sort of supported accommodation." He said "I think it is fair to say that I cannot walk fifty yards as I struggle at every step". The note of his oral evidence at the hearing was "I am in constant pain …the further I go the worse it gets….I think I could walk about 30 sec to 2 minute – not very long – it is the pain that would stop me."

11. What the Appellant was saying in his written and oral evidence was that he suffered pain when he walked, that he would walk slowly for a short distance despite the pain but that it would get worse until the pain would stop him. It could not properly be assumed that, because the Appellant managed to keep going for a certain distance, any pain he experienced while he was walking was not relevant. If a claimant cannot carry out an activity at all, regulation 4(2A) does not come into play. Where a person is able to carry out an activity, pain is clearly a potentially relevant factor to the question whether he or she can do so to an acceptable standard.

12. Although not legally binding, the approach set out in PIP Assessment Guide (2016), which provides guidance for health professionals in assessing claimants, reinforces my conclusion:

> "3.2.5 The fact that an individual can complete an activity is not sufficient evidence of ability. HPs may find it helpful to consider:
>
> …
>
> - Impact – what the effects of reaching the outcome has on the individual and, where relevant, others; and whether the individual can repeat the activity within a reasonable period of time and to the same standard (this clearly includes consideration of symptoms such as pain, discomfort, breathlessness, fatigue and anxiety)."

13. This was also the approach taken by Upper Tribunal Judge Parker in CPIP/2377/2015 where she said of regulation 4(2A) and 4(4):

> "6. … 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'…
>
> 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."

14. The Appellant here was asserting that his was such a case. He had not succeeded in showing that he could not walk over 50 metres repeatedly or within a reasonable time period, but he said that he did so in considerable pain. The answer to Mr Whitaker's rhetorical question is found in the Appellant's request for mandatory reconsideration from which I have cited above: that he would rather push through the pain in order to stay as active and independent as possible. In addition, in his claim form he said that he experienced other difficulties while walking – his arm going into spasm or flailing, and his leg giving way – which could also be relevant to whether he could walk the distance to an acceptable standard.

15. The tribunal was wrong not to consider what the impact of pain was on the Appellant's ability to mobilise the distance found to an acceptable standard. The tribunal was not relieved of the requirement to consider the application of regulation 4(2A) simply because it, or any element of it, had not been mentioned in terms by the Appellant. The provision was put in issue by the evidence.

16. There is no need for me to determine the other matters raised in my grant of permission. In any event, on reflection I agree with Mr Whitaker's submissions that whether the Appellant could walk the distance repeatedly did not arise on the evidence. Nor was there anything in the evidence to suggest that the Appellant's condition was variable such that regulation 7 might apply. On the contrary, the Appellant's case was that his condition was "pretty much the same from day to day" (page 105).

17. On the basis of the error of law which I have found, I allow the appeal and set aside the tribunal's decision. Further findings of fact are required and so I have decided to remit this appeal to a different tribunal in accordance with the directions which are set out above.

Signed on the original
on 11 July 2016

Kate Markus QC
Judge of the Upper Tribunal