

IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER

Case No. CPIP/2908/2015

Before: A. Rowley, Judge of the Upper Tribunal

**Decision:**

I allow the appeal. As the decision of the First-tier Tribunal (made on 3 August 2015 at Newcastle under reference SC225/15/00396) 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. Does a claimant who needs to use incontinence pads to be able to manage incontinence fall within descriptor 5b of the daily living activities of PIP? I have decided that the answer to this question is yes.
2. The claimant has (among other things) incontinence. She applied for, and was refused, PIP. She appealed to the First-tier Tribunal, which awarded her 6 points under the daily living activities and 4 under the mobility activities. The tribunal decided that the claimant did not satisfy any of the descriptors of activity 5 in relation to her incontinence, in part because in its view incontinence pads were not aids within the meaning of the Social Security (Personal Independence Payment) Regulations 2013 (“the PIP Regulations”).
3. I gave permission to appeal. At the Secretary of State’s request the appeal was stayed pending the decision of Upper Tribunal Judge Lane in *JM v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0296 (AAC). I lifted the stay following the issue of the decision in that case.
4. The Secretary of State supports the appeal. His representative, Ms Barnes, submits that the tribunal erred in law in deciding that incontinence pads were not aids. For the reasons given below I accept that submission.
5. Daily living activity 5 in Part 2 of Schedule 1 to the PIP Regulations is headed “managing toilet needs or incontinence.” The relevant parts of the activity insofar as this case is concerned are as follows:

<i>Column 2</i> <i>Descriptors</i>	<i>Column 3</i> <i>Points</i>
a. Can manage ... incontinence unaided	0
b. Needs to use an aid ... to be able to manage ... incontinence	2

6. Regulation 2 of the PIP Regulations provides that an “aid or appliance”:  
“(a) means any device which improves, provides or replaces C’s impaired physical or mental function...”

7. Part 1 of Schedule 1 to the PIP Regulations contains definitions of some of the terms used in the descriptors. The following ones are relevant:

*“unaided” means without – (a) the use of an aid or appliance; or (b) supervision, prompting or assistance.’*

*“manage incontinence” means manage involuntary evacuation of the bowel or bladder, including using a collecting device or self catheterisation, and clean oneself afterwards’.*

8. It is noteworthy that “incontinence” is not itself defined but, as Judge Lane observed in *JM*, its meaning can be extrapolated from the definition of “managing incontinence.”
9. It seems to me that an incontinence pad falls squarely within the definition of an “aid.” It constitutes a device which improves a claimant’s impaired physical function of control of the bladder or bowel.

10. I am fortified in my view by what is said in the Government’s response (dated 13 December 2012) to the consultation which immediately preceded the PIP Regulations. It is referred to in paragraph 8.2 of the explanatory memorandum accompanying the Regulations, and is accordingly incorporated by reference. The Government’s response contains the following:

*“5.57 Various respondents asked us to clarify whether we consider incontinence pads ... as aids and appliances. We recognise that ... these can create additional costs and therefore they are considered as aids and appliances for the purposes of the assessment.”*

11. Further, the PIP Assessment Guide issued by the DWP to Health Professionals carrying out PIP assessments<sup>1</sup> contains the following advice:

*“Managing incontinence means the ability to manage involuntary evacuation of the bladder and/or bowel including ... [using] incontinence pads...”*

12. And in relation to descriptor 5b, both the Government response to the consultation and the Guide list “suitable aids” which:

*“could include ... incontinence pads.”*

13. This approach may explain why question 7a on the PIP claim form is in these terms:

*“Q7a Do you use an aid or appliance to go to the toilet or manage incontinence? Aids and appliance include things like ... incontinence pads...”*

14. Taken together the Government’s response to the consultation and Guide reinforce my view, as does the Secretary of State’s submission to the Upper Tribunal, where Ms Barnes accepts that incontinence pads come within the definition of aids for the purposes of activity 5.

15. Where does that leave the application of descriptors 5a and 5b? In my judgment it follows from *JM* (with which I respectfully agree) that a claimant who manages their incontinence with incontinence pads will not fall within descriptor 5a (which, it will be recalled, scores 0 points). It cannot be said that they can manage their incontinence unaided.

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<sup>1</sup> Which is, of course, of persuasive value only

16. In contrast, if a claimant needs to use incontinence pads to be able to “manage involuntary evacuation of the bowel or bladder” they will score points under descriptor 5b.
17. For the sake of completeness I should, perhaps, add that there is no doubt in my mind that the use of the word “or” between “bowel or bladder” in the definition of “manage incontinence” is used in the disjunctive sense. In other words, a claimant (such as the one in this case) who has bladder but not bowel incontinence could potentially qualify under 5b; and vice versa.
18. For the reasons given above the tribunal erred in law and I set aside its decision. I agree with Ms Barnes that further findings of fact are required (for example in relation to the level and frequency of the claimant’s incontinence). Accordingly, I remit the matter to be reheard by a new tribunal.
19. I give the following directions to the new tribunal. They may be added to or amended by a District Tribunal Judge.
20. 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.
21. 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 (1 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.
22. 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.
23. While it is not a matter for me to direct, it is suggested that the claimant should attend the re-hearing. 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.

**A. Rowley, Judge of the Upper Tribunal**

**(Signed on the original)**

**Dated:** 12 October 2016