

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CPIP/2523/2016

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 17 May 2016 under number SC064/16/00158 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 20 January 2016. Any further evidence, to be relevant, should shed light on the position at that time.**

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

Background

- 1. The Appellant suffers from a variety of conditions: depression and alcoholism, as well as osteoarthritis, asthma and diabetes. She had appealed to the First-tier Tribunal against the Secretary of State's decision that she was entitled to neither rate of personal independence payment (PIP). The tribunal decided that she was entitled only to two points for activity 1(d) and one point for activity 3(b), and so was not entitled to PIP. I gave the Appellant permission to appeal because I thought that it was arguable that the tribunal had erred in failing to award points under activity 9.**
- 2. The Secretary of State does not support the appeal.**

3. Neither party has requested an oral hearing and I am satisfied that I can fairly determine this appeal on consideration of the papers.

Legal framework

4. A claimant's ability to carry out daily living activities is to be assessed by reference to activities and descriptors in Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013. Activity 9 is as follows:

<i>Column 1 Activity</i>	<i>Column 2 Descriptors</i>	<i>Column 3 Points</i>
9. Engaging with other people face to face	a. Can engage with other people unaided	0
	b. Needs prompting to be able to engage with other people.	2
	c. Needs social support to be able to engage with other people	4
	d. Cannot engage with other people due to such engagement causing either- (i) overwhelming psychological distress to the claimant; or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	8

5. Paragraph 1 of Part 1 of Schedule 1 to the Regulations provides that

“engage socially” means: “(a) interact with others in a contextually and socially appropriate manner; (b) understand body language; and (c) establish relationships;

...

“psychological distress “means distress related to an enduring mental health condition or an intellectual or cognitive impairment;

The evidence and the First-tier Tribunal's decision

6. In her PIP claim form the Appellant described a history of self harm and loneliness. In relation to activity 9, she had ticked boxes that she sometimes needed help from another person to help her mix with people and that she found it difficult to mix with other people. She said that she avoided mixing with other people daily, was totally isolated and that that led to self harm. She said that she went out daily to drink but when other people were around her or attempted to be in her company this made her anxious.

7. The assessment was carried out by a nurse, who noted a history of attempted suicide but that the Appellant said she would not now attempt to do so because it never worked, and recorded the following:

“She just wants to go to bed and not wake up. Every day is a struggle and she never feels anything other than being sad and alone...She self harms whenever she is

worried or feels panicky. She last self harmed last week. She was very stressed at the thought of today's assessment and cut off all her eyebrows....She cannot cope with anything and alcohol is her only way of dealing with things...She is not scared of going out but is scared of being around people.

...She goes out to the pub at about 1pm every day and goes between 3 pubs. She stands at the bar as she does not like speaking to people. She moves to another area if anyone tries to chat with her. The regulars in the pub no [sic] her now and know she does not like to speak and tend to leave her alone."

8. The nurse noted that Appellant had some difficulty coping at interview, appeared tense but had adequate rapport. She was withdrawn but did not require prompting. The nurse concluded that the reported difficulties with engagement with others were inconsistent with her going to the pub every day, that she was at the consultation alone and did not require prompting, and that she had adequate eye contact and rapport, and decided that she was able to engage with other people unaided.

9. Before the First-tier Tribunal there was a letter from the Appellant's GP explaining that it was difficult for the Appellant to obtain help because:

"It is the anxiety and social phobia that most troubles [the Appellant's] life as this causes her severe restriction with contact with other people ..."

10. In its statement of reasons at paragraph 10 the First-tier Tribunal noted the nurse's observations of the Appellant's presentation at the assessment and observed her presentation to have been the same at the hearing.

11. In relation to activity 9 the tribunal found that the Appellant's statements about her isolation and difficulties mixing with people were "unhelpful" because they were contradicted by her going to the pub daily. They preferred the nurse's observations. At paragraph 43 the tribunal noted that she met the nurse alone, went to three pubs daily, went to a chip shop daily, attended appointments with her GP and went to the pharmacist, and concluded:

"It is plain that, on a daily basis, [the Appellant] readily exposed herself to the possibility of a great deal of contact with people she might not have known in situations she would have been unable to control. That she was apparently able to do so successfully in our view supports the findings of the nurse's examination of her mental state."

Issues

12. I gave permission to appeal because I considered that it was arguable that the tribunal had erred in finding that going to the pub daily was inconsistent with the Appellant's claim that she could not engage socially. In addition the fact that the Appellant could undertake the activities listed in paragraph 43 arguably did not evidence her ability to "engage socially".

13. In written submissions sent on behalf of the Secretary of State, Ms Sutenstall said that the tribunal's findings show that the Appellant was able to interact face to face in a contextually and socially appropriate manner, when she chose to. In addition Ms Sutenstall says that the Appellant saw her diabetic nurse monthly, had contact with a GP outreach worker and her CAB representative, and interacted with people at the pub by buying a drink. Finally she says that, even if

the tribunal made an error, it was not material because at best the Appellant could have been awarded 4 points and so would not have had sufficient, along with the existing 3 points, to be entitled to PIP.

Discussion

14. The First-tier Tribunal found the Appellant's evidence to be unhelpful (and so, it seems, did not afford it any weight) because of what it considered to be the inconsistency between her statements as to her isolation and difficulties in mixing with other people and her going daily to the pub. The first problem with the tribunal's decision is that it failed to make adequate findings of fact to support this. The Appellant had said that she stood at the bar and moved away if anyone tried to chat with her, and that the regulars tended to leave her alone. The tribunal did not address this evidence but, if it was accepted as true, then that would explain how the Appellant could go to the pub despite her anxiety and difficulties in mixing with people. In addition, it would be relevant to know how crowded the pubs were and whether there were significant numbers of people other than regulars. The tribunal's finding that she exposed herself to contact in situations which she would have been unable to control was not supported by adequate findings of fact. The tribunal's findings of fact on these matters, had it addressed them, may have resolved what it considered to be inconsistencies in the Appellant's evidence. It follows from this that it was not reasonably open to the tribunal, on the factual findings which it made, to conclude that the Appellant's evidence was inconsistent and so it was not open to it to reject the Appellant's evidence on that basis.
15. The second problem with the decision is that the tribunal did not make adequate findings or give adequate reasons to support a conclusion that the interactions which the Appellant had, whether at the pubs, chip shop, or with the various professionals who she saw, amounted to engagement with others for the purposes of activity 9.
16. In AM v Secretary of State for Work and Pensions [2015] UKUT 215 (AAC) Judge Mark noted that the regulations do not define "engage" and that, although "engage socially" is defined, that term does not appear in the descriptors. He said
"11 ... in determining whether a claimant can engage with other people to an acceptable standard, the factors set out in the surplus definition of "engage socially" are relevant considerations even if the definition itself lacks meaning because the expression "engage socially" is to be found nowhere else in the Schedule."
17. The tribunal made no findings of fact as to the nature or quality of the Appellant's interactions with other people. As I have said, her case was that she did not engage with people when at the pubs. It is possible that she may have had little if any engagement with the bar staff in the pubs, for instance if she always had the same drinks. Similarly in relation to the chip shop staff. Whether the Appellant's involvement with professionals satisfied the definition was a question of fact for the tribunal to determine, but it did not do so.
18. Moreover, it is possible or even likely that many or even all of the individuals with whom the Appellant interacted were known to her. There is no indication in the regulations that the term "engage socially" is limited to engagement with people who a claimant knows. Indeed the use of the word "others" in the definition of "engage socially", which is unqualified, strongly suggests that it is not so limited.

Moreover, the requirement to be able to *establish* relationships suggests that the activity is not limited to considering engagement with those known to a claimant. Although it is not itself a statement of the law, I am reinforced in this by the PIP Assessment Guide published by the Department for Work and Pensions which states (page 122):

“When considering whether claimants can engage with others, consideration should be given to whether they can engage with people generally, not just those people they know well”.

19. The tribunal did not address whether the Appellant regularly attending the same pubs and chip shop, or meeting with a limited range of professionals, evidenced her ability to engage with people generally.
20. Although the tribunal also relied on the Appellant’s appropriate interactions as observed by itself and the nurse (paragraph 10), neither of whom she knew, it is impossible to know whether the tribunal would have reached the same conclusion as to activity 9 if it had addressed the above matters correctly. In any event, paragraph 10 of the statement of reasons considered isolated and specific examples which, on their own, did not evidence ability to engage with people generally including the ability to establish relationships, for the majority of the time (see regulation 7).
21. The Secretary of State submits that, even if the First-tier Tribunal erred in relation to activity 9, it was not material because the Appellant could not have achieved sufficient points to qualify for the daily living component. I do not agree. The tribunal made no findings of fact as to the Appellant’s claims to self harm as a result of anxiety generated by engagement with others. I acknowledge that the tribunal may have thought that the Appellant’s apparent ability to engage with the nurse contradicted her claim to be so panicked by the prospect of the assessment that she harmed herself. Nonetheless it was an important factual matter which the Appellant raised not only in the context of her meeting with the nurse but also more generally. Although the Appellant said in her claim form that she sometimes needed another person to help her to mix with people, this should not be taken as meaning that she only sought points under descriptor (b) or (c). She had made a number of statements which, if accepted, could have brought her case within descriptor (d): see for instance pages 33, 37, 41, 54 and 89.
22. For these reasons I allow the appeal. It has not been necessary to address the relevance of regulation 4(2A) to the tribunal’s assessment but, as there will need to be a fresh hearing before a new First-tier Tribunal, that tribunal must of course assess the Appellant’s ability to engage with other people face to face in accordance with that provision. I should make it clear that I am making no finding about nor expressing a view on the Appellant’s entitlement to PIP. That is for the new tribunal to decide.

**Signed on the original
on 1 November 2016**

**Kate Markus QC
Judge of the Upper Tribunal**

