IN THE UPPER TRIBUNAL **Appeal No. CPIP/3352/2015**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

Representation
Appellant: Ms J Moore (counsel)
Respondenet: Ms F Scolding (counsel)

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 13 August 2015 under number SC194/15/00141 was made in error of law.

Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and **remake the decision as follows:**

> **The Appellant's appeal against the decision of the Secretary of State dated 31 December 2014 is dismissed.**

REASONS FOR DECISION

Introduction

1. At the time of the Secretary of State's decision which is the subject of these proceedings and is dated 31 December 2014, the Appellant was 41 years old. The main conditions upon which she relied in her claim for personal independence payment (PIP) were fibromyalgia, hip dysplagia and a dislocated knee. She said that she suffered from constant pain, poor memory and concentration, and tiredness. The First-tier Tribunal awarded her 5 points for daily living activities and 4 points for mobility activities, so that she was not entitled to any award of PIP.
2. The Appellant advances the following grounds of appeal:
   a) In relation to disability living activity 6 the tribunal erred in failing to determine whether the Appellant needed to use her bed as an aid in order to dress and undress. In support of this ground, she seeks to depart from the decision in CW v SSWP [2016] UKUT 197.

b) The First-tier Tribunal failed to consider whether the Appellant needed to use an aid (a bath seat) to get in and out of the bath such that descriptor 4(b) would apply.

c) The tribunal erred in failing to consider whether mobility activity 2(c) applied because it did not determine what distance the Appellant could mobilise without crutches. This ground involves consideration of the different approaches of the Upper Tribunal in JP v SSWP [2015] UKUT 529 and in L v SSWP [2015] UKUT 612.

d) The tribunal erred in relation to mobility activity 2 in failing to consider the effect of any pauses or halts in the Appellant's mobility and/or failing to address her speed of walking.

3. I heard the appeal on 27 September 2016. The Appellant was represented by Ms J Moore (counsel) instructed by the Free Representation Unit. The Respondent was represented by Ms F Scolding (counsel) instructed by the solicitor for the Secretary of State. Both counsel had prepared skeleton arguments and I am grateful for these and their helpful oral submissions at the hearing.

The legislative framework

4. The primary legislation governing PIP is the Welfare Reform Act 2012. In summary, the effect of sections 78-80 of the Act is that a person is entitled to the daily living component or the mobility component at the standard or enhanced rate if their ability to carry out daily living activities or mobility activities is, respectively, limited or severely limited by their physical or mental condition. Whether their ability is limited or severely limited is assessed in accordance with the Social Security (Personal Independence Payment) Regulations 2013 ("the Regulations") by reference to activities listed in Part 2 of Schedule 1 and the award of points accordingly.

5. Regulation 4 of the Regulations provides as follows:

> **"4 Assessment of ability to carry out activities**
>
> (1) … whether C has limited or severely limited ability to carry out daily living activities …, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.
>
> (2) C's ability to carry out an activity is to be assessed-
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> (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
>
> (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use."

6. I set out the relevant activities contained in Schedule 1 in the sections below where they arise in relation to each of the grounds of appeal.

Ground 1: Activity 6 – the bed as an aid

7. Activity 6 in Schedule 1 of the PIP Regulations is as follows:

Activity	*Descriptors*	*Points*

6. Dressing and undressing	a. Can dress and undress unaided.	0
	b. Needs to use an aid or appliance to be able to dress or undress.	2
	c. Needs either- (i) prompting to be able to dress, undress or determine appropriate circumstances for remaining clothed; or (ii) prompting or assistance to be able to select appropriate clothing.	2
	d. Needs assistance to be able to dress or undress their lower body.	2
	e. Needs assistance to be able to dress or undress their upper body.	4
	f. Cannot dress or undress at all.	8

8. The Schedule provides that

> "'dress and undress' includes put on and take off socks and shoes;"

9. Regulation 2 defines "aid or appliance":

> "… 'aid or appliance'-
>
> (i) means any device which improves, provides or replaces C's impaired physical or mental function; and
>
> (ii) includes a prosthesis;"

10. The First-tier Tribunal addressed this activity as follows:

> "27. The Tribunal was satisfied that for the majority of the time the Appellant was able to dress and undress unaided. She told the healthcare professional that she did this whilst sat on the bed after showering. Her physical and mental health assessment by the healthcare professional was unremarkable. We were not persuaded from the evidence before us that she could not dress and undress independently and we were not persuaded that she needed prompting or assistance from another person in order to dress or undress. No points were awarded for activity 6."

11. The Appellant submits that the tribunal assessed her ability to dress and undress while sitting down, but it did not consider whether she needed to sit down in order to do so and, if so, whether the bed on which she sat was an aid for the purpose of descriptor 6b. The Respondent's case is that the bed could not be an aid and so there was no need for the tribunal to decide whether the Appellant needed to sit on a bed in order to dress or undress.

12. In NA v Secretary of State for Work and Pensions [2016] UKIUT 197 (AAC) Judge Mark decided that an object can be a "device" within regulation 2 even if not specially made for the purpose and can comprise an ordinary household item. In relation to dressing and undressing, he said:

> "14. …the question is not whether other people might choose to use a chair or a bed to assist when dressing or undressing, but whether a claimant is unable to dress or undress without using them or some other qualifying aid or appliance."

13. The question whether a bed is an aid for the purpose of activity 6 was next considered by Upper Tribunal Judge Jacobs in CW v SSWP [2016] UKUT 0197 (AAC). He agreed (as did the Secretary of State) with Judge Mark that an aid does not have to be specially designed, made or sold for the purpose. The difficult question on which Judge Jacobs focussed was this:

> "19…in order to be relevant, an aid or appliance must relate in some way to the particular activity. I call this the *connection argument*. The difficulty is to define what the connection is."

14. For present purposes, the key passages of Judge Jacobs' analysis are as follows:

> "24…an aid must help to overcome consequences of a function being impaired that is involved in carrying out an activity and is limited by the claimant's condition. To satisfy an *aid or appliance* descriptor, the claimant must need an aid to assist in respect of a function involved in the activity that is impaired.
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> 25. The claimant's representative argues that the claimant needs to sit on account of her physical condition, and is using the bed as an aid to overcome her impaired ability to stand and balance. That, he argues, is all that the claimant has to prove to score the points. I do not accept that argument, because it fails to analyse the functions involved, in this case, in the activity of dressing and undressing….
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> 27. I accept the Secretary of State's argument that there must be some connection between the aid and the activity or descriptor. This is always made clear by the language of the descriptors….
>
> 30. It is often possible, as the claimant's representative submits, to find strategies to avoid the need for an aid altogether. To take an example from dressing and undressing, a claimant could avoid any problems with sitting or standing by lying on the floor to dress and undress. I accept the representative's argument that that approach would render the references to an aid otiose, at least for some activities. I am sure that the Secretary of State's representative did not intend to go that far, but the example shows that it is not appropriate to require that the function in respect of which the claimant uses the aid be absolutely essential to carrying out the activity.
>
> 31. The claimant's entitlement depends on the extent to which they are limited in carrying out the everyday activities specified. That is what the legislation provides. It does not provide for entitlement if the claimant is only limited in carrying out the activity in a particular manner. This provides a focus for avoiding the extreme example I have just considered and for giving proper significance to the role that function plays in the definition of an 'aid or appliance'. The question is this: would this 'aid' usually or normally be used by someone without any limitation in carrying out this particular aspect of the activity? If it would, the 'aid' is not assisting to overcome the consequences of an impaired function that is involved in the activity and its descriptors. So, using an ordinary wooden spoon to stir hot food while it is cooking is using an 'aid' in the everyday sense of the word, but it would not assist in overcoming the consequences of any loss of function, because it would be used anyway. But if the spoon had a special handle for someone with poor grip, it would be an aid for the purposes of Activity 1 (preparing food). Gripping is a function involved in cooking and the use of a handle that improves grip makes the spoon an aid.
>
> 32. There is a difference between a person with has no limitation but who uses a spoon to stir hot food and one who uses a chair or a bed to sit during dressing. In the former case, it is not a matter of choice; no one stirs hot food with their fingers. In the latter case, it is a matter of choice or convenience, as it is possible for someone with full function to dress without sitting. They are, though, also similar in that they are both usual or normal ways of performing the activity. By employing them, the person

> is not demonstrating a limitation with the functions that are required for that aspect of the activity. Rather, the person is demonstrating a limitation with one manner of carrying out that aspect of the activity.
>
> 33. In summary, entitlement to a personal independence payment depends on the claimant having a condition that limits their ability to carry out particular activities. The need to use an aid is a measure of the extent of that limitation. Whether something is an aid depends on whether it assists in overcoming the consequences of a function being impaired in the carrying out of that activity. That function must be one that is required in order to carry out the particular aspect of an activity, not merely one of a range of functions that could be employed.
>
> *The First-tier Tribunal did not make an error of law*
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> 34. The First-tier Tribunal did not express itself in quite the way I have done. It did, though, reject the argument that the claimant was using the bed as an aid and it did so by reference to what most people do when dressing. In essence, that is what I have decided. The tribunal directed itself correctly in law.
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> 35. The tribunal also applied its approach correctly. The evidence was that the claimant sat in order to put on her jeans and take them off because of impaired balance. It is normal to carry out that aspect of dressing and undressing while standing, but it is just as normal to do so sitting down for convenience. Balance for that part of dressing and undressing is not required in order to carry out the activity in a normal manner. Needing to sit does not show an impaired function for carrying out the activity, but only for one manner of carrying out the activity. The tribunal was right, on the evidence, to find that the claimant did not score points for this Activity 6."

15. I applied this decision in ED v SSWP CPIP/282/2016. That case concerned a claimant who suffered from OCD. She could not allow her clothes to touch the floor while dressing and so sat on a bed to do so. Following CW, sitting on a bed was a normal way of dressing and I decided that the mental effect of the claimant's aversion to her trousers touching the floor did not limit her ability to dress in a normal manner. I said:

> "The function in question was putting on trousers. Her ability to put on her trousers (and presumably other clothes on her lower body) was not impaired because, by sitting on the bed, she could do so in a normal manner."

16. Ms Moore did not dispute much of Judge Jacobs' analysis. The dispute in this case has centred on paragraphs 31 and 32 of his decision. Ms Moore submits that a disabled person who does not have a choice as to how to perform an activity which can be performed in a variety of ways, is limited in doing so. She also challenges the relevance of the usual or normal manner of performing an activity. First she says that it is wrong in principle to take that into account. If a disabled claimant needs to use a device to perform an activity, it is irrelevant that non-disabled people may choose to use that device. Second she says that, in any event, it is not usual or normal for people without disabilities to sit on a bed to dress.

17. Ms Scolding relies on CW and in particular the analysis at paragraph 32. She endorses Judge Jacobs' connection test. It identifies whether a function is part of the activity in question.

Analysis

18. The activities in Schedule 1 to the Regulations can be performed in a variety of ways. Dressing and undressing is no exception. A person who has little or no choice as to the manner in which they can carry out an activity but who can do it nonetheless, is not limited in doing so. I respectfully agree with Judge Jacobs' reasoning at paragraph 31 and 32 of CW. Otherwise a claimant who can eat sitting down but needs an aid or assistance to eat standing up would qualify for points under activity 2, and a claimant who can sit in a bath but needs an aid or assistance to lie down in it would qualify for points under activity 4. Once that is understood, it can be seen that what is usual or normal is both a relevant and a necessary consideration. It provides the limits for what a claimant can be expected to do and not to do (see Judge Jacobs' example at paragraph 30 of his decision) in order to undertake an activity.

19. This approach is consistent with an earlier decision of Judge Jacobs, PE v SSWP [2016] AACR 10, in which he said at paragraph 15 that a claimant's limitations cannot be used to raise the standard by which their ability is judged and so a claimant who has difficulty with handling small objects cannot rely on problems in fastening a particular dress that has numerous small buttons. He said that, in considering the sort of clothing to which a claimant's limitations must be applied, it is permissible to consider reasonable and practical alternatives. Thus a claimant who cannot raise her arms to put on a pullover may be able to put on a cardigan. That was in the context of the type of clothing to which a person's limitations applied, but it is equally permissible to consider reasonable and practical alternative means of performing a function.

20. Further support for Judge Jacobs' approach in CW is found in regulation 4(2A) of the Regulations which provides that a claimant is to be assessed as satisfying a descriptor only if they can do so safely, to an acceptable standard, repeatedly and within a reasonable time period. It follows that as long as a claimant can perform the relevant functions in a manner which satisfies those criteria, it does not matter that they cannot do so in ways which a person without disabilities would do.

21. Ms Moore submits that the effect of regulation 4(1) and (2A) taken together is that it is relevant to consider the reason for someone performing an activity in a particular manner. A person who cooks very slowly because they are fussy does not have limited ability to cook, but a person who cooks very slowly because of arthritis does. This is correct, as far as it goes, because the legislation requires a person to be limited in performing an activity by their physical or mental condition. But the submission misses the point because it does not assist in identifying the connection between the aid and the activity.

22. Ms Moore says that the effect of CW would be to exclude many needs which at present would be thought to qualify for PIP. In GB v SSWP [2015] UKUT 546 (AAC) the Upper Tribunal decided that a single lever tap is an aid. Another example is a dossette box. Ms Scolding says that the Secretary of State considers that GB is incorrect in the light of CW and is amending the PIP guidance to remove single lever taps as an aid or appliance. These submissions do not assist in the resolution of the issue here. Earlier decisions did not undertake the detailed analysis found in CW and, if they need to be revisited in the light of it that does not mean that CW is wrong. It is not appropriate for me to decide whether those decisions remain good as whether other everyday objects are aids depends on the activity in question because different activities test

different functions. That will be for the Upper Tribunal to decide in cases if and when the issues arise on the facts.

23. CW is not inconsistent with Judge Mark's analysis in NA. His observation at paragraph 4 that it was irrelevant what other people might choose to do was made in the context of addressing the question whether an ordinary every day object could be an aid. In that context, it did not matter that such objects may be used by non-disabled people as a matter of choice. He was not focussing on the question of connection which arose in CW and arises here, and so did not need to analyse the functions involved in the activity. For the reasons explained in CW and supplemented here, different considerations apply when deciding whether a person is able to perform the functions involved in an activity.

24. Ms Moore seeks to avoid the logic of CW in its application to the facts of the present case by saying that standing is a necessary function of dressing. She says it is important to take into account the wide range of circumstances in which people dress. It is not only done at home, but also in shops, sports centres, the mosque, or at work, where there may be no place to sit. The ability to stand in order to dress, even if leaning against a wall for balance, is essential. I do not accept Ms Moore's factual premise that public dressing places do not typically have a place to sit. Standing cannot be characterised as a function of dressing simply because there may be some awkward situations in which a person must stand.

25. This leads me to Ms Moore's submission that, as a matter of fact, it is not usual or normal to sit to dress or undress. I do not agree. I do not know whether sitting is the way in which *most* people dress but that is not the test. It is, to borrow Judge Jacobs' terminology in PE, a reasonable and practical way of doing so. In particular, many people will sit in order to put on their lower garments. One only needs to look around a public changing room to realise that sitting is one of a number of normal ways in which people dress.

26. Ms Moore says that, even if a person sits to dress, it is not usual or normal to do so for the whole process: they must raise themselves from sitting in order fully to pull on lower garments. A claimant who is unable to stand up to do that, or who can only do so holding onto something so that their hands are not free to pull their clothes on, will have to lie back in order to raise their bottom and pull on their clothes. Ms Scolding accepted that in such circumstances a claimant may need to use a bed to dress such that the bed is an aid. That might theoretically be correct in an extreme case if it can be said that the bed is being used to assist with the function of pulling on clothes, which is a function tested by activity 6. It is difficult to envisage such a case in practice. The manoeuvre suggested would involve use of considerable body or leg strength. It seems to me that a person who has difficulty standing is far more likely to lift themselves to a standing or partially standing position for a short time, even if they need to use one hand for support or to lean on a wall or furniture, in order to finish dressing.

27. In any event, this was not the Appellant's case in the First-tier Tribunal. Her case was that she could dress while sitting on a bed. In her PIP claim form the Appellant explained that her difficulty in dressing was that she struggled to reach down to put on shoes, socks and trousers because of stiffness and pain. She also said she needed to use crutches when walking because she was in constant pain and she was fatigued which could cause her to trip and stumble. Although in the

"Additional information" box she explained a variety of problems, she did not mention any that was relevant to her ability to dress. The report of the healthcare professional noted that she said she sat on a bed to dress and could do it independently. She is also recorded as saying that she struggled carrying heavy pans and peeling potatoes but there is no indication that she needed to sit when preparing food or cooking, so the implication is that she was able to hold objects while standing up. The report also noted that she walked in the assessment room without crutches and the summary stated "She was able to mobilise 10 metres without aids". The Appellant's appeal to the First-tier Tribunal focussed on pain and tiredness She provided the tribunal with a copy of a local authority assessment of her needs which noted that she needed help with a variety of functions, but did not note a need for help with dressing and also found that she could get up from the sofa and in and out of bed unaided. It was no part of her case that she needed to lie down on the bed in order to finish dressing her lower body, nor that she was unable to raise herself from the bed in order to do so. The Appellant has submitted a witness statement for this appeal. Insofar as it comprises new evidence which was not before the First-tier Tribunal it is not relevant to deciding whether the tribunal erred in law but I simply observe that even there the factual case does not assist her in this regard.

28. In summary, the Appellant's case was that she had difficulty putting on her shoes, socks and trousers but that she could do so when sitting on a bed. For the reasons set out above the tribunal did not make any error of law in concluding that she could perform the activity unaided.

Ground 2: Activity 4 – bath seat

29. The tribunal accepted the Appellant's evidence that if she had a bath she would use a bath seat. It found that she did not need to use it and so awarded no points.

30. The descriptor in issue is 4(b): "Needs to use an aid or appliance to able to wash or bathe". This descriptor attracts two points. Ms Moore conceded that, if I am against her on activity 6, any error in failing to award points for descriptor 4(b) is immaterial because the additional two points are insufficient to generate entitlement to the standard rate of the daily living component. In the light of that, I explain very briefly why I consider that the First-tier Tribunal erred in relation to activity 4.

31. First the tribunal ignored highly relevant evidence in the form of local authority assessment completed less than four months after the Secretary of State's decision, which stated that the Appellant needed a bath seat.

32. Second the tribunal's decision was that she could "get into and out of a bath on her own *using a bath seat"* (my emphasis). This is the language of descriptor 4(b), not 4(a). The Secretary of State submits that the sentence is awkwardly worded but that there is no error. I do not agree. The sentence is clear. The tribunal need not have added the words "using a bath seat" but it did and they qualify the preceding words. Even if I am wrong as to that, at best the sentence leaves a doubt as to what the tribunal meant which leads me to conclude that the reasons are inadequate.

Ground 3: Mobility Activity 2(c)

23. Mobility Activity 2 is 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 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

33. The tribunal found that the Appellant was able to stand and move more than 50 metres but less than 200 metres either aided or unaided. Therefore she satisfied activity 2(b). The tribunal noted the Appellant's case that she walked with crutches for some journeys, but did not make a finding of fact as to whether she could walk any distance without crutches. The HCP had observed that the Appellant was able to walk 10 metres without aids, but did not state whether that was the limit of what she could manage unaided.

34. Ms Moore submits that the tribunal should have determined whether the Appellant could walk up to but no more than 50 metres unaided, in which case she would have satisfied activity 2(c) regardless of how far she could walk with an aid.

35. This issue was considered by Judge Hemingway in JP v SSWP [2015] UKUT 529 (AAC). He addressed the issue as follows:

> "26. The issue relates to the possible applicability and the interpretation of descriptor 2(c) under the activity of moving around. That is the only one of that set of descriptors which enables the scoring of points and which does not contemplate the possibility of a claimant being aided in some way. In looking at the wording of that descriptor, in isolation, it would appear that if a claimant is capable of standing and moving unaided for more than 20 metres but no more than 50 metres he will score 8

points, thereby establishing entitlement to the standard rate of the mobility component, no matter how far he is subsequently able to move using an aid such as, for example, a stick. If that is how the descriptor is to be read then it would follow that a tribunal dealing with a claimant who had some ability to walk unaided but could also use an aid to walk further, would have to specifically address and decide how far that claimant could walk unaided rather than simply reaching a view as to the overall distance he could manage by, in part, moving without an aid and in part moving with one. This tribunal did not do that.

27. As Mr Whitaker points out, such an interpretation would seem to lead to an anomaly. As he says, if a claimant can walk unaided for, to take the example he gives, 1000 metres, then he or she would not satisfy a scoring descriptor. If the claimant could walk aided all the way for 1000 metres, then, similarly, no scoring descriptor would be satisfied. However, if the claimant could walk 50 metres but no more, unaided, and could then manage a further 950 metres aided then that claimant would satisfy 2(c) under moving around and would establish entitlement. That would be despite the fact that an arguably worse off claimant who needs to be aided in order to move, all the time, would score no points at all. It would, as Mr Whitaker again points out, create a special category of claimant – the person who can manage unaided for some of the journey and aided for the rest – who receives unusually generous treatment in the context of the descriptors.

28. If descriptor 2(c) is not looked at in isolation, though, matters appear somewhat different. All of the descriptors set distance boundaries. 2(a) is more than 200 metres, 2(b) is more than 50 metres but no more than 200 metres, 2(c) and 2(d) are more than 20 metres but no more than 50 metres, 2(e) is more than 1 metre but no more than 20 metres and 2(f) is no more than 1 metre. So, if 2(c) were to be capable of being satisfied by the claimant able to achieve a distance of more than 200 metres albeit not able to achieve a distance of more than 50 metres unaided, then that descriptor would be operating in a different way to all of the others with respect to the distance boundary set. Further, it does appear that the intention of 12(c) and 12(d) was to capture claimants who are limited to walking more than 20 but no more than 50 metres and giving differing points based on the way they cover that distance, that is to say, either with an aid or appliance or without one. Specifically it would seem 2(c) was intended to capture claimants who are limited to walking more than 20 but no further than 50 metres and no further even if they have an aid. That might, for example, apply to a claimant who suffers from severe breathlessness or excessive fatigue. Thus, and logically, the arguably worse off claimant who needs an aid or appliance to achieve a distance of more than 20 but no more than 50 metres scores 2 more points than the one who can do so completely unaided. That represents a way of understanding and rationalising the descriptors which does not require the interpretation which would create the above anomaly.

29. In light of the above, therefore, I accept Mr Whitaker's submission that once the tribunal had found that the appellant was able to walk more than 50 metres then it mattered not how that was achieved. He had passed from one threshold to another and that was the end of the matter. It follows that the tribunal did not err in law in considering only the distance the appellant was able to achieve although, for the reasons set out above, that does not save it from having its decision set aside."

36. Shortly after this decision was made and unaware of it, Judge Mitchell made observations on the same issue in L v SSWP [2015] UKUT 612 (AAC). He had allowed that appeal on a different ground and remitted it to the First-tier Tribunal. That tribunal would need to decide whether mobility activity 2(c) applied and,

although he had not heard argument on the point, Judge expressed some the following views:

> "25. I have not heard argument on the point but am not presently convinced there is any justification for departing from the literal wording of mobility descriptor 2(c). I do not think it is irrational to isolate claimants unable to move the relatively short distance of 50 metres unaided and confer upon them entitlement to the standard rate of the mobility component. Such a person is likely to be especially reliant on a walking aid, use it a lot and take it with them wherever they go. There is not much that can usefully be done in day-to-day life with a movement radius of less than 50 metres. Whether or not the person can move further, even a lot further, will not change that effectively continuous need for a walking aid. By contrast, a person who is able to move 50 metres unaided but cannot move 200 metres even with an aid may well be less reliant on a walking aid. For example, imagine a person who can move 150 metres unaided but not 200 metres even with an aid.
>
> 26. On the face of it, there is logic in the treatment of those who are especially reliant on a walking aid. Everything being equal, their use of walking aids and hence their disability-related costs are likely to be greater.
>
> 27. The PIP Regulations are part of a social welfare scheme for those who have to cope with a disability. It recognises that, for disabled people, life tends to pose challenges that are not faced by others. Clearly, it is no part of any tribunal's role to seek to expand the entitlement criteria for a disability benefit. However, in the light of the rationale for PIP, I think a tribunal should be slow to depart from the literal meaning of legislation setting entitlement criteria if that would result in them being effectively tightened up. I am not convinced that descriptor 2(c) operates anomalously if applied literally such that a strained judicial interpretation is required. If the DWP are of the view that its literal wording runs counter to PIP's purpose, they can deal with that by amending the PIP regulations in accordance with the open and relatively democratic process for doing so."

37. Although Judge Mitchell's views were obiter, I gave permission to appeal on this point. It was apparent from a number of applications to the Upper Tribunal that as a result of the different views of the two judges, there was some wider uncertainty as to the correct approach.

38. Ms Moore aligns herself with Judge Mitchell's approach and Ms Scolding with that of Judge Hemingway. I have decided that Judge Hemingway's approach is the correct one. I entirely agree with the reasons which he gave. Having had the benefit of counsels' submissions, I also add the following.

39. First, the Appellant's approach is inconsistent with the clear wording of descriptor (a) that a person who can walk more than 200 metres (whether aided or unaided) scores no points.

40. Second, I do not agree with Ms Moore that the approach in JP involves departing from the words of descriptor (c), whether by reading words in or otherwise. Even if that descriptor is read alone, the words do not clearly have the meaning for which she contends. The meaning depends on whether "unaided" qualifies "no more than 50 metres" and that is not clear.

41. Third, I reiterate and emphasise the anomaly which would arise from the Appellant's approach, as Judge Hemingway identified at paragraph 27. Judge Mitchell suggested that it was rational to treat those who are especially reliant on

a walking aid as being more disabled. That consideration is reflected by descriptors (c) and (d).

42. Fourth, Ms Moore says that the approach in JP strips the distinction between 2(c) and 2(d) of any practical effect because on either basis a claimant would qualify only for the standard rate of the mobility component and, on either basis, if they achieved any points under mobility activity 1, would be entitled to the enhanced rate. This is simply a consequence of the way in which the points are structured.

43. Fifth, Ms Moore acknowledges that her approach would mean that a claimant who can walk less than 20 metres unaided but can manage 200 metres or more with an aid will receive 0 points, whereas those who can walk further unaided (20 – 50 unaided and who can also manage 200 metres or more aided would be awarded 8 points. She submits that this is because the method by which a claimant travels a distance of under 20 metres is not considered in the descriptors, but that this is an anomaly which does not justify Judge Hemingway's reading of 2(c). I disagree. Save for (c), none of the descriptors is concerned with the method of walking, and this reinforces the conclusion that distance is the key to the application of the descriptors with the additional refinement provided by (c) and (d). Ms Moore's example illustrates the absurdity of the interpretation for which she contends.

44. The Secretary of State has provided a witness statement by Dr James Bolton, Deputy Chief Medical Adviser at the Department for Work and Pensions. He was one of the people responsible for the development and on-going refinement of the PIP assessment and worked on the consultation exercise. His evidence provides background to the development of the mobility descriptors and the government's intention. There was some discussion as to the admissibility of this evidence as an aid to construction. Ms Scolding submits that the discussions in the consultation documents and government responses provide the context of the legislation and assist in identifying its purpose, and that it is legitimate to look to this in adopting a purposive approach. Ms Moore does not object to my having regard to the material, with caution. It seems to me that it would be acceptable for me to rely on this evidence as an aid to construction, should I need to do so, for the reasons given by Ms Scolding. But I do not need to do so because I have been able to reach a view without reliance on that evidence.

45. Having said that, I am reassured in my conclusion by Dr Bolton's evidence because it shows that it is consistent with the policy intent underlying mobility activity 2. It is apparent from the consultation documents and the changes to the various drafts of mobility activity 2 that as originally drafted a person's reliance on aids and appliances was a key factor in determining entitlement to standard or enhanced rate, but in later drafts absolute distance was the determining factor.

46. One apparent quirk of the drafting history is that, in the second draft of the activity, descriptor c was "can move up to 50 metres unaided *but no further"* (my emphasis). Had the italicised words been retained, there would be no question but that the approach in JP was the correct one. The words were removed as part of the Government's response to the consultation in December 2012. This was done without comment and it appears simply to have been part of the tidying up of the descriptors which had themselves been greatly simplified. The text accompanying the revised descriptors made it clear that the key determinant was to be distance.

47. In October 2013 the Government responded to a further consultation. Tellingly, the response included the following:

> "4.21 We consider that the key determinate in the barriers faced by individuals is whether they can reliably walk a given distance. In previous drafts of the assessment we took greater account of the use of aids, appliances and wheelchairs, but the feedback was that this was unclear and created inconsistencies….
>
> 4.22 Given that a key part of the policy intent is to create an objective and consistent assessment, and that our previous attempts to put greater emphasis on the use of aids and appliances demonstrated that it creates inconsistencies, we do not feel it would be productive to introduce further differentiation between aided or unaided ability."

48. The Appellant's interpretation of descriptor (c) is inconsistent with this approach because it differentiates between aided and unaided ability (by assessing only unaided ability, regardless of what a claimant can do when aided) and departs from the distance as the key determinant of mobility.

Ground 4: speed and stops

49. In deciding that mobility descriptor 2(b) applied, the tribunal took into account the health professional's report that the Appellant walked 200 metres to her mother's house and back, on a daily basis. It accepted that she would have some difficulty and would have to stop frequently, but was of the view that she would not undertake the walk if it was too difficult or painful.

50. The Appellant denies that she told the health professional that she walked to her parents' house on a daily basis. In any event, the Appellant submits that the tribunal erred in failing to consider the speed of her walking or the effect of breaks. She relies on KN v Secretary of State for Work and Pensions [2016] UKUT 261 (AAC) at [15] in which Judge Hemingway held that in some circumstances a particularly long halt might bring to an end a period of walking while shorter halts might bring into play the factors in regulation 4(2A) and, in particular, whether the activity could be completed within a reasonable time period. Ms Scolding accepts that the tribunal fell into error because it did not address speed, the effect of breaks and how far the Appellant could walk without stopping. Not all stops will bring to an end the particular bout of walking. Whether it does so is a matter of fact.

51. I agree that the First-tier Tribunal erred in law as identified by both parties, and I need say no more about that.

52. Ms Scolding submits that the case should be remitted to the First-tier Tribunal to determine only the application of mobility activity 2 on a correct basis including making findings of fact, but says that if the Upper Tribunal remakes the decision then the correct descriptor is 2(b). Ms Moore submits that, if the tribunal does not allow the appeal on any of the other three grounds, then the Upper Tribunal should remake the decision as to mobility rather than remit the appeal to the First-tier Tribunal. She points out that the Appellant did not attend the First-tier Tribunal hearing and is unlikely to attend another hearing if the appeal is remitted.

53. I have decided that it is not proportionate to remit the appeal to the First-tier Tribunal to determine this issue. The Appellant does not want to attend a hearing and it is unlikely that she will. I have sufficient evidence to determine the issue. I

lack the specialist expertise which the First-tier Tribunal would have but in the light of the considerable evidence as to the Appellant's walking ability and the matters to be determined, this is not a case which cries out for medical or disability expertise.

54. There is no doubt that the Appellant suffers from pain and tiredness. The Appellant has provided a letter dated 26 July 2016 from Dr Hopwood, a specialist in pain management, which states that the Appellant's pain was assessed then as interfering significantly with her ability to walk (a score of 9, where 10 represents complete interference). I note, however, that the evidence does not indicate what is meant by "interference" nor the basis of the assessment giving rise to the scores. Dr Hopwood said that the Appellant's pain was the same as when she was seen previously, although did not state when that was, and she also said that the Appellant had become more disabled because of her chronic pain. In the light of these considerations, the letter from Dr Hopwood provides little if any assistance as to the application of the descriptors in mobility activity 2 in December 2014.

55. I accept that the Appellant did not tell the health professional that she walked to her mother's house daily. Indeed, the health professional's account of what the Appellant told her (page 46) does not on careful reading say that. It may be that the health professional drew an unwarranted inference that the Appellant walked rather than drove to her mother's on a daily basis.

56. For present purposes I am prepared to assume (in the Appellant's favour) that the Appellant's evidence in her recent witness statement is generally consistent with her ability in December 2014. The Appellant says that she sometimes walks to her mother's, a distance of 450 metres. She has not suggested that what she can achieve on those occasions is any different to what she can achieve most of the time. She says that she walks that distance by stopping at least four times for a few minutes each time. Thus the Appellant walks a little short of one hundred metres in one go without stopping and then repeats it four times with a break each time. It appears that the breaks are longer than mere pauses and so I accept that each break is a halt. It follows that the Appellant can walk more than 50 metres. The Appellant has not contended that she is unable to do so safely or to an acceptable standard. Although she says she stumbles, the evidence does not indicate that she is unsafe if she walks at her own speed and takes breaks.

57. I am satisfied that she can do so repeatedly. Regulation 4(4)(b) defines "repeatedly" as meaning "as often as the activity being assessed is reasonably required to be completed". On her own evidence after a break the Appellant can continue walking and can repeat that on a few occasions within a relatively short time. There is no evidence to support her claim that she cannot walk distances of between 50 and 100 metres when she needs to do so. Her ability to go shopping indicates that she can.

58. The Appellant says that she takes three or four times longer than her husband does to cover the whole distance to her mother's house. It is implicit in her statement that her husband walks at a normal speed. The time taken by the Appellant includes breaks. I do not accept that each break is as long as "a few minutes", as the Appellant says. Her husband can complete the whole journey in three or four minutes and she takes about three times as long which means that she takes a maximum of twelve minutes. But if she walked slowly and stopped

four times for a few minutes each stop, it would take her very much longer than that. Even allowing for the difficulty in estimating time and speed, I conclude that the Appellant's evidence in this respect is exaggerated. Moreover, if the total journey including stops takes her approximately twelve minutes, and allowing for shorter stops of between one and two minutes each, her speed when actually walking is unlikely to be more than double the speed of her husband and even less likely to be more than twice as long as the maximum speed of a non-disabled person (paraphrasing regulation 4(4)(c)). I conclude that at the present time the Appellant is able to walk more than 50 metres within a reasonable time period.

59. It follows therefore that mobility descriptor 2(b) applies.

60. If there were any doubt about the above, which in my judgment there is not, it is dispelled by other evidence. First, the Appellant's assertions as to her limited mobility are not consistent with the observations of the health professional, who saw her in December 2014 and observed her walking to the interview from the car park and that she mobilised in the centre with crutches. There is no record of any difficulties in that respect, save that she moved slowly and carefully. She was observed to walk 10 metres without aids and did not appear to be unbalanced. The Appellant has not challenged those specific observations. Second, the letter from the Appellant's consultant following a clinic in April 2015 noted widespread pain and the limitations this placed on the Appellant's life but said nothing about her walking ability being severely limited. Third, although it appears that the local authority assessment was concerned only with the Appellant's needs in the home and so did not assess her ability to walk longer distances, there is nothing in it to support the Appellant's case. The assessment noted that the Appellant walked with crutches but did not mention any limitations in her ability to do so. The assessment was carried out in April 2015 and noted that the Appellant had applied for a blue badge but, if her ability to walk was as limited as she contended at that time (and at the time that she completed the claim form in November 2014), it is likely she would have applied for a blue badge earlier. The assessment noted that the Appellant's husband took her shopping but said nothing about difficulty in walking around the shops. It is likely that the Appellant could walk for the distances normally involved with shopping which, taking into account typical distances in car parks and within supermarkets, are over 50 metres.

61. It follows that the Appellant is not entitled to the mobility component of PIP for the period in question.

Conclusion

62. I dismiss the appeal in relation to the daily living component and I allow it in relation to the mobility component on ground four only. As a result of that error, I set aside the decision and remake it. The error affects only the tribunal's finding in relation to mobility activity 2 and so I adopt the First-tier Tribunal's decision that the Appellant is not entitled to the daily living component of PIP. In the light of my conclusion that the Appellant is not entitled to the mobility component of PIP, my substituted decision is to dismiss the Appellant's appeal against the Secretary of State's decision of 31 December 2014.

Signed on the original
On 4 November 2016

Kate Markus QC
Judge of the Upper Tribunal