

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC053/16/00238, made on 18 March 2016 at Wolverhampton, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. History and background

1. The claimant was receiving a disability living allowance when he was invited by the Secretary of State to make a claim for a personal independence payment. He did so on 10 September 2015, but the Secretary of State refused the claim on 25 November 2015. The claimant exercise his right of appeal to the First-tier Tribunal, but the tribunal dismissed his appeal. In explaining the tribunal's decision, the presiding judge wrote:

17. **General.** The Tribunal considered the Appellant's entitlement in the light of the prevailing circumstances down to the date of the decision under appeal on 25th November 2016.

2. On the face of it, what the judge wrote was an unassuming paragraph, apart from the obvious error in the date: the decision was made in 2015, not 2016. That aside, it is the sort of statement that judges write every day in order to explain that they have complied with the limit on their jurisdiction imposed by section 12(8)(b) of the Social Security Act 1998, which provides that a tribunal 'shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

3. In this case, the passage was sufficient for the claimant's representative to argue that the tribunal had misdirected itself in law. His argument was this. Regulation 7 of the Social Security (Personal Independence Payment) Regulations 2013 (SI No 377) requires that the claimant satisfy a descriptor only for 50% of the 'required period', which was 'a 12 month period starting 3 months before the date of claim and extending 9 months thereafter.' The tribunal should have investigated and made findings on the whole of that period and, had it done so, it might have found sufficient points to allow an award to be made.

4. I come to the parties' argument after analysing the relevant legislation. I am not aware of any relevant caselaw on the personal independence payment provisions.

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

B. Analysis

Components and rates

5. Personal independence payment consists of two components, the daily living component and the mobility component: section 77(2) of the Welfare Reform Act 2012. It is the former that is in issue here. Each component may be awarded at one of two rates, the standard rate or the enhanced rate: sections 78 and 79. It is the former that is in issue here.

The required period condition – the statute

6. It is a condition of entitlement to a personal independence payment that the claimant 'meets the required period condition': section 78(1)(b). That provision applies to the daily living component at the standard rate, which is what is in issue here. There are equivalent provisions for the daily living component at the enhanced rate (section 78(2)(b)) and both rates of the mobility component (section 79(1)(b) and (2)(b)).

7. Sections 80(2) and 81 enable regulations to be made on the required period condition:

80 Ability to carry out daily living activities or mobility activities

(1) For the purposes of this Part, the following questions are to be determined in accordance with regulations—

(a) whether a person's ability to carry out daily living activities is limited by the person's physical or mental condition; ...

(2) Regulations must make provision for determining, for the purposes of each of sections 78(1) and (2) and 79(1) and (2), whether a person meets 'the required period condition' (see further section 81).

81 Required period condition: further provision

(1) Regulations under section 80(2) must provide for the question of whether a person meets 'the required period condition' for the purposes of section 78(1) or (2) or 79(1) or (2) to be determined by reference to—

(a) whether, as respects every time in the previous 3 months, it is likely that if the relevant ability had been assessed at that time that ability would have been determined to be limited or (as the case may be) severely limited by the person's physical or mental condition; and

(b) whether, as respects every time in the next 9 months, it is likely that if the relevant ability were to be assessed at that time that ability would be determined to be limited or (as the case may be) severely limited by the person's physical or mental condition.

(2) In subsection (1) 'the relevant ability' means—

(a) in relation to section 78(1) or (2), the person's ability to carry out daily living activities;

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

- (b) in relation to section 79(1) or (2), the person's ability to carry out mobility activities.
- (3) In subsection (1)—
 - (a) 'assessed' means assessed in accordance with regulations under section 80;
 - (b) 'the previous 3 months' means the 3 months ending with the prescribed date;
 - (c) 'the next 9 months' means the 9 months beginning with the day after that date.
- (4) Regulations under section 80(2) may provide that in prescribed cases the question of whether a person meets 'the required period condition' for the purposes of section 78(1) or (2) or 79(1) or (2)—
 - (a) is not to be determined in accordance with the provision made by virtue of subsections (1) to (3) above;
 - (b) is to be determined in accordance with provision made in relation to those cases by the regulations.

The required period condition – the regulations

8. Regulation 12 of the Social Security (Personal Independence Payment) Regulations 2013 is made under that authority:

12 Required period condition: daily living component

- (1) C meets the required period condition for the purposes of section 78(1) of the Act (daily living component at standard rate) where —
 - (a) if C had been assessed at every time in the period of 3 months ending with the prescribed date, it is likely that the Secretary of State would have determined at that time that C had limited ability to carry out daily living activities; and
 - (b) if C were to be assessed at every time in the period of 9 months beginning with the day after the prescribed date, it is likely that the Secretary of State would determine at that time that C had limited ability to carry out daily living activities.

C means the claimant: regulation 2.

9. Four points appear from the language of that regulation. The first point is that, despite the language of section 78, there is not one period but two: one of three months (I call this the retrospective period) and one of nine months (I call this the prospective period), both fixed by reference to 'the prescribed date'. The terms I am using are for convenience only. The required period condition must be satisfied for both the retrospective period and the prospective period.

10. In this case, regulation 12 is subject to the transitional provision in regulation 23 of the Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI No 387):

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

23 Assessment of claim: transfer claimants to be taken to meet part of required period condition

(1) In applying the required period condition under Part 3 (required period condition) of the PIP Regulations to a claim by a transfer claimant or by a person to whom paragraph (2) or (3) applies, the claimant shall be regarded as meeting such of the conditions contained in the following provisions of Part 3 (which relate to a claimant's abilities in the past) as are relevant to the claim regardless of whether those conditions have been met—

(a) in regulation 12 (required period condition: daily living component), paragraph (1)(a) ...

As the claimant had been receiving disability living allowance and made a claim for a personal independence payment in response to the Secretary of State's invitation, he is a transfer claimant. The effect of regulation 23 is to exempt him from having to satisfy the required period condition for the retrospective period, but not for the prospective period. This does not affect the analysis of regulation 12; it merely modifies its application in a particular case.

11. The second point about the language of regulation 12 is that the definition is expressed in terms of likelihood. The issue is not whether the claimant satisfies the conditions, but whether 'it is likely' that they would have done so if the matter had been determined. This reflects the terms of section 81(1).

12. The third point is that the condition is applied to the component, here the daily living component.

13. The fourth point is that the condition is applied to every day of the period: 'at every time'.

The prescribed date and advance awards

14. The prescribed date is fixed under regulations 14 and 15 of the 2012 Regulations. Only regulation 14 applies here:

14 The prescribed date

Except where paragraph (2) or (3) of regulation 15 applies, the prescribed date is—

- (a) where C has made a claim for personal independence payment which has not been determined, the date of that claim or, if later, the earliest date in relation to which, if C had been assessed in relation to C's ability to carry out daily living activities or, as the case may be, mobility activities, at every time in the previous 3 months, it is likely that the Secretary of State would have determined at that time that C had limited ability or, as the case may be, severely limited ability to carry out those activities; and
- (b) where C has an award of either or both components, each day of that award.

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

15. Like regulation 12, this has to be applied to the component, here the daily living component. The starting point for applying this regulation is the date of claim. If the claimant does not satisfy the prescribed period condition at that date, the prescribed date may be later. This does not cause any problems if the decision is not made until after the claimant has satisfied the condition in respect of the retrospective period. But what if the retrospective period has not been satisfied at that date? The language of regulation 14 suggests that the full three months must have been satisfied by the date of decision if an award is to be made. That is the only way that the tenses make sense. However, the regulation has to be read in conjunction with regulation 33 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI No 380):

33 Advance claim for and award of personal independence payment

(1) Where, although a person does not satisfy the requirements for entitlement to personal independence payment on the date on which the claim is made, the Secretary of State is of the opinion that unless there is a change of circumstances the person will satisfy those requirements for a period beginning on a day ('the relevant day') not more than 3 months after the date on which the decision on the claim is made, the Secretary of State may award personal independence payment from the relevant day subject to the condition that the person satisfies the requirements for entitlement on the relevant day.

That allows for the possibility that the claimant may have satisfied only part of the retrospective period when the decision is made. But the circumstances must be such that the whole of the retrospective period (and the prospective period as well) will be satisfied unless there is a change of circumstances.

The 50% of the time rule

16. It is now time to look at regulation 7, which provides for the 50% of the time rule:

7 Scoring: further provision

- (1) The descriptor which applies to C in relation to each activity in the tables referred to in regulations 5 and 6 is —
- (a) where one descriptor is satisfied on over 50% of the days of the required period, that descriptor;
 - (b) where two or more descriptors are each satisfied on over 50% of the days of the required period, the descriptor which scores the higher or highest number of points; and
 - (c) where no descriptor is satisfied on over 50% of the days of the required period but two or more descriptors (other than a descriptor which scores 0 points) are satisfied for periods which, when added together, amount to over 50% of the days of the required period—

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

- (i) the descriptor which is satisfied for the greater or greatest proportion of days of the required period; or,
 - (ii) where both or all descriptors are satisfied for the same proportion, the descriptor which scores the higher or highest number of points.
- (2) For the purposes of paragraph (1), a descriptor is satisfied on a day in the required period if it is likely that, if C had been assessed on that day, C would have satisfied that descriptor.
- (3) In paragraphs (1) and (2), "required period" means —
- (a) in the case where entitlement to personal independence payment falls to be determined, the period of 3 months ending with the prescribed date together with—
 - (i) in relation to a claim after an interval for the purpose of regulation 15, the period of 9 months beginning with the date on which that claim is made;
 - (ii) in relation to any other claim, the period of 9 months beginning with the day after the prescribed date.
 - (b) in the case where personal independence payment has been awarded to C -
 - (i) during the period of 3 months following a determination of entitlement under a claim for the purpose of regulation 15, the period of 3 months ending with the prescribed date together with, for each day of the award, the period of 9 months beginning with the day after that date;
 - (ii) in any other case, for each day of the award, the period of 3 months ending with that date together with the period of 9 months beginning with the day after that date.

17. In order to understand this regulation, it is necessary to go back to section 78(1)(a). This makes it a condition of entitlement to the daily living component at the standard rate that the claimant's 'ability to carry out daily living activities is limited by the person's physical or mental condition'. Section 78(4) provides for regulations to prescribe the activities that amount to daily living activities. Regulation 3 and Schedule 1 provide that they consist of a series of activities, each of which contains a number of descriptors. The descriptor that is satisfied determines the number of points scored for that activity. This is where regulation 7(1) fits in. Unlike regulations 12 and 14, it applies to the period as a whole, not to each day of the period. Also unlike those regulations, it applies not to the component or rate but to the descriptors within an activity, although these combine to determine whether a component is satisfied and, if so, the rate. So logically it operates before those regulations.

18. There are two interesting features of regulation 7. One is that, unlike regulations 12 and 14, regulation 7(1) is not worded in terms of likelihood. It

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

provides for a descriptor being 'satisfied', but regulation 7(2) provides that whether or not a descriptor is satisfied depends on likelihood, just like regulations 12 and 14. I can see no significance to this difference in structure. Perhaps it was used just for convenience of drafting.

19. The second feature is that regulation 7 contains a definition of 'required period.' This appears to be to the same effect as regulation 12. It would not have been possible simply to refer to or adopt the definition in regulation 12, because that is a definition not of the required period, but of the required period *condition*. Like regulation 12, though, there is not one period but two: a retrospective period and a prospective period. Together, they constitute the required period. Both must be satisfied for that period to be satisfied.

Section 12(8)(b) of the Social Security Act 1998

20. Finally, there is the issue of how the above provisions fit with section 12(8)(b)? The answer is found in *R(DLA) 2 and 3/01* at [58]-[69], in which I analysed how that provision applies when the legislation requires a prediction of future disablement.

C. Applying my analysis

21. I set out in paragraph 3 the argument put by the claimant's representative in his grounds of appeal. I reject that argument. The flaw is that it assumes that the retrospective period and the prospective period constitute a single period that has to be considered as a whole. As I have explained, there is a single required period and a single required period condition, both consist of two separate periods, the retrospective period and the prospective period. They are separate periods, both of which must be satisfied. It follows that if a First-tier Tribunal decides that the retrospective period is not satisfied, it is entitled to decide the case on that basis without considering the prospective period. I accept the Secretary of State's argument to that effect.

22. The claimant's representative has argued that investigation of the likely progress of the claimant's condition might have shown that he would satisfy the required period condition. The only basis on which a tribunal could take that approach is under the advanced award provision. That approach was not open to the tribunal in this case. Regulation 33 only applies if two conditions are satisfied. One is that the conditions of entitlement will be satisfied no more than 3 months after the date of decision, which just happens to be the length of the retrospective period. The other is that the conditions of entitlement will be satisfied unless there is a change of circumstances. Putting those together has this effect: it will only apply if the tribunal has made findings of fact to show that, barring any change of circumstances, within three months the claimant will have satisfied the 50% of the time rule leading to sufficient points to allow an award. In other words, the tribunal must have been able to make those findings in respect of the date of the decision under appeal. The claimant's representative has not challenged the tribunal's findings as of that date. All he has done is to

UPPER TRIBUNAL CASE NO: CPIP/2504/2016

criticise the tribunal's investigations for not enquiring beyond that date. As he wrote in his grounds of appeal:

Had the FtT considered the effect of [the claimant's] medical conditions within the context of the 'required period', they may have found that he scored additional points under the various 'daily living' activities.

And as he wrote in his reply to the Secretary of State's response:

How is one to know what the circumstances of the claimant were (or could be) unless there was an enquiry into the claimant's circumstances that went beyond the date of decision?

23. Finally, the claimant's representative has said:

It is not sufficient for a FtT to simply look at the person's circumstances at the date of decision (to take a 'snap shot' of need).

I agree with that, but it is not what the tribunal did. The tribunal did not limit itself to the circumstances at the date of decision. It took account of all circumstances down to that date. That is the correct approach. Section 12(8)(b) is a negative provision. It does not stipulate what circumstances or period the tribunal must consider. That varies from case to case. A typical case will require the tribunal to consider the period from the date of claim to the date of decision. It may have to look at a period and circumstances before that date, as it must when considering the retrospective period. What section 12(8)(b) does is to stipulate what a tribunal must not consider. The tribunal in this case complied with that restriction.

24. For those reasons, I dismiss the appeal.

**Signed on original
on 05 December 2016**

**Edward Jacobs
Upper Tribunal Judge**