IN THE UPPER TRIBUNAL **Case No.** CPIP/772/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: A. Rowley, Judge of the Upper Tribunal

Attendances:
For the Appellant: Mr. Billy Durrant, Welfare Rights Worker

For the Respondent: Mr. Stephen Cooper, solicitor

Decision:
I allow the appeal. As the decision of the First-tier Tribunal (made on 25 November 2015 under reference SC240/15/01726) involved the making of an error in point of law, it is **set aside** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. It is appropriate for me to **re-make** the decision under section 12(2)(b)(ii) of the 2007 Act. My decision is that the claimant is entitled to the daily living component of PIP at the standard rate, and the mobility component at the standard rate from 17 April 2015 to 2 June 2017 (both dates included).

REASONS FOR DECISION

The issues

1. The issues with which this appeal is primarily concerned arise in relation to activity 6 of the daily living component of PIP. I have decided that:

   (a) It is not necessary for a claimant to demonstrate that they have difficulties with both dressing *and* undressing themselves in order to be awarded points under descriptor 6b. The need to use an aid or appliance for one or the other will be enough.

   (b) If a claimant needs to use an aid or appliance to be able to put on socks (but not shoes) that is sufficient to score points under descriptor 6b.

2. I have also expressed the view that:

   (a) A claimant who is able, unaided and unassisted, to put on slip-on shoes but not shoes that require fastening, does not score points under activity 6.

   (b) On the question of whether a bed can be an aid for the purposes of descriptor 6b, the approach set out in *CW v Secretary of State for Work and Pensions* [2016] UKUT 197 (AAC), as followed and expanded upon in *AP v Secretary of State for Work and Pensions* [2016] UKUT 501 (AAC), should be adopted.

3. Furthermore, I have decided that the tribunal did not make sufficient findings upon activity 10 of the daily living component.

The claim and the appeal to the First-tier Tribunal

4. The claimant has a number of physical health problems, most of which are not directly relevant to this appeal. What is relevant is that she experience dizziness and loss of balance, particularly on a morning. She also has a long history of depression.

5. In her claim for PIP the claimant identified how her health conditions affected her day to day activities in a number of areas. Following a decision dated 10 June 2015 under which she had been awarded 4 points in respect of each of the daily living and mobility activities, the claimant sought a mandatory reconsideration, as a result of which on 22 July 2015 it was decided that she scored 6 points under the daily living activities (having satisfied descriptors 1b, 4b and 9b) and 8 points under mobility activity 2c. That meant that, whilst she was entitled to an award of the mobility component at the standard rate, nonetheless despite the increased score under the daily living activities, she had still not reached the threshold of 8 points for the daily living component. The award of the mobility component was made for the period 17 April 2015 to 2 June 2017 (both dates included).

6. The claimant appealed to the First-tier Tribunal. Mr. Durrant (a welfare rights worker) made written representations on her behalf in which he argued that she was entitled to the enhanced rate of both the daily living and mobility components. The First-tier Tribunal heard the appeal on 25 November 2015. The claimant attended the hearing and gave evidence. She was represented at the hearing by Mr. Durrant.

7. The tribunal refused the claimant's appeal and, although not in so many words, confirmed the mandatory reconsideration decision of 22 July 2015.

The proceedings in the Upper Tribunal

8. The claimant appealed to the Upper Tribunal with my permission. I held an oral hearing of the appeal on 2 November 2016. Mr. Durrant represented the claimant, and Mr Stephen Cooper, solicitor, represented the Secretary of State. I must record my gratitude to them both, not only for their helpful, concise and clear submissions, but also for their exemplary co-operation with each other and the Upper Tribunal, particularly in discussing the appropriate disposal of the appeal.

Daily Living Descriptor 6b

9. The claimant's case is that she should score 2 points under descriptor 6b, the terms of which are:

   "Needs to use an aid or appliance to be able to dress or undress."

10. It should be noted that a claimant who "can dress and undress unaided" scores 0 points under descriptor 1a.

11. There are some relevant definitions to be considered.

12. Regulation 2 of the Social Security (Personal Independence Payment) Regulations 2013 provides that an

    '"aid or appliance" – (a) means any device which improves, provides or replaces C's impaired physical or mental function….'

13. Under Schedule 1 to the Regulations:

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

14. It is implicit from the Statement of Reasons that the tribunal was of the view that if a claimant needs to use an aid or appliance to dress, but not to undress, that would not be sufficient to satisfy descriptor 6b. On giving permission to appeal I asked whether this was the correct approach. The issue is relevant in this case because the claimant has difficulties getting dressed (putting on her socks) without an aid, but it appears that she can remove the socks unaided.

15. I accept the Secretary of State's submission that it is not necessary for a claimant to demonstrate that they have difficulties with both dressing *and* undressing themselves in order to be awarded points under descriptor 6b. The need to use an aid or appliance for one or the other will be enough. Such a conclusion follows from the natural and ordinary meaning of the words of the descriptor.

16. It is the claimant's case that, due to dizziness when bending low, she is unable to put on socks (even when sitting on a bed), so she avoids wearing socks at all, even in cold weather. Mr. Durrant contends that she would reasonably benefit from the use of an aid, and so she satisfies descriptor 6b.

17. Bearing in mind the definition of "dress and undress" which is set out at paragraph 13 above, I asked the parties to make submissions on this question: 'if a claimant needs to use an aid or appliance to be able to put on socks (but not shoes) is that sufficient to score points under descriptor 6b?'

18. The Secretary of State concedes that the simple answer to this question is "yes." One does not need to have a problem with both shoes and socks. It can be either. Mr Durrant agrees with that concession. So do I. Again, it is consistent with the natural and ordinary meaning of the words used.

19. In the light of the above, the parties agreed that the tribunal's decision should be set aside, on the basis that the tribunal erred in law in failing to consider whether the claimant's claimed need to use an aid to be able to put on socks fell within descriptor 6b. As she had already scored 6 points, the further 2 points under descriptor 6b would have taken the total to 8 and the claimant would have met the statutory threshold for the standard rate of the daily living component. The error was, therefore, a material one.

20. In the circumstances, it is not strictly necessary for me to consider the other issues raised on the appeal under this descriptor, but for the sake of completeness I will make the following observations.

21. The claimant has dizziness when she bends low, and so she cannot fasten shoes (even when sitting on a bed). As a result, she wears slip-on shoes, putting her feet into them whilst upright.

22. The necessity for a claimant to wear certain clothing was discussed in *PE v Secretary of State for Work and Pensions* [2015] UKUT 0309 (AAC); [2016] AACR 10. In that case the claimant's appeal was allowed on the basis that the test in activity 6 was based upon an abstract test of normal clothing. A claimant's choice of clothing was irrelevant, unless it was dictated by the claimant's impaired function. Just as a claimant's limitations could not be used to raise the

standard by which their ability was judged, nor could the limitations on what clothing a claimant could cope with be used to lower that standard.

23. Guidance was given:

"19 …

- *The test is the general one whether the claimant can dress – I focus on this for convenience and because it will usually present more difficulty than undressing – not whether they can dress in any particular types of clothing.*
- *But dressing is not an abstract activity. We dress for a particular purpose or occasion. The clothing we wear depends on whether we are going to be inside or out as it will on the temperature and weather. The tribunal should not limit itself to the minimum clothing necessary for warmth and decency.*
- *This does not mean that the claimant is entitled to specify the type of clothing by way of preference or requirement, for example, in a particular job. That would defeat the uniform nature of the test.*
- *The tribunal must not identify the clothing to which the test is applied in a way that the defeats the purpose of the test by defining away the limiting effects of the claimant's disability.*
- *But the tribunal is entitled to consider reasonable and practical alternatives. For example: claimants who cannot raise their arms to put on a pullover, may be able to put on a cardigan.*
- *The balance between not defining away the claimant's disability and taking account of alternatives can be struck by concentrating on the functions that underlie the activity. The legislation imposes a test of the claimant's ability to perform the functions involved in the activity. It may be appropriate in an overall assessment of the claimant's ability to dress to disregard a limitation with a particular function. But it would not be appropriate to disregard a limitation with so many functions that the claimant could only wear loose, elasticated clothes with no fastenings. The test would then no longer be a test of the activity, but of only a limited part of the activity…"*

24. In the light of this I wondered whether slip-on shoes would constitute clothing that the claimant chose only on account of the limitations imposed by her physical condition (in which case she would satisfy descriptor 6b), or whether they would constitute a reasonable and practical alternative to other shoes (in which case she would not satisfy the descriptor). I asked whether a claimant who could only wear slip-on shoes would fall into the same category as the hypothetical claimant in *PE* who could not raise their arms to put on a pullover but was able to put on a cardigan.

25. Mr. Durrant argued that if slip-on shoes were considered to be a reasonable and practical alternative form of footwear, this would create limitations on the clothing which a person with functional restrictions could wear. The effect would be unduly to narrow the options available, for slip-on shoes would not necessarily be suitable for all occasions. Mr. Durrant further argued that as "shoes" are specifically referred to in the definition of "dress and undress" the draftsman could have made specific reference to types of shoes if not all were to be included.

26. Mr. Cooper submitted that, in the case of a cardigan being a reasonable and practical alternative to a pullover, the functional loss experienced by a person is the ability to raise their arms above their head. The function of the lifting of the

arms is effectively bypassed by the use of a cardigan. There is, then, no functional loss if that person uses cardigans instead of pullovers. Thus, they can dress adequately without the need to use the function of lifting the arms.

27. The cardigan is a reasonable and practical alternative because, submitted Mr. Cooper, it performs a similar clothing role, namely providing a layer of warmth for the upper body, and it is a commonly available, non-specialist item of clothing. By the same token, Mr. Cooper submitted that slip-on shoes are a reasonable and practical alternative to others which need to be fastened.

28. In my judgment slip-on shoes do constitute the kind of reasonable and practical alternative clothing envisaged by the Upper Tribunal Judge in *PE.* In so finding, I am of the view that the balance is struck in the appropriate place. It is right to disregard the limitation of function that would be caused by putting on shoes that required to be fastened due to the claimant's dizziness. By using the slip-on shoes the claimant bypasses the impaired function. As in the example of the cardigan and pullover, slip-on shoes perform a similar clothing role to other shoes, in that they cover and protect the feet; and they are a commonly available, non-specialist item of clothing. I accept the Secretary of State's submission that they are available in a range of styles for whatever need or occasion.

29. Furthermore, I do not consider the lack of specific reference to types of shoes in the definition of "dress and undress" to be a significant omission, and it certainly does not lead the conclusion that a claimant who is able, unaided and without assistance, to put on slip-on shoes but not other types will score points under daily living activity 6.

30. Thus, had it been necessary to decide the issue, I would have decided that the tribunal's failure to consider whether the claimant's inability to wear shoes other than slip-on shoes did not amount to an error of law.

31. I turn now to the issue of whether a bed can be an aid for the purposes of descriptor 6b. It is right to say that this issue was not the primary focus of the appeal, and the party's submissions on it were brief. The issue arose because the tribunal did not, in terms, consider the claimant's case that because of her dizziness in the mornings she had to sit on a bed to put on her upper clothing and leggings. Mr Durrant argued that this was a material error. He relied on *NA v Secretary of State for Work and Pensions* [2015] UKUT 572 (AAC), in which it was held that the claimant's use of a chair when dressing and undressing could satisfy descriptor 6b.

32. The Secretary of State, on the other hand, submitted that the tribunal had not made a material error, as a bed is not an aid for the purposes of descriptor 6b. He relied on *CW v Secretary of State for Work and Pensions* [2016] UKUT 197 (AAC), in which it was held that sitting down was an acceptable way to perform the activity of dressing and undressing, and so a bed was not an aid to undertake that activity.

33. Mr. Durrant replied that *CW* should not be followed, as it introduces an additional test into the Regulations which is not contained within them. He submitted that the fact that a healthy person may choose to sit on a bed whilst dressing or undressing did not mean that the bed did not "improve, provide or replace" the function of dressing for a disabled person.

34. I agree with the Secretary of State's submission that this is the very point that the Upper Tribunal Judge grappled with and decided upon in *CW.* His reasoning clearly takes into account that a disabled person may have no choice in performing the activity in a certain way. But he concludes that if the manner in which the disabled person must perform the activity is a normal way of performing that activity for a non-disabled person, then there is no functional loss.

35. I should add that, after I had held the oral hearing, the decision in *AP v Secretary of State for Work and Pensions* [2016] UKUT 501 (AAC) was issued. It contains a thorough analysis of the issue, and of *CW* and *NA*. It follows and expands upon the reasoning in *CW.* On the basis that my observations on this issue did not affect the final outcome of the appeal (having already decided that the tribunal had erred in its consideration of descriptor 6b for other reasons), and given that the argument on the issue was not the main focus of the appeal, I considered that it would be disproportionate to seek further submissions from the parties with reference to *AP.* Suffice to say that I agree with what it says.

36. For these reasons, the fact that the tribunal did not expressly consider the claimant's case on the issue of whether a bed can constitute an aid for the purposes of descriptor 6b does not, in my judgment, amount to a material error of law.

Daily Living Descriptor 10b

37. I can deal with this descriptor more briefly. Under it a claimant scores 2 points if they need "prompting or assistance to be able to make complex budgeting decisions." Schedule 1 to the Regulations again has a relevant definition:

> '"*complex budgeting decisions" means decisions involving-*
> *(a) calculating household and personal budgets*;
> *(b) managing and paying bills*; and
> *(c) planning future purchases'*

38. The claimant had contended that she satisfied descriptor 10b, as due to her depression she was unable to manage her money effectively, and she had extensive debts. The tribunal concluded that there was no indication that the claimant had a cognitive impairment that prevented her from making complex budgeting decisions, and the fact that she was in severe financial difficulty was due only to a lack of finance.

39. The Secretary of State, in my view rightly, concedes that someone who has no intellectual impairment but whose depression leads to them avoiding the task of making budgeting decisions altogether, or perhaps to make irrational budgeting decisions, could satisfy descriptor 10b.

40. It is not in dispute that the tribunal failed sufficiently to explain why the claimant's depression did not impact upon her ability to make complex budgeting decisions. For this reason the tribunal erred in law, and I set aside its decision on this basis as well.

One further matter

41. I had also given permission to appeal in relation to the tribunal's consideration of daily living activity 9. However, as a result of discussions during the hearing

(which it is not necessary for me to set out here) and having taken the claimant's instructions, Mr. Durrant withdrew this part of the appeal with my consent, pursuant to rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr. Cooper offered no opposition.

My decision

42. For the reasons set out above the tribunal erred in law and I set aside its decision. There was some discussion during the hearing as to how I should dispose of the appeal. Mr Cooper accepted that the clear evidence was that the claimant needed to use an aid to be able to put on her socks, and accordingly satisfied descriptor 6b, so she should be awarded 2 further points. That would bring her total to 8 under the daily living component.

43. Moreover, the claimant would score only 2 further points under descriptor 10b even if the case were to be remitted to a new tribunal and even if that new tribunal were to find that she satisfied the descriptor. Thus, she would still only be entitled to the standard rate of the daily living component. Mr. Durrant and Mr. Cooper accepted that in those circumstances it would be pointless to remit the case for a re-hearing by a new tribunal.

44. In the light of the above I indicated that I felt able, in the exercise of my discretion, to re-make the tribunal's decision under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, by awarding the claimant 2 further points under daily living descriptor 6b. I considered that such an approach would be an appropriate one. The parties did not oppose that course of action.

45. Accordingly, I re-make the tribunal's decision. I decide that the claimant scores 2 points under descriptor 6b. That brings her total to 8 and therefore she is entitled to an award of the daily living component at the standard rate. Thus, my decision is that the claimant is entitled to the daily living component of PIP at the standard rate, and to the mobility component at the standard rate. I follow the period of the decision under appeal, namely 17 April 2015 to 2 June 2017 (both dates included).

A. Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 5 December 2016