

RB V SECRETARY OF STATE FOR WORK AND PENSIONS
[2016] UKUT 0556 (AAC)
UPPER TRIBUNAL CASE NO: CPIP/2916/2016

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 SC145/16/00054, made on 11 July 2016 at Salisbury, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. What I have to decide

1. Is a nebuliser an aid or appliance that enables the claimant to manage his medication? The question is easy to ask and, as posed, it appears easy to answer. Of course it enables the claimant to manage his medication; it is the only way he can deliver it in the manner required. Once the definition of *aid or appliance* is fed into the question, it becomes more complicated.

B. How the issue arises

2. The claimant claimed a personal independence payment in February 2015. The Secretary of State made an award consisting of the mobility component at the standard rate, based on a score of 8 points, but of not the daily living component, for which the claimant scored only 6 points. Subsequently, following a review, the Secretary of State made another decision on supersession to the same effect. It is that decision that was the subject of the appeal to the First-tier Tribunal. Although the tribunal dismissed the appeal, it increased the score for the daily living component from 6 to 7, which was short by one point of the score necessary for an award at the standard rate. The claimant would have scored that point if the tribunal found that he satisfied Activity 3b in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI No 377).

C. Activity 3b and its definitions

3. This is the relevant legislation:

Managing therapy or monitoring a health condition

b. Needs either-

(i) to use an aid or appliance to be able to manage medication or monitor a health condition; or

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- (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.

Regulation 2 contains a definition of *aid or appliance*. It:

- (a) means any device which improves, provides or replaces C's impaired physical or mental function; and
- (b) includes a prosthesis.

Regulation 2 also defines *C*. In this case, *C* is the claimant.

D. The evidence

4. The claimant has an enlarged heart with atrial fibrillation, chronic obstructive airways disease, and high blood pressure. In his original claim, he wrote that he needed to be prompted to take his medication and that his wife checked his blood pressure and pulse. The health professional's view was that there was no relevant disability, as the claimant's report was inconsistent with his diagnoses, which did not indicate cognitive impairment or mental health problems. In the review pack, the claimant wrote that he needed help with his inhalers and nebuliser. He told the health professional that he managed his medication most of the time, but sometimes forgot and needed prompting. The health professional's view was that there was no relevant disability, as the claimant did not have a cognitive impairment, mental health support or any evident restriction on memory or concentration.

5. The claimant's evidence to the First-tier Tribunal was that he used the nebuliser two or three times a day in the morning. He kept it on the bedside table and his wife plugged it in for him. When he was short of breath, he would panic and drop the capsule for the machine. He needed his wife to insert the capsule and to calm him. He said he was not breathless in bed.

E. The First-tier Tribunal's reasoning

6. The presiding judge devoted four paragraphs to Activity 3. Those reasons dealt first with the claimant's inhalers before coming to the nebuliser. The judge recorded the claimant's evidence and then set out the tribunal's conclusion on this Activity;

In answer to a question from the Tribunal [the claimant] further explained that he did not get breathless when he was in bed. He had earlier confirmed that he had no difficulty with his hands and fingers. The Tribunal found what [the claimant] said confusing. They concluded from what [he] said that he used the Nebuliser when he was in bed, that it sat on his bedside table, that it was near where he was, that he was not breathless in bed and that he had no problems with his fingers and hands. The Tribunal decided that there was no physical or mental reason for [him] not being able to manage the Nebuliser by himself without assistance or prompting from another person and without the use of an aid or appliance.

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F. What the representatives have argued

7. The claimant's representative applied for permission on the ground that a nebuliser was an appliance that administered medication to improve the claimant's physical function of breathing. I gave permission to appeal:

This case merits the attention of the Upper Tribunal as it raises issues concerning the meaning of 'aid or appliance' and the relationship between managing therapy (Activity 3) and other Activities that refer to the use of an aid or appliance.

It must be the case that the nebuliser improves the claimant's function, but what is it that has that effect, the machine itself or the medication it delivers? Can medication be an aid, for example an inhaler for asthma? The inhaler is a device, but it is difficult to describe the contents as a device.

8. In response to the appeal, the Secretary of State's representative has relied on the decision of Upper Tribunal Judge Rowley in *KR v Secretary of State for Work and Pensions* [2015] UKUT 0547 (AAC). In dealing with mobility Activity 2, she wrote:

Is an asthma inhaler an 'aid'?

15. The question as to whether or not an asthma inhaler is an aid under regulation 2 was not addressed by the tribunal, although it found that the claimant could walk a distance of between 100 and 200 metres if he used an inhaler.

16. The claimant had been prescribed a Ventolin inhaler (to be used as needed) and a preventer (which he took daily). The Health Professional had noted that the claimant had an audible wheeze and that a cough was present during the assessment. He was observed to have a poor peak flow.

17. The claimant's evidence was that he needed to 'take a puff on his inhaler' before walking a distance, and indeed had used his asthma spray before the walking observed by the Health Professional. In contrast to descriptors 2(a), (b), (e) and (f), which apply whether the claimant can satisfy the criteria either aided or unaided, descriptor 2(c) only applies if the claimant can stand and then move more than 20 metres but no more than 50 metres unaided.' A claimant who satisfies this descriptor will attain the requisite 8 point threshold for the standard rate of the mobility component. (Descriptor 2(d) is the appropriate one where the claimant can move that distance 'using an aid').

18. Part 1 of Schedule 1 to the 2013 Regulations defines 'unaided':

*'Unaided' means without –
the use of an aid or appliance; or
supervision, prompting or assistance.*

19. By regulation 2

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'aid or appliance'

(a) *means any device which improves, provides or replaces C's impaired physical or mental function; and*

(b) *includes a prosthesis.*

20. This is, on any view, a broad definition. The Secretary of State submits that an asthma inhaler does not fall within it. He contends that the prescription medicine may improve the claimant's impaired physical function of breathing, but is not an 'aid' as it is not a 'device.' And although the inhaler could be described as a 'device,' it simply delivers the medication into the body and so does not, in itself, improve, provide or replace a claimant's impaired physical function.

21. The claimant's representative argues that one should not artificially split the inhaler and medication into two parts. Rather, the matter should be considered holistically. He compares and contrasts the situation to a teaspoon holding medicine. That, he acknowledges, is not an aid, as the teaspoon can be separated from the medication. But in the case of an asthma inhaler, he submits that the medication is part of the device, and the overall device improves the claimant's impaired physical function.

22. I do not agree with the claimant's representative's submissions. To construe the legislation in the manner he contends for would be to distort its natural meaning. In my judgment an asthma inhaler does not constitute an 'aid' for the purposes of the moving around descriptor. It has long been accepted in other areas of disability benefits that a claimant's ability should be assessed taking into account the beneficial effects of medication which it would be reasonable to expect the claimant to take (see, for example, *R(IB) 1/08*). I can see no reason why this should not also apply to PIP. It is, in my view, the medication which improves the claimant's physical function of breathing. The fact that that medication is administered using a device is irrelevant.

9. Relying on that case, the representative argued that the nebuliser in this case was not being used as an aid but rather as one of the methods of delivering the medication. She went on to draw a distinction between a nebuliser that was used to deliver medication, as in this case, and one that was used in a therapeutic role when it does not deliver medication but eases chest function.

10. In reply, the claimant's representative has said that the analysis has become too complex. The answer is to be found in the use of ordinary English meanings. Activity 3b envisages two situations. One is where the claimant cannot manage medication alone; that is 3b(ii). The other is where the claimant can manage alone, but needs an aid or appliance to do so; that is 3b(i). What does *manage* mean? Using a dosette box can be an aid to managing medication. This type of container was suggested as a means of management by the Secretary of State in *CSPIP/666/2014*; Upper Tribunal Judge May accepted the submission.

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The nebuliser delivers a precise dose of medication in a form that the claimant can absorb and is used when the patient cannot administer the medication in any other manner. By delivering a fine mist, the medication is more easily absorbed than from an inhaler, which also requires deep breathing. This is managing medication. As to Judge Rowley's decision, she was dealing with mobility, not with managing medication.

G. Analysis

11. Activity 3b distinguishes between the aid or appliance and the medication. The former must be needed in order to be able to manage the latter. So the medication that is delivered by the nebuliser cannot be an aid or appliance.

12. I do not accept the Secretary of State's argument that I can simply apply Judge Rowley's decision in *KR* for two reasons. One is that she was concerned with the mobility component. The claimant's representative was right to draw attention to that difference. I am concerned with the daily living component and in particular with Activity 3b, not with the mobility component. The question whether something is an aid or appliance does not arise in the abstract. It only arises in the context of individual descriptors. It is possible that something may be an aid for one descriptor, but not for another. To take an obvious example, something that is an aid for preparing food (Activity 1) is unlikely to be an aid for communicating verbally (Activity 7).

13. The other reason why I cannot simply apply Judge Rowley's conclusion to this case is that she did not have the benefit, if that is what it would have been, of my subsequent decision in *CW v Secretary of State for Work and Pensions* [2016] UKUT 0197 (AAC). I there analysed how the definition of aid or appliance fits into the overall scheme of personal independence payment:

24. The 2012 [Welfare Reform] Act defines entitlement by reference to a claimant's limited ability to carry out daily living *activities*. The limitation must be caused by the claimant's physical or mental *condition*. The activities are set out in Schedule 1 to the 2013 Regulations. Every activity is divided into a series of descriptors each of which carries a number of points. The points scored provide the measure of the limitation on the claimant's ability to carry out the activity. They depend on the nature of any intervention that the claimant needs in order to carry out the activity. In the case of aids, the descriptors are always in the form: the claimant 'Needs to use an aid or appliance to be able to ...' What follows depends on the nature of the activity. *Aid or appliance* is defined by reference to whether it improves, provides or replaces the claimant's impaired *function*, which for convenience I describe as assisting in overcoming the consequences of a function being impaired. Putting all that together, 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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Having considered Judge Rowley's reasoning in *CW*, I consider that her analysis is consistent with mine, as she concentrated on the relevance of the inhaler to the function involved in the descriptor.

14. Having analysed the overall scheme of the legislation, I went on to consider the nature of the connection that had to exist between the use of the aid or appliance and the activity in question. This is how I summarised my analysis:

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.

15. In contrast to that analysis, the argument by the claimant's representative is based on the language of the descriptors without reference to the definition and the importance within that definition of the function that is being tested by the descriptor. That is not the correct approach.

16. It is essential to identify the function that is impaired. In *KR*, the activity concerned was *Moving around*, which is why the judge said that the impaired function was breathing. Breathing was a necessary function to be able to move around. It was the medication that improved the breathing, not the inhaler. That was just the way the medication was delivered. The medication was not an aid or appliance, because it is not a device; and the inhaler was not an aid or appliance, because it did not improve the claimant's breathing.

17. In this case, the claimant's representative has based his case on breathing. That is wrong. The function being tested by Activity 3b is the management of the medication. The relevant function is not the shortness of breath; that is why he needs the medication. The relevant function has to be found in the management of that medication.

18. Some medication can only be delivered by the use of a device. Someone with diabetes may have to use a syringe to deliver their insulin. Their use of the syringe does not indicate that their ability to carry out the daily living activity of managing medication is limited by their physical condition, as required by section 78(1)(a) of the Welfare Reform Act 2012. What it indicates is that the medication can only be delivered in a particular way. The syringe does not improve, provide or replace any function relevant to the management of the insulin for the purposes of the definition in regulation 2.

19. The position is different if the claimant experiences problems with using a syringe. A claimant who has dexterity problems, visual impairment or needle anxiety will need to use one of the devices on the market that assist them by improving or replacing the impaired function that arises from their condition.

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20. There are two ways of looking at the claimant's use of the nebuliser. One way is to see it as just a means of delivering the medication required, just like an inhaler or a syringe. Looking at it in this way, the use of the nebuliser does not indicate any limitation on the claimant's ability to carry out the activity of managing his medication. So this approach does not work on the legislation. The claimant's representative has suggested a different approach. He says that the nebuliser is needed because it delivers the medication as a fine mist that is more effective than an inhaler for someone who cannot take a deep enough breath. This argument founders on the tribunal's findings. The claimant can and does use an inhaler and he only uses the nebuliser when he is in bed, when he denies being breathless. So this approach does not work on the evidence.

21. That is why I have decided that the First-tier Tribunal did not go wrong in law in respect of Activity 3b.

**Signed on original
on 15 December 2016**

**Edward Jacobs
Upper Tribunal Judge**