

**IN THE UPPER TRIBUNAL**

**Appeal No. CPIP/449/2016**

**ADMINISTRATIVE APPEALS CHAMBER**

**Before Upper Tribunal Judge Poynter**

**Attendances**

For the Appellant:                   The claimant's husband

For the Respondent:                 Mr Stephen Cooper

**DECISION**

The appeal does not succeed.

The decision of the First-tier Tribunal given at Southend-on-Sea on 11 August 2015 under reference SC919/15/00166 did not involve the making of any material error on a point of law.

Therefore that decision continues to have effect and the claimant is not entitled to a personal independence payment from and including 14 April 2014.

## REASONS FOR DECISION

### Introduction

1 The claimant appeals with the permission of Upper Tribunal Judge Rowland against the above decision of the First-tier Tribunal ("FTT"). The Secretary of State's representative does not support the appeal.

2 The FTT's decision was taken following a hearing that was attended by the claimant's husband as her representative, but not by the claimant herself. The FTT confirmed a decision taken on behalf of the Secretary of State on 13 February 2015 that the claimant was not entitled to any rate of either component of personal independence payment ("PIP") from and including 14 April 2014.

3 The decision maker had awarded the claimant 6 points towards the daily living component as follows:

Activity	Descriptor	Points
1. Preparing food.	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
4. Washing and bathing.	b. Needs to use an aid or appliance to be able to wash or bathe.	2
6. Dressing and undressing.	b. Needs to use an aid or appliance to be able to dress or undress.	2
	<b>Total</b>	<b>6</b>

and four points towards the mobility component as follows:

Activity	Descriptor	Points
2. Moving around.	b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided	4

4 The FTT confirmed those scores and awarded the claimant a further point for Descriptor 3b:

Activity	Descriptor	Points
3. Managing therapy or monitoring a health condition	b. Needs either— (i) to use an aid or appliance to be able to manage medication; or (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.	1

giving a total of seven points towards the total of eight points needed for the standard rate of the daily living component.

## **The issues**

5 Although the claimant originally claimed points for all the activities, the issues between the parties have now been refined to the extent that she is only seeking the standard rate of the daily living component (which is equivalent to her previous award of disability living allowance) and the activities I have to consider are those identified by Judge Rowland when giving permission to appeal:

“I held an oral hearing of this application for permission to appeal, at which the claimant was represented by her husband. The Secretary of State, quite properly, did not appear and was not represented.

The claimant has raised three grounds of appeal.

In relation to daily living activity 1, it is just arguable that the First-tier Tribunal has not adequately explained why a perching stool would be of sufficient assistance to the claimant, given that her problem is with a risk of falling when holding hot items, particularly when bending to do so. Mr Warner argued that moving hot items when sitting may not be practical. It may be material that the descriptor refers to a “simple meal”, which is defined in Part 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) as a “cooked one-course meal for one using fresh ingredients”, so that not all cooking techniques need necessarily be employed, but the point merits consideration. The claimant seeks 4 points under descriptor 1(e), rather than 2 points under descriptor 1(b).

In relation to daily living activity 3, the First-tier Tribunal seems to have confused descriptors 3(b) and 3(c), but this appears to be immaterial as the claimant was claiming a need for assistance with medication, rather than with therapy, and so the award of 1 point under descriptor 3(b) was appropriate.

In relation to daily living activity 5, the First-tier Tribunal appears to have addressed adequately the question whether the claimant needed an aid to manage toilet needs, given the definition of “toilet needs”, but it appears to have failed to address the question whether she needed the commode to enable her to manage incontinence. The claimant has an arguable case for 2 points under descriptor 5(b).”

6 Judge Rowland also gave directions that the Secretary of State should answer the following two questions at the hearing:

“Is it accepted that, in principle, a commode is an aid to “managing involuntary evacuation of the bowel or bladder”?”

and

“... is it relevant that, but for the stairs in the house, it appears that the claimant would not have required a commode? In other words, are the particular circumstances of a claimant to be taken into account for personal independence payment in the same way as they are for disability living allowance?”

7 It will be convenient to deal with the disputed daily living activities in reverse order.

### **Managing toilet needs or incontinence**

8 The range of descriptors under this daily living activity is as follows:

<b>Activity</b>	<b>Descriptor</b>	<b>Points</b>
5. Managing toilet needs or incontinence	a. Can manage toilet needs or incontinence unaided.	0
	b. Needs to use an aid or appliance to be able to manage toilet needs or incontinence.	2
	c. Needs supervision or prompting to be able to manage toilet needs.	2
	d. Needs assistance to be able to manage toilet needs.	4
	e. Needs assistance to be able to manage incontinence of either bladder or bowel.	6
	f. Needs assistance to be able to manage incontinence of both bladder and bowel.	8

9 A number of the words and phrases used in those descriptors are defined. Under regulation 2 of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations") :

- (a) “aid or appliance”—
- (a) means any device which improves, provides or replaces C’s impaired physical or mental function; and
  - (b) includes a prosthesis;” and
- (b) “C” means a person who has made a claim for or, as the case may be, is entitled to personal independence payment”

and under Part 1 of Schedule 1 to those Regulations:

- (c) “toilet needs” means—
- (a) getting on and off an unadapted toilet;
  - (b) evacuating the bladder and bowel; and

- (c) cleaning oneself afterwards;”
- (d) ““manage incontinence” means manage involuntary evacuation of the bowel or bladder, including use a collecting device or self-catheterisation, and clean oneself afterwards;”.
- The word “incontinence” is not itself defined. However, as was explained by Upper Tribunal Judge Shelley Lane in *JM v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0296 (AAC) (and followed by Upper Tribunal Judge Rowley *BS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0456 (AAC) at [8]) the definition can be extrapolated from the definition of “managing incontinence” and therefore means “involuntary evacuation of the bowel or bladder”.
- (e) ““aided” means with—
- (a) the use of an aid or appliance; or
  - (b) supervision, prompting or assistance;”.
- (f) ““assistance” means physical intervention by another person and does not include speech;”.
- (g) ““prompting” means reminding, encouraging or explaining by another person;”.
- (h) “supervision” means the continuous presence of another person for the purpose of ensuring C’s safety;”.

One consequence of those definitions—and, indeed, of the structure of daily activity 5—is that “toilet needs” and “incontinence” are two different things. The claimant’s ability to manage them must therefore be considered separately. An important difference, which may not have been sufficiently appreciated in this case, is that although everyone has “toilet needs”, not everyone—not even everyone who is prone to “toilet accidents”—necessarily suffers from “incontinence”.

10 The written statement of reasons dealt with the issues that arose under daily living activity 5 as follows:

“23. On toileting, the medical noted the Appellant said she could get herself on and off independently and sometimes she had problems with opening her bowels. If this happened, she would need help getting off the toilet and this could happen once or twice a week. This was not for the majority of the time and so no points were awarded for this descriptor. [The claimant’s husband] said his wife could use the toilet ok but sometimes needed an arm just to support her. He said she had a crutch which are used. She had not had an occupational therapy assessment. The medical mentioned the Appellant’s evidence [that] she had no problem with toileting was inconsistent with her own form where she said she had constipation. It was also inconsistent with the fact that she said she had bought a mobile toilet for downstairs. The Appellant’s evidence that she did not need any help getting on and off the

toilet coupled with her and [her husband's] evidence that she could walk to Tesco Express/GP or School led the Tribunal not to award any points for this descriptor. The Appellant did not require a mobile toilet based on her own evidence of what she could and could not do. It was after weighing all this evidence the Tribunal did not award any points for this descriptor. The Appellant was able to manage her own toilet needs independently and there was no need for any aid or appliance to assist her in doing this."

11 I accept—and the claimant's husband did not challenge—Judge Rowland's suggestion that that passage "addressed adequately the question whether the claimant needed an aid to manage toilet needs, given the definition of "toilet needs"".

12 The issue was therefore whether the FTT had explained adequately why the claimant did not need an aid or appliance, namely a commode, in order to manage incontinence.

13 At the hearing, and in response to Judge Rowland's directions, Mr Cooper accepted on behalf of the Secretary of State that a commode is an "aid" within the definition of "aid or appliance" quoted above. That is consistent with the Secretary of State's published guidance and I accept that it is correct.

14 Mr Cooper also accepted on behalf of the Secretary of State that it is the particular circumstances of the individual claimant are relevant to the PIP assessment. What has to be assessed are the reasonable requirements of a person with the claimant's characteristics and circumstances, so the test is partially objective and partially subjective. Again I accept that that is correct.

15 What the Secretary of State does not accept is that a claimant's mobility difficulties can ever be relevant to the daily living activity of managing toilet needs or incontinence.

16 As it relates to managing incontinence, I regard that position as problematic.

17 I accept that if a claimant does not suffer from incontinence—that is to say, if he does not have a condition that reduces his ability to control his bowel or bladder so that, at least on occasion, he experiences involuntary evacuation—then there is nothing to manage within the meaning of the activity and therefore mobility problems cannot be relevant to such management.

18 Put another way, many people with normal bowel and bladder control may nevertheless experience being "caught short" from time to time. And it is not difficult to accept that a person whose mobility is restricted is likely to find himself caught short more often than someone whose mobility is unimpaired. That may mean that the former person has more toilet accidents than the latter (who may, in practice, have none). But, in the absence of a condition that impairs voluntary control over the bowel or bladder, that is because of the former's restricted mobility, not because he is incontinent.

19 However, if a claimant *does* have a condition that can lead to involuntary evacuation of the bowel or bladder, the position seems to me to be different. Such a person may or may not also have mobility problems and, if he does, then it

seems likely that the condition will be more difficult to manage than if he does not. In such a case, I cannot as presently advised see any reason why any mobility problems should not be taken into account when assessing whether such a claimant reasonably needs to use an aid or appliance. That is particularly so given the Secretary of State's acceptance that the assessment must address the reasonable needs of a person with the claimant's characteristics. Finally, it is relevant that the definition states that managing incontinence *includes* "us[ing] a collecting device or self-catheterisation, and clean[ing] oneself afterwards": it is not *confined* to those activities.

20 There is also a tension between the Secretary of State's acceptance in this appeal that a commode can be an aid for the purposes of daily living activity 5 and his view that mobility problems are never relevant to that activity.

21 The main difference between a commode and a toilet is that the former is mobile and the latter is not. A person suffering from incontinence has to go to a toilet; but a commode can come to him. I accept that it is also the case that a toilet will be plumbed in and a commode will not. However, that is really no more than an aspect of the need for the commode to be mobile. I can see no other relevant differences.

22 As it is obviously not a prosthesis, acceptance that a commode is an "aid" within the definition in regulation 2 of the PIP Regulations entails acceptance that it is a "device which improves, provides or replaces C's impaired physical or mental function". Mental functions are not in issue, and it is difficult to see which physical function the commode is improving, providing or replacing, if not mobility. Therefore, if mobility is never a relevant physical function in relation to managing incontinence, it is difficult to see how a commode be an aid for the purpose of that activity. Yet the Secretary of State accepts that it is such an aid.

23 However, I am persuaded by Mr Cooper that it is unnecessary for me to decide those issues in this appeal. That is for two reasons. First, at least on the evidence before the FTT, the claimant does not suffer from incontinence and second, even if she does, there is no error of law in the FTT's conclusion that she did not reasonably need to use a commode, given its findings of fact about the extent of her mobility difficulties.

24 As explained at paragraph 9 above, for the purposes of PIP, "incontinence" means the "involuntary evacuation of the bowel or bladder". It is accepted that the claimant does not suffer from involuntary evacuation of the bowel. On the contrary, her evidence is that she suffers from constipation of such severity that she sometimes has to evacuate faeces manually.

25 The claimant's husband told me that the claimant did suffer from involuntary evacuation of the bladder and that that is supported by an extract from a DLA examination report dated 30 September 2012.

26 However, I accept Mr Cooper's submission that that examination report was not before the FTT, and therefore the FTT did not err in law by not considering the issue of urinary incontinence.

27 From the position of the report in the appeal papers, it appears that it was put in evidence for the first time to support the claimant's application for permission to appeal to the Upper Tribunal. It was not included in the scheduled papers that were sent to the parties before the hearing. The record of proceedings

states that the FTT checked the papers at the beginning of the hearing and no additional documents are recorded as having been produced. Moreover, had the issue of urinary incontinence been raised, I would have expected the FTT to have dealt with it in the written statement of reasons.

28 The claimant's husband says that the FTT was made aware of the report and it is true that, at one point the record of proceedings states:

“DLA claim assessed by Dr at home  
He made assessment in kitchen”

However, the passage immediately following that, in which the claimant's husband is asked whether he wants to comment on a report and declines to do so, refers to the ESA85 medical report dated 8 April 2013 on page 57 of the papers and not—as the claimant's husband maintains—to the DLA report dated 30 September 2012. It is also relevant, that the claimant is not recorded as having raised any incontinence problems with the physiotherapist who examined her on the former occasion.

29 However, nothing actually turns on whether the DLA report was before the FTT because, correctly understood, that report undermines the claimant's case rather than supports it. The part of the report that it is most helpful to the claimant notes that:

“Having a bedside commode would help her toileting difficulties”.

However, the examining doctor answers “No” to the question:

“In your opinion is the customer's medical condition(s) likely to cause incontinence (consider urinary and faecal incontinence)”.

and continues:

“Although customer reports that she gets bladder incontinence as she can not reach to *[sic]* toilet quickly enough and needs her family in the night to come out of bed → But she also said that she sleeps mostly downstairs. [T]oilet and bathroom are upstairs. One would of *[sic]* thought that if the toilet was difficult due to mobility then she would have preferred to sleep in one of the bedrooms upstairs.”

So, had the report been before the FTT, it would have known that the claimant was saying that she had problems with her bladder. However, it would also have known that those problems were said to arise because she could not reach the toilet in time and that an examining doctor formed the view that the claimant did not suffer from a medical condition that could cause urinary incontinence. In other words, what is described in the report is—at most—a case that falls into the “caught short because of mobility problems” category rather than the “impaired control over evacuation of the bowel or bladder” category. Moreover the final



passage quoted above makes it clear that the examining doctor also doubted the extent of the mobility problems asserted by the claimant.

30 It might be argued that a report from 2012 was of little relevance to a claim for PIP where the required period began in January 2014. However, there was more recent evidence to the same effect. The claimant's letter of appeal dated 17 March 2015 stated:

“I don't suffer with incontinence or blader [sic] issues. The only assistance I require is getting to the bathroom. My toilet is located on the 1<sup>st</sup> floor, and I have difficulty with moving up the stairs.”

Again, that evidence tended to show that the claimant experienced being caught short as a result of mobility difficulties, rather than that she suffered from incontinence that required management.

31 In those circumstances, I judge that there was no evidence before the FTT on which it could have concluded that the claimant suffered from involuntary evacuation of the bowel or bladder and therefore—whatever the position may have been as regards managing “toilet needs”—the written statement of reasons did not need to discuss the “managing incontinence” aspect of daily living activity 5 in any detail.

32 It would certainly have been preferable for the FTT to have said in as many words that that was the case, but if its omission to do so is an error of law, it is an immaterial error. On the evidence, and whatever the FTT did or did not say, the claimant is not incontinent for the purposes of entitlement to PIP.

33 In case I am wrong about that, I should add that what the FTT said about the claimant's mobility needs in the passage from the statement of reasons quoted at paragraph 0 above, and the statement generally, would have been sufficient to demonstrate that the claimant did not need to use a mobile toilet or commode even if she did suffer from bladder incontinence. That paragraph was dealing with the “managing toilet needs” aspect of daily living activity to which, given the decision of Upper Tribunal Judge Hemmingway in *GP v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 498 (AAC), mobility problems are not relevant. However, it recorded evidence that had been given about walking that the claimant actually undertook (and which it was entitled to accept) and then found as a fact that “[t]he Appellant did not require a mobile toilet based on her own evidence of what she could and could not do”. That was a finding that the FTT was entitled to make on the evidence and, as it applied to toilet needs generally, it is as applicable to bladder problems as it is to bowel problems.

34 Finally, in view of the claimant's reliance on the report of a DLA medical examination, I should also say that the rules for DLA and PIP are different. Helping a person whose only disability is restricted mobility to get to the toilet, would, if reasonably required, amount to attention from another person in connection with a bodily function for the purposes of DLA. However, PIP is a descriptor-based benefit and such help would not count as assistance with the activity of managing incontinence because for PIP purposes, a person whose only disability is restricted mobility has no incontinence to manage.

## Managing therapy or monitoring a health condition

35 It will be remembered that Judge Rowland considered (paragraph 5 above) that the FTT had confused descriptors 3(b) and 3(c), but that the error was immaterial as the claimant was claiming a need for assistance with medication, rather than with therapy, and so the award of 1 point under descriptor 3(b) was appropriate.

36 What the FTT said was:

“21. On managing therapy, the Appellant said she set up an alarm on her phone as a reminder. This was acknowledged in the medical. [The claimant's husband] said her medication was marked out for her and sometimes she was told to take it. Acknowledging the use of the phone to serve as a reminder and the sometimes prompting and assistance, [the Tribunal] awarded her 1 point for this descriptor. Such assistance or prompting did not take longer than 3.5 hours per week.”

The confusion arises from the fact that descriptor 3b does not contain any reference to “3.5 hours” while descriptor 3c:

Activity	Descriptor	Points
3. Managing therapy or monitoring a health condition	c. Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week.	2

does.

37 Under Part 1 of the Schedule to the PIP Regulations:

(a) ““medication” means medication to be taken at home which is prescribed or recommended by a registered—

(a) doctor;

(b) nurse; or

(c) pharmacist”;

(b) ““therapy” means therapy to be undertaken at home which is prescribed or recommended by a—

(a) registered—

(i) doctor;

(ii) nurse; or

(iii) pharmacist; or

(b) health professional regulated by the Health Professions Council”; and

- (c) ““manage medication or therapy” means take medication or undertake therapy, where a failure to do so is likely to result in a deterioration in C’s health;”
- (d) “supervision”, “prompting” and “assistance” are defined as set out in paragraph 9 above.

38 Although the passage from the written statement of reasons quoted above says it is dealing with managing *therapy*, it actually discusses managing *medication* and all the parties agree that the award of 1 point for managing medication is appropriate because descriptor 3b is satisfied.

39 However, the claimant’s husband submitted that his wife also satisfied Descriptor 3c and should therefore be awarded 2 points instead. The issue is important because it makes the difference between the claimant’s being entitled to the standard rate of the daily living component and her not being entitled to PIP.

40 The claimant’s husband pointed out at the hearing before me that his wife had raised her use of a transcutaneous electrical nerve stimulation (“TENS”) machine, and that the FTT had not dealt with that issue in its statement. Specifically, the claimant had stated at page 35 of the claim form:

“I also have crutches, walking stick, wheelchair, tens machine and waist belt all purchased privately and used when needed”

From the record of proceedings, it appears that the TENS machine was mentioned in passing, but that no follow-up questions were asked. The claimant’s husband is correct to state that the statement of reasons does not mention the point.

41 In order for the claimant’s use of her TENS machine to count as therapy for the PIP purposes, it must have been recommended by a registered doctor, nurse, or pharmacist, or by health professional regulated by the Health Professions Council. There was no evidence that that was the case: the claimant said she had purchased it privately but not who, if anyone, had suggested she should do so.

42 However, in my judgment, the FTT cannot be criticised for having explored that point because, even assuming that the necessary recommendation had been given, the mere fact that the claimant undertook therapy does not lead to a score of points under daily living activity 3 unless she needed supervision, prompting or assistance in order to manage that therapy. The first time that such a need was mentioned appears to have been in the appeal to the Upper Tribunal:

- (a) On page 15 of the PIP claim form, the claimant is asked to “Tell us more information about the ... help you need to ... manage home therapies” but her reply does not mention the TENS machine.
- (b) The passage quoted above from page 35 of the claim form does not indicate that the claimant needs help to use her TENS machine.
- (c) The ESA85 medical report dated 8 April 2013 does not mention the TENS machine.

- (d) The PA4 PIP consultation report dated 30 January 2015 mentions the TENS machine (on page 3 of the report) but does not record anywhere that the claimant required any help to use it.
- (e) The request for mandatory reconsideration on the decision date 13 February 2015, does not mention a need for assistance with the TENS machine.
- (f) The letter of appeal dated 17 March 2015 discusses daily living activity 3 but does not mention the TENS machine, far less assert a need for help with it.

Further there is no reason to suppose, given the other medical evidence, that the claimant would need help to use a TENS machine.

43 As neither party raised the point, and it was not an issue that was apparent from the evidence, I judge that the claimant's alleged need for assistance with her TENS machine was not an issue raised by the appeal and the FTT did not err in law by omitting to deal with it.

### **Preparing food**

44 The statement of reasons dealt with the issues arising under daily living activity 1 in the following terms:

"18. On preparing food, the Appellant said in her form, most of her meals were prepared by family and her ex-husband and friends. She said on good days she can use the microwave but found this difficult and bad days. She said she would not use the cooker if she was alone. [Her husband] said the Appellant could not prepare food as she was a danger to herself with moving water around and with so many accidents. He said there was a risk in her taking something hot out of The microwave and so someone came round for meals times and most of the time.

19. The Tribunal noted the arthritis in the Appellant's lower back. The face to face mentioned the Appellant's brother coming around or friend helping her but there was no mention of the Appellant's mother in law. The appellant apparently stated she could cook simple things. The evidence raised the question why the claimant's husband or anyone else had to go round (as stated in the claim form) if [the claimant's mother-in-law] was already there (having stayed overnight). The Tribunal noted that the Appellant said in her form she could use a microwave on good days, although [her husband] said someone came round most of the time and even using the microwave was a risk, which was different to what the Appellant said. The Appellant also stated she would not use the cooker if she was alone, again implying there were times when she could use the cooker, which was not [her husband's] suggestion. The tribunal found [the husband's] evidence, although well intended, was either confused with the current situation as opposed to the date of decision or that [the

husband] himself was not really an authority of what his wife could and could not do for the simple reason that he was not actually living there and was otherwise engaged in police work most of the time. Weighing all this evidence, the Tribunal found the Appellant could cook herself a main meal but that an aid or appliance such as a tray or perching stool would allow her to transfer any hot food and also support her due to her arthritis. Such aid or appliance would help her to the task reliably and repeatedly and safely.”

45 The claimant’s case is that she should have been awarded four points for satisfying Descriptor 1e:

Activity	Descriptor	Points
1. Preparing food.	e. Needs supervision or assistance to either prepare or cook a simple meal.	4

46 Under Part 1 of the Schedule to the PIP Regulations:

- (a) “cook” means heat food at or above waist height;
- (b) “prepare”, in the context of food, means make food ready for cooking or eating;
- (c) “simple meal” means a cooked one-course meal for one using fresh ingredients;

In addition, “aid or appliance”, “supervision” and “assistance” are defined as set out in paragraph 9 above.

47 The claimant argues that she was previously in receipt of the lowest rate of the care component of DLA on the basis of the cooking test, that the tribunal had accepted she could not stand to clean herself safely and that it would be even more dangerous for her to stand to cook; that a perching stool would not assist her and that she could not use a tray to move items because she needs to use her crutches.

48 However:

- (a) the tests under PIP daily living activity 1 are not identical to the main meal test for DLA and the FTT was not only entitled, but obliged, to reach its own assessment of the claimant’s needs against the current legal criteria. A previous award of the lowest rate of the care component on the basis of the cooking test does not necessarily mean that the claimant satisfies any of the “Preparing food” descriptors.
- (b) The FTT did not find that the claimant could not stand to clean herself safely. It upheld the Secretary of State’s decision that she needed an aid to do so. That is consistent with its decision that the claimant needed an aid to reduce her need to stand when preparing food. Further, the FTT’s confirmation of the 2 points for washing and bathing awarded by the Secretary of State was very much on the generous side, given the clinical findings it accepted and the conclusion it reached that there was no

“functional restriction that would prevent the Appellant [washing and bathing] reliably and repeatedly”. If I had been minded to allow the appeal as it related to the other activities, I would have had to consider carefully whether the claimant should be permitted to retain her points for washing and bathing.

- (c) As “cook” means heat food at or above waist height, the FTT did not have to consider whether the claimant would be able to remove hot food from an oven below the counter-top. A perching stool would be high enough to allow the claimant to move pans on to and off a waist-high hob. The point of a perching stool is that it is high enough to remove, or at least reduce, the need to stand while cooking. As the “simple meal” contemplated by the test is a one course meal for one person, it will not involve large quantities of food and need not involve moving pans full of hot liquid. Food can be served directly from the pans on the hob to the plate, while perching on the stool.
- (d) It is implicit in the FTT’s conclusion that the claimant could use a tray to transfer food, that it did not accept that she needed to use crutches to move around indoors for more than 50% of the time. The claimant’s evidence was that she had purchased the crutches privately (*i.e.*, her doctors had not provided her with them) and used them “when needed”. The only evidence before the FTT as to the claimant’s use of a crutch was that she used a (single) crutch to help her rise from the toilet. The FTT was entitled to take the view on the evidence as a whole that the claimant did not need a crutch, far less two crutches, to move around indoors and would be able to transfer the small amounts of food required to make a one course mean for one person using a tray.

49 I therefore accept Mr Cooper’s submission that the FTT was entitled to reach the decision it did on this issue. As the claimant did not attend the hearing herself, the FTT had to do the best it did with the indirect evidence it received from her husband. It had to weigh that evidence against all the other evidence, including that of the health care professional. In doing so it was inevitable that it would take into account the inconsistencies it had identified between the written accounts the claimant had given of her condition and what it was told by her husband. There is nothing to suggest that the Tribunal overlooked relevant evidence while carrying out that weighing exercise, or that it took irrelevant matters into account. The resolution of the conflicts in the evidence was a matter of fact and therefore a matter for the FTT. In my judgment, the FTT did not make any error of law in relation to this activity.

## **Conclusion**

50 For all those reasons, my decision is as set out on page 1.

(Signed on the original)

Richard Poynter  
Judge of the Upper Tribunal

31 January 2017