

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Upper Tribunal case No. CPIP/1673/2015

Before: Mr. E Mitchell, Judge of the Upper Tribunal

Hearing: 24 February 2016 at North Shields Combined Court Centre (followed by two further rounds of written submissions)

Attendances: For the Appellant Mr O, Mr Lloyd (non-legally qualified representative) of the Macmillan Welfare Benefits Team at North Tyneside Council

For the Respondent Secretary of State for Work & Pensions, Mr Cooper, solicitor, instructed by the Government Legal Department

Decision: The appeal is dismissed. The decision of the First-tier Tribunal (14 January 2015, sitting at North Shields, file reference SC 232/14/00252) is not set aside. The Tribunal's decision did not involve a material error on a point of law.

REASONS FOR DECISION

Introduction

1. This appeal concerns the relationship between the “required period”, which is part of the Personal Independence Payment (PIP) assessment rules, and the PIP “required period condition”. The former is provided for by Part 2 of the Social Security (Personal Independence Payment) Regulations 2014 (“PIP Regulations”) and the latter by Part 3 of the Regulations.

2. The facts of this appeal starkly illustrate why the relationship between Parts 2 and 3 of the PIP Regulations matters. Mr O was recovering from cancer surgery. On the First-tier Tribunal's findings, he scored at least eight PIP assessment points on more than 50% of the days of the required period. Had there been no issue as to satisfaction of the required period condition, Mr O would have been entitled to PIP. However, the Tribunal found that Mr O had recovered from surgery within some six months of his operation and did not need assistance of a type that would score at least eight PIP assessment points for the period of nine months following his date of claim. The Tribunal found he did not satisfy the required period condition and was not therefore entitled to PIP.

3. I decide that the First-tier Tribunal correctly applied the required period condition provisions of the PIP Regulations. While this may seem a harsh result, given the debilitating effects of cancer treatment, the Tribunal correctly applied the law. Since the effect on Mr O was largely short-term, he was not entitled to PIP.

4. If there are policy concerns about the implications of this decision for cancer patients, I simply observe that the Secretary of State may have power, under section 81(4) of the Welfare Reform Act 2012, to amend the PIP Regulations and treat such patients as a special case. Section 81(4) allows regulations to enact a different form of required period condition in prescribed cases.

Background

5. Mr O was diagnosed with bowel cancer in September 2013. In October 2013 he had surgery to remove cancerous tissue and fit a stoma. Mr O's date of claim was 22 November 2013. His appeal proceeded on the basis that this was his "prescribed date" for the purposes of the PIP entitlement rules. Mr O's claim form was completed on 3 December 2013.

6. The claim form stated that, during the first 10 months of 2013, Mr O was admitted to hospital on four occasions with abdominal pain associated with frequent vomiting, fatigue, dizziness when standing and restricted movement due to abdominal pain.

7. The claim form described Mr O's difficulties in performing certain PIP assessment activities:

(a) *Preparing Food* – Mr O could stand for no more than five minutes, sometimes less. Standing led to dizziness, headaches and "jelly legs" and meant he needed to sit and rest. He could not prepare a full meal using an oven but did prepare food using a microwave. The form argued it would be reasonable for Mr O to use a perching stool when preparing food and descriptor 1(c) applied: 2 points;

(b) *Eating and Drinking / Taking Nutrition* – during Mr O's illness he became reluctant to eat due to nausea, vomiting and abdominal pain. His partner needed to encourage him to eat. The form argued descriptor 2(d) applied: 4 points;

(c) *Washing and Bathing* – bathing was difficult because, following surgery, Mr O needed to keep his wound dry, and he had problems getting in and out of a bath and with bending. Mr O's partner helped him in and out of the bath and washed his legs and hair. It would be reasonable for Mr O to use a bath board. The form argued either descriptor 4(b) or (d) applied: 2 points;

(d) *Managing Toilet Needs* – Mr O could not empty his stoma bag or change the bag. It needed to be emptied 4-5 times per day and changed every 2 days, with Mr O's partner's assistance. The form argued either descriptor 5(b) or (d) applied: 2 or 4 points;

(e) *Dressing and Undressing* – both before and after surgery, Mr O's partner needed to dress the lower part of his body. He could not do so himself due to abdominal pain and dizziness. The form argued descriptor 6(d) applied: 2 points;

(f) *Moving Around* – before surgery, Mr O could walk no further than 3-400 metres but at a slow pace and with rests. Mr O would be too tired to do such a walk more than once a day. After surgery, Mr O could walk no more than 100 metres but at less than half normal pace due to exhaustion. He would be unable to do such a walk more than once a day. The form argued descriptor 2(e) applied: 12 points.

8. On 2 June 2014, Mr O had a consultation with a healthcare professional (HCP) for the purposes of his PIP claim. The HCP's report stated that Mr O always experienced background pain with episodes of severe pain which would leave him breathless. Mobilising would worsen pain and could bring on panic attacks. Three days a month were bad days when Mr O could not go out. Mr O had been having chemotherapy but this was stopped due to side effects.

9. The HCP report also stated that Mr O informed the HCP:

(a) for the majority of the time, he could manage his stoma bag himself. He occasionally needed his partner's help to shave the affected area;

(b) around three times per month, his stoma bag would make it difficult for him to dress himself. On these occasions, Mr O's partner needed to help him dress the lower half of his body;

(c) twice a week, he would walk 400 metres to a local shop;

(d) he could make a sandwich and cook for himself although 3-4 times per month he would have a bad day affecting how long he could remain standing and his ability to cook;

(e) for the majority of the time, he could bathe himself but 3-4 days per month he could not. After his surgery, Mr O needed help bathing to ensure his stitches were washed carefully but this was no longer a problem.

10. The HCP advised the Secretary of State that Mr O satisfied no PIP points-scoring descriptors. The Secretary of State agreed and rejected Mr O's PIP claim.

11. Mr O appealed to the First-tier Tribunal. His representative, the Macmillan Welfare Benefits Team at North Tyneside Council provided the First-tier Tribunal with a written submission. Three episodes of need were discernible in the submission: pre-surgery, post-surgical recovery and ongoing needs persisting after recovery from surgery:

(a) the description of Mr O's difficulties in preparing food was largely the same as that in his claim form;

(b) Mr O's washing and bathing difficulties differed over the course of his illness, treatment and recuperation: before surgery he needed help due to difficulty bending and twisting;

afterwards he needed help to keep the stoma site clean, dry and shaved; there was a persistent need for help getting in and out of the bath and washing his legs. The submission argued over that, over the course of Mr O's illness and recuperation, for over 50% of the time he needed help so that descriptors (b), (d) and (e) applied;

(c) Mr O's stoma had been in place for about a year. Throughout this period, Mr O's partner needed to help him with it approximately four times a week, sometimes several times a day. The submission argued descriptors (b), (d) and (e) applied;

(d) the submission's description of Mr O's dressing needs was largely the same as in his claim form;

(e) the submission, unlike the claim form, argued for points under the 'engagement with other people' activity area. Due to embarrassing stoma bag incidents, Mr O had come to need his partner's encouragement to go out and be accompanied when outside. The submission argued descriptors (b) or (c) applied;

(f) the submission's description of Mr O's mobility problems was similar to that given in the claim form but it also described Mr O's ongoing difficulties. While Mr O did walk 400 metres to the HCP consultation, the HCP report failed to mention that he needed to stop three times and was too exhausted to walk outdoors again that day.

12. Mr O's submission disputed the HCP report's description of the variability of Mr O's symptoms, arguing instead that his condition was such that he needed help with preparing food, washing, dressing, toileting and mixing with other people, and had impaired mobility, on 4 days a week "through the later part of the prospective period and all the time for several months after surgery and chemotherapy".

13. Mr O's GP provided two supporting letters.

14. A GP letter dated 13 October 2014 said that, in July 2014 (the time of the HCP consultation), "[Mr O] was coping very well with his physical health" but "he did struggle before this to a great extent". For "at least six months" after surgery, Mr O struggled with reduced mobility (he could only walk 50 yards without experiencing severe discomfort and breathlessness), pain and leakage from his stoma bag. The GP also wrote that "he was fairly reliant on his partner...for help with washing and dressing at this stage and bending was painful due to his stoma and operation scar". It is not entirely clear, to my mind, what 'stage' was being referred to. This passage came after a section of the letter which said Mr O was due to re-start cardiovascular medication although the letter ended by saying that Mr O "has now made a full recovery".

15. A GP letter dated 7 February 2015 stated that Mr O experienced difficulties for six months after his surgery. Before surgery, Mr O had episodes of significant abdominal pain. The GP's

opinion was that Mr O would have struggled getting in and out of the bath for 3 months before and 4-5 months after surgery. The GP could not say precisely how often Mr O had difficulties with his stoma but this “could have been” for 6 months following surgery.

The First-tier Tribunal’s decision

16. Mr O attended the hearing and gave oral evidence. The Tribunal directed itself that it needed to decide whether Mr O had limited ability to carry out daily living and mobility activities for the PIP Regulations’ required period and whether he met the “required period condition”. The Tribunal dismissed Mr O’s appeal.

17. The Tribunal made the following findings of fact:

(a) with the exception of Mr O’s difficulties with toileting and engaging with people, Mr O had difficulties with the PIP activities claimed during the three months before his date of claim but not for nine months afterwards;

(b) “while Mr [O] reasonably required much assistance immediately after his operation, which was about three weeks prior to his date of claim, as he recovered his reasonable requirements for assistance or the use of aids or appliances reduced”;

(c) the Tribunal relied on Mr O’s GP letters to find that, 6 months after surgery, Mr O had made a full recovery from surgery;

(d) Mr O did not need “significant assistance” for the whole of the 9 month required period after the date of claim;

(e) within 2-3 months of surgery, Mr O could prepare a simple meal and wash and bathe himself without assistance. The Tribunal relied on Mr O’s evidence and its medical knowledge as to typical surgery recovery times in making this finding. No PIP points were awarded for these activities;

(f) the Tribunal found that, throughout the period of nine months following surgery, Mr O’s partner provided him with daily help in changing his stoma bag and shaving around the surgery site;

(g) for 2-3 months after surgery, Mr O needed help to dress the lower parts of his body. The Tribunal relied on Mr O’s evidence and medical expectations in making this finding;

(h) Mr O’s difficulties in engaging with people were due to embarrassment connected to his stoma rather than a mental health condition. No PIP points were justified under this activity area or under the ‘planning and following journeys’ mobility activity area;

(i) for three to six months after surgery, Mr O would have had restricted mobility but no 'moving around' points were awarded since Mr O did not have impaired mobility throughout the nine months following the date of claim.

18. The Tribunal concluded that Mr O did not reasonably require assistance, or the use of aids and appliances, in performing any PIP activities, apart from managing toilet needs, for more than 50% of the time, throughout the whole of the 9 month required after his date of claim. Mr O's six points for his toileting difficulties (descriptor 5(e)) did not reach the 8 point award threshold. Mr O was not entitled to PIP.

Legislative framework

Welfare Reform Act 2012

19. Personal Independence Payment was created by Part 4 of the Welfare Reform Act 2012. PIP takes the form of an allowance "payable in accordance with" Part 4 of the 2012 Act (section 77(1)). A person's entitlement to PIP may be an entitlement to the daily living component or the mobility component or both (section 77(2)).

20. For both components, the 2012 Act specifies two core entitlement criteria.

21. The first is concerned with an individual's ability to carry out either daily living or mobility activities. If ability is limited by the person's physical or mental condition, s/he is potentially entitled to the standard rate of the daily living or mobility component. If ability is severely limited, s/he is potentially entitled to the enhanced rate of those components.

22. The 2012 Act is framework legislation. For the most part, the detail is set out in the PIP Regulations. Section 80(1) provides that the questions whether a person's ability to carry out daily living or mobility activities are limited or severely limited "are to be determined in accordance with regulations". Section 80(3) requires regulations to provide for the questions to be determined "on the basis of an assessment" (except in prescribed circumstances).

23. The second core entitlement criterion is that "the person meets the required period condition". Section 80(2) of the 2012 Act requires regulations to "make provision for determining...whether a person meets "the required period condition"". Section 80(3) requires regulations to provide for the "question" whether the required period condition is met to be determined "on the basis of an assessment" (except in prescribed circumstances). Section 81 goes on to control the content of the provision to be made by regulations for determining whether a person meets the required period condition. I set out the relevant provisions in full:

“(1) Regulations under section 80(2) must provide for the question of whether a person meets “the required period condition”...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;

(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.”

24. I make the following observations about section 81 of the 2012 Act:

(a) it requires the PIP assessment rules to be applied in determining whether the required period condition is met: see the definition of “assessed” in section 81(3);

(b) it has an historical element (“previous three months”) and a prospective element (“next nine months”), thus creating a 12 month window of analysis;

(c) it calls for a notional, rather than an actual, application of the PIP assessment rules. It envisages a determination as to “whether” a particular result would follow “if” an assessment were carried out during the 12 month window of analysis;

(d) that notional assessment is to be performed at “every time” during those 12 months although this cannot be taken entirely literally. Parliament could not have expected a decision-maker to perform this task for every nanosecond during the 12 month window of analysis.

25. The 2012 Act must be read with the general decision-making rules contained in the Social Security Act 1998. Section 8(1)(a) of the 1998 Act provides that “it shall be for the Secretary of State to decide any claim for a relevant benefit” (PIP was added to the list of relevant benefits in section 8(3) by amendment made by the 2012 Act). Section 8(2) provides that where “at any time a claim for a relevant benefit is decided by the Secretary of State” then (a) the claim shall not be regarded as subsisting after that time, and (b) accordingly, the claimant shall not be entitled to benefit “on the basis of circumstances not obtaining at that time”. The section 8(2) rules apply on appeal to the First-tier Tribunal. Section 12(8)(b) provides that, in deciding an appeal, the Tribunal “shall not take into account any circumstances not obtaining when the decision appealed against was made”. It has not been argued that, in this case, the Tribunal failed to comply with section 12(8)(b).

The PIP Regulations

The PIP assessment rules

26. Given the definition of “assessed” in section 81(3) of the 2012 Act, the required period condition operates by reference to the PIP assessment rules in Part 2 of the PIP Regulations. Headed “Personal Independence Payment Assessment”, this Part contains regulations 3 to 11.

27. Regulation 3 introduces the daily living activities and mobility activities that the 2012 Act requires the regulations to prescribe. The activities themselves are set out in Schedule 1 to the Regulations together with associated descriptors which describe various modes of carrying out the activity in question.

28. Regulation 4 is headed “Assessment of Ability to Carry out Activities”. Regulation 4(1) simply repeats the requirement of the 2012 Act that the question whether an individual has limited or severely limited ability to carry out activities “is to be determined on the basis of an assessment”. Arguably, the drafting becomes a little slack at this point because there is no provision that directly introduces the “assessment” as that contained in Schedule 1 to the Regulations (the definition of “assessment” in regulation 2(1) is simply “the assessment referred to in regulation 4”). It is clear, however, that the assessment - the “basis” for the PIP ability determinations – involves applying Schedule 1 to the Regulations.

29. Regulation 4 sets certain parameters for the assessment, including:

(a) Regulation 4(2) requires an individual’s “ability to carry out an activity” to be assessed on the basis of certain rules and assumptions about the use of aids and appliances;

(b) Regulation 4(2A) introduces the concept of the “descriptor”, defined by regulation 2 as simply “a descriptor in column 2 of the tables in Parts 2 and 3 of Schedule 1”. By this point, the regulations have not explained the role of a descriptor in the assessment of ability to carry out an activity. Nevertheless, regulation 4(2A) places restrictions on determining whether a descriptor applies:

“(2A) Where C's ability to carry out an activity is assessed; C is to be assessed as satisfying a descriptor only if C can do so—

- (a) safely;
- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period.”

30. “Safely”, “repeatedly” and “reasonable time period” are defined in regulation 4(4) but I need not set those out for present purposes.

31. By the regulation 4 stage, the PIP Regulations have yet to connect the assessment with the determination of whether an individual has limited or severely limited ability to carry out daily living or mobility activities. All they have done is introduce the assessment and prescribe rules about how the descriptors are to be applied.

32. Regulations 5 and 6 deal with scoring an individual’s abilities to carry out daily living and mobility activities and, in so doing, connect the assessment with the determination of ability on which entitlement depends. The aggregate score for the activities is the sum of the points for each individual activity (regulation 5(1) and 6(1)). The points for each activity are those allotted to the descriptors applicable to the individual. If the aggregate score for either the daily living or mobility activities is at least eight, the individual has limited ability. If it is at least twelve, the individual has severely limited ability. These correspond to the standard and enhanced rates of the two PIP components.

33. Regulation 7 contains further provision about scoring. It forms part of the legislative scheme for assessing whether an individual has limited or severely limited ability to carry out daily living or mobility activities.

34. Regulation 7(1) contains rules for deciding which descriptor applies for each of the prescribed activities. These include the following:

- (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” applies.

35. Regulation 7(2) provides that “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”. Accordingly, the assessment involves considering day-by-day, during the required period, the individual’s limitations and asking whether, if the individual were assessed on that day, a descriptor would have been satisfied. Hence, the mainstream PIP assessment also includes a notional aspect.

36. The “required period” in regulation 7(2) is not in fact defined by reference to the required period condition (which is dealt with in Part 3 of the PIP Regulations). It is dealt with by regulation 7(3), which provides:

“(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.”

37. The “prescribed date” is identified by regulation 14. On a new claim, it is typically the date of claim. So far, matters are relatively straightforward. We are dealing with a mental task that involves the following elements:

(a) the fixing of a 12 month window of analysis;

(b) determining whether, on the day of assessment (i.e. the day on which it is decided whether an individual has limited or severely limited ability), a descriptor applied;

(c) a day-by-day analysis of whether, had the person been assessed on each day of the required period, a descriptor for a particular activity did or would apply;

(d) adding up all of the days on which a descriptor did and would apply;

(e) normally, taking into account a descriptor that was satisfied on over least 50% of those days and discounting other descriptors;

(f) where, for a particular activity, more than one scoring descriptor applies, selecting the higher or highest scoring descriptor;

(g) an exception to this general approach concerns cases where (i) a descriptor for a particularly activity is not satisfied on at least 50% of the days of the required period, but (ii) in total two or more descriptors are satisfied on over 50% of the period. Here, the descriptor satisfied for the greater or greatest proportion of the days applies or, in the case of a tie-break, the higher or highest scoring descriptor applies.

38. I acknowledge that, in reality, the task is not nearly as formulaic as that and I am not suggesting that a decision maker needs to make day-by-day findings. In many cases, the required period is not a live issue because the individual's condition is relatively stable (even if, by its nature, fluctuating).

Part 3 of the PIP Regulations – the Required Period Condition

39. Part 3 of the PIP Regulations is devoted to the required period condition. While separate provision is made for the different PIP components and rates, the content of the provision is materially the same. I shall only refer to the provision made in regulation 12(1) for the standard rate of the daily living component:

“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.”

Proceedings before the Upper Tribunal

40. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal. Mr O sought permission to appeal on the ground that there appeared to be an inconsistency between regulations 7 and 12 of the PIP Regulations. According to the application made by Mr O to the First-tier Tribunal, “reg.7 implies that to satisfy a descriptor C need only satisfy it on over 50% of the days of the required period. While reg’s. 12 and 13 imply that C needs to be likely to satisfy the descriptor on every day of the required period”.

41. The Secretary of State's written response to the appeal indicated that he supported the appeal. However, his support did not rely on regulation 12 of the PIP Regulations. Instead, the Secretary of State argued the First-tier Tribunal erred in law by failing to make findings as to

the frequency of Mr O's bad days and failing to consider his dressing and mobility abilities at the date of claim. In written reply, Mr O's representative agreed with the Secretary of State.

42. The First-tier Tribunal granted permission to appeal to the Upper Tribunal in order for it to consider the arguably complex question of the relationship between Parts 2 and 3 of the PIP Regulations. Regulation 12 was not relied on in the Secretary of State's support for the appeal but any Tribunal to which the appeal might be remitted would need to grapple with the relationship between Parts 2 and 3 of the Regulations. For these reasons and because I had difficulty following the argument that the Tribunal's fact-finding involved errors of law, I directed a hearing of Mr O's appeal, despite the appeal having become supported.

43. At the hearing, the Secretary of State withdrew his earlier support for the appeal and supported the First-tier Tribunal's fact-finding. Following the hearing, I directed further written submissions because I did not consider that the complexity of the relationship between Parts 2 and 3 of the PIP Regulations had been fully addressed in the arguments advanced at the hearing.

44. The Secretary of State's final position is:

(a) on a literal reading of the PIP Regulations, Mr O would be entitled to PIP because, on the facts found, he satisfied descriptors with a total score of 8 points for more than 50% of the days within the required period;

(b) however, to read regulation 7 in isolation would ignore the requirements of regulation 12. The Secretary of State draws attention to the requirements of regulation 12, in particular its instruction to consider whether, were C to be assessed "at every time" during the required period, it is likely that the Secretary of State would determine that C had limited ability to carry out daily living activities. This means:

"in looking at the required period, the decision maker is required to take account of the actual assessment...but also to ask what the results of a notional assessment would be, if conducted at any time during the nine month period";

(c) the Secretary of State concedes a tension between regulations 7 and 12. However "it is suggested that it is necessary to give priority to regulation 12 because it is the provision which is more specifically directed to the required period condition; and because it is required by the primary legislation, while regulation 7 is merely authorised by it". The provisions are reconciled by reading the reference to "days of the required period" in regulation 7 as a reference to "days throughout the required period";

(d) regulation 7 is designed to assist claimants with fluctuating but ongoing symptoms, not claimants who recover during the nine month prospective period;

(e) the First-tier Tribunal did not err in law by refusing to award PIP despite having found that, on more than 50% of the days within the required period, Mr O satisfied descriptors with a total score of at least 8 points. This was because the Tribunal found that Mr O's condition

would have improved considerably following surgery so that he would not have continued to require eight points-worth of assistance during the whole of the nine months of the prospective period.

45. Mr O's representative argues;

(a) regulations 7 and 12 of the PIP Regulations are not in conflict. Regulation 12 should be read as "a qualifying criteria to get an assessment and then regulation 7 acting as the criteria to apply points";

(b) "provided Mr O has a condition which qualifies him under regulation 12 i.e. a condition that restricts his daily living activities for the whole of the nine month period after the prescribed date, it is then for the medical examiner to apply the mathematical formula set out in regulation 7". Mr O did so, on the Tribunal's findings of fact, and should therefore be awarded the standard rate of the PIP daily living component.

Conclusions

46. Interpreting the required period condition provisions is not straightforward. They operate by reference to the Part 2 assessment rules but without taking account of the descriptor scoring rules, in particular the 50% rule in regulation 7. These rules determine whether a person is assessed as having limited or severely limited ability to perform daily living or mobility activities.

47. If the required period condition is satisfied simply because descriptors totalling at least eight points are satisfied for more than 50% of the required period, in accordance with regulation 7, what is the point of the required period condition? A claimant would be entitled if he scored at least 8 points for over one and a half months of the historical part of the required period and over four and a half months of the prospective period. The required period condition would make no difference to the outcome of a claim.

48. It cannot be right that applying the required period condition at "every time" during the 12 month window of analysis (that is asking whether the PIP assessment rules would result in a finding of limited or severely limited ability) involves determining whether, by reference to every time during those 12 months, the three month historical and nine month prospective criteria were met. This would have the effect of elongating the required period. For example, if a decision maker is considering the position in month eight of the prospective period, this would extend the required period condition for a further nine months. This cannot have been intended because it would conflict with the spirit of section 81 of the 2012 Act.

49. However, the legislative language is apt to confuse. Applying the required period condition requires a notional Part 2 assessment to be carried out "at every time" during the 12 month window of analysis but the required period conditions provisions do not expressly recognise that such an assessment has a fixed reference point, namely the prescribed date. Conceptually, this is challenging. How does a decision maker determine "at every time" during the 12 months that a finding of limited or severely limited would be made when that finding – since it involves

applying the Part 2 assessment rules – can only be made from the standpoint of the prescribed date?

50. A further question, and the key question on this appeal, is whether the required period condition is satisfied simply because the PIP assessment rules in Part 2 of the Regulations result in a determination that sufficient points are scored over the required period (that is on over 50% of the days of the required period). That is one possible reading of the provisions since the required period condition involves applying the Part 2 assessment rules. However, I am persuaded by the Secretary of State that this does not reflect the legislation intention and is not the legal meaning of the required period condition.

51. If a positive Part 2 finding of limited or severely limited ability resulted in automatic satisfaction of the required period condition, the required period condition provisions would add nothing. The intention must have been for them to add something since the 2012 Act clearly enacts two broad entitlement conditions. One is a determination of limited or severely limited ability. The other is the required period condition. The Act did not envisage that satisfaction of the first broad entitlement condition would necessarily result in satisfaction of the other.

52. To recap, section 81(1) of the 2012 Act provides:

“(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.”

53. The “previous 3 months” and the “next 9 months” are defined by reference to the prescribed date and “assessed” means assessed in accordance with the PIP Regulations (section 81(3)).

54. I decide that the required period condition provisions are to be applied without taking account of the 50% scoring rule in regulation 7 of the PIP Regulations. Otherwise, they would not make any difference to the outcome of a claim. Leaving regulation 7 out of account also makes sense of the requirement to carry out a notional assessment “at every time” during the 12 month window of analysis. Throughout this period, I decide that the individual must fairly be said to have had, or to be likely to have, limited or severely limited ability to carry out daily living or mobility activities, as assessed in accordance with the PIP assessment rules in Part 2 of the Regulations apart from the 50% rule in regulation 7.

55. This approach must be applied sensibly in the case of conditions with fluctuating symptoms. The legislative intention, which in fact finds expression in regulation 7, is that individuals with such conditions should not be denied entitlement if their symptoms are severe enough to result in limited or severely limited ability most of the time. The question to be asked, in applying the required period condition “at every time” in the 12 months, is whether it can fairly be said that the individual’s physical or mental condition would, at the time of the analysis, generate symptoms that would most of the time result in limited or severely limited ability to carry out the prescribed daily living or mobility activities.

56. If, however, the individual’s health or disability is likely to alter during the nine months following the prescribed date, so that his or her physical or mental condition would no longer generate symptoms resulting in limited or severely limited ability, the required period condition would not be met. The individual would not be entitled to PIP.

57. Applying these findings, I decide that the First-tier Tribunal did not err in law in its interpretation of the required period condition. It found that, as a result of Mr O recovering from surgery within six months or so of his operation, he would not experience any points-scoring difficulties apart from those for toileting difficulties. It followed that he did not meet the required period condition because he did not, at every time in the nine months following the prescribed date, have limited ability to carry out daily living or mobility activities. He had toileting difficulties at every time during the nine months but that only gave him 6 points which was below the award threshold.

58. I do not accept that the First-tier Tribunal erred in its fact-finding. It did not need to make a precise finding as to the number of bad days experienced by Mr O in the light of its finding that the required period condition was not met. And, while I find it difficult to understand why it is argued the Tribunal failed to make findings about Mr O’s abilities at the date of claim, again its finding that the required period condition was not met renders any such error immaterial.

59. Deciding this appeal has been delayed by the need for further post-hearing written submissions but also by my absence from work due to illness. I apologise for the frustration this must have caused the parties, especially Mr O.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
3 March 2017