

## THE UPPER TRIBUNAL

### ADMINISTRATIVE APPEALS CHAMBER

#### DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal is allowed.

The decision of the tribunal given at Hamilton on 28 September 2016 is set aside.

The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out below.

#### REASONS FOR DECISION

1. The claimant has appealed against the decision of the tribunal which confirmed the decision of the Secretary of State on 5 April 2016 and found that the claimant was not entitled to any rate of the daily living component or any rate of the mobility component from 5 April 2016. The appeal is restricted to the daily living component and the grounds are related to the tribunal's decision in respect of descriptors 1(d), 2(b)(i) and 2(b), 4(c) and 6(c)(i).

2. The claimant's grounds of appeal are neatly summarised in the Secretary of State's submission as follows:

- "The Tribunal erred by failing to fully address the claimant's difficulties with reflective surfaces and how these difficulties affect his ability to prepare food and to take nutrition.
- The Tribunal erred by failing to fully consider how the claimant's low mood and obsessive rituals affect his ability to wash and dress."

The Secretary of State has supported the appeal for the reasons set in his submission at pages 293 to 295.

3. I consider that the concession made by the Secretary of State in relation to the descriptors referred to in respect of activities 4 and 6 is well founded and I am prepared to hold that the tribunal erred in law in that regard. If the tribunal had held that the claimant satisfied the descriptors in issue, which I do not need to determine in this appeal the total number of points would have been four.

4. It is apparent from paragraph 7 of the tribunal's statement of reasons that the tribunal relied upon the Health Care Professional's report in making its decision in respect of descriptor 1(d). In that report the tribunal found that the claimant could prepare and cook a simple meal unaided. At page 210 it was said:

"The claimant did not report significant functional problems with this activity in their questionnaire or at consultation, and there was no evidence to suggest otherwise."

However in setting out functional history the Health Care Professional noted under the heading "Preparing food" -

"He does not cook. He is unable to manage he struggles to manage times he has poor coordination, he struggles to cope in the kitchen. His mum will make all his meals. He is able to peel and chop vegetables but he is unable to do this due to the reflection in knives and forks this increases his anxiety. He is able to lift a pot. He knows how to cook."

On the face of it there is an apparent contradiction in the Health Care Professional's report which I do not consider the tribunal have satisfactorily resolved. In these circumstances I am satisfied that its decision errs in law in this regard. Whether it is material this error is open to question as the descriptor contended for is one where there is a requirement of prompting to be able to either prepare or cook a simple meal. It is not clear to me where the evidence was that the claimant's problems, as asserted, would have been resolved by prompting from another person in circumstances where his principal problem asserted to be related to reflections in implements and surfaces used in cooking. The other difficulty for the claimant is that whilst he asserts that reflective surfaces such as cooking implements, metal cutlery and his computer screen as referred to in the first paragraph of the grounds of appeal at page 277, causes him difficulties, it is apparent that he uses his computer and has no difficulty with it. I refer for example to the tribunal's record of the claimant's evidence in paragraph 4 of its statement.

5. The same reasoning as to why there was an error in law in respect of the descriptors in issue in descriptor 2(d) arises in relation to activity 1. There does seem to me to be a contradiction between what is said in the first paragraph for the justification of descriptor choice and what is said under the heading of "taking nutrition in the functional history". That I do not consider has been satisfactorily resolved by the tribunal.

6. What the tribunal did not do was address the terms of descriptor 2(b)(i) as on its view of the evidence it did not require to do so as it simply accepted the opinion of the Health Care Professional. In the grounds of appeal it is said:

"In addition to his lack of appetite, [the claimant] states each time he takes nutrition that he requires to use cutlery, he will use a plastic knife and fork. Hence the representative's submission of **2 b (i) aid, as well as 2 d prompting**.

And as the appropriate test, for this activity is to convey food to the mouth, chew and swallow. As [the claimant] states he is unable to use normal cutlery, as **reflective surfaces increase his anxiety** and his anxiety is linked to that of his condition, then the tribunal fail to fully address within their reasoning as to why they do not accept this item as an **aid**.

Instead the tribunal come to the conclusion that [the claimant]; can eat as desired and sometimes uses plastic cutlery."

The Secretary of State in supporting this ground of appeal submits:

“2. I must highlight that the claimant’s representative has submitted that the claimant may be entitled to descriptor 2(b)(i) – Needs to use and aid or appliance to be able to take nutrition. This is contended because the claimant needs to use a plastic knife and fork as they have a non reflective surface. It is stated, *“the use of a plastic knife and fork, can be more difficult, this combined with [the claimant’s] lack of appetite, would in fact impede his ability to eat at a normal pace ...”*. The meaning of “within a reasonable time period” within Regulation 4 is *“no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person’s ability to carry out the activity in question would normally take to complete that activity.”* I submit that the evidence before the Tribunal would therefore have to demonstrate that due to the claimant’s use of a plastic knife and fork he takes twice as long as the maximum period a person with no difficulties would take to cut up food and convey to his mouth. I submit that the evidence does not demonstrate this as the claimant advised the HCP that *“He is able to cut up his food okay”* (p.204). However this has not been adequately explored by the Tribunal and they have therefore materially erred in law by failing to make sufficient findings in regards to this activity.”

7. I am satisfied, that the tribunal did not err in law in reaching the conclusion it did in relation to descriptor 2(b)(i).

That descriptor is:

- “2. Taking nutrition ...
  - (b) needs
    - (1) to use an aid or appliance to be able to take nutrition”

Thus the question at issue is whether or not plastic cutlery is an aid or appliance. Satisfaction of the descriptor depends upon a finding that it is such an aid or appliance. The phrase “aid or appliance” is set out in regulation 2 of the Social Security (Personal Independence Payment) Regulations 2013. It is defined there as follows:

- “(a) means any device which improves, provides or replaces, seize, impaired physical or mental function; and
- (b) includes a prosthesis;”

Whilst the difficulty which the claimant asserts is the reflective surfaces of metal cutlery I cannot accept that cutlery made of a different material such as plastic or wood could properly be described as a “device”. Plastic cutlery does not improve, provide or replace the claimant’s impaired mental function. It is not designed for such a purpose. It is just a different material used in the manufacture of cutlery and it is incidental that its use obviates the claimant’s asserted anxiety in using metal cutlery. According the tribunal’s finding –

*“He is using a fork and knife but they have to be plastic due to the reflection in the knife and fork. He is able to cut up his food okay.”*

is a finding which excludes the requirement for a device as what the claimant is using are ordinary every day implements for eating food. There is thus no merit in the claimant's ground of appeal. The Secretary of State's submission in respect of regulation 4 is dependent upon plastic cutlery being an aid or appliance. As it is not I do not have to deal with this submission.

8. Although I consider that the error in law identified in the tribunal's decision in respect of descriptor 1(d) was possibly not material I am prepared in the light of the Secretary of State's concession to set the decision aside. I accept the Secretary of State's invitation in his submission to remit the case to a freshly constituted tribunal.

9. However in remitting the case to a freshly constituted tribunal I direct that tribunal that plastic cutlery is not "aid or appliance" for the purposes descriptor 2(b)(ii) and I accordingly direct that it cannot find that the use of plastic cutlery can give rise to satisfaction of description 2(b)(i). That tribunal should also note that descriptors 1(d) and 2(d) are dependent on findings that the claimant needs prompting to do them.

(Signed)  
D J MAY QC  
Judge of the Upper Tribunal  
Date: 5 April 2017