

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/3730/2016

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made on 26 August 2016 at Reading under reference SC303/16/00251) involved the making of an error in point of law, it is set aside under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is remitted to the tribunal for rehearing by a completely differently constituted panel.

Directions:

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment in respect of a claim made on his behalf by his mother and appointee on 7 August 2015.
- C. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the date of the decision: R(DLA) 2 and 3/01.

REASONS FOR DECISION

Introduction

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a district tribunal judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal") of 26 August 2016, to the effect that he is not entitled to a personal independence payment ("PIP"). The Secretary of State has supported the appeal to the Upper Tribunal and, for reasons which are set out below, I have decided to allow the appeal, to set aside the tribunal's decision and to remit for a complete rehearing.

The background

2. The claimant was born on 3 August 1999. He is, therefore, now aged 17 years but was 16 as at the date of the claim for PIP.

3. In fact, disability living allowance had been in payment in respect of the claimant prior to his having attained the age of 16 but it became necessary for a claim for PIP to be made as a consequence of the Personal Independence Payment (Transitional Provisions) Regulations 2013. The claim for PIP was made through his appointee who is also his mother.

4. Although the previous award had been one of the middle rate of the care component and the lower rate of the mobility component of disability living allowance, the application for PIP was refused. The decision to refuse appears to have been largely based upon the content of a report of a health professional who had had a “face-to-face consultation” with the claimant and the appointee on 21 December 2015.

5. In form PIP2 (the PIP application form) much had been stated by the appointee as to what was said to be the claimant’s inability to perform a considerable number of tasks and functions. However, limiting myself to those matters which ultimately became relevant in the context of this appeal to the Upper Tribunal, it had been said, as to dressing, that he would need help to select suitable clothing, would (as I understand it) attempt to put on underwear he had previously worn without its having been washed and would attempt to put on dirty clothing. It was suggested that this would sometimes result in disagreement between the claimant and the appointee. As to budgeting it was asserted that he is unable to “grasp the concept of money”, that when he has money he will spend it straightaway and that money is taken from him by his appointee so as to prevent him spending it unwisely.

6. As to the health difficulties said to underpin the claimed inability to perform functions and tasks his appointee had written:

“ADHD, social and communication problems, autism at the far end of the spectrum.”

Pausing there, the letters ADHD stand for attention deficit hyperactivity disorder. The documentation before the tribunal clearly did demonstrate that such a diagnosis had been made and that appropriate medication had been prescribed. As to the suggestion of autism, however, I note that a letter written by a consultant child and adolescent psychiatrist on 9 May 2016 (pages 105 and 106 of the appeal bundle) stated of him “he was reliably found not to meet the criteria for Autistic Spectrum Disorder”.

7. The refusal of the claim for PIP did not find favour with the claimant’s appointee and, since a mandatory reconsideration did not result in any change to the decision, an appeal was pursued to the tribunal.

The proceedings before the tribunal and its decision

8. The tribunal held an oral hearing which was attended by the claimant and appointee. The bulk of the oral evidence was provided by the claimant himself. The tribunal decided that 6 points were scored under the activities and descriptors relevant to the daily living component of PIP and no points at all under those relevant to mobility. That was not sufficient to ground entitlement. The points scored were under descriptors linked to the activities of “Preparing food”; “Washing and bathing” and “Engaging with other people face to face”, 2 points being awarded for each.

9. The tribunal did not award any points under the descriptors linked to the activities of “Dressing and undressing” nor “Making budgeting decisions”. That is despite its being strongly urged to do so by the claimant’s appointee. In its statement of reasons for decision (“statement of reasons”) the tribunal explained why it was not awarding points with respect to the former in this way:

“ 50. The appellant claims that he needs help putting outfits together which are suitable for the time of year. He will also try to wear dirty clothes which he believes is appropriate.

51. At the examination, the appellant told the HCP that he tends to wear clothes that he likes and which are comfortable. His mother tells him to wear appropriate clothing but he is unconcerned whether colours go together or not. He can dress his whole body and he would only wear a coat if he thinks it is cold outside.

52. The HCP reported that the appellant knows how to dress and undress himself. At the examination he was well kempt, had normal cognition and insight and there were no physical restrictions.

53. The tribunal found that the evidence suggested that the appellant can dress and undress unaided. This was consistent with the appellant’s medical condition and treatment and was accepted by the tribunal.

54. The appellant can dress and undress himself which he confirmed in his oral evidence. There is a family conflict between what the appellant wishes to wear and what his mother considers is appropriate for him to wear. However, the tribunal considers this issue to be a matter of preference rather than the appellant requiring prompting to be able to dress and undress.

55. The tribunal therefore found that descriptor 6(a) applies and that the appellant scored 0 points.”

And as to the latter:

“ 79. The appellant claims that he does not understand the concept of money and it has to be explained to him: particularly, how to save and to put money away.

80. At the examination, the appellant told the HCP that he does not pay any household bills but he gets an allowance which he then spends quickly. He spends money on snacks and will buy items from the shop. However, if he has any change left over his mother takes it away from him and puts it into a savings account.

81. The HCP reported that the appellant had normal cognition and demonstrated adequate concentration in order to manage his own budgeting. He is in full-time education and so he is not paying bills but he understands the concept of money.

82. The tribunal found that the evidence suggested that the appellant can manage complex budgeting decisions unaided. This was consistent with the appellant’s medical condition and treatment and was accepted by the tribunal.

83. The tribunal accepts that as a young man the appellant has yet to experience financial independence. However, he has no cognitive impairment and he told the tribunal in his oral evidence that he was able to purchase items of food when he was at college, to know how much the items cost and to understand the change that should be received.

84. The tribunal therefore found that descriptor 10(a) applies and that the appellant scored 0 points.”

The grant of permission

10. The claimant's representatives at Reading Welfare Rights Unit sought permission to appeal. The grounds were, in summary, to the effect that the tribunal had erred in failing to adequately consider the contention that the claimant would, without prompting, wear dirty or smelly clothing and in failing to adequately consider whether he was able to make "complex" budgeting decisions without prompting or assistance.

11. The district tribunal judge who granted permission to appeal did not limit the grant but was clearly more attracted to the second ground than the first. Further, she saw a point of some potential importance regarding the way in which daily living descriptor 10(b) should be applied to claimants under 18 years of age and said this:

"The application has served to highlight absence of guidance in respect of the applicability of the Descriptor to those still recognised in law as children. It is appropriate for the Upper Tribunal to consider whether or not the tribunal applied the law correctly. The issue of whether any person aged 16 or thereabouts is able, or should be expected, to make complex budgeting decisions (such as managing a household budget) has not been addressed at a higher level and guidance is sought."

12. I subsequently issued directions which have led to my receiving written submissions from the party's representatives who are, in fact, broadly in agreement. Neither have sought an oral hearing before the Upper Tribunal. The representative for the Secretary of State has asked me to set aside the tribunal's decision and to remit. The representative for the claimant has not opposed that suggested course of action. The Secretary of State's position is that both grounds are made out.

Some relevant legislative provisions

13. Prior to explaining why I have allowed the appeal it might be of assistance to set out certain of the law which the tribunal was required to apply.

14. Personal independence payments were introduced by the Welfare Reform Act 2012. They consist of two components: the daily living component and the mobility component (section 77(2)). This case concerns only the former, which is governed by section 78:

"Daily living component

- 78.** - (1) A person is entitled to the daily living component at the standard rate if –
- (a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and
 - (b) the person meets the required period condition.

- (2) A person is entitled to the daily living component at the enhanced rate if –
- (a) the person’s ability to carry out daily living activities is severely limited by the person’s physical or mental condition;
 - (b) the person meets the required period condition.”

15. The daily living activities and descriptors are prescribed by Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. Part 2, insofar as it is relevant for the purposes of this appeal, provides:

Activity	Descriptors	Points
6. Dressing and undressing.	a. Can dress and undress unaided.	0
	b. Needs to use an aid or appliance to be able to dress or undress.	2
	c. Needs either –	2
	(i) Prompting to be able to dress, undress or determine appropriate circumstances for remaining clothed; or	
	(ii) Prompting or assistance to be able to select appropriate clothing.	
	d. Needs assistance to be able to dress or undress their lower body.	2
10. Making budgeting decisions.	e. Needs assistance to be able to dress or undress their upper body.	4
	f. Cannot dress or undress at all.	8
	a. Can manage complex budgeting decisions unaided.	0
	b. Needs prompting or assistance to be able to make complex budgeting decisions.	2
	c. Needs prompting or assistance to be able to make simple budgeting decisions.	4
	d. Cannot make any budgeting decisions at all.	6
		6
		6

16. A number of relevant terms are defined in Part 1 of Schedule 1 as follows:

“‘Unaided’ is defined as meaning without the use of an aid or appliance, or supervision, prompting or assistance.

‘Assistance’ is defined as physical intervention by another person and does not include speech.

‘Prompting’ is defined as reminding, encouraging, or explaining by another person.

‘Complex budgeting decisions’ are defined as decisions involving calculating household and personal budgets, managing and paying bills, and planning future purchases.

‘Simple budgeting decisions’ are defined as decisions involving calculating the cost of goods, and calculating change required after a purchase.”

17. Regulation 4 of the PIP Regulations is also relevant:

“Assessment of ability to carry out activities.

- 4.** - (1) For the purposes of section 77(2) and sections 78 or 79, as the case may be of the Act whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C’s physical or mental condition, is to be determined on the basis of an assessment.
- (2) C’s ability to carry out an activity is to be assessed –
- (a) on the basis of C’s ability whilst wearing or using any aid or appliance which C normally wears or uses; or
 - (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.
- (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;
 - (d) within a reasonable time period.
- (3) ...
- (4) In this regulation –

- (a) 'safely' means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
- (b) 'repeatedly' means as often as the activity being assessed is reasonably required to be completed;
- (c) 'reasonable time period' means 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."

My reasoning

18. I shall deal, first of all, with activity 6. There was, as noted above, a suggestion in the written evidence before the tribunal that the claimant would, without intervention, put on dirty clothes (presumably what is meant is clothes he had worn previously) and would also fail to change his underwear from one day to the next. Other claimed difficulties had been raised with respect to dressing, in particular as I understand it a claim that he would wear clothing which did not match (perhaps a colour clash) or that he would fail to select clothing appropriate for the weather. The tribunal seemed to have considered the latter two issues and to have decided that what was at the heart of them was really a disagreement or difference in approach between the claimant and his mother.

19. The tribunal also attached importance in this context to its finding that he had normal cognition and insight. That would probably have been sufficient to deal with matters had the issue regarding dirty clothing and the underwear not been raised. However, it seems to me that those were discreet issues of importance which merited attention. I agree with both representatives that such was not gone into by the tribunal. In looking at its record of proceedings it did not appear to enquire further into those aspects in its questioning. Since the claimant did not have a representative at the hearing it cannot be said that the omission can be attributed to any failure on the part of a competent representative to put pertinent questions or to invite the tribunal to do so.

20. Whilst the evidence clearly showed that the claimant was able to physically dress himself without difficulty, it seems to me that the reference in descriptor 6c(ii) to an ability "to select appropriate clothing", whilst perhaps primarily inserted in relation to a need to select outdoor clothing appropriate for the weather, is a relatively wide concept and is capable of encompassing decision making as to when to select newly washed clothing. Further and in any event, there is the requirement to perform relevant tasks and functions "to an acceptable standard" stemming from regulation 4(2A) of the PIP Regulations. In my judgment dressing to an acceptable standard must include dressing in a way which avoids the selection of items which have, for example, become malodorous or which have already been worn to the extent that it would be unhygienic to wear them again without them having been washed first. That said, a broad common sense approach must be taken to all of this and a claimant is unlikely to score points simply because he/she operates a less fastidious regime than others might. It is also important to stress that, in light of section 78 of the Welfare Reform Act 2012, the inability to dress and undress must be due to a "physical or mental condition" so that mere indifference of itself will not suffice. That means, in the case of this claimant, points will only be scored under activity 6 if the contentions regarding his selection of clothing are ultimately made out and if they are caused by symptoms of health conditions, seemingly in this case impulsiveness when dressing consequent upon the ADHD. What was required,

though, were findings in relation to all of this. There was an absence of enquiry and, in consequence an absence of such findings. That does translate into an error of law.

21. The above error was material because if it had been decided that prompting or assistance to select appropriate clothing was required then 2 points would have been awarded under daily living descriptor 6(c) and that would have enabled the claimant to reach the necessary 8 point threshold for entitlement to the standard rate of the daily living component of PIP. On that basis therefore, and with the agreement of the parties, I set aside the tribunal's decision.

22. Strictly speaking, my having reached the above view, it is not necessary for me to go on to address the activity 10 arguments at all. However, given what was said in the grant of permission and given that the parties have both made submissions about this activity it seems appropriate for me to say something even though this part of my decision will now not be more than an expression of opinion.

20. I do not though, in general, see any real problem in decision makers and tribunals having to assess the capability of 16 or 17 year old young persons in the context of the making of complex budgeting decisions.

23. I have already set out how the term "complex budgeting decisions" has been defined. Despite the use of the word complex it does not seem to me that the standard set by the definition or by descriptor 10b is a particularly demanding one or one which will be beyond 16 or 17 year olds simply on account of age. It will be the case, as the Secretary of State's representative points out, that many 16 year olds and 17 year olds will not have had to acquire experience of calculating household and personal budgets or of managing and paying bills or of planning in relation to future purchases. Nevertheless, as was explained in both *CPIP/0184/2016* and *CPIP/3015/2015* the emphasis with respect to daily living activity 10 is primarily (though not always exclusively) upon a person's cognitive ability and intellectual capacity in the context of the function of decision making. Upper Tribunal Judge White who had considered both of those decisions in *RB v SSWP (PIP)* [2016] UKUT 0393 (AAC) observed:

"I agree with both decisions insofar as they indicate that the primary focus of the activity of making budgeting decisions is the cognitive or intellectual function of making decisions which fall within the definitions of simple and complex budgeting decisions."

24. Once it is appreciated that it will normally be a claimant's cognitive or intellectual function which is important, it seems to me at any rate clear that it is appropriate to assess a claimant aged 16 or 17 on that basis. The focus on cognitive or intellectual function renders the young age to be a less important factor.

25. It is also important, here, to bear in mind once again section 78 of the Welfare Reform Act 2012 and the need for any inability to be in consequence of a claimant's physical or mental condition. Thus, mere immaturity of itself will not avail a claimant. That is true though of anyone be they under or over the age of 18. Nor will the lack of any actual experience of making budgeting decisions avail a claimant since it is what a claimant is capable of rather than what he/she has done which is relevant.

26. But having said all of the above, it is possible in some cases that factors not linked to cognitive impairment or intellectual function might nevertheless lead to the scoring of points under activity 10. Upper Tribunal Judge White in *RB* accepted that, in principle, limitations in making budgeting decisions might flow from physical disabilities alone though (and I am respectfully in complete agreement) he considered that the circumstances in which that might be so were so extreme that such cases were highly unlikely ever to be the subject of appeals to tribunals. As to a person who has ADHD though, it might be argued, as does the claimant's representative in this case, that the condition causes problems with respect to concentration, memory and other elements of mental functioning such that it interferes with the ability to calculate household and personal budgets. However, it might be thought that for many people with the condition the real problem, as the representative for the Secretary of State alludes to, will come with the implementation of such decisions when a person has money in hand, as a result of impulsiveness. Perhaps such a person will be well able to make calculations, plan future purchases and identify bills which should be paid and initially resolve to pay them but will then not stick to the plans and will, instead, simply exhaust the available funds on more superficially attractive propositions. Doing so, in my judgment, would fall within the relevant definition, because it would amount to a decision involving paying (or I suppose not paying) bills. Again, these are areas in respect of which the tribunal did not make sufficient findings.

27. Having decided to set aside the tribunal's decision I have also decided to remit. Matters will, therefore, be considered entirely afresh by the new tribunal. As to activity 10 and its associated descriptors, the tribunal need not be troubled by the young age of the claimant for the reasons set out above. Its focus will be upon cognitive and intellectual functions, impulsiveness and the way in which the ability to make complex budgeting decisions as defined is or may be adversely impacted by his ADHD.

28. The appeal, therefore, is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated:

12 April 2017