DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Gray **CPIP/1469/2017**

Decision: This appeal by the claimant succeeds.

Having given Permission to appeal on 12 June 2017 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Liverpool and made on 30 January 2017 under reference SC 068/16/03752. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Directions

1. These directions may be supplemented or changed by a District Tribunal Judge (DTJ) giving listing and case management directions.
2. The case will be listed as an oral hearing in front of a freshly constituted tribunal. The appellant is advised to attend.
3. She should be aware that the new tribunal will be looking at her health problems and how they affected her day-to-day life at the time that the decision under appeal was made, 7/7/2016.
4. The new panel will make its own findings and decision on all relevant descriptors.

Reasons

1. The appeal below concerned entitlement to a Personal Independence Payment (PIP). Both parties agree that the decision of the tribunal was made in error of law, and neither wishes to have an oral hearing. This is a case which I can decide justly on the basis of the papers alone, and in which I need not give detailed reasons, although I accept the observations of the appellant's representative, Mr Bernard of Citizens Advice Sefton, that there were certain matters which required clarification such that a decision without reasons, despite the parties being agreed in principle as to the outcome, might be inappropriate.
2. In essence I adopt the reasons set out in the submission of Ms Hawley on behalf of the Secretary of State, which itself accepts a point I identified as arguable in addition to the grounds of appeal put forward by Mr Bernard. In granting permission to appeal I said the following:

The grounds of appeal seem to me generally arguable. In that context I note the observation in the paragraph of the statement of reasons which deals with activity 2, taking nutrition, that the applicant's evidence was that she bought chopped vegetables. This seems to me to emphasise the need for an explanation of the approach taken in respect of activity 1.

3. Two points were awarded by the tribunal under 1b, reflecting the decision under appeal in that regard, but the appellant had argued for four points under 1e. Given that her points score for the daily living activities was six, the additional two points was critical as to whether or not an award was made.
4. The grounds of appeal, which were fully and helpfully drafted with references to case law, boiled down to the argument that the statement of reasons was an inadequate explanation as to the chosen descriptor under activity 1, preparing food. The point was made, and I agree with it, that given that the tribunal perceived a need for an aid or appliance, the statement of reasons should have indicated what sort of aid or appliance it had in mind. There were other inadequacies in that regard, which are detailed well in Ms Hawley's thorough and helpful submission.
5. In the light of that submission, which together with the grounds of appeal will be before the fresh tribunal, I do not think I need to say more about activity 1, and any other inadequacies in the statement of reasons fall by the wayside given the general support for remission and rehearing. However there is one further point which arises from that statement, which I must mention because it seems to be an erroneous approach which I have seen in other statements of reasons recently. I hope I am not being unfair to the judge who prepared this statement, and it is possible that what I point out is merely infelicitous wording, but my reading of it suggests a fundamental misunderstanding as to the role of the FTT hearing an appeal from the Secretary of State. Of itself it vitiates the decision, requiring it to be set aside.
6. The statement of reasons, in discussing each of the activities considered, uses a standard phrase. I give the example in respect of activity 1, since that has been in contention before me. The relevant part of the paragraph reads

1. Preparing food – The appellant sought (e) Needs supervision or assistance to either prepare or cook a simple meal. The Tribunal, as the respondent, awarded the appellant 2 points (1b) i.e. needs to use an aid or appliance to be able to either prepare or cook a simple meal and the Tribunal had insufficient persuasive evidence available to them to make any contrary findings in accordance with the requirements set out at paragraph 12 to 17 above.

7. The reference to paragraph 12 to 17 is that these paraphrase certain elements common to consideration of all activities under regulations 4 and 7 of the Social Security (Personal Independence Payment) Regulations 2013.
8. The wording is repeated with only marginal differences in relation to each activity; for example in relation to activity 10 *'The Tribunal awarded (a) 0 points for this activity in concordance with the respondent and the Tribunal had insufficient persuasive evidence available to them to make any contrary findings…"*
9. The tenor of the standard phrase is that the findings of the Secretary of State should remain unless there was sufficient persuasive evidence to enable contrary findings to be made. That is a fatally flawed approach to what is a hearing *de novo*, that is to say a completely fresh look at the facts unconstrained by the findings of the decision maker. This tribunal seems to have thought its role akin to that of judicial review, where the decision under

appeal is being looked at to see whether or not it is sustainable on the evidence, or otherwise legally irrational, rather than considered afresh.

10. I said in not dissimilar circumstances in *CF-v- Secretary Of State for Work and Pensions (PIP) [2017] UKUT 356 (AAC)* at paragraph 11

Additionally the FTT said *"the tribunal did not ignore the medical evidence produced by the appellant but in the judgment of the tribunal this was insufficient to actually challenge the report of the nurse in connection with the appellant's needs and ability to carry out the activities associated with the descriptors upon which she sought to rely."* This remark at [29] both supports my reading of the other paragraphs and appears to envisage a judicial review type approach by the FTT to its role rather than that of an appeal *de novo* with the FTT standing in the shoes of the Secretary of State which is provided for by statute *(R (IB) 2/04).* This also appears from paragraph 17 with its references at (d) *"There was insufficient medical evidence before the tribunal to challenge, contradict or place in issue the findings or conclusions of the nurse"* and (e) *"the conclusions of the Decision Maker to award Nil points for Daily Living and Nil points for Mobility was reasonable, proportionate and in accordance with the evidence."*

11. The decision in R (IB) 2/04 was that of a Tribunal of Commissioners, the precursor to the current three judge panel, and equally authoritative. At paragraph 25 this was said

In our judgment, that approach to the nature of an appeal as a rehearing, which is how it was understood in the Social Security context before the 1998 Act changes, is to be applied to the current adjudication and appeal structure, subject only to express legislative limitations on its extent. Taking the simple case of an appeal against a decision on an initial claim, in our view the appeal tribunal has power to consider any issue and make any decision on the claim which the decision-maker could have considered and made. The appeal tribunal in effect stands in the shoes of the decision-maker for the purpose of making a decision on the claim.

12. I need add only that, given the nature of the appellant's problems it will be critical for the FTT to establish whether any of the activities set out in the Schedule are affected by pain, and if so to what extent, with focus on the terms of regulation 4 in relation to the quality of performance of the activities in addition to the rule set out in regulation 7 as to the need for performance to be affected for the majority of the time. As to the application of regulation 7 the decision of Upper Tribunal Judge Hemingway in *TR-v-SSWP (PIP) [2015] UKUT 0626 (AAC)* is likely to be pertinent. It establishes that if a claimant is unable to perform an activity for part of a day that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34].
13. The appellant must understand that the fact that her appeal has succeeded at this stage on legal points is not to be taken as any indication as to what the tribunal might decide as to the facts in due course.

Upper Tribunal Judge Paula Gray

Signed on the original on 20 October 2017