

[2017] AACR 31
(AS v Secretary of State for Work and Pensions (PIP))
[2017] UKUT 104 (AAC)

Judge Bano
24 February 2017

CPIP/3404/2016

Personal independence payment – daily living activity 5: managing toilet needs or incontinence – assistance to self-catheterise by itself not therapy for the purposes of activity 3

The claimant had been awarded a personal independence payment (PIP) because, among other things, she stated that she needed her partner's help to insert a catheter as she was unable to do so alone due to brittle bones in her wrist. Following her report of a change of circumstances, the claimant submitted a new PIP claim. She was examined by a health care professional who reported that the claimant's statement was inconsistent with her medical condition and her urologist's report that she could insert a catheter. The Secretary of State awarded the claimant two points under descriptor 5(b) (needs to use an aid or appliance to be able to manage toilet needs or incontinence). The claimant's application for a mandatory reconsideration of that decision was unsuccessful, despite her submitting letters from a community mental health nurse and her urologist which both referred to her need for help. The claimant appealed to the First-tier Tribunal (F-tT) but did not attend the hearing. The tribunal confirmed the award under descriptor 5(b) but not descriptor 5(d) (needs assistance to be able to manage toilet needs) as it did not accept that the claimant needed her partner's help and it also held that self-catheterisation did not amount to therapy for the purposes of activity 3. The claimant appealed to the Upper Tribunal to challenge the relevance of the activities used by the F-tT to support its findings while her representatives later argued that the claimant's needs also fell within activity 3 and that the F-tT hearing should have been adjourned to enable her to attend.

Held, allowing the appeal, that:

1. to describe help with catheterisation as “therapy” would be a strained use of language. The specific provision made by paragraph 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 for the management of incontinence to include self-catheterisation for the purposes of activity 5 also indicated that catheterisation should not count as “therapy” for the purposes of activity 3 (paragraph 7);
2. “self-catheterisation” referred to the type of catheterisation device used and did not require a catheter to be self-administered; otherwise the definition of “manage incontinence” would be ineffective in both descriptor 5(e) (needs assistance to be able to manage incontinence of both bladder or bowel) and descriptor 5(f) (needs assistance to be able to manage incontinence of both bladder and bowel) (paragraph 8);
3. as a matter of statutory construction, a provision which specifically provided for a situation may prevent a provision expressed in more general terms from applying to the same situation. Activity 5 represented an attempt to calibrate toilet needs and problems resulting from incontinence in terms of their severity, and that intention might be undermined if some situations which were specifically provided for in activity 5 were also held to fall within the more general provisions of activity 3. There may be situations in which assisting a person with catheterisation may form part of a treatment which amounted to therapy for the purposes of activity 3, but by itself assisting a person to catheterise did not do so (paragraphs 8 to 9);
4. the F-tT erred in failing to consider properly the question of whether the claimant needed assistance to administer a catheter; the activities it referred to did not provide a sufficient test, the letters from the mental health nurse and urologist were not mentioned and it failed to address the claimant's assertion that she was unable to insert a catheter because of the condition of her wrists (paragraphs 10 to 11).

The judge set aside the First-tier Tribunal's decision and remitted the case for hearing before a differently constituted tribunal.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision: My decision is that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the tribunal's decision and remit the case for hearing before a differently constituted tribunal.

REASONS FOR DECISION

1. The claimant, a woman now aged 45, has a number of mental and physical problems and needs to use a catheter. Having been in receipt of disability living allowance, she made a claim for personal independence payment (PIP) on 13 December 2013, stating in her claim form that her partner assisted her with catheterisation and that she had difficulty using a catheter without help because of brittle bones in her wrist. The claim for PIP was initially refused, but after the claimant submitted additional medical evidence the decision was revised to award the claimant the enhanced rate of the daily living component and the standard rate of the mobility component of PIP from 12 November 2014 to 11 November 2015.

2. On 16 November 2015 the claimant reported a change of circumstances, resulting in a change in her award without a medical examination, and on 1 December 2015 she submitted a new PIP claim form, stating that she needed help in connection with her toilet needs. The claimant was examined by a health professional on 15 January 2016, who reported that the claimant's assertion that she needed assistance with catheterising was inconsistent with her medical condition and with a report from the claimant's urologist suggesting that she could in fact self-catheterise. On the basis of that report, a decision was made on 25 January 2016 awarding the claimant 11 points in respect of daily living activities and four points in respect of the mobility component, including an award of two points activity 5(b) (needs to use an aid or appliance to be able to manage toilet needs).

3. On 29 January 2016 the claimant requested a mandatory reconsideration of that decision, submitting two items of further evidence to support her request. The first was a letter from a community mental health nurse dated 12 January 2016, stating:

“[the claimant] also acknowledges that her mental health is affected by her pain and her self catheterisation that she is unable to do. She told me that she can only pass urine when catheterised and this is now her partner's responsibility to catheterise her and as he doesn't live with her this can be inconvenient and preventing social activities.”

The second item of additional evidence was a letter dated 24 December 2015 from the claimant's urologist stating:

“I reviewed [the claimant] who has recently re-presented to Urology with increasing difficulty in performing ISC. She is now unable to do it herself and relies on her partner to perform catheterisation four times a day. She had a previous urethral dilation with no benefit. She has been unable to tolerate an indwelling catheter. She had her TVT three years ago for what sounds like stress incontinence. She has struggled with retention for the past two years”.

However, the decision was maintained on reconsideration and the claimant appealed against it on 30 March 2016, stating in her notice of appeal that she was appealing against the award of only two points in respect of toilet needs. She said:

“... I have to catheterise. I cannot manage with me having brittle bones in my wrists. This has to be done lying down every time. My partner inserts catheter each time, but its causing friction each time as we do not live together.”

Most unfortunately, the claimant did not attend the hearing of the appeal.

4. Under paragraph 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations) (SI 2013/377), “manage incontinence” means “manage involuntary evacuation of the bowel or bladder, including use a collecting device or self-catheterisation, and clean oneself afterwards.” The tribunal applied descriptor 5(b) (needs to use an aid or appliance to be able to manage toilet needs or incontinence) on the basis that the claimant needed to use a catheter, but did not apply descriptor 5(d) (needs assistance to be able to manage toilet needs) because it did not accept that the claimant needed her partner to help her with catheterisation. Having noted that the claimant could carry out all the tasks necessary to drive a car, the tribunal said:

“In this context the Tribunal assesses whether descriptor 5 is applicable. She has consistently maintained that she does need help in managing her catheter. The Tribunal accepts that the Urologist indicates that she self-catheterises but that may be not the whole picture. One difficulty for the tribunal is to assess her domestic situation since at page 274 it is clearly stated that she was then living in a house with a pet dog. How was her partner therefore engaging in the various activities identified earlier that month in the mental health assessment. In particular how was this new partner actually administering the help with the catheter. The experience in particular from the medical member of the Tribunal would suggest that the administration of the catheter should normally not be a particular problem from a physical perspective – not unlike the insertion of a tampon. There may well be some psychological or emotional issues involved in using the catheter but physically on balance the Tribunal cannot understand why it cannot be self administered. Physically the evidence states that [the claimant] is able to bend at least to her knees and she clearly has sufficient grip when she drives her car and again from the Tribunal’s experience and knowledge staff in the Urology Department will undoubtedly have instructed her in how to operate the catheter. On balance therefore the Tribunal do not find it credible that [the claimant] given her circumstances and particularly given her physical capabilities would for most of the time be unable to operate the catheter herself. It seems highly unlikely in the Tribunal’s view that most of the time this task would be dealt with by her partner who according to the evidence from the medical was not actually living as part of [the claimant’s household.]”

5. The tribunal also considered whether the claimant’s needs in respect of catheterisation qualified her for points under activity 3 (managing therapy or monitoring a health condition). “Therapy” is defined in paragraph 1 of Schedule 1 to the PIP Regulations as meaning:

“therapy to be undertaken at home which is prescribed or recommended by a –

- (a) registered –
 - (i) doctor;
 - (ii) nurse;
 - (iii) pharmacist; or

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

The tribunal held that, although the claimant had been advised to use a catheter by a doctor, the term “therapy” connoted a more long-term treatment and therefore did not extend to what might in the claimant’s case be a purely temporary need.

6. In her application for permission to appeal, the claimant challenged the relevance of the activities to which the tribunal referred in support of its finding that she did not need to help to catheterise, and again stated that she could not use a catheter unaided because of pain in her wrists, back and neck. However, after permission to appeal was refused by a tribunal judge, the claimant’s present representatives submitted new grounds of appeal, arguing, firstly, that catheterisation falls within activity 3 and, secondly, that the tribunal ought to have adjourned the proceedings to enable the claimant to give evidence in view of the importance of the issue of whether the claimant could use a catheter unassisted. Permission to appeal was given by Judge Levenson on 21 November 2016, but the appeal has been opposed by the Secretary of State in a written submission dated 16 December 2016.

7. “Therapy” is defined in Chambers Dictionary as “the treatment of physical or mental diseases and disorders”. It is a word with a wide meaning and has been held to extend to the use of a TENS machine in *RH v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 281 (AAC), renal dialysis in *HH v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 558 (AAC) and a dilator which was used to maintain the function of the urethra in *MF v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 554 (AAC); [2016] AACR 20. However, in my view it is a somewhat strained use of language to describe help with catheterisation as “therapy”, and I have come to the conclusion that the Secretary of State’s representative is correct in submitting that the specific provision made by paragraph 1 of Schedule 1 to the PIP Regulations for the management of incontinence to include self-catheterisation for the purposes of activity 5 indicates that catheterisation should not also count as “therapy” for the purposes of activity 3.

8. I take the term “self-catheterisation” in the definition in paragraph 1 of Schedule 1 to the PIP Regulations to refer to the type of catheterisation device used by a claimant, (ie as excluding an implanted device), rather than as requiring a catheter to be self-administered; since otherwise the definition of “manage incontinence” as including the use of a catheter would be ineffective in the case of both descriptor 5(e) (needs assistance to be able to manage incontinence of both bladder or bowel) and descriptor 5(f) (needs assistance to be able to manage incontinence of both bladder and bowel). As Judge Williams held in *MF v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 554 (AAC); [2016] AACR 20, there is no rule that because an individual’s problems fall to be assessed as creating limits within one activity, they can not also be assessed as creating limits within another activity – see also *GP v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 498 (AAC) where Judge Hemingway rejected an argument about the overlap of two descriptors based on “double-counting”. However, as Judge Gamble held in *CSPIP/386/2015*, as a matter of statutory construction, a provision which specifically provides for a particular situation may prevent a provision expressed in more general terms from applying to the same situation.

9. In my judgment, that well-established principle applies with perhaps even greater force where, as in this case, there is no indication in the statutory scheme that a claimant should benefit twice over from the same condition. Activity 5 represents an attempt to calibrate toilet needs and problems resulting from incontinence in terms of their severity, and I consider that that intention

may be undermined if some situations which are specifically provided for in activity 5 are also held to fall within the more general provisions of activity 3. There may be situations in which assisting a person with catheterisation may form part of treatment which amounts to therapy for the purposes of activity 3, but I do not consider that by itself assisting a person to catheterise falls within the scope of that activity.

10. However, I consider that the claimant is correct in asserting that the tribunal did not deal adequately with the question of whether she needed assistance to administer a catheter. While according every deference to the tribunal as the sole judges of fact, I do not consider that the activities to which it referred came anywhere near to testing the manual dexterity needed to insert a catheter, particularly in the case of someone who has received unsuccessful urethral dilation treatment. The tribunal did not refer to the mental health nurse's letter of 12 January 2016 saying that the claimant's mental health was being affected by her inability to catheterise without assistance, nor did it mention the urologist's letter of 24 December 2015 stating that the claimant was unable to insert her catheter herself and relied on her partner to do so. Both in her original claim form and in her grounds of appeal, the claimant stated that it was the condition of her wrists which prevented her from inserting her catheter by herself, but the tribunal did not deal with that issue at all. While sympathising with the tribunal for the position in which it found itself in the absence of the claimant, I have therefore come to the conclusion that the reasons for its decision are inadequate.

11. In those circumstances, I do not consider it necessary to decide whether the tribunal should have adjourned the hearing of the appeal to enable the claimant to attend. I allow the appeal, set aside the tribunal's decision and refer the case to the First-tier Tribunal for complete rehearing before a differently constituted tribunal.

12. It will be very much in the claimant's interests for her to attend the next hearing.