IN THE UPPER TRIBUNAL **Case No.** CPIP/2327/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal, which it made at Bristol on 3 May 2017 under reference SC186/16/03233, did not involve the making of an error of law and shall stand.

REASONS FOR DECISION

Background

1. The claimant suffers from narcolepsy, cataplexy and type 2 diabetes. She was receiving a disability living allowance consisting of the lower rate of the mobility component and the middle rate of the care component when the Secretary of State invited her to apply for a personal independence payment (PIP). She did so on 23 March 2016.

2. Since this appeal to the Upper Tribunal is only concerned with the application of the descriptors linked to daily living activity 1 (preparing food) I shall limit myself to addressing that. In standard form PIP2 (sometimes referred to as a customer questionnaire) the claimant wrote this: "Because of my narcolepsy and cataplexy I am unsafe alone in the kitchen. I have lost count of the number of times I have burnt myself when I have briefly fallen asleep. I also burn the food and am unsafe with boiling water. I cut myself a lot. If I am tired I also drop things a lot. My husband will always be there to supervise if I try to cook".

3. The health professional who had conducted a "face-to-face assessment" with the claimant thought that she would be able to prepare and cook a simple meal unaided. She observed that the claimant's "narcolepsy is managed" and that "she mostly gets a warning before a cataplexy episode". On 8 August 2016, probably in reliance upon what was said in the health professional's report, the Secretary of State decided that the claimant was not entitled to PIP. That decision remained unaltered after a mandatory reconsideration.

The appeal to the tribunal

4. Dissatisfied with the outcome of her application the claimant appealed to the tribunal. In doing so she wrote "I can't cook a simple meal unaided, because [of] the danger of falling asleep or a cataplexy episode. …". In a written submission to the tribunal the claimant's representative argued that she should be awarded either 4 points under daily living descriptor 1e or 8 points under 1f.

5. The tribunal, after an oral hearing, allowed the appeal to a limited extent. It decided that the claimant was entitled to the standard rate of the mobility component of PIP but not to the mobility component. It did, though, depart from the Secretary of State's conclusions in relation to daily living in that it considered there was entitlement to five daily living points (the Secretary of State had awarded no points at all) under descriptors 1b, 3b and 4c. It produced a careful and detailed statement of reasons for decision (statement of reasons). This is what it had to say, at various points, with respect to its conclusion that daily living descriptor 1b as opposed to any other descriptor linked to the same activity applied:

" 12. Based on her oral evidence and the other evidence in the appeal papers, we make the following findings of fact:

(a) …

(b) [the claimant's] narcolepsy is more or less controlled by amphetamines. She plans some naps of between 30 and 60 minutes (maximum 2 hours, minimum 10 minutes), at about 11.00 and 14.00, and nods off at other times. She nods off three to four times a day as well as the planned naps. Overall, she does not fall asleep unintentionally or have irresistible sleep episodes during the day but may fall asleep in front of the computer. She does not have sleep paralysis, hypnogogic or hypnopompic hallucinations.

(c) [The claimant] gets two to four minor episodes of cataplexy a day. She gets a buzzing sensation just before one of these episodes mostly. She notices her speech slurring. When she gets that she sits on the floor and can usually get down to the floor before falling. She also may be able to avoid a fall by supporting herself on something. But sometimes if she gets emotional or if she laughs, she collapses to the floor. Episodes when her cataplexy causes her to fall to the floor happen, we think, about once a month on average. Her head starts to nod and her arms or knees start collapsing. It lasts a minute. Sometimes she cannot breathe. She does not lose consciousness, but feels drained afterwards. During an episode she will slur her speech. Other than the fact that emotions or laughter may trigger those episodes, there is no predictable pattern to them.

(d) In the kitchen, [the claimant] can manage pans on a stove top, and can put things into the oven and take them out. If she oven cooks when she is too tired, there is a risk of her burning herself. She, her husband and two teenage children prepare things in the kitchen. If she is boiling something in a pan on the stove and she happens to collapse from the cataplexy, the pan would boil over and burn. [The claimant] does not cook chips for that reason. But she has burnt things on occasion. From what she has said about her difficulties with cooking, we conclude that she can use fresh or raw ingredients to cook a main meal. She can use a microwave. She can make a sandwich too. Although her husband is often there when she cooks, we find he is not always, and when he is not, there are precautions that she can take to avoid the risks she describes. She does also use frozen ingredients, or uses convenience foods. She can get things out of the freezer. She can set alarms to make sure she does not leave things cooking and forget about them so that they burn."

6. And then:

" 18. … we think it is agreed that [the claimant] has some warning of an episode and we do not accept Mr Annand's submission at page 101 that they occur without warning. [The claimant's] evidence is that she gets a buzzing sound in her head or a buzzing sensation. She can to some extent feel an episode coming on: that is what she told Mrs Sinoia. She sits, to avoid a fall. There is a suggestion that support of some kind can also help avoid a fall (page 37). Whatever the amount of warning is, the evidence shows that she mostly avoids full collapse. Dr. Seddon has corroborated that, presumably based on what [the claimant] told her. That, we think, is why she only had three or four full collapses in the three months before March 2016."

7. And then:

" 20. The result of that is that we think full collapses are relatively infrequent – a little over once a month perhaps. On the other hand cataplectic episodes not leading to full collapse – because [the

> claimant] takes avoiding action – are more frequent, at two to four times a day. They are not medically different but [the claimant's] avoiding action is what distinguishes them. Both types of event last from one to several minutes."

8. And then:

> " 23. As far as **preparing food** is concerned we agree with Mr Annand that [the claimant] has difficulty. However, we do not think she cannot prepare and cook food. She can manage pans, oven-friendly cookware and microwavable or other convenience foods. In our view that rules out descriptor 1(f). She can prepare and cook food, within limits. We also do not agree that she needs supervision or assistance to prepare or cook a simple meal. As far as the claimed need for supervision or assistance is concerned, we do not accept that [the claimant] is always accompanied in the kitchen when preparing food there. We observe that there are two potential problems in the kitchen for [the claimant]: (1) she may fall asleep and forget she has left cooking on, and (2) she may get a cataplectic episode. In our view the problem of forgetting she has left cooking on can be solved by the use of an alarm, which we find would be a reasonable thing for her to set, either on a phone, on her cooker or on a stand-alone alarm device. We are not persuaded that once it went off, there would still be a real risk of her not heeding it. In any case, she could set a couple of alarms to go off a minute or two before the time the activity was due to finish. As regards the cataplexy, we have reviewed this above. The fact that [the claimant] nearly always get enough warning to avoid collapse by sitting down straightaway means she can avoid problems in the kitchen by doing just that. She can spend more time seated at food preparation in the kitchen (using a chair or perching stool), and she can make sure a chair or stool is always very close to hand. In our view that would be a sufficient, reasonable alternative way of making sure cooking is safe. (It is a different situation than driving, which we address below, because when driving, there is no opportunity to take avoiding action or pause the activity instantly without danger). She can also try to avoid the emotions she says can trigger a cataplectic episode. We accept that at her medical she was observed to have burnt her arm, but we think that with the use of suitable preparations and aids like really effective, long oven-gloves, this could be avoided without the intervention of another person. For those reasons, we do not accept that [the claimant] needs supervision or assistance to prepare a simple meal. The oven-gloves, stool, alarm and other items are all aids which would allow her to prepare or cook a simple meal, so we award 2 points for that, under descriptor 1(b)."

9. Pausing there, Mr Annand is the claimant's representative. Dr. Seddon is a person who has been involved in her treatment. Ms Sinoia is the health professional.

The appeal to the Upper Tribunal

10. The claimant, through her representative, asked for permission to appeal to the Upper Tribunal. It was argued in the grounds that the tribunal had erred in failing to consider any risk stemming from a cataplexy episode which did not lead to full collapse; and in wrongly concluding (in effect) that any risk stemming from a cataplexy episode was too remote. I granted permission because I thought the tribunal might have erred, given that it seemed to accept that the claimant might albeit rarely collapse when preparing and cooking food due to the effects of the cataplexy, in failing to apply the guidance set out in *RJ, GMcL and CS v SSWP (PIP)* [2017] UKUT 105 (AAC) in the context of safety and supervision. But I also pointed out that, even if the tribunal had erred in that regard, if that only led to a conclusion that daily living descriptor 1e applied that would still not be sufficient to enable the claimant to reach the 8 point threshold necessary for an award of the standard rate of the daily living component to be made. So, there was an issue as to whether or not the suggested errors, if made, might or might not be material.

The relevant legislation

10. These are the descriptors concerning the activity of preparing food as set out in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013:

	Descriptors		Points
1. Preparing food	(a)	Can prepare and cook a simple meal unaided.	0
	(b)	Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	(c)	Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	(d)	Needs prompting to be able to either prepare or cook a simple meal.	2
	(e)	Needs supervision or assistance to either prepare or cook a simple meal.	4
	(f)	Cannot prepare and cook food.	8

11. There are relevant definitions in regulation 2 and in Part 1 of Schedule 1. These are as follows:

> "Aid or appliance –
>
> (a) means any device which improves, provides, or replaces C's impaired physical or mental function; and
>
> (b) includes a prosthesis;
>
> 'assistance' means physical intervention by another person and does not include speech;
>
> 'cook' means heat food at or above waist height;
>
> 'prepare' in the context of food, means make food ready for cooking or eating;
>
> 'supervision' means the continuance presence of another person for the purpose of ensuring C's safety;
>
> 'simple meal' means a cooked one– course meal for one using fresh ingredients."

12. Regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013 is also relevant:

> "**4. Assessment of ability to carry out activi**ties
>
> (1) …
>
> (2) …

(2A) Where C's ability to carry out an activity as 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 any other 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; and

(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."

Analysis

13. The grounds are, as I read them, directed towards the tribunal's consideration of cataplexy rather than narcolepsy. In any event, there is no direct challenge to the finding at paragraph 12b of the statement of reasons that the narcolepsy is largely controlled with amphetamines and that the claimant does not fall asleep unintentionally or have irresistible sleep episodes during the day. On any view those findings, which as I say are not the subject of specific challenge and which the tribunal was clearly entitled to reach on the material before it, are destructive of any claim to any points at all under daily living activity 1 with respect to that particular condition.

14. As to the cataplexy, the tribunal did distinguish between what it categorised as minor episodes and what it characterised as more serious ones when the claimant would fall to the ground (paragraph 12(c) of its statement of reasons). It was open to it to treat the latter type of incident, the type which it found to be less frequent, as being potentially more serious than the other type. But it did not, in my judgment, fail to consider risk stemming from what it characterised as the more minor cataplexy episodes. Its reasoning as to those was, in effect, that the claimant would receive a warning which would enable her to take what it described as 'avoiding action' (see paragraph 20 of its statement of reasons). So, it rationalised its view as to the limited degree of risk stemming from that type of episode. It was open to it to do so in the way it did.

15. As to remoteness, it is certainly right to say that the tribunal did not make any reference to the decision of the 3 Judge Panel of the Upper Tribunal in *RJ*. It is made clear therein that in considering whether an activity can be carried out safely and whether or not there is a requirement for supervision or assistance in the context of risk, both the likelihood of harm occurring and the severity of the consequences will be relevant. But a tribunal does not have

to refer to specific case law so long as its reasoning demonstrates that it applied the correct test. Here, the tribunal considered whether there was some potential risk and considered a range of measures which might be taken by the claimant to avoid any such potential risk crystallising. This included such as using a microwave oven, being seated where possible during times of food preparation, making sure a stool is close to hand, seeking to avoid the onset of emotions which may trigger an episode and using long oven gloves. It talked of there being, or in this case not being, "a real risk". Although it did not use the language used in *RJ* I am satisfied that it was, essentially, applying the same test and that it was concluding that any risk as a result of cataplexy, or for that matter narcolepsy, was too remote or, put another way, was not one where there was a real possibility that could not be ignored of harm occurring.

16. I do appreciate that a differently constituted tribunal faced with the same evidence might have come to a different conclusion. But the degree of risk and its remoteness or otherwise was a matter for the tribunal's good judgment. It exercised that judgment in a way which it has rationally explained. It was, therefore, open to it to conclude that the claimant scored only two points under daily living descriptor 1b as opposed to points under 1e or 1f. It did no err in law.

17. If I had decided that the tribunal had erred in law in one of the ways suggested by the claimant's representative or in the way in which I had suggested it might have done when granting permission, I would have concluded that any such error was not material. I shall now explain why.

18. The claimant was awarded 5 daily living points including two under daily living activity 1. So, to establish entitlement to the standard rate of the daily living component he needed to score at least a further 3 points. If he were to receive 4 points under daily living activity 1e, that would mean he would not receive the 2 points under the lower scoring descriptor 1b. So, it would give him a total of 7 points. But the claimant's representative says an award of 8 points under 1f might be appropriate.

19. As to that, let us suppose that there was a real possibility that could not be ignored of harm occurring when the claimant was preparing and cooking food consequent upon her cataplexy. That risk, as a matter of common sense, would not be there all the time. It would arise at various points during the process from the commencement of preparation of ingredients to the completion of the cooking of a meal. There is no reason to suppose and there was no evidence to suggest that for example, the claimant might be at risk if she had a cataplexy episode when she was washing vegetables or taking items out of packaging or containers. There was no reason, on the tribunal's findings, to think that there would be any risk whilst items were, for example, being boiled, fried or steamed except for the occasions when it might become necessary for the claimant to actually have contact with hot items. There would not, on the tribunal's findings, be any risk whilst items were actually cooking in a microwave. So, if there was risk it would only be at certain points during the process. If the use of an aid or appliance would not obviate the risk but supervision or assistance, as defined, would then daily living descriptor 1e rather than 1f would apply.

20. The definition of "assistance" as contained in Part 1 of Schedule 1 to the 2013 Regulations has been set out above. By way of reminder it means physical intervention by another person and does not include speech. As Upper Tribunal Judge Jacobs pointed out in *SSWP v GM* [2017] UKUT 268 (AAC) the use of the word intervention is significant. It was

decided in *GM* that that word was not apposite to describe a situation where another person would undertake an entire process for a claimant. That is because doing so does not constitute intervening. However, if a person steps in to undertake a discreet or a number of discreet parts of an overall process that will amount to intervening. That is so, in my judgment, even if the basis for a person doing so is precautionary. So it will cover a situation where a person steps in and undertakes part of a process, such as by way of example handling hot pans or substances, but otherwise allows the claimant to perform the rest of the process. If that intervention is needed to enable the overall task to be performed safely then points may be awarded. On that basis, in the circumstances of this case, assistance to either prepare or cook a simple meal would inevitably, on the tribunal's findings, obviate the risk. That means the claimant, on the facts and on the tribunal's findings, would not possibly have been able to establish entitlement to 8 points under daily living descriptor 1f. I suppose in some circumstances there might come a point when the required instances of intervention become so frequent that they amount, in effect, to undertaking the whole process such that "intervention" no longer describes what is actually occurring. But that is not the case here. So, although what I have had to say about assistance and intervention is not an essential part of my decision and should not be considered formally binding, it does seem to me that even if I had accepted an error of law had been made it could not possibly have been a material one.

21. In the above circumstances this appeal to the Upper Tribunal fails.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **9 January 2018**