

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 24 October 2017 at Cardiff under reference SC188/17/02783) 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 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. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 5 January 2017 and decided on 28 April 2017 from the effective date of 31 May 2017.
- D. 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 time of the decision: *R(DLA) 2 and 3/01*.
- E. The Secretary of State's representative has now provided the papers relating to the claimant's award of disability living allowance. They can be found following her submission at pages 222-224.

REASONS FOR DECISION

A. Background

1. The claimant was in receipt of an award of a disability living allowance when the Secretary of State invited him to make a claim for a personal independence payment. He did so on 5 January 2017 and the Secretary of State made an award consisting of the daily living component at the standard rate for the inclusive period from 31 May 2017 to 12 April 2020. The claimant exercised his right of appeal, but the First-tier Tribunal confirmed the Secretary of State's decision.

B. The Secretary of State's support for the appeal

2. The Secretary of State's representative has supported the appeal in respect of activity 1 of the mobility component. I accept that submission. The representative has identified two errors. First, the tribunal did not make findings

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sufficient to show that the claimant could perform the activity of planning and following a route unaided in accordance with regulation 7 of the Social Security (Personal Independence Payment) Regulations 2013 (the 50% rule), given his evidence that he only went out for specific purposes. Second, the tribunal did not make findings relevant to whether the effects of the claimant's post traumatic stress disorder amounted to overwhelming psychological distress.

C. Other possible errors

3. The claimant's representative has submitted that the tribunal made errors in respect of other activities. I do not need to deal with those alleged errors. Any that were made will be subsumed by the rehearing, the outcome of which will depend on the tribunal's findings of fact on the evidence and assessment of the arguments presented at that hearing.

D. All points are equal

4. In refusing permission to appeal in the First-tier Tribunal, the judge said in respect of taking nutrition: 'As a descriptor offering 4 points, half of those required for an award of benefit, it is right that the Tribunal applied a high standard to daily living activity 2.'

5. The judge was not the presiding judge at the hearing and there is nothing in the tribunal's reasons to show that this was the approach it took. The comment is, therefore, not part of the decision under appeal to the Upper Tribunal in which any error must be found (*Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279 at [67]). Nevertheless, I need to comment on it because it is wrong.

6. In response to my comment in granting permission, the Secretary of State has submitted that there is no 'high' standard operating in social security appeals. I accept that submission. There is a single standard of proof that has to be applied to all issues: the civil standard of the balance of probabilities. There is no rule that the standard becomes more (or perhaps less) demanding according to the significance of the issue for an award of benefit. Logically, the judge's approach produces the result that the standard, already high for a score of 4 points, would be higher for a score that alone is sufficient for an award at the standard rate and higher again if the score carries entitlement at the enhanced rate. It also produces problems. Would the standard increase if the descriptor in issue, when taken together with one already awarded, would carry half of the points awarded for benefit? And so on and so on.

7. As I have said, I am not attributing the judge's comment to the panel that heard the appeal. But it is important that this idea should not take hold and be disseminated among those who do make decisions.

**Signed on original
on 04 June 2018**

**Edward Jacobs
Upper Tribunal Judge**