IN THE UPPER TRIBUNAL **Case No.** CPIP/2751/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 26 April 2017 is set aside only insofar as it held that the claimant was not entitled to the daily living component of personal independence payment from 9 November 2016 and the case is remitted to a differently constituted panel of the First-tier Tribunal for that part of the decision to be re-made in accordance with my reasons below. The First-tier Tribunal's award of the enhanced rate of the mobility component from 9 November 2016 to 8 November 2018 is not set aside.

Direction: The Secretary of State is directed to send to the First-tier Tribunal within one month of being sent a copy of this decision full details of any supersession or revision of the award of personal independence payment under appeal that has involved consideration of the claimant's entitlement to the daily living component.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with permission given by Upper Tribunal Judge Markus QC, against a decision of the First-tier Tribunal dated 26 April 2017 allowing in part the claimant's appeal against a decision of the Secretary of State dated 10 October 2016 to the effect that an award of the lower rate of the mobility component and the middle rate of the care component of disability living allowance should end on 8 November 2016 and that the claimant was not entitled to personal independence payment thereafter. Having considered Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/337), the First-tier Tribunal allowed the appeal to the extent of awarding the enhanced rate of the mobility component of personal independence payment from 9 November 2016 to 8 November 2018. It awarded 12 points (under descriptor 1(f)) in respect of the mobility activities, but only 3 points (under descriptors 3(b)(ii) and 9(b)) in respect of the daily living activities, which was not sufficient for entitlement to the daily living component. The claimant needed 8 points for entitlement to the standard rate of a component, or 12 points for entitlement to the enhanced rate.

The applications for permission to appeal

2. When the claimant asked the First-tier Tribunal for permission to appeal, her application was considered by District Tribunal Judge Hindley who had not been the presiding judge at the hearing. Judge Hindley considered it to be arguable that the First-tier Tribunal had not dealt adequately with daily living activity 10 in its statement of reasons, saying –

> "7. … The statement of reasons does not explain specifically why the Tribunal did not agree with the appellant's psychiatric nurse on this. It may be inferred that they did not accept her evidence because it was contradicted by other evidence that they did accept but they still should have explained this. It could also be said that the First-tier Tribunal should have dealt with other issues about this in more detail."

However, permission to appeal was still refused because 4 extra points under descriptor 10(c) would not by itself have made any difference to the outcome and the judge was not satisfied that there was any other arguable error of law.

3. Judge Markus QC, on the other hand, considered that there were other arguable points. She said –

> "3. The community mental health nurse had written a letter setting out a number of difficulties experienced by the Appellant. She was present at the hearing although did not give oral evidence. The FTT did not refer to her written evidence and did not explain why it (in effect) did not accept the nurse's evidence in relation to activity 4 and activity 10. In relation to the latter I agree with the observations of the Tribunal Judge at paragraph 7 of the refusal of permission to appeal (page 207).
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> 4. Moreover, it is arguable that the FTT's reasons are inadequate to explain why descriptor 9(b) applied but not 9(c), particularly in the light of the finding that the Appellant never goes out alone."

Accordingly, she gave permission to appeal.

Submissions on the appeal

4. In a helpful response to the appeal, the Secretary of State conceded that the First-tier Tribunal had indeed erred in the manner suggested by Judge Markus QC, pointing out that, not only had the First-tier Tribunal failed to mention the community mental health nurse's evidence in its statement of reasons but it had also failed to ask her any questions about her evidence, including putting to her its reasons for doubting her written evidence, despite her having been present at the hearing. It was submitted that –

> "This evidence provides an indication that the claimant could possibly be entitled to a further 4 to 6 points by satisfying descriptors 4(c) and 10(b) or 10(c)."

As regards descriptor 9(c), it was pointed out that the claimant had apparently needed to be accompanied by both her stepfather and the community mental health nurse when attending the health care professional's assessment and the hearing before the First-tier Tribunal and that there was evidence that they had both apparently prompted her to engage with the health care professional and the members of the First-tier Tribunal. It was suggested that the case should be remitted to the First-tier Tribunal.

5. However, the claimant's representative, her stepfather, submitted that it was necessary to have a hearing before the Upper Tribunal, arguing that "the Secretary of State agrees that at least 8 further points should be awarded" but pointing out that the Secretary of State had not addressed activity 3, which had been the main focus of the claimant's application for permission to appeal, and arguing, in effect, that whether the claimant was receiving "therapy" for the purposes of that activity so that points could be awarded under any of descriptors 3(c) to 3(f) was a question of law that could be determined by the Upper Tribunal without any further findings of fact.

6. The case then came before Upper Tribunal Judge Mesher, who stayed it to await a decision that was expected to be given by a three-judge panel of the Upper Tribunal, before whom the Secretary of State was to argue that an earlier decision given by Judge Mesher, *Secretary of State for Work and Pensions v LB* (PIP) [2016] UKUT 530 (AAC), had been wrongly decided. In the event, the Secretary of State withdrew both her appeal before the three-judge panel and also her appeal to the Court of Appeal against *LB*.

7. The Secretary of State now submits that that "leaves *LB* as being the primary case law on the meaning and interplay between the various activity 3 descriptors, [which] should be applied if the matter is to be remitted". She further submits that the First-tier Tribunal did not err in law as regards activity 3 in the present case but that it would be open to the First-tier Tribunal to make new findings of fact if the case were to be remitted. On the other hand, the claimant's stepfather still submits that the case does not need to be remitted and that the Upper Tribunal can decide whether or not the claimant satisfies any of descriptors 3(c) to 3(f) so as to be entitled to the enhanced rate of the daily living component rather than the standard rate. However, he no longer seeks an oral hearing.

Daily Living Activities 4, 9 and 10

8. I accept that the First-tier Tribunal erred in law in relation to daily living activities 4, 9 and 10 for the reasons identified by Judge Hindley, Judge Markus QC and the Secretary of State. However, I am satisfied that this case must be remitted to the First-tier Tribunal. Contrary to the claimant's stepfather's submissions, the Secretary of State has not conceded that the claimant *should* be awarded sufficient points to qualify for at least the standard rate of the daily living component; she has only conceded that the claimant *could* have been awarded sufficient points to qualify for it and that the First-tier Tribunal had erred in law in its approach to the case or its lack of reasoning, so that the issue needs to be reconsidered. The question whether any additional points should be awarded in respect of activities 4, 9 and 10 is still in dispute and would be far better decided at an oral hearing before a panel of the First-tier Tribunal, which has a doctor and a disability-qualified member among its members, than on paper by a judge of the Upper Tribunal.

Daily Living Activity 3

9. As to activity 3, it is not necessary for me to decide whether the First-tier Tribunal erred in law in its approach to the case because, as I am obliged to set aside the First-tier Tribunal's decision in relation to the daily living component due to the other errors, it will, as the Secretary of State has pointed out, be open to the panel to whom this case is remitted to consider afresh entitlement to points in respect of activity 3. However, I ought to address some of the parties' arguments in order to give guidance to that panel.

10. Following *LB*, the 2013 Regulations were amended by regulation 2(1) to (3) of the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 (SI 2017/194), so as to reverse much of what had been decided in that case. However, as the Secretary of State accepts, it is necessary in the light of the history of the litigation following *LB* that that decision should be followed in cases like the

present where the Secretary of State's decision was made before the 2017 Regulations came into force. At that time, activity 3 was in the following terms –

Column 1 Activity	***Column 2 Descriptors***	***Column 3 Points***
3. Managing therapy or monitoring a health condition.	a. Either – (i) does not receive medication or therapy or need to monitor a health condition; or (ii) can manage medication or therapy or monitor a health condition unaided.	0
	b. Needs either – (i) to use an aid or appliance to be able to manage medication; or (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.	1
	c. Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week.	2
	d. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week.	4
	e. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 7 but no more than 14 hours a week.	6
	f. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 14 hours a week.	8

11. When considering the descriptors in Column 2, it must be borne in mind that, among other terms to be found in them, "supervision", "prompting", "assistance", "therapy" and "manage … therapy" are all defined in Part 1 of Schedule 1 and, in particular, that neither of the terms "prompting" and "manage" is limited to what might be regarded as its most natural meaning. The former includes "encouraging or explaining", perhaps making up for the exclusion of speech from "assistance", and "manage" is to be construed as "undertake".

12. In the present case, the First-tier Tribunal reasoned that the claimant was not a person who "[n]eeds supervision, prompting or assistance to be able to manage therapy" for the purposes of descriptors 3(c) to 3(f), because the support she received from her parents "was akin to support with general living rather than therapy" and "was a product of the 'loving and caring environment' provided by her closest family rather than therapy". In taking that approach, it relied on *DC v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 11 (AAC). It also held that holidays and activities "out of the house" did not amount to therapy, given the definition of "therapy" as "therapy to be undertaken at home which is prescribed or

recommended by a … registered … nurse …", and it referred to *AH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 276 (AAC).

13. In *DC*, Upper Tribunal Judge Jacobs said –

> "9. The claimant's representative has accepted that there are difficulties in scoring more points on the basis that the claimant requires his health condition to be monitored. She has argued that the assistance he requires can properly be classified as therapy. She points out that he was placed in supported and supervised accommodation. He is well and living in the community because of the support he receives. Staff give him his medication. They help with his daily life to keep his stress levels to a minimum. She relies on the Department's guidance, which refers to safety and to the risk of deterioration that can arise from a failure to carry out therapy.
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> 10. This is an ingenious argument, but I do not accept it. It is necessary to start with the facts. What is it that the staff do for the claimant? I accept what the representative says, but the question is whether that is therapy. There is no definition of what 'therapy' involves. No doubt, that reflects the many and varied forms that it may take. But I do not accept that keeping an eye on the claimant to spot deterioration and the support provided with his general living to help keep him free from stress amounts to therapy. It is support, certainly, and important support that has proved effective, but it is not therapy. Therapy may be difficult to define with precision, but it is a concept that has limits. There are many things that are beneficial for a claimant that are not therapy. A job, for example, may help a claimant socialise and develop self-esteem. It might even be described as therapeutic. But it would not generally be properly described as therapy.
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> 11. Something more than a beneficial effect is necessary. I do not propose to lay down what would or might be sufficient to amount to therapy. It is sufficient to say that the evidence in this case does not contain it."

14. I do not disagree with anything said in that decision, as far as it goes, and I agree with the Secretary of State that, to the extent that the First-tier Tribunal followed that decision, it did not err in law. Whether it asked itself all the necessary questions and whether it reached a decision that was open to it on the evidence before it or for which it provided adequate reasons are perhaps more debateable issues that I need not consider because there is now rather more detailed evidence that has been submitted by the claimant's stepfather and the panel to which this case is remitted will be able to take that evidence into account.

15. I do not, though, agree with the way that the First-tier Tribunal expressed itself in the light of *AH*. In that case, it was held that therapy that required attendance at keep-fit classes or appointments for counselling outside the home was not undertaken at home. It seems to me that the reference in the definition of "therapy" to "at home" is really designed to exclude cases, such as *AH*'s, where the therapy is undertaken at a hospital or other venue to which the claimant goes specially to receive the therapy, rather than to exclude any therapy that takes place "out of the house" even if provided by family members wherever the claimant happens to be.

16. On the other hand, insofar as the support provided by the claimants' parents in this case amounted to prompting the claimant to undertake journeys or amounted to accompanying her so as to enable her to undertake them, it fell to be taken into

account under mobility activity 1 rather than daily living activity 3. Similarly, support that satisfied any of the "prompting" descriptors in the other daily living activities could not, *to that extent*, also be taken into account under daily living activity 3. Otherwise there would be double counting of that prompting and that cannot have been intended. That is not to say that such prompting might not be part of the "therapy" (see *LB* at paragraph [36]). However, it is well established (see *RH v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 281 (AAC) and *HH v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 558 (AAC)) that the references in descriptors 3(c) to 3(f) to numbers of hours refer to the length of time for which "supervision, prompting or assistance" is needed, rather than the length of time that the therapy takes overall, and it is inconceivable that it was intended that the same prompting should be taken into account in the calculation of points under two different activities.

17. However, different considerations arise in relation to the question whether there may be an overlap between descriptors within a single activity. In this regard, there are two different aspects of the reasoning in *LB*.

18. First, it was held that descriptor 3(b)(ii) did not apply where a claimant required supervision, prompting or assistance to be able *both* to manage medication *and* to monitor a health condition, although it obviously applied where supervision, prompting or assistance was needed to enable a claimant *either* to manage medication *or* to monitor a health condition. Therefore, it being accepted that descriptors 3(c) to 3(f) could not apply in any case where the therapy amounted *only* to supervision, prompting or support satisfying descriptor 3(b)(ii), because that would have had the effect of making descriptor 3(b)(ii) otiose, it was held that one of descriptors 3(c) to 3(f) might apply where the therapy amounted to no more than taking medication *and* monitoring a health condition. This part of the reasoning – now, reversed by amendments made to descriptor 3(b) by the 2017 Regulations – is probably not relevant to the present case, as the evidence here does not suggest that the support provided to the claimant was confined either to medication or to monitoring a health condition or to both.

19. Secondly, it was held in *LB* that it did not matter as a point of statutory construction that there may have been an overlap between the descriptors within the activity, as long as the higher scoring descriptor described a greater need than the lower-scoring one, because regulation 7(1)(b) had the effect that only the higher scoring one counted. Therefore, it was held, managing therapy for the purposes of any of descriptors 3(c) to 3(f) might include actions that would amount to managing medication or monitoring a health condition for the purposes of descriptor 3(b)(ii). This part of the reasoning is more likely to be relevant to the present case. Thus, there is no reason why, say, prompting to enable the claimant to manage medication or to monitor a health condition should not be taken into account as part of prompting to enable her to manage therapy. This is consistent with the approach taken in relation to mobility activity 1 in a decision of a three-judge panel, *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC) at [45] - [46], given on the same day as *LB*. (The 2017 Regulations were intended to reverse these parts of *LB* and *MH* in respect of the particular activities with which they were concerned. As regards activity 3, this has been done by amending the definition of "therapy" in Part 1 of Schedule 1 to the 2013 Regulations. As regards mobility activity 1, it was to be

done by regulation 2(4) of the 2017 Regulations, which amended three descriptors in that activity, but regulation 2(4) was held invalid and was quashed in *R(F) v Secretary of State for Work and Pensions* [2018] EWHC 3375 (Admin); [2018] PTSR 1147; [2018] AACR 13.)

20. The overall effect of the case law as it applies for the purposes of this case is therefore that a need for "prompting … to be able to manage therapy" must be a need for something more than, or different from, ordinary interactions within a household and also more than, or different from, a need for supervision, prompting or assistance such as would score points either under descriptor 3(b)(ii) as construed in *LB* or under any of the other daily living or mobility activities.

21. Subject to that qualification, it seems to me that, insofar as engaging with other people may be therapeutic for a claimant and is in a form recommended by a relevant health professional, engagement by those other people with the claimant may amount to prompting the claimant to undertake therapy for the purposes of descriptors 3(c) to 3(f).

22. The First-tier Tribunal will need to make clear findings of fact as to the nature, amount and intensity of support needed by the claimant and then decide whether or not it amounts to therapy. It will also need to make findings as to the extent to which such therapy was recommended by the community mental health nurse, exercising her professional expertise, as intervention required to improve or maintain the claimant's health. In considering these issues, it would no doubt be assisted by evidence from the community health nurse herself, if she is still available to attend a hearing as she did last year.

23. More than that I do not think I can properly and usefully say about daily living activity 3 in this case. It will be for the First-tier Tribunal, having heard the evidence, to decide whether any of descriptors 3(c) to 3(f) is in fact satisfied.

Disposal

24. As I have said, this case must be remitted to the First-tier Tribunal. Judge Mesher having expressed concerned that setting aside the whole decision of the First-tier Tribunal in this case would have the effect of terminating its award of the enhanced rate of the mobility component which appears no longer to be in dispute, the Secretary of State has invited the Upper Tribunal to consider giving directions so that only the daily living component is in issue or, which seems to me to be the same thing, to direct the First-tier Tribunal to accept the previous award in respect of the mobility component. However, such directions would not prevent the award being terminated although it would give the claimant the assurance that the award would be reinstated when the remitted case was re-decided. The Secretary of State's power to make payments on account of benefit are more limited in relation to personal independence payment than they are in relation to disability living allowance.

25. On the other hand, I see no reason in principle why the Upper Tribunal should not set aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 a discrete part of a decision that is wrong in law, leaving intact the other part

that is unaffected by the error, and then remit the case to the First-tier Tribunal for it, in effect, to complete its decision. Generally, the Upper Tribunal is reluctant to do that because there is a risk of parts of a decision made at different times being made on inconsistent views of the facts, particularly as remission is usually to a differently-constituted panel, but it does not follow that such an approach is impermissible where it would simplify proceedings or avoid injustice.

26. In the circumstances of the present case, I consider that a departure from the usual practice is justified. Not only has the Secretary of State invited the Upper Tribunal to consider making a direction that would have the effect of preserving the award of the mobility component in the long run, but also that award is about to expire if it has not already been revised or superseded. I am therefore content to give a decision setting aside the First-tier Tribunal's decision only to the extent that it decided that the claimant was not entitled to the daily living component of personal independence payment.

27. It will therefore be unnecessary for the panel to whom the case is remitted to consider the claimant's entitlement to the mobility component and, indeed, it is precluded from making a decision as regards that component on the remitted appeal. If the award of the mobility component has not been revised or superseded, my decision will enable the award to remain in payment until it expires, after which entitlement to both components will presumably depend on whatever decision has been, or is to be, made by the Secretary of State (or, on appeal, by the First-tier Tribunal) on a renewal claim. Whether the period for which the daily living component will be in issue on the remitted appeal ends before 8 November 2018 will depend of the terms of any revisions or supersessions that there may have been. Accordingly, I direct the Secretary of State to inform the First-tier Tribunal of the relevant adjudication history.

Mark Rowland
11 September 2018