

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. CPIP/315/2018

Before: Mr. E Mitchell, Judge of the Upper Tribunal

Appellant: Miss P, represented by Lancashire County Council's Welfare Rights Service

Respondent: Secretary of State for Work & Pensions

Decision: This appeal **SUCCEEDS**. The decision of the First-tier Tribunal (20 September 2017, sitting at Blackpool, file reference SC 064/17/00338) involved an error on a point of law. The tribunal's decision is **SET ASIDE** and Miss P's appeal against the Secretary of State's decision as to her PIP entitlement is **REMITTED** to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

REASONS FOR DECISION

Introduction

1. A claimant's ability to communicate verbally is part of the prescribed Personal Independence Payment (PIP) assessment. The relevance of lip-reading to that assessment is clearly important given the prevalence of hearing impairments. To date Upper Tribunal decisions have recorded and applied the Secretary of State for Work & Pensions' 'concession' that lip-reading should not be considered a satisfactory means of carrying on verbal communication.

2. This decision holds that the Secretary of State's 'concession' is in fact a correct interpretation of the law. The impediments to effective verbal communication through lip-reading are such that it is not to be regarded as verbal communication to an effective standard.

Grounds of appeal

3. The Upper Tribunal's determination granting Miss P permission to appeal against the First-tier Tribunal's rejection of her appeal against the Secretary of State's decision that she was not entitled to PIP read as follows:

“3. Miss [P’s] application argues there were errors of law in the First-tier Tribunal’s approach to the verbal communication PIP assessment activity area. The Tribunal gave inadequate reasons for its finding that it was reasonable for Miss [P] to use a hearing aid, in the light of evidence that she did not use her hearing aid, and an ability to lip read should not have been taken into account.

4. The tribunal decided that Miss [P’s] condition justified two points for limitations in daily living activities. She was granted two points because the tribunal was satisfied she needed to use an aid or appliance to be able to speak or hear. The award threshold is eight points.

5. Miss [P] application relies on the Upper Tribunal’s decision in *CC v Secretary of State* [2017] UKUT 429 (AAC)...

6. I grant permission to appeal because, having considered *CC*, it is not immediately obvious to me (a) what is the Secretary of State’s view on the correct legal interpretation of PIP assessment activity area 7, in particular whether an ability to lip read is to be taken into account; and (b) why a ‘concession’ as to the meaning of legislation, as referred to in *CC*, has any weight at all when a tribunal is discharging, in other cases, its statutory responsibility to construe relevant legislation...”.

4. The Secretary of State supports Miss P’s appeal. Her representative’s written response submits:

- the First-tier Tribunal made insufficient findings of fact to support its conclusion that it was reasonable for Miss P to use a hearing aid, given the evidence about her difficulties using hearing aids;

- the tribunal made insufficient findings of fact about the help provided by Miss P’s mother to assist her to understand verbal communication so that it was unable properly to decide whether such help was reasonably required;

- the tribunal failed adequately to consider the issue of lip-reading. In this respect, the representative submits that “lip reading is not an acceptable way of verbally communicating, particularly when taking into account regulation 4(2A) of the Social Security (PIP) Regulations 2013”. Regulation 4(2A) provides:

“Where C's ability to carry out an activity is 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; and

(d) within a reasonable time period.”

- The representative submits that the Secretary of State’s stance regarding lip-reading is supported by Upper Tribunal Judge Jacobs’ decision in *SB v Secretary of State* [2018] UKUT 122 (AAC) where he said:

“It is the Secretary of State’s position that lip reading is not considered an acceptable way to interpret verbal communication, particularly when one takes into consideration regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013.

It seems to me that it is pointless to disagree with a Secretary of State who wishes to implement legislation in a way that is perhaps more generous to claimants than the legislation strictly allows. I therefore set aside the tribunal’s decision for taking lip reading into account and direct the tribunal at the re-hearing to take the same approach as the Secretary of State”.

5. Insofar as the Secretary of State’s response addresses matters not falling within the Upper Tribunal’s grant of permission to appeal, I amend the grounds of appeal to include them.

6. The Secretary of State invites the Upper Tribunal to set aside the First-tier Tribunal’s decision and remit Miss P’s case to that tribunal for re-determination. Miss P’s representative’s written reply accepts the Secretary of State’s ‘concession’ but also says welfare rights and other organisations would welcome legal clarity about the relevance of lip-reading under activity 7. The representative also requests that, on remission, Miss P’s appeal is not re-heard at the First-tier Tribunal’s Blackpool venue.

Conclusions

Lip-reading as a form of verbal communication: general principles

7. The activity 7 descriptors, set out in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (“the 2013 Regulations”), identify different modes of “communicating verbally”. The full set of activity 7 descriptors, with their associated points, are as follows:

7(a) – can express and understand verbal information unaided	0 points
7(b) – needs to use an aid or appliance to be able to speak or hear	2 points
7(c) Needs communication support to be able to express or understand	4 points

complex verbal information	
7(d) Needs communication support to be able to express or understand basic verbal information	8 points
7(e) cannot express or understand verbal information at all even with communication support	12 points

8. Certain terms used within the activity 7 descriptors are defined by paragraph 1 of Schedule 1 to the 2013 Regulations:

- "basic verbal information" means "information in C's native language conveyed verbally in a simple sentence";
- "communication support" means "support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into a non-verbal form and vice versa";
- "complex verbal information" means "information in C's native language conveyed verbally in either more than one sentence or one complicated sentence";
- "unaided" means "without (a) the use of an aid or appliance; or (b) supervision, prompting or assistance".

9. I also need to refer to some of the general rules about the application of the PIP assessment descriptors, set out in regulation 4 of the 2013 Regulations:

- a person's "ability to carry out an activity is to be assessed (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use" (regulation 4(2));
- regulation 4(2A) provides:
 - “Where C's ability to carry out an activity is 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 [which means “as often as the activity being assessed is reasonably required to be completed”: regulation 4(4)]; and
 - (d) within a reasonable time period.”

10. For my part, I am not satisfied that the Secretary of State's stance regarding lip-reading involves an overly-generous reading of the PIP assessment regulations. I recognise that I am no expert in communication by hearing-impaired individuals but the problem with lip-reading, it seems to me, is that it involves a third party over whom the hearing-impaired individual has no necessary control. For lip-reading to be effective, there must surely be an accommodating communication partner who is (a) aware that s/he is speaking to a person with a hearing impairment, (b) willing to look directly at the person, regardless of environmental distractions; and (c) willing to enunciate speech, without mumbling, in a way that prioritises the lips as a speech organ. On that final point, it is I believe common medical knowledge that a number of speech organs are used to talk. As well as the lips, speech sounds are articulated using the larynx, pharyngeal area, soft palate and tongue. There are plenty of speech sounds that may be articulated with little or no lip involvement.

11. For the above reasons, I find it difficult to see how lip-reading, as a rule, satisfies the regulation 4(2A) requirement for verbal communication to an acceptable standard. In the context of verbal communication, this must mean the accurate transmission of information verbally. Since there appear to be many stumbling blocks in the way of effective communication through lip-reading, can it properly be considered as a form of verbal communication to an acceptable standard? Well, it would be if the assessment regulations were applied on the assumption that a communication partner has the attributes described in the previous paragraph. In my view, however, the legislation is not intended to operate on such an assumption.

12. The verbal communication descriptors form part of a prescribed assessment whose purpose is to identify individuals whose "ability to carry out daily living activities" is either limited or severely limited by their physical or mental condition. In the absence of a contrary legislative intention, this purpose calls for the PIP assessment regulations to be interpreted in a way that recognises the concept of normal day-to-day life inherent in the term 'daily living'. Accordingly, in my judgment, the verbal communication descriptors are not to be applied on the assumption that a claimant has an ideal communication partner. Instead, they are to be applied by reference to the typical range of communications that crop up in everyday life. Such communications involve third parties over whom a claimant is unlikely to have effective communication control. In my judgement, therefore, the Secretary of State's concession is not objectionable on the basis that it involves an overly-generous interpretation that departs from the strict legal meaning of the activity 7 descriptors.

13. For the above reasons, I decide it is not open to the First-tier Tribunal to whom this matter is remitted to find that Miss P is able to communicate verbally to an acceptable standard by means of lip-reading.

Why the First-tier Tribunal erred in law

14. The First-tier Tribunal agreed with the Secretary of State that Miss P satisfied descriptor 7(b), that is she needed to use an aid or appliance to be able to hear. Miss P's case, however, was that she could not use hearing aids due to a sensitivity to the high-pitched sounds amplified by her hearing aids. The tribunal noted this argument but did not explain whether it was accepted or rejected. In failing to deal with an issue raised by the appeal, the tribunal's decision involved an error on a point of law in the form of inadequate reasons for its decision.

15. I shall deal next with the question whether the tribunal made insufficient findings of fact about the help provided by Miss P's mother to assist her to understand verbal communication. If the tribunal's hearing aid finding was sound, the nature of the help given by Miss P's mother would not have been relevant. It would only have been an issue if hearing aids were excluded from the activity 7 analysis and, of course, the tribunal was not to know that its hearing aid finding involved an error on a point of law. Since the tribunal's hearing aid finding involved an error on a point of law, there is no need for me to address whether the tribunal made sufficient findings of fact about the communication assistance provided for Miss P by her mother. It is an issue that may need to be tackled by the next First-tier Tribunal, depending on what it makes of Miss P's evidence that she cannot reasonably use hearing aids.

16. Finally, the question whether the First-tier Tribunal dealt adequately with the lip-reading issue. On my reading of the tribunal's statement of reasons, the issue was not in fact addressed. The statement of reasons finds that Miss P completed a course and was able to hear the Healthcare Professional (HCP) during her consultation if the HCP raised her voice. But these points were made in support of a finding that Miss P's mother did not need to provide communication assistance. Miss P's notice of appeal to the First-tier Tribunal argued that she tries to lip-read but would often mishear what was said. The HCP report noted that Miss P "tries to lip read" and "had difficulty hearing assessor at times and assessor had to speak up" so that, as a result, she needed to use hearing aids.

17. The First-tier Tribunal did not address Miss P's argument that her lip-reading was ineffective. Had the tribunal's hearing aid finding been sound, on Miss P's case this issue would not have been relevant. Of itself, the tribunal's failure to address the effectiveness of Miss P's lip-reading was not a material error of law. The failure would only have been a material error of law had the tribunal accepted that Miss P was unable to use hearing aids. While it would not have been open to the tribunal to rely on Miss P's lip-reading, for the reasons given above, its key error was not in failing to make such a finding but in failing to deal with Miss P's hearing aid argument.

Disposal of appeal

18. The First-tier Tribunal's decision involved an error on a point of law and the Upper Tribunal sets it aside. Miss P's appeal against the Secretary of State's decision of 20 December 2016 is remitted to the First-tier Tribunal for re-determination. Since the next tribunal is re-determining the appeal, all relevant issues must be considered afresh and the tribunal may not, in its reasoning, take into account the findings of fact and other conclusions of the tribunal whose decision has been set aside.

19. Miss P requests that the First-tier Tribunal does not list her appeal for hearing in Blackpool. As a general principle, an appellant may not choose their hearing venue. While Miss P's request to the Upper Tribunal does not explain why she wishes to avoid Blackpool, the First-tier Tribunal's bundle suggests she may have been subjected to domestic violence by a man living in, or near, the Blackpool area. That puts her request in a different light. However, I shall not myself make any direction about the hearing venue. In my view, this is a case management issue that ought to be dealt with by the First-tier Tribunal. I am confident it will deal considerately with Miss P's request.

Directions

I direct as follows:

1. Miss P's appeal against the Secretary of State's decision of 20 December 2016 is remitted to the First-tier Tribunal for re-determination.
2. The tribunal panel that re-determines Miss P's appeal must not include any person who sat on the panel whose decision has been set aside by the Upper Tribunal.
3. The First-tier Tribunal must hold a hearing before re-determining Miss P's appeal.
4. Before fixing a hearing venue, the tribunal is to consider Miss P's request for a hearing venue other than Blackpool. The tribunal may direct Miss P to provide a written explanation, supported by evidence, as to why she would not be able effectively to participate in a hearing held in the Blackpool area.
5. The First-tier Tribunal may not, in assessing Miss P's ability to communicate verbally, rely on any ability she may have to lip-read.

Directions 3 and 4 may be varied by case management direction given by the First-tier Tribunal.

Miss P is reminded that the law prevents the First-tier Tribunal from taking into account circumstances that did not apply at 20 December 2016, when the Secretary of State's decision was taken (section 12 of the Social Security Act 1998). Evidence generated after that date may be taken into account if it is relevant to Miss P's circumstances at that date.

(Signed on the Original)

**E Mitchell
Judge of the Upper Tribunal
3 November 2018**