

IN THE UPPER TRIBUNAL

Appeal No. CSPIP/208/2019

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge A I Poole QC

The decision of the Upper Tribunal is **to allow the appeal**. The decision of the First-tier Tribunal made on 21 January 2019 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

1. The case is to be reconsidered at an oral hearing. The members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision which has been set aside. The new Tribunal should have regard to paragraphs 4-17 of this decision, the grounds of appeal at page 137, and the submission of the Secretary of State for Work and Pensions at pages 152-155, when reconsidering the case.
2. Parties may provide any further evidence upon which they wish to rely before the First-tier Tribunal to the relevant HMCTS office, the deadline for doing so being one month from the date of issue of this Decision. The new tribunal will be looking at the claimant's circumstances at the time that the decision under appeal was made, that is 23 October 2017, as they applied during the times covered by the required period condition under Part 3 of the Social Security (Personal Independence Payment) Regulations 2013. Any further evidence, to be relevant, should shed light on the position at those times.
3. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider matters afresh and it may reach the same or a different conclusion to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS

Background

1. This is a case about personal independence payment ("**PIP**"). The appellant (the "**claimant**") suffers from anxiety. On 29 December 2017 the claimant was found by the Secretary of State for Work and Pensions ("**SSWP**") not to be entitled to PIP, as he scored no points in respect of daily living and mobility activities in Parts 2 and 3

of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the “**PIP Regulations**”). The claimant appealed to the First-tier Tribunal (the “**tribunal**”). In a decision of 21 January 2019, the tribunal allowed the appeal, setting aside the decision and finding that the claimant was entitled to the mobility component of PIP, as he scored 10 points under mobility activity 1. The tribunal found that the claimant did not qualify for the daily living component of PIP, because although he scored 4 points under activity 9, that was insufficient for an award. The claimant appealed to the Upper Tribunal against the decision in respect of the daily living component. The ground of appeal was that the tribunal did not give adequate reasons why descriptor 9c, and not 9d, was chosen. The claimant argued that, had the tribunal exercised its proper inquisitorial function, it would have found descriptor 9d to apply. Permission to appeal was granted on 8 July 2019 on the basis that the grounds of appeal in respect of activity 9 merited consideration.

2. In her response of 7 August 2019, the SSWP supports the appeal. She submits that the tribunal erred in law in its approach to daily living activity 9. It failed to provide adequate reasons to justify its decision to choose descriptor 9c rather than other descriptors within activity 9. It also failed, in the light of evidence before it from a clinical psychologist about the claimant’s anxiety and engagement, to exercise its inquisitorial function to decide whether a higher scoring descriptor applied. It did not properly explore the claimant’s significant issues with engaging with other people face to face in a normal setting on a day to day basis. She submits that the decision should be set aside and remitted to a reconstituted tribunal for reconsideration. She consents to a decision without reasons in terms of Rule 40(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and does not request an oral hearing of this appeal.

3. The claimant, in a response dated 15 August 2019, does not request an oral hearing. He does not consent to a decision without reasons under Rule 40(3)(b); rather he requests guidance and directions about how the new tribunal should approach activity 9. Further submissions were made by the claimant in a letter received by the Upper Tribunal on 2 September about the guidance it was suggested the Upper Tribunal give, which I have taken into account in the discussion below.

Discussion

4. I am content to provide some general guidance on the application of activity 9 in the present case as requested. However, I do so with the strong caveat that all cases are different, and what the tribunal will have to consider in any given case will depend on the evidence before it and what is in issue.

5. Activity 9 in Part 2 of Schedule 1 of the PIP Regulations provides as follows:

“9. Engaging with other people face to face

- | | |
|-------------------------------------------------------------------|---|
| a. Can engage with other people unaided. | 0 |
| b. Needs prompting to be able to engage with other people. | 2 |
| c. Needs social support to be able to engage with other people. | 4 |
| d. Cannot engage with other people due to such engagement causing | 8 |

either –

(i) overwhelming psychological distress to the claimant; or

(ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person”.

Descriptor 9d can therefore be satisfied either by a finding of engagement causing overwhelming psychological distress OR causing behaviour by the claimant resulting in a substantial risk of harm to themselves or others.

6. The definition in Paragraph 1 of Part 1 to Schedule 1 of “engage socially” applies to consideration of engagement under Activity 9 (*SSWP v MM* [2019] UKSC 34 at paragraph 14). “Engage socially” means

“(a) interact with others in a contextually and socially appropriate manner;
(b) understand body language; and
(c) establish relationships”.

Tribunals have to take into account all three parts of this definition (*HA v SSWP* [2018] UKUT 56).

7. Also relevant when applying activity 9 is Regulation 4(2A) in the PIP Regulations (which applies when the tribunal is considering descriptors 9a, 9b, and 9c; *AB v SSWP* [2017] UKUT 217 at paragraph 39). Regulation 4(2A) provides that:

“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”.

“Safely” is defined as meaning “in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity”.

8. Finally, Regulation 7 contains the “50% rule” and provides:

(1) The descriptor which applies to C in relation to each activity in the tables referred to in regulation 5 and 6 is —

(a) where one descriptor is satisfied on over 50% of the days of the required period, that descriptor;

(b) where two or more descriptors are each satisfied on over 50% of the days of the required period, the descriptor which scores the higher or highest number of points; and

(c) where no descriptor is satisfied on over 50% of the days of the required period but two or more descriptors (other than a descriptor which scores 0 points) are satisfied for periods which, when added together, amount to over 50% of the days of the required period—

(i) the descriptor which is satisfied for the greater or greatest proportion of days of the required period; or,

(ii) where both or all descriptors are satisfied for the same proportion, the descriptor which scores the higher or highest number of points.

The required period is the period of three months ending with the prescribed date and the period of nine months beginning with the day after the prescribed date. In this case the prescribed date was the date of the claim, 23 October 2017. 23 October 2017 falls a quarter of the way through the year long required period.

9. A tribunal applying activity 9 will start by looking at the available descriptors within activity 9 in the light of the evidence before it. When deciding which descriptor applies, the tribunal will bear in mind the statutory definition of “engage socially” set out in paragraph 6 above, and test the types of engagement of which the claimant is capable against this definition. Some additional general principles in decided caselaw which may be of relevance are:

9.1 Engaging with people face to face is an activity which can take many differing forms (*SSWP v MM* [2019] UKSC 34 paragraph 29);

9.2 The activity applies to engaging with people face to face, which by definition is only possible on a one-to one basis or within a small group. It does not include difficulties engaging with a crowd; the crowd merely provides the circumstances in which a difficulty may arise (*AM v SSWP* [2017] UKUT 7);

9.3 It implies engaging with people you do not know (*HJ v SSWP* [2016] UKUT 487).

10. If the claimant has difficulties with engaging face to face in the sense of being able to interact with others in a contextually and socially appropriate manner, understand body language, and establish relationships, safely and to an acceptable standard, for more than 50% of the days in the required period, the tribunal will have to consider descriptors 9b, 9c and 9d.

11. If the tribunal is trying to choose between descriptors 9b and 9c, it will find the case of *SSWP v MM* [2019] UKSC 34 and Regulation 7(1)(c) of assistance. Descriptor 9c reflects a greater degree of disability than 9b, which needs the attention not just of another person but of a person trained or experienced in assisting people to engage in social situations. The focus is on necessity and relevant training or experience. If both 9b and 9c seem to apply at different times, then the provisions of Regulation 7 (in paragraph 8 above) will assist the tribunal deciding which to choose.

12. In my opinion, and subject to the requirements of Regulation 7 dealt with in the next paragraph, descriptor 9d should be found to apply in any of the following situations:

12.1 where engagement (in the way envisaged in the definition of “engage socially”) causes overwhelming psychological distress to the claimant (9(d)(i));

12.2 where engagement may cause the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person (9(d)(ii)). It was found in *SSWP v AM* [2015] UKUT 215 that if a claimant is limiting their engagement with others substantially to avoid the risk of substantial harm, that may mean they cannot engage socially;

12.3 where, even with social support, the claimant would not be able to engage with other people “safely” or “to an acceptable standard”, because the claimant might not be able to engage in a manner unlikely to cause harm to the claimant or to another person, either during or after completion of the activity (Regulation 4(2A)). (*SSWP v AM* [2015] UKUT 215 at paragraphs 12, 17-19; cp *AB v SSWP* [2017] UKUT 217).

13. It is also necessary to bear in mind Regulation 7(1) of the PIP Regulations, which may have the effect of extending the situations in which descriptor 9d applies.

Descriptor 9d should be chosen where any of the ways 9d may be satisfied set out in the previous paragraph apply for over 50% of the days in the required period (Regulation 7(1)(b)). But descriptor 9d must also be chosen even if, on some days, 9c applies rather than 9d, if either of the following are satisfied:

13.1 both 9c and 9d apply for over 50% of the days in the required period;

13.2 neither 9c nor 9d apply of themselves for over 50% of the days in the required period, but when the periods they apply are added together the result is over 50%, and 9d is satisfied for the same or more days in the required period than 9c.

The tribunal's errors in law

14. The tribunal's reasons in relation to activity 9 were as follows:

"Where the additional medical evidence did assist the appellant was with regard to engaging with others. That was corroborated in important respects by the claimant's own evidence of difficulty in being able to deal with other people in certain situations, notably on public transport. He had related to the Health Professional instances where he feels very stressed in his dealings with others, a situation that can often exacerbate his deep-seated anxiety. We accepted his evidence in that regard as consistent with what had been said at the assessment and it was supported by the professional correspondence now to hand. His ability to engage is aided by experienced and trained sources and we came to the view that the award of descriptor 9c was appropriate".

15. Evidence before the tribunal included a letter dated 8 January 2018 from a counselling psychologist who was treating the claimant (pages 112-113). It contains the following passages:

"My clinical impression is that [the claimant] suffers from symptoms of severe anxiety...there is an element of general anxiety and also more specifically social anxiety which is quite incapacitating for him...he is on life licence and as such holds a fear that if he 'slips up' in any way he could be sent back to prison indefinitely. The fear of this happening is perhaps exacerbating his anxiety and he is careful to avoid interacting with people in general in case it could lead to a confrontation that would cause trouble for him. If [the claimant] is feeling heightened anxiety because he's in a new situation particularly when it is not of his choosing, and if it involves people whom he does not know, it is likely that his heightened anxiety will lead to an increased perceived sense of threat. This in turn could likely trigger angry or aggressive behaviour leading to conflict which may have extremely significant negative consequences for [the claimant]..."

A further letter from the same psychologist dated 9 July 2017 (page 121) refers to

"extremely high levels of anxiety particularly in social situations along with intrusive images and avoidance. Due to all of this [the claimant] tends to remain quite socially isolated".

There was also evidence from the social work department in a letter dated 20 September 2016 (page 117) that the claimant's

"experience of relationships are those which are based on suspicion and mistrust and this restricts his social integration".

16. This evidence, in my opinion, put in issue before the tribunal all three of the ways in which the claimant might have qualified for descriptor 9d (and consequently an award of the daily living component of PIP at the standard rate) listed in paragraph 12 above. The evidence of extremely high levels of anxiety particularly in social situations, and incapacitating social anxiety, put descriptor 9(d)(i) in issue. The evidence that new situations involving people the claimant doesn't know could result in him exhibiting angry and aggressive behaviour leading to conflict put in issue descriptor 9(d)(ii). It also put in issue whether the claimant could engage "safely" and to an acceptable standard even with social support, having regard to Regulation 4(2A). Further, the effect of Regulation 7 was also in issue, because even if 9c might have applied some of the time, there was no consideration of the extent to which 9d might have applied and whether it should have been selected on application of Regulation 7(1). These were material and substantial questions, because if the claimant did qualify for points under descriptor 9d, then he was entitled to the daily living component of PIP at the standard rate. However, the tribunal does not address the possibility of activity 9d applying in its reasons at all. In these circumstances, I find that the tribunal failed to give adequate reasons for its decision and so erred in law.

17. I therefore set the decision of the tribunal aside, and remit the case to a differently constituted First-tier Tribunal for reconsideration in accordance with the directions at the beginning of this decision. The new Tribunal may proceed on the basis that the claimant qualifies for the mobility component as found by the previous Tribunal, since that finding has not been challenged in this appeal. It may confine its consideration to the daily living component and in particular to consideration of activity 9. In doing so it should consider which descriptor within activity 9 applies, having regard to the various different ways in which the claimant may qualify for descriptor 9d outlined in paragraph 12 above, and the application of Regulation 7 set out in paragraph 13 above. In making this decision I should make it clear that I am not expressing a view on the claimant's entitlement to the daily living component of PIP; that is for the new tribunal to decide.

**Signed on the original
on 18 September 2019**

**A I Poole QC
Judge of the Upper Tribunal**