



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2021-002048-PIP

On appeal from: First-tier Tribunal (Social Entitlement Chamber)

Between:

CB

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Hemingway

Decision date: 8 April 2022

Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 7 October 2020 under number SC292/19/00128 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and re-make the decision in the following terms:

Re-made decision: The appeal against the Secretary of State's decision of 26 November 2018 is allowed. The claimant is entitled to a personal independence payment comprising the standard rate of the daily living component and the standard rate of the mobility component, from 26 November 2018 to 27 October 2021. That is because, in addition to the points awarded by the First-tier Tribunal, she is entitled to two additional points under daily living descriptor 5b.

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (F-tT) which it made on 7 October 2020 following a remote hearing of 6 October 2020. The F-tT, in fact, allowed the appeal and decided that she was entitled to a personal independence payment (PIP) comprising the standard rate of the mobility component only, from 26 November 2018 to 25 November 2021. It explained why in a statement of reasons for decision (statement of reasons) of 30 November 2020. However, the claimant thought her award ought to have included the daily living component and so, aided by her representative Mr J Cunningham of Durham Welfare Rights, she pursued this appeal.

I have allowed the appeal; I have set aside the F-tT's decision of 7 October 2021; and I have remade the decision in the terms set out above. The following explains why I have done so and why it is I have not considered it appropriate to decide, as a component of my decision, whether dentures used by the claimant are an aid or appliance with respect to her ability to take nutrition (daily living activity 2).

2. The claimant has health problems said to include mild spinal degeneration, carpal tunnel syndrome, chronic fatigue syndrome and a heart murmur. She was first awarded PIP (the standard rate of each component) for the period from 9 July 2013 to 3 February 2016. She was subsequently awarded PIP (this time the standard rate of the mobility component only) from 4 February 2016 to 25 November 2018. But on 26 November 2018 (the decision under appeal before the F-tT) a decision-maker acting on behalf of the Secretary of State decided there was no longer any entitlement from that date and the decision was later confirmed by way of mandatory reconsideration. The claimant appealed to the F-tT.

3. The F-tT held a remote hearing as it was then doing in most cases as a part of its response to the coronavirus pandemic. The claimant was represented at that hearing by Mr Cunningham who argued, amongst other things, that the claimant was entitled to two points under daily living descriptor 2b(i) (needs to use an aid or appliance to be able to take nutrition) and to two points under daily living descriptor 5b (needs to use an aid or appliance to be able to manage toilet needs or incontinence). The argument under 2b(i) was founded upon a contention that the claimant had missing teeth and so used dentures which, in such circumstances, ought to be regarded as an aid or appliance. The F-tT, whilst deciding the claimant scored 6 points under the activities and descriptors relevant to the daily living component and 10 points under the activities and descriptors relevant to the mobility component (translating into the award of the standard rate of the mobility component only) rejected both contentions. On my reading of the statement of reasons it decided the claimant's dentures could not be an aid or appliance for three reasons being: a) Parliament could not have intended dentures to be an aid or appliance for PIP purposes because they are a commonly used item; b) even if there were circumstances whereby dentures could be an aid or appliance such was not the case here due to a lack of any identifiable health condition which had led to the claimant's loss of teeth and hence her need for dentures; and c) the definition of "*taking nutrition*" as set out at Part 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations") requires an item to be needed for both chewing food and (my underlining) swallowing food before it can count as an aid. Further, it decided that the claimant did not, as had been asserted before it, need to use an aid such as the sink in her bathroom (which is what she had said she did use) in order to rise from a sitting position when using the toilet because she had been observed by a health professional to be able to rise from a seated position by using a stick.

4. I gave permission because I thought the F-tT might have erred in law with respect to its consideration of both of those matters. As to the dentures issue, I thought the F-tT might have erred through speculating as to what Parliament might or might not have intended as opposed to focusing on the words used in the relevant legislation, through wrongly requiring an identifiable health condition which had led to the loss of teeth, and through thinking that to be an aid as defined an item had to assist with both chewing and swallowing rather than with just one of those functions. As to the toileting issue, I thought the F-tT might have erred through failing to

consider that the observation it relied on actually pointed to a need for an aid when rising and that use of a stick when doing so might itself amount to the use of an aid.

5. When granting permission, I directed submissions from the parties in the usual way. I also directed the Secretary of State, whatever stance was to be taken on the toileting issue, to address the dentures issue as well.

6. The Secretary of State, through her representative and having taken legal advice (paragraph 2 of a holding submission of 13 December 2021), accepted, I think essentially for the same reasons which had caused me to give permission on the point, that the F-tT had erred with respect to its consideration of the toileting issue. It was pointed out that the claimant had been consistent in her evidence that she did need an aid to assist her in the manner described (getting up from the toilet seat) and I was, therefore, invited to set aside the F-tT's decision on that basis and to substitute my own decision awarding a further 2 points under daily living descriptor 5b, thus enabling the claimant to reach the threshold for entitlement to the standard rate of the daily living component. The representative for the Secretary of State, Mr R Naeem, acknowledged my direction that the issue of the dentures be dealt with too but addressed it by suggesting that, if I were to do as asked, the issue would be rendered immaterial because a further 2 points under daily living descriptor 2b(i) would not change the level of entitlement. It was also suggested that there had been insufficient findings by the F-tT to demonstrate whether any inability of the claimant to chew was limited by a physical or mental condition (see section 78(1) of the Welfare Reform Act 2012) such that there would be little merit in the Upper Tribunal attempting to take matters further. But striking a partially conciliatory note, Mr Naeem did say "*It is, however, my submission that if any claimant cannot carry out any of the relevant actions prescribed in the statutory definition of taking nutrition, it can be said they cannot take nutrition*".

7. The claimant, through Mr Cunningham, indicated contentment with the suggestion I should remake the decision in the terms suggested and for the reasons suggested. However, notwithstanding that my doing so would dispose of the appeal without the need to evaluate the dentures issue, he urged me to hold an oral hearing and to decide the questions of whether in principle dentures can be an aid or an appliance, whether any loss of teeth must be attributable to an identifiable health condition, and whether an aid, to count as such, must assist with anything more than chewing. He urged me to deal with all of these matters because, in his view, my doing so would clarify the law and would be helpful to claimants, the Secretary of State and the F-tT. He also, perhaps exuding a slight degree of frustration, made the point that this was the third occasion he had raised the issue of dentures as an aid or appliance on appeal to the Upper Tribunal and he seemed to suggest (unless I misunderstand) that the Secretary of State was seeking to avoid a "*definitive ruling*".

8. I accept, with respect to the toileting issue, that the F-tT did err in the manner I had suggested it might have done when I gave permission to appeal. The error was material in that, had the F-tT not made it and had it gone on to award an additional 2 daily living points under daily living descriptor 5b, it would have awarded the standard rate of the daily living component of PIP in addition to the mobility component. On that basis I set aside the F-tT's decision. As to disposal, the parties are agreed that I should re-make the decision by awarding those 2 points. I do so. That means, in remaking the decision, I award the claimant the standard rate of each component of PIP. The end date of the award shall be 27 October 2021. That is because Mr Naeem has indicated that the award made by the F-tT was superseded from 28

October 2021 and the Mr Cunningham has not disagreed. But Mr Cunningham, of course, asks me to now go further and fully address the arguments he has raised about the dentures.

9. As to the dentures issue, I can understand Mr Cunningham's desire for a comprehensive resolution, and I can understand why he thinks such a resolution might be of assistance in clarifying matters. But I have already decided this appeal and I have done so in the way in which I have been urged to by the two representatives. That being so, anything I do say on the issue will be non-binding opinion only (*"obiter dicta"* for that declining group of people who may continue to prefer the Latin) and that will be so even if I am to direct an oral hearing and receive full argument. Had I been minded to set aside and then remit the appeal I would have dealt fully with the issue because remittal would have restored the terms of the Secretary of State's original decision of 26 November 2018 under which no daily living points had been awarded such that it might have been necessary for the F-tT to decide entitlement to points under daily living activity 2 along with entitlement under other daily living activities, and in such circumstances any clarification I might have given would have been of potential assistance to it in its task upon remittal. However, in the circumstances as they actually are, it would be an artificial exercise for me to do so and it would mean time being taken by the Upper Tribunal and each party and possibly the holding of a hearing, in order to secure only a non-binding opinion which for that reason would not, in any event, give the definitive clarification which Mr Cunningham seeks. So, I am not going to purport to decide those matters. Having said the above, I do not see the harm in my expressing an opinion as to the F-tT's view that to be an aid or appliance an item must assist with both chewing and swallowing, as the matter has been addressed and effectively conceded on behalf of the Secretary of State in the context of this appeal.

10. The F-tT thought that for dentures to be an aid or appliance (assuming in principle that they could be) they would have to assist with both the task of chewing and the task of swallowing. Regulation 2 of the PIP Regulations defines the term "*aid or appliance*" to mean "*any device which improves or replaces C's impaired physical or mental function*" and to "*include a prosthesis*". Schedule 1 Part 1 of the above Regulations contains a definition of "*aided*" which includes "*the use of an aid or appliance*" and defines taking nutrition as "*(a) cut food into pieces, convey food and drink to one's mouth and chew and swallow food and drink; or (b) take nutrition by using a therapeutic source*". Moving to Part 2 of Schedule 1, daily living activity 2 is "*Taking nutrition*" and descriptor 2b(ii) relevantly reads "*(b) Needs-(i) to use an aid or appliance to take nutrition*".

11. I do not agree with the conclusion reached by the F-tT that for dentures to count as an aid or appliance they must assist with both chewing and swallowing. That is because the language used in the legislation does not point to such an interpretation; because the process of taking nutrition involves four components being cutting food, conveying it to the mouth, chewing it and swallowing it all of which are necessary (according to the definition) to achieve the taking of nutrition such that if only one of the components (such as chewing) cannot be done the overall task cannot be done; because the F-tT's interpretation would seem to require an aid or appliance of considerable and quite probably unrealistic versatility if it is required to assist with all four components, and because Mr Naeem has, both fairly and realistically in my view, conceded the point in his submission on this appeal. So, I have formed what is only an opinion, albeit I have to say a very strongly held one, that for an item to count as

an aid or appliance for the purpose of taking nutrition it does not need to assist with more than one of the necessary components as set out in the definition appearing at Schedule 1 part 1 of the PIP Regulations and set out above.

12. I will not say any more.

M R Hemingway
Judge of the Upper Tribunal
8 April 2022