IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001660-PIP**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-Tier Tribunal, Social Entitlement Chamber

Between:

SO

Appellant

- v –

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge ELEANOR GREY KC

Representation:
Appellant: Mr M. Williams (CPAG)
Respondent: Mr D. Edwards, Normanton Chambers, London.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 6 November 2020 under number SC315/19/00115 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. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing, to be listed at the first available opportunity that is convenient for all the parties.**

2. **The Tribunal that re-determines the appeal must not include any member of the panel whose decision has been set aside by the Upper Tribunal.**

3. **The First-tier Tribunal will consider all the issues in the case afresh.**

4. **If the Appellant wishes to put any further written evidence or written argument before the First-tier Tribunal, that evidence should be**

received by the First-tier Tribunal's office in Birmingham within one month of this Decision being issued. If the Appellant cannot provide this material within that period, he should write to the Tribunal office within that period and let them know when it might be expected.

5. **The Appellant should understand that the new Tribunal will be looking at his health problems and how they affected his daily activities at the time that the decision under appeal was made, i.e. 29 November 2018. Any further evidence, to be relevant, should shed light on the position at that time.**

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

REASONS FOR DECISION

Background and History of this Appeal

1. This is an appeal against a decision of the First-tier Tribunal ("the FTT") dated 6 November 2020. The Appellant was appealing against a decision of the Secretary of State for Work and Pensions (the Respondent to this appeal), made on 29 November 2018, that the Appellant was not entitled to an award of Personal Independence Payments (PIP). The FTT dismissed his appeal. He now appeals to the Upper Tribunal with the permission of Upper Tribunal Judge Mitchell, granted on 8 August 2021.

2. The appeal is supported by the Respondent. The reasons for this support were set out, first, in a Statement dated 23 December 2021; then, after it was suggested by the Appellant that the issues under Activity 2 (see further below) required further explanation, in further submissions that were filed by the Respondent on 30 August 2022. However, on 25 November 2022, I nevertheless directed an oral hearing of the appeal, in order to satisfy myself that the issues arising, and the decision in *MM and BJ v SSWP* [2016] UKUT 490 AAC in particular, had been addressed. An oral hearing duly took place on 24 February 2023, and I have been greatly assisted by the submissions of the representatives on both sides. They remain agreed on the legal approach that it is submitted that the Upper Tribunal should adopt.

3. The only significant point of difference is that, if I am minded to set aside the FTT's decision, the Appellant urges me to make further findings of fact and to allow the appeal, whereas the Respondent submits that the case should be remitted back to the FTT for further fact-finding and decision-making. I have returned to the issue of disposal at paragraph 46 below.

The Issues in the Appeal

4. In his decision, the Respondent had awarded the Appellant no points under the various activities considered for an award of PIP. After hearing his appeal, the FTT awarded the Appellant five points under the daily living descriptors 1(d), 3(b) and 9(b) and nil points for the mobility descriptors. The result was that the Appellant still scored insufficient points to be awarded any rate of the daily living or the mobility component of PIP.

5. The appeal concerns only the daily living component, and specifically Activity 2 and Activity 9. The mobility descriptors are not in issue.

6. According to the FTT's findings of fact (paragraph 10), the Appellant, who is a former soldier, has anxiety, depression and Post-Traumatic Stress Disorder (PTSD). His evidence in relation to Activity 2 ('taking nutrition') was that due to an incident while on active service abroad, he was unable to eat for two days. He now has difficulty in knowing when to stop eating. When he left the army, he was 15 stone and now he is 22 stone. He overindulges in food (see paragraph 22 of the Statement of Reasons). The written submission filed with the FTT explained that the Appellant relied on his wife to control his diet and eating habits. His wife monitored his food intake, making him packed lunches to ensure he was not overindulging whilst at work, and preventing him from taking cash so that he could not buy 'junk' food. He needed her assistance to eat in a healthy or controlled manner, so as to avoid excessive weight gain.

7. The FTT found, in relation the activity of 'taking nutrition', that the Appellant could do this unaided. It stated:

> "…. the Appellant can convey food to his mouth which is the test that needs to be satisfied. The Appellant was not losing weight at the time of decision. There was no specialist input or treatment regarding his food intake. The Tribunal find that the Appellant can do this activity safely, to an acceptable standard, repeatedly and in a reasonable time period for more than 50% of the days in the required period. The Appellant scores no points for this activity." (paragraph 23, Statement of Reasons).

8. The Appellant argues that the Tribunal should have made a clear finding on whether his difficulties with food were caused by a mental health problem. If they were, then the need for 'prompting' to stop eating too much food fell within descriptor (d) of Activity 2 and should have entitled him to an award of four points.

9. The case was originally put on the basis of a claim for two points for 'supervision' under 2(b)(ii). Even if successful, that alone would not have qualified the Appellant for an award of the daily living component, for which he needed to be awarded eight or more points. However, it was also argued that the treatment of Activity 9 was legally flawed, as inadequate reasons were given for the choice of

descriptor. There is agreement that the Tribunal's reasons on this issue were inadequate; see further paragraph 41 below.

Activity 2 – definitions

10. It will be apparent that the chief argument concerns the proper approach to Activity 2 of the Social Security (Personal Independence Payments) Regulations 2013. Under these Regulations and as at the date of the Secretary of State's decision, the Activity is defined as follows:

Activity	Descriptors	Points
2. Taking nutrition	a. Can take nutrition unaided	0
	b. Needs - (i) to use an aid or appliance to be able to take nutrition; or- (ii) supervision to be able to take nutrition; or (iii) assistance to be able to cut up food.	2
	c. Needs a therapeutic source to be able to take nutrition.	2
	d. Needs prompting to be able to take nutrition.	4
	e. Needs assistance to be able to manage a therapeutic source to take nutrition.	6
	f. Cannot convey food and drink to their mouth and needs another person to do so.	10

11. This Activity is underpinned by further definitions:

> ""take nutrition" means –
>
> (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;" (see Schedule 1, Part 1).

12. Also relevant is Regulation 4(2A):

"Where [a claimant's] ability to carry out an activity is assessed, [a claimant] is to be assessed as satisfying a descriptor only if [the claimant] can do so:

(a) safely,

(b) to an acceptable standard;

(c) repeatedly; and

(d) within a reasonable time."

13. "Safely" means "in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity." "Repeatedly" means "as often as the activity being assessed is reasonably required to be completed".

14. "To an acceptable standard" has not been defined in the Regulations, but it "can … be said that an acceptable standard is a standard which is "good enough", judged from both an objective and subjective perspective (see *DE v Secretary of State for Work and Pensions* (PIP) [2021] UKUT 226 (AAC) at para 63).

15. The term "within a reasonable time period" is defined as meaning "no more than twice as long as the maximum that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity."

16. "Prompting" is defined as meaning "reminding, encouraging or explaining by another person", whereas "supervision" means "the continuous presence of another person for the purpose of ensuring C's safety" (see Schedule 1, Part 1 of the Regulations).

Activity 2 – Caselaw and DWP Guidance

17. In the context of this case, there are two significant decisions on the proper approach to Activity 2.

18. The first is the decision of Upper Tribunal Wright in *MM and BJ v SSWP* [2016] UKUT 490 AAC. In this, Judge Wright held that the statutory definition of "taking nutrition" in the Regulations meant the physical action of ""cutting food into pieces, conveying food and drink to one's mouth and chewing and swallowing food or drink", and no more". The nutritious quality (or absence of nutritious quality) of the diet in question was irrelevant; see paragraphs 23 – 30 of the decision, including the following:

> 25. The plain focus of the activity "taking nutrition" in my view is therefore on, and is only on, the act of eating and drinking, and thus the enquiry under the PIP scheme has on be on whether, *per* sections 78(1) and 80(1)(a) of the Welfare Reform Act 2012, a person's ability to carry out the activity of cutting food into pieces, conveying food and drink to their mouth and chewing and swallowing food or drink, is limited by their physical or mental condition. Once it is understood that, putting matters colloquially, it is the activity of *eating and drinking* and the physical and mental actions needed to carry out that activity which is in issue under the activity "taking nutrition", then the word "nutrition" ceases to have any special quality beyond its being a term to cover both eating and drinking, and therefore the nutritious quality of what is being eaten or drunk can be recognised as being irrelevant under the PIP statutory scheme.
>
> 26. I accept that there may be instances where what is being consumed may be so outwith any reasonable or rational view of what constitutes food or drink that it might not fall on any reasonable analysis within a person taking nutrition within activity 2. This, however, has

> nothing to do with what is being consumed not being "nutritious" in some healthy eating sense but it simply not being "food" or "drink" at all. Such cases are likely to be very rare. Neither of these two appeals is such a case, nor were they argued as being such a case. It may also be open to argument that a person who due to their physical or mental functions is only able to cut up the softest type of food or can only chew or swallow the most tiny amount of food or drink might not be said to be "taking nutrition" in the PIP statutory sense. Again, however, this is not because they are not having a nutritious diet but because they are not in any proper sense of the words either cutting food into pieces or carrying out the actions of chewing or swallowing food or drink. And again, neither of these cases is such a case.
>
> 27. Once the above is understood it seems to me that the flaw in the arguments of the claimants relying on the "acceptable standard" provision in regulation 4(2A) of the PIP Regulations is revealed. As regulation 4(2A) makes clear, it applies where a claimant's ability to carry out an activity is assessed, and the claimant is to be assessed as satisfying a descriptor only if they can do so "to an acceptable standard". What has to be assessed, therefore is the ability to carry out an activity to an acceptable standard. The activity under activity 2 "taking nutrition" is, as set out above, the ability to cut food into pieces, convey food and drink to one's mouth and chew and swallow food or drink. It is those acts, which make up the activity, e.g. the act of cutting food into pieces, which have to be done to an acceptable standard: see to similar effect [22] to [24] of *PE v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 309 (AAC); [2016] AACR 10. The (nutritious) quality of what is eaten or drunk is not part of those acts, and so the contents of what is being eaten or drunk does not need to be to "an acceptable standard".
>
> 28. Likewise, if the focus is on satisfying, say, descriptor 2d, the analysis still has to be, on the statutory wording, on needing prompting to be able to "cut food in to pieces, convey food and drink to one's mouth and chew and swallow food or drink" to an acceptable standard. The content of the food and drink is irrelevant. It is the actions involved in eating and drinking that have to be to an acceptable standard and not the food and drink consumed."

19. The second decision is that of Upper Tribunal Judge Markus KC in *TK v SSWP* [2020] UKUT 22 (AAC). The case concerned whether a claimant who needed prompting to go on eating enough fell within the scope of Activity 2 and required prompting. The claimant in that case had cystic fibrosis, which meant that he needed a high calorie diet but would feel full and want to stop eating before he had in fact eaten a sufficient quantity of food. Judge Markus KC that this issue fell within the scope of the activity, on the basis that regulation 4(2A) required a person to be able to perform the activity 'repeatedly' - which must mean enough times to be able to eat sufficient food to meet their needs.

20. She noted that the DWP PIP Assessment Guide accepted that claimants who needed prompting about portion size might score points and this supported her analysis. This Guide has been put before me as well and provides, relevantly:

> **"Activity 2 – taking nutrition**
>
> **Notes**
>
> The defined term 'taking nutrition' refers solely to the act of eating and drinking and so the quality of what is being consumed is irrelevant for the purposes of daily living activity 2. Therefore, if for any reason a claimant elects to have a bad or restricted diet, makes dietary choices or chooses to avoid certain foods as part of dietary requirements, they're nevertheless 'taking nutrition' to an acceptable standard and therefore will not score under activity 2.
>
> Cases where what is being consumed is so beyond any reasonable or rational view of what constitutes food or drink that it does not amount to 'taking nutrition' are possible but will be very rare. However, if a claimant needs prompting to eat because they have a physical or mental condition that affects their ability to make active choices about the food they consume (for example claimants with a learning disability or an eating disorder who because of that disorder need prompting to undertake the physical act of eating), they'll qualify under descriptor D.
>
> The frequency of taking nutrition should only be considered if the claimant has an underlying condition which affects their ability to remember to eat, or their motivation to eat e.g. dementia or severe clinical depression or an eating disorder ….
>
> …..
>
> **Descriptor D (4 points): Needs prompting to be able to take nutrition**
>
> 'Prompting' means reminding, encouraging or explaining by another person.
>
> Applies to claimants who need to be reminded to eat (for example, due to a cognitive impairment or severe depression), or who need prompting about portion size. Prompting regarding portion size should be directly linked to a diagnosed condition such as Prader Willi syndrome or anorexia. In cases where obesity is a factor and where there is no impaired cognition which would suggest a lack of choice or control then this descriptor would not apply."

21. It is of course accepted that the Guide is not an aid to statutory construction, however much it helps to explain the Respondent's approach.

22. The parties have further noted that in in *GP v SSWP (PIP)* [2016] UKUT 444 (AAC), Upper Tribunal Judge Gray referred, without adverse comment, to part of the reasons of a FTT who had been prepared to award points to a person with

Obsessive Compulsive Disorder (OCD) because "*On many occasions the appellant fails to make appointments because of the inordinate length of time it takes him to wash, dress and eat*." It is said that this is an indication that eating for an excessive period of time, as a result of a mental health condition, falls within the Activity.

Submissions

23. Against that background, both parties submit that (i) there should have been a clear finding as to whether or not the Appellant's overeating was as a result of his PTSD, i.e., a mental health condition; but if was, then (ii) in principle, it was open to the Tribunal to consider whether he needed "prompting" to take nutrition, as a result of that mental health condition. It is common ground that any impairment or limitation must stem from a physical or mental condition – see s78 of the Welfare Reform Act 2012.

24. Mr Edwards submitted, and Mr Williams agreed, that as recognised in the DWP Assessment Guide, a limitation on the activity of taking nutrition can arise, depending on the facts of particular case, where prompting is required to avoid undernourishment or where it is required to avoid excessive nourishment (from overeating). Whilst each case will depend on its own facts, the 'undernourishment' case is illustrated by *TK*, or by the situation of a young person suffering from anorexia, who needs prompting to secure their dietary input. The 'overeating' case is referred to in the Guide, which references the clinical condition of Prader Willi syndrome. This is a rare genetic condition which causes a wide range of physical symptoms, including (according to the NHS website) an excessive appetite and overeating, which can easily lead to dangerous weight gain: "Someone with the syndrome can eat much more than other people and still feel hungry"; there is also an increased risk of choking. Another example given in the hearing was that of someone suffering from dementia, who forgets what they have already eaten or drunk, and so continues to drink alcohol or to consume further food. It was also accepted that, depending on the facts, these principles could also cover the situation of a person who, due to depression, over-ate by eating whatever was available, regardless of its nature or quality or the results of such excesses.

25. Both parties stress that they are not seeking to challenge the authority of *MM and BJ v SSWP*. It is said that the 'quality' of the food or drink eaten is not the focus of the examination, which remains on the act (or function) of taking nutrition. As the Respondent's Skeleton for the oral hearing stated:

> "In short, too little conveying of food to the mouth or swallowing food, as also too much, without prompting to do so sufficiently or without excess, gives rise to an unreliability in the act of taking nutrition. This has nothing to do with the quality of what is being eaten, or personal choices about food, or the "nutritious adequacy" of what is being eaten."

26. When asked about how the question of what constituted "too much" eating was to be evaluated, Mr Williams referred to the overall calorific intake and, in this case, the fact that the Appellant's evidence was that he had put on some 7 stone in weight; this meant that eating was taking place more than reasonably required. Calorific density was therefore relevant, but assessment would be a matter of fact for the Tribunal. Mr Edwards concentrated more on the repetition of the actions in question; i.e., the excessive repetition of the 'taking of nutrition', regardless of its quality or the nature of what was being eaten. Both representatives were agreed that these difficulties must arise from a physical or mental condition, rather than being a matter of 'personal choice'. The parallel of excessive bathing was relied upon (e.g., as a result of obsessive-compulsive disorder).

27. The Respondent further submits, and the Appellant agrees, that in principle consideration of these issues could arise under the heading of any of the conditions set out in Regulation 4(2A) (see paragraph 12 above), i.e., the issue of whether the activity can be carried out safely, to an acceptable standard, repeatedly, and within a reasonable time. The question of safety may not often arise, but it could: see the description of Prader Willi syndrome above, which might (on the facts) give rise to questions about choking risks. Issues under the other elements of Regulation 4(2A) might arise, depending on the facts; but the Respondent stressed that whilst there was no set order for them to be applied, each was a separate condition and (in particular) the question of an 'acceptable standard' was a free-standing condition and could not be used to reconsider or dilute the tests under the headings of safety, repetition and reasonable time, if any of those had not been satisfied.

28. Finally, Mr Williams noted that not only must difficulties arise from a mental or physical condition, but that 'prompting' must also be effective if a claim under 2(d) was to be allowed: see the discussion of 'needing' social support or prompting in *Secretary of State for Work and Pensions v MM* [2019] UKSC 34.

Discussion and Conclusions

29. Cases of over-eating are likely to involve individuals who in a physical sense are able to 'take nutrition', insofar as they are able to fulfil the statutory definition of being able to "cut food into pieces, convey food and drink to one's mouth and chew and swallow food and drink". As a result, there are difficulties in applying the definition of this term under the Regulations and as discussed in *MM and BJ v SSWP*, which all agree was correctly decided.

30. The submission made to me that the focus should be on the "quantity" of food taken, rather than its "quality", applying *TK v SSWP.* Yet it is difficult to see how, in practice, evaluation of whether repetition of the "act" of taking nutrition has become excessive can take place without any regard to the nutritional quality of the food taken. Repeated 'grazing' or refusing to stop eating generally attracts concern when it leads to eating high quantities of high-calorific, nutrition-poor food; it is far

less likely to raise issues if the food being consumed is fruit or similar, or remains nutritionally varied and healthy. The submission that there should be concern if an excess of calories was regularly consumed seems to me to be an aspect of this, as it takes the debate into the area of the quality or adequacy of a diet, rather than the mechanics of the function of eating and drinking.

31. The same would apply if the concept of taking nutrition "safely" was used to examine not merely the physical action of eating and risks such as choking, but the wider cumulative effects of over-eating over the longer term; i.e., the risks linked to the development of obesity.

32. All that said:

a. I accept that if under-eating can fall within the scope of the Activity (see *TK*), then is it logical to examine over-eating as well;

b. *TK* illustrates the need to consider the definition of the Activity not on its own, but with the requirements of Regulation 4(2A) in mind; moreover

c. There are plainly some physical or mental conditions, of which Prader Willi syndrome is an example, in which individuals' ability to regulate the taking of nutrition is significantly impaired, to the extent that it would be artificial to regard them as being able to 'take nutrition', in any normal or practical sense.

33. Against that background, I accept that a person who, as a result of a "physical or mental health condition", is unable to regulate or control the quantity of food eaten may qualify for an award of points under Activity 2, if this activity cannot be performed to the standard envisaged by Regulation 4(2A). The FTT would need to assess not only the nature of the physical or mental condition relied upon, and its casual impact on eating, but also the application of the tests of safety, an acceptable standard, repeatedly, and within a reasonable time.

34. Safety might be at issue in the case where food is eaten so quickly or compulsively that choking or serious vomiting risks arise.

35. The repetition of the act of eating was the basis on which *TK* was decided. Given the stance of the parties before me, I am prepared to accept that compulsive over-eating, as well as under-eating, might engage this limb of "repeatedly". Seeing whether an activity can be performed "repeatedly" means assessing whether it can be performed "as often as the activity being assessed is reasonably required to be completed". The argument is that if repetition of the act of taking food (or drink) is no longer reasonably required, yet continues, that is sufficient.

36. This approach implies, first, that the statutory language of repetition applies to a situation where the element of compulsive repetition means that the individual is unable to stop, even when repetition of the activity is no longer "reasonably required." But such an approach would probably be consistent with the scenario in

GP v SSWP (PIP), a case where the condition causing the impairment was OCD. Perhaps more difficult is the fact that, in my view, in the last resort a judgment upon when repetition is "no longer reasonably required" must have some regard to the adequacy of the nutrition already taken, rather than relating purely to the frequency by which food (or drink) is being ingested. However, given the submissions heard and that this result is consistent with the decision in *TK*, which raised a similar point, I have accepted that this is how the statutory provisions should be interpreted.

37. An alternative way of analysing the same problem would be to look at whether the taking of nutrition was being performed 'to an acceptable standard'; it would be said that compulsive over-eating is not an adequate performance of the activity, as it is now being performed repeatedly and to excess, in a disordered way. However, given whether the manner of eating is "good enough" cannot be measured by reference to the quality of a person's diet (*MM*) but has to be assessed by reference to the standard to which the (physical) actions of taking nutrition should be performed, this seems to me to be a more difficult analysis.

38. As for eating 'within a reasonable period of time', the Appellant originally argued that a person who continues to eat for more than twice the time another person with the same dietary needs would normally take should qualify. But, ultimately, little weight was put on this limb of the statutory definition, at least in relation to the facts of this appeal. It seems to me that the factual context will be key. In the case of a person with OCD, it may be that taking an inordinate length of time to eat, without assistance, could be at issue (although there is great variation in the time spent eating, depending on the social context, and that would require consideration). In other cases, over-eating is more likely to be happening too fast than too slowly, and issues of repetition to excess may be better addressed under the heading of 'repeatedly', as discussed above.

39. It can be seen that, inevitably, much will depend on the facts. Furthermore, part of the context of this decision is the assistance I have derived from the parties' submissions; as I have outlined, they are agreed as to the proper approach. The relationship between over-eating and 'taking nutrition' may require further consideration in cases where there is greater room for disagreement.

40. For these reasons, I accept the parties' submissions that the FTT erred in law in its consideration of Activity 2. Its conclusions (in paragraph 23 of the Statement of Reasons, set out above at paragraph 7 above), erroneously focussed only on the physical ability of the Appellant to eat, and failed to assess whether a physical or mental condition had caused him to eat to excess. It also failed to examine whether any such excessive eating meant that he could not undertake the activity safely, to an acceptable standard, repeatedly, or within a reasonable time; and, if so, whether assistance or prompting was required.

Activity 9.

41. The FTT awarded two points under 9(b). If more specialised or experienced assistance was required, this would have entitled the Appellant to a further two points. Alone, any error of law under this heading would not be enough to have led to an award of PIP, but an error might have been material in combination with an error of approach under Activity 2 (at least if only 2 points were claimed for 'supervision' under this heading, as at one point was suggested by the Appellant).

42. In the application for permission to appeal, it was noted that the FTT in refusing permission to appeal accepted that the reasons for the decision on this Activity did not deal adequately with whether the prompting that it accepted was needed for social engagement, had to be given by someone with knowledge or experience of providing support to people with disabilities. "Arguably the Tribunal did not find sufficient facts to explain why a high higher scoring descriptor did not apply (ie 9C not 9B) and specifically did not address the Appellant's ability to further close personal relationships." (p123).

43. In his submissions to the Upper Tribunal, the Respondent accepts that the FTT failed to make adequate investigations into whether the Appellant will or is able with prompting to engage with others face to face. He also accepted that the FTT have failed to consider if the Appellant would benefit from social support to be able to engage with people. It is said that the Tribunal should have gone on to consider whether the claimant met any of the other descriptors within this activity and if not, why not.

44. I note that the written claim filed before the FTT hearing (p104) had argued that the Appellant was entitled to an award of 4 points under this activity, under 9D. This supports the argument that the matter should have been explicitly considered by the tribunal. I am satisfied that the criticisms of the FTT's reasoning are correct, and that the tribunal's investigation of this issue was flawed in law.

Conclusions and Disposal.

45. For all these reasons, the appeal will be allowed.

Remission

46. The Appellant has urged me to make further findings of fact, rather than remitting the matter for fresh decision making by a newly constituted Tribunal. Although it is accepted that the Tribunal's findings were inadequate, he points out that the Upper Tribunal has the power to make factual findings. If four points should have been awarded under Activity 2(d), then this would be enough for an award of the daily living component; there would be no need to reconsider Activity 9. He notes the passage of time in this case. The original decision under appeal dates back to November 2018. Furthermore, a fresh PIP claim was made by the Appellant on 1/11/2019 which was refused but unchallenged by the Appellant (although he subsequently reapplied and has been in receipt of PIP since 27/09/2021). The practical result is that this appeal is concerned only with the period from 20/08/2018

– 31/10/2019 – a little over a year. If the case is remitted, the Appellant will struggle to give evidence of his state of mind, etc, during the period some 5 years or more ago.

47. The Appellant's representative submitted that there was consistent evidence about overeating. The evidence about the reasons for the Appellant's overeating (the traumatic experience of being without food on active service) had "the ring of truth" and should be accepted. There was also clear evidence about the help provided to him by his wife, in response to these difficulties.

48. The Respondent's position is that the case should be remitted back for further fact-finding; it is said that medical expertise is needed.

49. With reluctance, given the time that has elapsed, I have concluded that the Respondent's approach should be accepted. It seems to me that the PTSD and its impact upon patterns of eating, as well as the role of 'prompting', all require more detailed exploration and findings of fact. I note that paragraph 22 of the Statement of Reasons includes the following: "When he left the army, he was 15 stone and now he is 22 stone. He overindulges in food, in the army he could balance this with exercise, but [he] does not have the same structure now". This suggests that the nature and causes of the weight gain, and the links to PTSD, do require further exploration by the judicial fact-finding body and the appeal will be remitted for this to take place.

ELEANOR GREY KC
Judge of the Upper Tribunal
Authorised for issue on 2 March 2023