IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2024-000689-PIP
[2024] UKUT 339 (AAC)

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

Between: QWH Appellant

and

The Secretary of State for Work and Pensions Respondent

Before: Upper Tribunal Judge Perez

Decision date: 27 October 2024
Decided on consideration of the papers

Representation:
Appellant: David Beckett, Caseworker, Head of Welfare Benefits, Central England Law Centre
Respondent: L Ropel, Department for Work and Pensions

DECISION

1. Mrs QWH's appeal is allowed.

2. The First-tier Tribunal decision dated 19 October 2023 (heard under references SC015/23/00896 & 1691069695497500) is set aside so far as relating to the daily living component of personal independence payment. That part of the case is remitted to the Social Entitlement Chamber of the First-tier Tribunal, to be reheard in accordance with the directions at paragraph 58 of this decision.

REASONS FOR DECISION

Introduction

3. The claimant, Mrs QWH, appeals to the Upper Tribunal with my permission dated 17 June 2024. That permission was given on the papers.

Factual and procedural background

Secretary of State's decisions

4. The claimant made a claim for both components of personal independence payment.

5. The claimant was assessed on 17 April 2023 by a health care professional for the Secretary of State (page 15). The HCP recommended two points for needing an aid or appliance to be able to wash or bathe (descriptor 4b), two points for needing prompting to be able to engage with other people (descriptor 9b), and zero points for the other daily living activities. The HCP recommended zero points for mobility activity 1: planning and following journeys, and four points for mobility descriptor 2b: can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.

6. The Secretary of State's decision maker accepted that the claimant has: anxiety and depression, musculoskeletal problem – spine and lower limb, asthma and dyslexia.

7. On 2 May 2023, the Secretary of State's decision maker decided that the claimant was not entitled to an award of personal independence payment from 16 February 2023 (pages 41 to 45). The decision maker awarded two points for needing an aid or appliance to be able to wash or bathe (descriptor 4b), and two points for needing to be prompted by another person to be able to engage with other people (descriptor 9b). Those four points did not suffice for a daily living award (regulation 5(3) of the Social Security (Personal Independence Payment) Regulations 2013[1]). The decision maker awarded four moving around points, for being able to stand and then move more than 50 metres but no more than 200 metres either aided or unaided, and no points for planning and following journeys. Those four mobility points were not enough for a mobility award (regulation 6(3)).

8. On 6 July 2023, that decision was upheld on mandatory reconsideration.

Appeal to the First-tier Tribunal

9. The claimant appealed to the First-tier Tribunal.

10. The First-tier Tribunal allowed the appeal so far as relating to the mobility component. The First-tier Tribunal gave 10 points for planning and following journeys, under mobility descriptor 1d: cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid. Those 10 mobility points were in addition to the four mobility points the Secretary of States's decision maker had given, which the First-tier Tribunal upheld. So the First-tier Tribunal awarded the mobility component at the enhanced rate (regulation 6(3)(b)). The First-tier Tribunal confirmed the four daily living points the decision maker had given, and so confirmed that no daily living award was merited.

[1] S.I. 2013/377.

11. The First-tier Tribunal said, among other things—

> "9. A descriptor is satisfied if a claimant is able to perform it for more than 50% of the time.
>
> […]
>
> 13. As the claimant was awarded the highest possible rate of PIP for mobilising activities, there is nothing to be gained by setting out the reasons for the Tribunal's decision in that respect. This statement will therefore focus on the claim for daily living activities.
>
> 14. In her Notice of Appeal, the claimant challenged the DWP's decision on activities 1 (preparing food), 2 (taking nutrition), 3 (managing therapy), 6 (dressing and undressing), 7 (verbal communication), 8 (reading and understanding), 9 (engaging with people fact to face), and 10 (making budgeting decisions). She had already been awarded 2 points for activity 4 (washing and bathing), and a further 2 points for activity 9. Activity 5 (toileting) was not an area of difficulty.
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> […]
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> Findings of fact
>
> 36. The claimant has anxiety and depression, but the functional impact is intermittent.
>
> 37. This condition was managed by the claimant's G.P.
>
> 38. There had been no previous counselling or other secondary support, although a referral was now underway.
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> 39. Medication for anxiety and depression is not at maximum dosage.
>
> 40. Functional limitations are variable, depending on the claimant's then mood.
>
> 41. In physical terms, the noted medical issues do not support claimed functional limitations, with the exception of activities 4 and 9. Reasons 42. The Tribunal had documents up to page 97.
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> 43. There are a number of preliminary observations to make at this stage.
>
> 44. First, a descriptor applies if it reflects one's ability for the majority of time.
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> 45. Second, this appeal is concerned with the functional impact of any claimed difficulties. By reference to the claim form, the only medical issues were anxiety and depression and asthma. The Tribunal noted later claims for other conditions, but as they were not included in the claim form (other than the torn ligament), the Tribunal concluded their functional impact was not such as to prompt the claimant to list them as live issues in her claim.
>
> 46. Third, no medical evidence has been submitted by the claimant. The Tribunal found that surprising as it considered MRI scan reports would have been available and could have been submitted. As a consequence, this appeal may only be determined on the basis of the claim form for this benefit, the UC assessment report, and the PIP assessment report.
>
> 47. In terms of anxiety and depression, the Tribunal accept the diagnosis, but not the claimed functional impact. It noted the claimant was on modest medication, although it also noted she had been prescribed citalopram shortly before her assessment, and her treatment may change depending on its effectiveness.

48. We turn next to the specific tests.

Preparing food

49. The claimant noted that "I suffer with anxiety and depression some days I don't feel like eating or feel like cooking food I have also got a torn ligament (left foot) which prevents me from standing".

50. The claimant is reminded that points may only be awarded if the functional difficulty exists for the majority of time. By itself, the use of the word 'sometimes' suggests it is not for a majority of time, but in reaching its conclusion the Tribunal needs to be alive to the possibility that the claimant did not mean 'sometimes' in that context.

51. The HP noted the claimant was able to "prepare her own meals, and was able to stand for the duration of time required" [40/19].

52. The claimed inability to stand is inconsistent with what was reported to both the UC and HP assessors, and with an admitted ability to walk to a friend's house, a local shop, the post office and a supermarket, and standing to take a shower.

53. The Tribunal concludes the claimant had, for the majority of time, the physical and mental ability to prepare and cook a simple meal for one, and accordingly no points are scored.

Taking nutrition

54. In her claim form, the claimant confirmed she had no issue with eating or drinking [30/9]. Although the claimant noted in her appeal form that she would eat unhealthy snacks, the nutritional quality of what is consumed forms no part of this test. The Tribunal agrees with what was said in the claim form, and again no points are scored.

[…]

Reading and understanding

61. In her claim form, the claimant identifies a struggle to read words in e.g. a letter, due to her dyslexia. It should be noted that complex language in this context is considered to be two or more sentences, or somewhat less that the average letter or bill. It is noted the claimant was diagnosed as dyslexic when at college, although no extra provision was made as a consequence. It is also noted the claimant had passed a driving test (including the theory test), and attained level 1 in science, maths and English in addition to a qualification in travel and tourism 40/19]. It is unfortunate the HP did not detail the qualification, but having regard to the limited threshold for this test, the Tribunal is satisfied no points are scored.

Engaging with people

62. In her claim form, the claimant noted her "extremely bad anxiety", which is not consistent with her levels of medication. Further, she reported to the HP she had good and bad days, appeared to have no problems in using taxis, and walked to shops and her friend's house. She accepted she could make small talk if necessary, even with people she had not previously met [40/19]. In her UC assessment, it was noted the claimant would speak with friends and family and did not like speaking to people she did not know [72/51].

> 63. On the evidence available to it, the Tribunal concluded the claimant would need prompting to engage with people, but would not need social support. It agrees with the DWP and two points are scored for this activity
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> […]
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> Summary
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> 68. The Tribunal accept the claimant has anxiety and depression, asthma, and suspected but unconfirmed musculo-skeletal issues in addition to a torn ligament. It does not accept the functional limitations arising from the medical conditions to be of such a degree as to score points in the daily living tests for this benefit, with the exception of activities 4 (washing and bathing) and 9 (engaging with people).
>
> 69. The Tribunal accepts the mental health issue is somewhat fluid, with a trial of a low dosage of citalopram, and planned secondary support. The physical position is unclear as the outcome of MRI scans was not disclosed to the Tribunal, and there was no medical evidence put before it. It may be the case the position has changed since the date of decision, but that is not something this Tribunal is able to take into account. It is however open to the claimant to make a fresh claim for this benefit if she wishes.”.

12. The claimant asked the First-tier Tribunal to set aside its decision. In a combined decision notice, the First-tier Tribunal refused to set aside its decision and refused permission to appeal to the Upper Tribunal. That decision notice was sent on 13 March 2024. So the deadline under the rules for renewing the application to the Upper Tribunal was 13 April 2024.

Late application to the Upper Tribunal for permission to appeal to the Upper Tribunal

13. The claimant’s application to the Upper Tribunal for permission to appeal was received by the Upper Tribunal on 22 May 2024, one month and nine days late. I admitted it late. The representative explained (in the second version of the Reasons for Delay page of the UT1 form) that the First-tier Tribunal did not send the decision notice to the representative despite the representative having requested the set-aside. The representative said the claimant then made the decision notice available to the representative who then lost it for a time. Whether or not the representative had submitted the necessary form to go on the record with the First-tier Tribunal, I accepted that the claimant was the one to supply the First-tier Tribunal’s refusal of permission to the representative and that the representative then lost it for a time. I was satisfied that the one month and nine days’ delay would not prejudice the respondent, and I did not hold against the claimant her representative’s delay. It was for those reasons that I admitted the application late.

Grounds of appeal to the Upper Tribunal

14. The claimant advanced the following grounds for seeking permission to appeal to the Upper Tribunal, all relating to the daily living component—

(1) **Ground 1:** Failure to give reasons for considering it not appropriate to adjourn for an oral or telephone hearing (despite the claimant not wanting to attend such a hearing).

(2) **Ground 2:** Failure to take account of evidence submitted to the First-tier Tribunal on 9 November 2023 (which was after the appeal had on 19

October 2023 been decided). The claimant's representative told the Upper Tribunal that he had not seen the email. But he submitted that it was an error of law for the First-tier Tribunal not to take it into account because it could have been evidence of circumstances prevailing at the time of the decision.

(3) **Ground 3:** Failure to make proper findings of fact in relation to activities 1, 2, 5, 8 and 10, that is, as to whether the claimant was able to undertake the activities safely, to an acceptable standard, repeatedly, within a reasonable time period and on over 50% of the days. For example—

(a) The First-tier Tribunal awarded zero points for activity 5 whereas the claimant was recorded as telling the HCP on page 19 that she used a raised toilet seat and grab rails, and that if she was not going anywhere she would wear lounge clothes – it was not clear that lounge wear amounted to clothing;

(b) In relation to activity 1, the claimant had said in the claim form on page 9 that due to mental health some days she did not feel like eating or cooking, the HCP records at page 19 that the claimant can prepare her own meals but mum tends to do it. There are no findings as to whether the claimant did prepare/cook food on over 50% of the days, or whether for example she required prompting.

Permission to appeal to the Upper Tribunal

15. On 17 June 2024, I gave permission to appeal to the Upper Tribunal in relation to the daily living component. I found Ground 1 arguable and Ground 2 not arguable. I found Ground 3 arguable in respect of daily living activities 1, 2 and 8. I found an additional arguable error of law in relation to activity 6, as regards physical functioning. I added that arguable error to Ground 3.

Ground 1

16. The reasons for which I found Ground 1 arguable were not quite as framed in the permission application. I found it arguable that the failure to adjourn or postpone for oral evidence was itself an error of law. The failure to give further reasons for not adjourning would be immaterial if the failure to adjourn was itself not material. But, given the number of points on which the First-tier Tribunal needed to make further findings (see below), I said that arguably the First-tier Tribunal should have told the claimant that it needed to investigate them with her, and adjourned (or postponed) to allow for that opportunity. However, I found that it was also arguable that the First-tier Tribunal had what it needed and just did not go far enough. For this reason, and given the other arguable errors set out in my grant of permission, I did not include this arguable error in the errors which I asked the Secretary of State to agree to. I said however that, if she opposed the appeal, she would need to make a submission on this ground, as reframed by me, as well as on the other grounds on which permission was granted. The Secretary of State did not oppose the appeal and so did not need to make a submission on Ground 1.

Ground 2

17. The reasons for which I found Ground 2 not arguable were as follows. The evidence submitted to the First-tier Tribunal was submitted to it after the appeal had on 19 October 2023 been determined, as the First-tier Tribunal pointed out. The failure to take it into account was not an error of law. The principle that evidence post-dating the decision can be taken into account if it evidences the circumstances obtaining at the date of the decision applies to the date of the Secretary of State's decision (section 12(8)(b) of the Social Security Act 1998). It does not apply where the evidence was supplied to the First-tier Tribunal after the First-tier Tribunal had made its decision. For such evidence to be taken into account and for permission to appeal to be given in relation to it, the evidence would need to satisfy the test in *Ladd v Marshall* [1954] EWCA Civ 1, [1954] 1 WLR 1489. There was nothing to suggest that the evidence submitted to the First-tier Tribunal on 9 November 2023 would satisfy that test. Indeed, the representative had not even seen that evidence. There was nothing to suggest that it was even material. As the First-tier Tribunal pointed out, functioning was what mattered. A diagnosis alone did not take the claimant's case far enough.

Ground 3: activities 1, 2, 6 and 8

18. I found in granting permission that Ground 3 was arguable in respect of daily living activities 1, 2 and 8, for the reasons set out in paragraphs 34 to 54 of this decision.

19. In granting permission, I found too – which I added to Ground 3 – that there was an arguable error of law in relation to activity 6, as regards physical functioning. Ground 3 mentioned lounge clothes but did not specify their relevance, and activity 6 was not expressly challenged in the grounds put to the Upper Tribunal. I found however in granting permission that it was arguable that the First-tier Tribunal had erred in failing adequately to consider and make a finding as to whether the claimant needs physical help to get dressed (she did not mention help getting undressed).

20. Dressing and undressing were said in the claim form to be a problem due to mental functioning (page 10): "*If im mentally in a bad was i wont want to wash or change my clothes i have to be told by my Mum*". It was not arguable that the First-tier Tribunal had erred in law in not finding that the claimant needs prompting to dress (or undress). The First-tier Tribunal relied, among other things, on the report of what the claimant had told the assessor in her Universal Credit assessment of 30 May 2023[2] (six weeks after the 17 April 2023 PIP assessment[3]): "*In her UC assessment, she was noted to say would get dressed into clean clothes without a need for prompting*". This was broadly correct; the UC assessor had said on page 50: "*After a coffee she will go upstairs and get dressed in clean clothes, she will wear track suit. She is not prompted to do this, this is part of her routine*". Given that the UC assessment was done only six weeks after the PIP assessment, the First-tier Tribunal was entitled to take account of what the UC assessment had said.

21. But mental functioning was not the only issue claimed with dressing and undressing. In the Notice of Appeal to the First-tier Tribunal, dressing and undressing had been said to be a physical problem for which the claimant sat on the bed and had help from her brother or mother to put on her top or jeans (page 3). Sitting on the bed

[2] The UC assessment date is on page 46.
[3] The PIP assessment date is on page 15.

will not attract points for using the bed as an aid: *CW v SSWP* (PIP) [2016] UKUT 197 (AAC) (Judge Edward Jacobs) and *AP v SSWP* (PIP) [2016] UKUT 501 (AAC) (Judge Kate Markus QC). But having help from her mother or brother to get dressed could indicate a need for such help (the claimant did not mention help with undressing).

22. I said in granting permission that, if the Secretary of State opposed the appeal, she must – in addition to addressing the other grounds on which permission was granted – make a submission as to whether there was an arguable error of law in relation to a need for physical help for activity 6. In the event, the Secretary of State has not needed to make such a submission.

Ground 3: toilet needs (activity 5)

23. I refused permission to appeal for Ground 3 so far as relating to toilet needs (activity 5). It was argued that the First-tier Tribunal had failed to make proper findings of fact, that is, as to whether the claimant was able to undertake activity 5 safely, to an acceptable standard, repeatedly, within a reasonable time period and on over 50% of the days. The grounds pointed out that "*the claimant is recorded as telling the HCP on page 19 that she used a raised toilet seat and grab rails*". In her claim form, the claimant had answered "*No*" to the question "*Does your condition affect you using the toilet or managing incontinence?*" (page 10). The First-tier Tribunal listed at paragraph 14 the activities that had been raised in the Notice of Appeal, and correctly excluded from that list toilet needs. The First-tier Tribunal also recorded that "*Activity 5 (toileting) was not an area of difficulty*".

24. That the claimant did not raise toilet needs in her First-tier Tribunal appeal did not however mean, of itself, that the issue of toilet needs was not raised by the appeal (section 12(8)(a) of the Social Security Act 1998).

25. But I refused permission to appeal for toilet needs because I found that it was open to the First-tier Tribunal not to find that toilet needs were an issue raised by the appeal. The only evidence relied on as having raised toilet needs as an issue was what the HCP had said on page 19. But the grounds do not go far enough in citing what the HCP had said on page 19. She had said—

> "She is able to get on/off the toilet and manage her toilet hygiene, there is a raised toilet seat for another family member that she uses, she also uses the grab rails that are there, she is unsure if she could manage without these there".

26. So the evidence was that the raised toilet seat was for another family member. And there was no suggestion that the grab rails had been placed for the claimant. Neither point necessarily meant that the claimant did not need them, however. But the claimant had not said anywhere in the evidence that she needed them, and had not said that toilet needs were an issue at all. I found that it was open to the First-tier Tribunal not to take the claimant's statement to the HCP that "*she is unsure if she could manage without these there*" as evidence that she needed the grab rails and raised seat.

27. And so I found that Ground 3 was not arguable so far as relating to toilet needs. This does not however mean that the claimant cannot ask for toilet needs to be considered afresh on remittal.

Ground 3: budgeting (activity 10)

28. I also refused permission to appeal for Ground 3 so far as relating to budgeting (activity 10). I found that it was open to the First-tier Tribunal, for the reasons it gave at paragraphs 64 to 67 of the statement of reasons, to award no points for this activity. But this does not prevent the claimant from raising budgeting in the remitted appeal.

29. In granting permission to appeal, I invited the parties to agree only to the errors of law I had found arguable for Ground 3 so far as relating to daily living activities 1, 2 and 8. But I said a submission on all grounds I had found arguable would be needed from the Secretary of State if she opposed the appeal, which in the event she did not.

Submissions

30. The parties have both agreed: to the Upper Tribunal finding that there were the errors of law set out at paragraphs 34 to 54 of this decision; to the daily living component part of the First-tier Tribunal's decision being set aside for the reasons in those paragraphs; and to the Upper Tribunal referring the daily living component part of the case for redetermination entirely afresh by the First-tier Tribunal.

Law

31. Provision as to personal independence payment is made by sections 77 to 95 of the Welfare Reform Act 2012, and by the Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/377).

32. At the relevant time, regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013 provided—

> "**4.**—(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.
>
> (2) C'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.
>
> (2A) 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.

(3) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(4) In this regulation—

(a) “safely” means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;

(b) “repeatedly” means as often as the activity being assessed is reasonably required to be completed; and

(c) “reasonable time period” means no more than twice as long as the maximum period 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.”.

33. Regulation 7 of the Social Security (Personal Independence Payment) Regulations 2013 provided, at the relevant time—

“**Scoring: further provision**

7.—(1) The descriptor which applies to C in relation to each activity in the tables referred to in regulations 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.

(2) For the purposes of paragraph (1), a descriptor is satisfied on a day in the required period if it is likely that, if C had been assessed on that day, C would have satisfied that descriptor.

(3) In paragraphs (1) and (2), “required period” means—

(a) in the case where entitlement to personal independence payment falls to be determined, the period of 3 months ending with the prescribed date together with—

(i) in relation to a claim after an interval for the purpose of regulation 15 or 15A, the period of 9 months beginning with the date on which that claim is made;

(ii) in relation to any other claim, the period of 9 months beginning with the day after the prescribed date.

(b) in the case where personal independence payment has been awarded to C—

(i) during the period of 3 months following a determination of entitlement under a claim for the purpose of regulation 15 or 15A, the period of 3 months ending with the prescribed date together with, for each day of the award, the period of 9 months beginning with the day after that date;

(ii) in any other case, for each day of the award, the period of 3 months ending with that date together with the period of 9 months beginning with the day after that date.".

Analysis

Errors of law

34. The First-tier Tribunal erred in law in relation to daily living activities 1, 2 and 8, as follows.

Activity 1: Preparing food

35. The First-tier Tribunal erred in law—

(i) in failing adequately to consider and make a finding as to whether the claimant needs prompting to be able to prepare or cook a simple meal;

(ii) in adopting the HCP's flawed findings as to preparing food;

(iii) in failing adequately to explain why the First-tier Tribunal found that the claimant had "*for the majority of time, the … mental ability to prepare and cook a simple meal for one*";

(iv) in failing to make findings as to whether the claimant can prepare and cook a simple meal unaided repeatedly, to an acceptable standard and within a reasonable time period; and

(v) in applying the wrong test and failing to make findings as to whether the claimant can do as mentioned in subparagraph (iv) above on over 50% of the days (rather than "for the/a majority of the time" and "for more than 50% of the time").

I take each of those points in turn.

(i) Failure adequately to consider and make a finding as to whether the claimant needs prompting to be able to prepare or cook a simple meal

36. As the claimant's representative points out, the claim form had said "*I suffer with anxiety and depression some days i dont feel like eating or feel like cooking food*" (page 9, my underlining). This evidence of a lack of motivation raised an issue as to whether there was a need for at least prompting to prepare food.

37. Moreover, the claimant had said in her Notice of Appeal to the First-tier Tribunal (pages 3 and 4)—

> "I do not cook meals for myself. I don't really think about eating due to my mental health, depression, and anxiety. It's usually my mother who cooks for me. She reminds me about meals, as I tend to forget about meals, and think the day is too short. I do not have energy to think about it. If my mother woldn't [sic] cook or woyuldnt [sic] remind me to eat I wouldnt [sic] eat at all, or eat things like crisps I do not prepare meals for myself primarily because I often neglect or forget to eat due to my mental health struggles with depression and anxiety. Thankfully, my mother takes on the responsibility of cooking for me. She not only prepares meals but also reminds me to eat, as I frequently overlook the importance of regular meals and feel that time passes by too quickly.
>
> My lack of energy and motivation further contribute to my inability to prioritize eating. Without my mother's involvement, I would likely go without meals or rely on unhealthy snacks like crisps for days.".

38. In saying that her mother "*reminds me about meals*", the claimant seemed to include preparing meals, rather than just eating. So this was specific evidence that the claimant receives prompting to prepare meals. Receiving it does not means she needs it of course, but it can be evidence of a need.

39. The HCP's report that "*She can prepare her own meals, but mum tends to do this*" on page 19 did not contradict the claimed lack of motivation in the claim form, or the needs suggested by the Notice of Appeal. The HCP did not go so far as to say whether the claimant could prepare meals unprompted. Moreover, the First-tier Tribunal had awarded 10 points for mobility descriptor 1d because of the claimant's mental ill-health.

(ii) Adopting the HCP's flawed findings

40. The HCP dealt with the claimed lack of motivation as follows (pages 19 and 26)—

> "She can prepare her own meals, but mum tends to do this as she enjoys it, She can do this if she needs to and is able to stand for duration of preparing a meal. She only had 1 meal yesterday, sometimes she needs encouragement to eat/drink water. She tends to just drink coffee. She thinks this is due to pain from her wisdom teeth and it is painful to eat. Yesterday when she did eat, she reports it caused pain and a chipped tooth due to the wisdom teeth so she tends to avoid eating. She also can tend to comfort eat and eat junk food to feel better. No reported weight loss in the last 12 months. Does not need encouragement throughout eating a meal." (page 19)

> "Although CQ reports low motivation in activity 1 and stress affecting activity 2, SOH reports she is able to prepare meals as needed but allows her mum to do so as she enjoys to. She is avoiding eating due to wisdom tooth pain, and therefore will make herself coffees instead. No physical restrictions that would impact ability to prepare a meal, she would be able to stand for the duration of preparing a meal. HOC reports previous weight loss however is now able to maintain this, no specialist input or

> recent weight loss reported. Although CQ does report low motivation this is not consistent or evidenced throughout the assessment, based on the available evidence 1A, 2A are likely" (page 26).

41. The HCP repeated that the claimant had told her that "*She can prepare her own meals*". But being "able" to prepare her own meals did not mean the claimant did not need prompting to be able to do so. The HCP does not however appear, from the passages set out at paragraph 40 above, to have investigated that. In this respect, the HCP's finding as to activity 1 was flawed in that it did not go far enough. In accepting the HCP's finding that the claimant can prepare her own meals, the First-tier Tribunal adopted that flaw.

(iii) Failure adequately to explain why the First-tier Tribunal found that the claimant had "for the majority of time, the…mental ability to prepare and cook a simple meal for one"

42. The First-tier Tribunal erred in law in failing adequately to explain why it found that the claimant had "*for the majority of time, the … mental ability to prepare and cook a simple meal for one*". This did go further than simply finding that the claimant can prepare her own meals; it addressed mental ability and not just physical ability. But what the First-tier Tribunal said in the rest of its statement of reasons did not explain why the claimant's mental ability was up to the task and why there was no need for prompting.

43. This is what the First-tier Tribunal said in the rest of its statement of reasons, about mental health and functioning (paragraphs 36 to 40, 47 and 50)—

> "The claimant has anxiety and depression, but the functional impact is intermittent";
>
> "This condition was managed by the claimant's G.P";
>
> "There had been no previous counselling or other secondary support, although a referral was now underway";
>
> "Medication for anxiety and depression is not at maximum dosage", "Functional limitations are variable, depending on the claimant's then mood";
>
> "the claimant was on modest medication, although it also noted she had been prescribed citalopram shortly before her assessment, and her treatment may change depending on its effectiveness"; and
>
> In relation to the evidence that "I suffer with anxiety and depression some days I don't … feel like cooking food", the tribunal observed that "By itself, the use of the word 'sometimes' suggests it is not for a majority of time, but in reaching its conclusion the Tribunal needs to be alive to the possibility that the claimant did not mean 'sometimes' in that context".

44. It was in the claimant's favour that the First-tier Tribunal did not find the reference to "*sometimes*" cited by the HCP, or "*some days*" stated in the claim form, to mean that "on over 50% of the days" was not met (or that "for a majority of the time" was not met, to which I return below). But it was still not apparent whether the First-tier Tribunal accepted the lack of motivation and a need for prompting, but did not accept that it was there on over 50% of the days (albeit not based on "sometimes" or "some days"), or

whether the tribunal did not accept that there was a lack of motivation and a need for prompting at all for preparing food. The finding that functional Impact was intermittent did not go far enough.

45. If the First-tier Tribunal's findings were construed as meaning there was no need for prompting at all for preparing food, it is not apparent why that was, given the following points—

(1) First, a need for prompting had been put in issue by the claimed lack of motivation on page 9 and the reference to being reminded in the Notice of Appeal to the First-tier Tribunal.

(2) Second, the claimed lack of motivation was not contradicted by the HCP's report that the claimant can prepare her own meals, as I have said above.

(3) Third, such a need is readily conceivable in a case of depression and anxiety, especially when the activity is considered, as it should have been, by reference to "repeatedly", "to an acceptable standard", and "within a reasonable time period" ("safely" was probably not relevant to prompting).

(4) Fourth, the First-tier Tribunal had been sufficiently persuaded of the adverse effects of the claimant's mental ill-health to award 10 points for planning and following journeys. That high planning and following journeys score indicates a mental health issue that could have had more of an effect on daily living than the First-tier Tribunal found. The First-tier Tribunal said at paragraph 13: "*As the claimant was awarded the highest possible rate of PIP for mobilising activities, there is nothing to be gained by setting out the reasons for the Tribunal's decision in that respect. This statement will therefore focus on the claim for daily living activities*". While there might indeed not have been anything to be gained in terms of avoiding an error of law for mobility descriptor 1d, the reasons for awarding mobility descriptor 1d were potentially relevant to the daily living activities too. It is not apparent whether the First-tier Tribunal accepted that the need to be accompanied was due to the claimed fear of falling, or whether it was due to anxiety more generally. The HCP had reported on page 19 that "*She doesnt go out anywhere else, unless her mother needs help with food shopping, she would then ask her brother to go with her due to anxiety about falling*" (although the HCP went on to consider mobility descriptor 1 not due to fear of falling but due to the mental health conditions: page 37). If the First-tier Tribunal awarded the 10 mobility points due only to the fear of falling, the mobility descriptor 1d reasoning was less relevant to a need for prompting in daily living activities. But without the First-tier Tribunal's explanation, we do not know which it was.

(iv) Failure to make findings as to repeatedly, to an acceptable standard and within a reasonable time period

46. Given what I say at paragraph 45 above, it was a material error of law for the First-tier Tribunal to fail to make findings as to whether the claimant could prepare food unaided repeatedly, to an acceptable standard and within a reasonable time period.

(v) Application of the wrong test and failure to make findings as to whether the claimant can do so on over 50% of the days (rather than "for more than 50% of the time" or "for the/a majority of the time")

47. The First-tier Tribunal materially erred in law in misciting the test in regulation 7 and in applying the wrong test. The test is not "for more than 50% of the time" (as the First-tier Tribunal said at paragraph 13), or "for the majority of the time" (as the tribunal said at paragraph 44), or "for a majority of the time" (as the tribunal said at paragraph 50). It is "*on over 50% of the days of the required period*". While some First-tier Tribunal panels do sometimes miscite regulation 7 in this way (a hangover from previous legislation), it is not always a material miscitation. Here, however, it appears that the First-tier Tribunal's application of "for more than 50% of the time" and of "for the/a majority of the time" could well have led it to reject any needs for activity 1 by imposing too high a bar: "on" a day is a lower test; it can be satisfied even if the descriptor is satisfied for less (indeed much less) than 51% of the day.

Activity 2: Taking nutrition

48. The First-tier Tribunal erred in law in relation to taking nutrition.

49. First, the First-tier Tribunal miscited the evidence.

50. The First-tier Tribunal said—

> "Other inconsistencies are apparent in the papers. For example, the claimant denies any issue with eating or drinking, but includes this as an issue in her appeal" (paragraph 19) and

> "In her claim form, the claimant confirmed she had no issue with eating or drinking … The Tribunal agrees with what was said in the claim form, and again no points are scored" (paragraph 54).

51. It was not correct to say that the claimant had confirmed in her claim form that she had no issue with eating and drinking nor to say that it was an inconsistency to include it as an issue in her appeal. It is true that she had in the claim form put "*No*" to the question "*Does your condition affect you eating and drinking?*". But she had said otherwise in answering the questions immediately above that one (page 9, my emphasis)—

> "Does your condition affect you preparing food, or ever prevent you from doing so?
> Yes
> Tell us about the difficulties you have with preparing food and how you manage them
> I suffer with anxiety and depression some days i dont feel like eating or feel like cooking food i have also got a torn ligament (left foot) which prevents me from standing".

52. The claimant had reported to the HCP: "*She only had 1 meal yesterday, sometimes she needs encouragement to eat/drink water*" (page 19). The HCP did go on to say that "*She tends to just drink coffee. She thinks this is due to pain from her wisdom teeth and it is painful to eat*". But the First-tier Tribunal needed to consider whether that undermined the claim made in the claim form and in the appeal that the lack of motivation to eat was due to anxiety and depression as stated on page 9 ("due to" was not used, but that was

the result of how they were linked in the sentence: "*I suffer with anxiety and depression some days i dont feel like eating*").

53. Second, motivation to eat having been put in issue, the First-tier Tribunal also erred in law: (i) in failing adequately to consider and make a finding as to whether the claimant needs prompting to be able to take nutrition; (ii) in failing to make findings as to whether the claimant can prepare and cook a simple meal unaided repeatedly, to an acceptable standard and within a reasonable time period; and (iii) in applying the wrong test and failing to make findings as to whether the claimant can do so on over 50% of the days (rather than "for the/a majority of the time" and "for more than 50% of the time").

Activity 8: Reading and understanding signs, symbols and words

54. The First-tier Tribunal erred in law in failing to make a finding as to whether the claimant needed an aid or appliance due to her dyslexia (which diagnosis, albeit by the college, the First-tier Tribunal seemed not to doubt). That the claimant did not mention using, for example, coloured overlays, did not mean she does not need them.

Ground 1 and dressing and undressing

55. I need not, and do not, make a finding as to whether the First-tier Tribunal erred in law as set out in Ground 1 of my grant of permission or in relation to dressing and undressing. The errors of law identified at paragraphs 34 to 54 above suffice – as the parties agree – to set aside and remit. The First-tier Tribunal will no doubt however take note of what I say about Ground 1, and dressing and undressing, at paragraphs 16, 19 and 21 above.

Disposal

56. Both parties agreed to remittal of the entire daily living component. I consider remittal appropriate for findings of fact to be made afresh in relation to all activities in the daily living component.

Conclusion

57. It is for the reasons at paragraphs 34 to 54 above that I allow the appeal so far as relating to the daily living component part of the First-tier Tribunal's decision and so set aside that part of the decision. It is for the reasons at paragraph 56 above that I remit the daily living component part of the case to a freshly-constituted panel of the First-tier Tribunal, for redetermination entirely afresh.

CASE MANAGEMENT DIRECTIONS

58. I therefore direct as follows—

(1) The daily living component part of the case is to be redetermined entirely afresh by the First-tier Tribunal.

(2) The First-tier Tribunal panel which rehears the daily living component part of the case must contain no-one who was on the panel which decided the case on 19 October 2023.

Rachel Perez
Judge of the Upper Tribunal
27 October 2024