



Neutral Citation Number: [2024] UKUT 376 (AAC)

**Appeal No. UA-2024-001134-PIP**

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Between**

**AB**

**Appellant**

**- v -**

**Secretary of State for Work and Pensions**

**Respondent**

**Before: Upper Tribunal Judge Wikeley  
Decided on consideration of the papers**

**Representation:**

**Appellant:** In person

**Respondent:** Ms L Ropel, Decision Making and Appeals, DWP

*On appeal from:*

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: SC271/24/00017

Digital Case No.: 1701121007725264

Tribunal Venue: Ashford

Decision Date: 31 May 2024

**Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.**

## **SUMMARY OF DECISION**

### **PERSONAL INDEPENDENCE PAYMENT**

#### **42.7 Activity 7: communicating verbally**

Judicial summary

This judgment decides that a bone anchored hearing aid (BAHA) qualifies as an 'aid or appliance' for the purposes of daily living descriptor 7(b) in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377).

***Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.***

## **DECISION**

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), b(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remake the decision as follows:

*The appeal is allowed.*

*The Secretary of State's decision of 25 September 2023 is revised.*

*The Appellant scores 8 points for daily living activities (descriptors 4b, 7b and 9c) and 0 points for mobility activities.*

*The Appellant is therefore entitled to the standard rate of the PIP daily living component with effect from 30 May 2023.*

## **REASONS FOR DECISION**

### **Introduction**

1. This appeal concerns daily living descriptor 7(b) – ‘needs to use an aid or appliance to be able to speak or hear’ – in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377). This judgment decides that a bone anchored hearing aid (BAHA) qualifies as an ‘aid or appliance’ for the purposes of descriptor 7(b).
2. An ‘aid or appliance’ is defined by regulation 2 as follows:

“aid or appliance” –

(a) means any device which improves, provides or replaces C’s impaired physical or mental function; and

(b) includes a prosthesis”.

### **The factual background**

3. The Appellant, who suffers from severe hearing loss, made a claim for personal independence payment (PIP). The decision-maker scored him at just 2 points for daily living activities (descriptor 4(b): ‘needs to use an aid or appliance to be able to wash or bathe’) and 0 points for mobility, and so disallowed the claim. On

appeal, the First-tier Tribunal (FTT) awarded an additional 4 points for daily living descriptor 9(c) ('needs social support to be able to engage with other people'), but this was still insufficient for the Appellant to qualify for the standard rate of the PIP daily living component (which, of course, would have needed an aggregate score of between 8 and 11 points).

4. The FTT made the following findings in connection with daily living activity 7:

**“Communicating verbally**

The Appellant had a cochlear implant in his left ear and doctors did not consider that it was necessary for him to be given an aid to enable him to hear. He was able to engage with the healthcare professional at the assessment without difficulty. The implant was not considered to be an aid by the Tribunal and a hearing aid for the right ear had not been prescribed. No points were awarded.”

**The grounds of appeal**

5. The Appellant appealed, pointing out that he did not have a cochlear implant in his left ear but rather a BAHA, without which he was totally deaf on that side. I might add that the most common type of BAHA is surgically implanted, with a surgeon placing a small titanium implant in the bone behind the ear. Once healed, an external sound processor is attached to the implant to restore hearing. The individual with hearing loss can remove the processor when e.g. sleeping or showering.

6. I granted the Appellant permission to appeal, making the following observations:

The FTT found that you scored 6 points for daily living descriptors 4b (washing and bathing 2 points) and 9c (engaging with others 4 points). A further 2 points would have entitled you to the standard rate of that component, for which the threshold is 8 points. Descriptor 7b – needs to use an aid or appliance to speak or hear – would have resulted in a further 2 points. It is arguable the FTT either failed to find sufficient facts or give adequate reasons for finding that descriptor 7b did not apply. If so, that could be a material error of law. I recognise that there may be some uncertainty as to whether a bone anchored hearing aid qualifies as an aid or appliance – see further *MR v SSWP (PIP)* [2017] UKUT 86 (AAC) where the issue of cochlear implants seems to have been left open. I also recognise that the HCP in this case found that no relevant descriptor applied (see FTT bundle p.165) – but, against this, previous

HCPs had advised that 7b did apply (see FTT bundle pp.37 (24.04.2017) and 87 (11.04.2019)).

## **Analysis**

### **7. The Secretary of State's representative makes the following submissions in support of the Appellant's appeal to the Upper Tribunal:**

4.1. The appellant has bilateral hearing loss with a total of 20% hearing from birth. They have a bone anchored hearing aid (BAHA) in their left ear [page 110]. This BAHA improves the appellant's hearing in their left ear, so the appellant may hear others, to an acceptable standard, as set out in Regulation 4(2A) of The Social Security (Personal Independence Payment) Regulations 2013 ("PIP Regulations"). The appellant submits evidence throughout the Tribunal bundle that displays their limitation in hearing without their BAHA:

"Has no problems with speaking or understanding. He can hear wearing his left aid. Speaks to his wife and work colleagues daily. He carries a walkie talkie around at work and he is able to hear to communicate with staff through this. Speaks with others over the phone when dealing with appointments, to the GP and others at face to face appointments and can hear and understand." [page 75]

"FH indicates ability to speak, hear wearing aids and understand, consistent with IO of ability to speak, hear and understand today." [page 87]

"I have problems communicating with people due to my hearing difficulties. (Born with 20% hearing) always worn hearing aids since age of 5 now wear a bone anchored aid to help me. I'm unable to communicate without my aid and I'm not able to use sign language.

It's very embarrassing for me being hard of hearing so I have to wear my hearing aid at all times. I don't go to sleep with my aid in as I take it out as its uncomfortable for me.

I need help from my wife or family to make all my appointments that require them to be done over the phone because there's often a lot of background noise and I struggle with focusing on what's being said directly." [pages 127].

4.2. It is my submission that the Tribunal has incorrectly disregarded the appellant's use of the BAHA by classing it as an implant and disregarding it on this basis. Within the SOR it states:

"The Appellant had a cochlear implant in his left ear and doctors did not consider that it was necessary for him to be given an aid to enable him to hear. He was able to engage with the healthcare professional at the assessment without difficulty. The

implant was not considered to be an aid by the Tribunal and a hearing aid for the right ear had not been prescribed. No points were awarded.” [para 11]

4.3. From the evidence provided within the bundle it states that the appellant has a BAHA fitted to their left ear. According to the NHS Audiology web page<sup>1</sup> on BAHAs and middle ear implants, a BAHA can be described as:

"BAHA systems consist of two parts - the external processor, worn on the side of the head, and a way of attaching it to the head.

Permanent ways of attaching the BAHA processor use a small operation to attach an abutment or a magnet to the skull. The BAHA processor then clips onto the abutment or onto a magnet.

You can take the BAHA processor on and off, but the attachment stays in place on your head. Non-permanent ways of wearing the BAHA processor use a fabric Softband, plastic headband or special sticker clip. This depends on the type of BAHA system used."

4.4. Thus, while the tribunal are correct in determining an internally fitted device, such as an implant, does not meet the definition of an aid, following the guidance in MR v SSWP (PIP) [2017] UKUT 0086 (AAC), the appellant has a BAHA which I submit should not be considered as an implant. A BAHA is a particular type of hearing aid that has both an internal and an external part, of which both are integral to its function. Whilst the internal part on its own could be viewed as an implant, the BAHA will only work with the use of the removable external part of the hearing aid. Having regard to the way in which the BAHA functions, along with the definition of “aid or appliance” in Regulation 2 of the PIP Regulations, it is my submission that the external part of the BAHA should be classed as an aid as it improves the appellant’s impaired physical function of hearing. It is not in dispute that the appellant has bilateral hearing loss. Without the use of the BAHA the appellant’s hearing would be at 20% which I submit, in the claimant’s circumstances, is insufficient in order to hear in accordance with Regulation 4(2A) of the PIP Regulations. I therefore invite the Upper Tribunal Judge to remake the decision and award the claimant 2 points for descriptor 7b – “needs to use an aid or appliance to be able to speak or hear”. This in addition to descriptor 4b and 9c would mean the claimant scores 8 points in total resulting in entitlement to the standard rate of the daily living component of PIP.

8. The Secretary of State’s representative accordingly submits that the Appellant satisfies descriptors 4b, 7b and 9c and is therefore entitled to the standard rate

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<sup>1</sup> [BAHA and Middle Ear Implants - Audiology \(ouh.nhs.uk\)](https://www.nhs.uk/conditions/baha/)

of the daily component of PIP as from the date of claim. I further consider that it is inappropriate to make a fixed term award (Welfare Reform Act 2012, section 88(2)).

9. I agree with the analysis of the Secretary of State's representative, especially at paragraphs 4.2 and 4.4 of her written submission on the appeal. This is consistent with the case law, which appears to make a distinction between permanently implanted devices (e.g. artificial joints, stents and retinal implants), which do not count as 'aids or appliances' for the purposes of PIP, and detachable devices, which may so qualify. See further *MR v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 86 (AAC) at paragraphs 41-49. Upper Tribunal Judge Gray remarked as follows:

49. As I have explained these remarks do not form part of my decision, nonetheless I add another note of caution. During argument cochlear implants were mentioned, and in view of the collective lack of knowledge in the court as to the way in which such devices operated, whether they were removable, for example, and there being likely variation as to effectiveness both due to the type of hearing loss and environmental factors, it is prudent for me to exclude them from my observations entirely.

10. My understanding is that cochlear implants comprise both an implanted device and an external detachable element (the microphone and processor). If that is right, and both the internal and external parts need to be operational for the implant to work, then a cochlear implant should presumably be treated in the same way as a BAHA for present purposes.

## **Conclusion**

11. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Under section 12(2)(b)(ii) of the same Act, I re-make the decision under appeal as follows:

*The appeal is allowed.*

*The Secretary of State's decision of 25 September 2023 is revised.*

*The Appellant scores 8 points for daily living activities (descriptors 4b, 7b and 9c) and 0 points for mobility activities.*

*The Appellant is therefore entitled to the standard rate of the PIP daily living component with effect from 30 May 2023.*

**Nicholas Wikeley**  
**Judge of the Upper Tribunal**

Authorised by the Judge for issue on 23 November 2024