Neutral Citation Number: [2024] UKUT 381 (AAC) **Appeal No. UA-2024-001023-PIP**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

AE

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Stout
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Helen Hawley, DMA Leeds

On appeal from:
Tribunal: First-Tier Tribunal (Social Entitlement Chamber)
Case No: SC065/23/00139
Digital Case No: 1668511418970213
Venue: Chester (in person)
Hearing Date: 16 January 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: PREPARING FOOD (42.1)

The claimant suffered from Chronic Fatigue Syndrome (CFS). She was able to work, but her evidence was that work left her so tired that she was unable to cook a simple meal from fresh ingredients in the evening. Applying the guidance in *TR v SSWP* [2016] AAC 23 to the present case, the Tribunal needed to be satisfied that on the majority of days the appellant was able to prepare and cook a simple meal for herself at a time of day when it was reasonable for her to prepare a fresh cooked meal and after she had spent her day doing activities that it is reasonable for her to have undertaken. What is reasonable will be a question of fact in each case, but in this case it was reasonable for the appellant to work and reasonable for therefore to have a meal cooked from fresh ingredients in the evening. However, the Tribunal had perversely reasoned from the fact that the appellant could get herself to and from work that she was also functionally able to cook a simple meal in the evening. That failed to address the appellant's case that her CFS meant she was too tired to do that. The Tribunal further erred in inferring from her acceptance that she could probably prepare a carrot when seated that she was capable of cooking a whole simple meal, and doing so on the majority of days in the week.

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)(i) and (3) 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 this decision and the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 16 January 2024.**

3. **The appellant is reminded that the new First-tier Tribunal can only consider the appeal by reference to their health and other circumstances as they were at the date of the original decision by the Secretary of State under appeal (namely 6 September 2022).**

4. **If the appellant has any further written evidence to put before the First-tier Tribunal relating to that period, including any further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.**

5. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or First-tier Tribunal Judge.

REASONS FOR DECISION

Introduction

1. The appellant has a number of medical conditions, in particular chronic fatigue syndrome (CFS) and depression. The appellant appeals against the First-tier Tribunal's decision of 16 January 2024 refusing the appellant's appeal against the decision of the Secretary of State of 6 September 2022 that the appellant was not entitled to Personal Independence Payment (PIP) under Part 4 of the Welfare

Reform Act 2012 (WRA 2012) and The Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) (the PIP Regulations) from 13 June 2022 (the date of claim).

2. The Secretary of State had awarded the appellant 0 (zero) points on both the daily living and mobility activities. The First-tier Tribunal allowed the appellant's appeal in part and awarded the appellant 6 points on daily living activities (2 points against descriptors 1b, 4b and 6b) and 4 points on mobility activities (descriptor 12b). However as these points were insufficient to qualify her for an award of PIP the appeal was dismissed.

3. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 6 April 2024 and permission to appeal was refused by the First-tier Tribunal in a decision issued on 18 June 2024. The appellant filed the notice of appeal to the Upper Tribunal on 17 July 2024 (in time). I granted permission to appeal in a decision sent to the parties on 12 September 2024.

4. The Secretary of State has responded to the appeal and supports it. The parties have consented to me determining the appeal on the papers and I am satisfied that it is appropriate for me to do so.

Why I allow this appeal

5. The appellant appeals in relation to the First-tier Tribunal's conclusion on daily living activity 1 (preparing food). The Tribunal awarded the appellant 2 points in relation to this activity on the basis that she "Needs to use an aid or appliance to be able to either prepare or cook a simple meal". The Tribunal reasoned as follows:

> "21. Having regard to the level of functional ability [claimant] had on the majority of days during the required period in terms of dressing themselves daily, driving themselves to work and carrying out a full days work 4 days a week, the Tribunal considered that this supported the conclusion that they could prepare a simple meal for one on the majority of days with the benefit of aids, such as a perching stool, to reduce the amount of effort required for this activity bearing in mind the fatigue the Tribunal accepted that they suffered from.
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> 22. Whilst the Tribunal noted that [claimant] stated that aids did not assist them, it considered that an aid such as a stool for this activity would enable [claimant] to

> prepare or cook a simple meal safely, reliably, repeatedly and to an acceptable standard within a reasonable timeframe for the majority of days bearing in mind that they were able to work without adaptations from a seated position on the majority of days and had stated that they may be able to prepare a carrot whilst seated.
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> 23. Further, the Tribunal did not consider that any additional points were warranted in respect of this descriptor in terms of requiring supervision or assistance as it considered that [claimant] functional ability in respect of this activity would meet the requisite standard with the use of aids such as a perching stool.
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> 24. The Tribunal consequently decided to award 2 points in respect of this descriptor.

6. The appellant's case is that she "needs supervision or assistance to either prepare or cook a simple meal" and therefore should have been awarded 4 points against descriptor 1e. That would have given her enough points for an award of the care component of PIP at the standard rate so if there is an error in the Tribunal's decision in this respect it is potentially a material one.

7. The appellant has a number of diagnoses, including Chronic Fatigue Syndrome (CFS) and Depression. She works 30 hours per week as an NHS secretary. Her case in relation to activity 1 is (in summary) that she is too tired after work to cook a fresh meal and relies on her husband and mother to do this.

8. The Tribunal recorded the appellant as accepting at the hearing that she, *"…could maybe prepare a carrot if they were seated, albeit they haven't done so for a long time"*. She complains that the Tribunal has erroneously inferred from this that she is able to prepare and cook a simple meal. She submits that the Tribunal failed properly to exercise its inquisitorial jurisdiction in that it failed to ask her about all elements of preparing and cooking a simple meal and/or that the Tribunal perversely concluded that she could do so without assistance as it underestimated the effect of her CFS or wrongly reasoned from her functioning at work that she was able to prepare and cook a simple meal without assistance.

9. The Secretary of State agrees and so do I. In LC v SSWP [2016] UKUT 0150 (AAC) Judge Gray held as follows at [23]:

> "The mention of microwave cooking in descriptor 1c does not mean the heating of ready prepared microwave meals. It is still necessary for the claimant to be able to prepare and cook the food from fresh ingredients, the definition in the Schedule of a

> 'simple meal' being 'a cooked one-course meal for one using fresh ingredients. His inability to cut up fresh food in order to cook is evident from the finding that he cannot cut up cooked food; it means that he satisfies descriptor 1e "needs supervision or assistance to be able to either prepare or cook a simple meal".

10. In this case, the Tribunal failed to consider properly not just whether the appellant was able to prepare a vegetable, but whether she was able to prepare a whole simple meal from fresh ingredients.

11. The Tribunal also erred in law in my judgment by failing properly to apply regulation 4(2A) and (4) (consider whether the claimant can carry out the activity safely, to an acceptable standard, repeatedly and within a reasonable time) and regulation 7 (that the claimant must normally satisfy the descriptor on over 50% of the days of the required period). Alternatively, the Tribunal's conclusion is perverse when the proper approach to those regulations is considered. My reasons for so concluding are as follows.

12. The claimant's evidence in the PIP2 questionnaire form dated 12/07/2022 was that *"Due to "extreme" exhaustion am unable to prepare food as I would like… As exhausted when been at work all day despite having a sit down job for the NHS."* [p.12]. The claimant described experiencing that her fatigue and symptoms of her CFS are debilitating and affect her quality life and although working for four days a week *"…at the weekend I often sleep for 15-16 hrs into the morning due to exhaustion".*

13. In the consultation report completed on 22/08/2022, it is noted by the Healthcare Practitioner (HCP) that the claimant reports experiencing 6 bad days a week with her CFS and that due to significant fatigue she relies on takeaways or preprepared food to avoid making meals, telling the HCP that *"…she will only prepare food one day when she can prepare food from scratch "* [p.51]. In a report completed by the claimant's GP surgery dated 31/08/2022 [pp.77- 80], it is noted that the claimant *"Can sleep for prolonged periods so needs support with shopping/housework/cooking"* [p.79]. The claimant's partner in a letter of support [Addition E p.3] states that he has *"…witnessed long periods of burnout and excessive sleeping…She is a determined person but regards tasks like cooking, cleaning and washing she is unable to do most of the time or has to take long rest periods after doing these things."*

14. In *TR v SSWP* [2016] AAC 23, Judge Hemingway gave the following guidance about the approach to be taken to those aspects of the PIP Regulations:

30. I would certainly accept Ms Pepper's contention that if a descriptor does apply at any point during a 24 hour period that must be a direct consequence of a claimant's physical or mental condition. That follows logically from the wording of section 78(1)(a) and section 79(1)(b) of the Welfare Reform Act 2012. Ms Pepper also submits that the *de minimis* principle applies. Put simply, that is a legal doctrine by which a court refuses to consider a trifling or trivial matter. So, if that argument is right, then a brief or momentary inability to perform a task within a 24 hour period will not mean that a descriptor relevant to that task will be satisfied for the relevant day.
31. Clearly Ms Pepper's contention, in this regard, is an entirely sensible and logical one. A personal independence payment is designed, in broad terms, as is disability living allowance which it is replacing, to assist persons who are disabled mentally or physically to lead a normal life and to get about. It would be inconsistent with that legislative approach and intention if a claimant who was incapable of performing a task or function for only a fleeting or trivial period to be able to satisfy one or more of the descriptors for that reason.
32. Following the above reasoning, therefore, it seems to me that for a descriptor to apply, on a given day, then the inability to perform the task or function must be of some significance, that is to say something which is more than trifling or, put another way, something which has some tangible impact upon a claimant's activity and functioning during a day but not more than that. So, by way of illustration, to use the example given in the PIP Assessment Guide, if a person were to take his painkilling medication at the start of the day and it was to take effect quickly, so that his normal daily routine would not be inhibited in any way, then the relevant descriptors, in this context perhaps those relating to functions such as dressing, washing and toileting, would not be satisfied such that no points would be scored. If, however, the medication did not start to work for a period such as to delay his going about his daily business then it would be satisfied. Such a claimant, having taken his medication, could not be expected to await embarking upon his washing, dressing and toileting for a significant period for his medication to take effect. This, again, would seem to be in accordance with the overall legislative intention and seems to me to be consistent with the Government's response.
33. It may be, though, that with respect to at least some of the descriptors there will be a little more to consider. With respect to matters such as washing, dressing and toileting these are functions which, in general, will obviously need to be performed at some point during each 24 hour period. The position with respect to venturing out-of-doors, for example, might be somewhat different. A person might, for example, simply have a lifestyle as a matter of choice not linked to disability which does not involve venturing out-of-doors during periods of dusk or darkness at all. So, in such a case, there may have to be a factual enquiry as to whether it is the disabilities or something

> else which is preventing such an activity. That is probably why Ms Pepper suggests, in this case, that there will need to be findings about the journeys the appellant embarks upon to and from work. However, it seems to me that detailed inquiries of that nature would be rare. Many people may tend to venture out-of-doors during the hours of daylight more than during the hours of darkness. Nevertheless, there are many reasons why a person might want to venture out after dark perhaps, dependent upon taste, to attend night school classes, or to visit the theatre, restaurants or perhaps even public houses. These activities might not be pursued every day and might indeed be pursued only rarely but if a person is effectively debarred from following the route of an unfamiliar journey or a familiar one without another person, an assistance dog or an orientation aid, which is in part what this appellant is contending, during the hours of dusk or darkness, then that person would not have to show, for the descriptor to be satisfied, that they would wish to undertake such a journey every day or anything like that but would only have to show that the particular disability which impacts upon them is sufficient to mean that that option is not, without the necessary assistance, available to them such that their lifestyle is restricted to more than a trivial extent.
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> 34. The key to all of this is the definition of repeatedly. In the examples above, it cannot properly be said that a claimant is able to wash, dress and attend to his or her toileting as often as the relevant activities are reasonably required to be completed if he or she is obliged to wait for a disruptive period of time until painkillers take effect. It cannot properly be said that a claimant is able to follow the route of a journey repeatedly if he or she cannot do so for a part of each day such that the claimant is obliged to live a restricted lifestyle.

15. It follows from Judge Hemingway's guidance in *TR* that in order to find that an activity 1 descriptor is satisfied on the majority of days in a particular period, the Tribunal needs to be satisfied that on the majority of days the appellant is able to prepare and cook a simple meal for herself at a time of day when it is reasonable for her to prepare a fresh cooked meal and after she has spent her day doing activities that it is reasonable for her to have undertaken. Although what is reasonable may vary from case to case, in the present case it could hardly be suggested that it was not reasonable for the appellant to work and, if it was reasonable for her to work, then the only reasonable time to expect her to cook a meal from fresh ingredients was in the evening. The Tribunal in this case proceeded on that basis, but what it lost sight of, in my judgment, was that the appellant's ability to cook in the evening needed to be judged by reference to how tired she was after work.

16. Given that the appellant's evidence is that her CFS means that after work she is for a majority of days each week too tired in the evening to prepare a meal from fresh ingredients, it would only be if it was rational to reject that evidence as untrue that the Tribunal could find that the appellant did not require assistance to cook.

17. In this case, however, the Tribunal reasoned from the appellant's functioning at work that she could prepare a meal in the evening. That reasoning simply does not address the appellant's case that work makes her so tired that she is not able to function normally in the evening. In the context of this case, that reasoning is perverse, and it betrays the Tribunal's failure properly to direct itself by reference to the correct legal principles.

18. It is also in my judgment perverse for the Tribunal to have concluded that the appellant would, if she used a perching stool, have sufficient energy left in the evening most days of the week to prepare a simple meal. There does not seem to be any evidence from which the Tribunal could have concluded that if the appellant sat on a perching stool her CFS symptoms would be sufficiently reduced to enable her to prepare a simple meal in the evenings on most days. The Tribunal did not even ask the appellant about this.

Conclusion

19. 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. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal subject to the directions above.

Holly Stout
Judge of the Upper Tribunal
Authorised by the Judge for issue on 27 November 2024