Neutral Citation Number: [2025] UKUT 252 (AAC)

Appeal No. UA-2024-000516-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

RH

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Hearing date: 24 April 2025

Representation:
Appellant: Imogen Marchant, Free Representation Unit
Respondent: Denis Edwards of counsel

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC140/23/00419
Tribunal Venue: Cambridge
Decision Date: 13 June 2023

SUMMARY OF DECISION

This decision is about whether the FTT erred in law in: (i) ruling out rest before an activity is undertaken in deciding whether the descriptors under an activity were completed within a reasonable time period (per regulation 4(2A)(d) of the PIP Regs); and (ii) failing to provide adequate reasons for whether the appellant could satisfy relevant descriptors repeatedly (per regulation 4(2A)(c) of the PIP Regs). The Upper Tribunal decides that resting before carrying out an activity is not relevant to whether the descriptors under the activity can be completed within a reasonable time period. However, the FTT erred in law in not providing an adequate explanation for why the need it apparently found the appellant had to rest after carrying out PIP activities and before repeating them did not assist the appellant under regulation 4(2A)(c).

KEYWORD NAME (Keyword Number) 41 (Personal independence payment - general)
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 judges follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 13 June 2023 under case number SC140/23/00419 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, that decision is set and the appeal is remitted to an entirely differently constituted First-tier Tribunal to be redecided, after an oral hearing, and in accordance with the law set out in this decision.

REASONS FOR DECISION

Introduction

1. The two issues with which this appeal is concerned are best described by setting out the reasons why the First-tier Tribunal ("the FTT") gave the appellant permission to appeal to the Upper Tribunal:

> "…..there is possibly an arguable point of law involved relating to whether the Tribunal has correctly interpreted Regulation 4(2A) (c) and (d) of the Social Security (Personal Independence Payment) Regulations 2013.
>
> The Appellant is a person who has a number of diagnoses including one of Chronic Fatigue Syndrome. At paragraph 22 of the Statement of Reasons prepared by the presiding Judge it is asserted that resting before carrying out a task is not part of that task. For this reason, the Tribunal has not included in their assessment of "a reasonable time period" any time spent by the Appellant resting before he undertakes any of the activities set out in Part 2 of Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013. The Upper Tribunal is requested to consider whether this is a correct interpretation of Regulation 4(2A)(d) of the Social Security (Personal Independence Payment) Regulations 2013.
>
> In respect of Regulation 4(2A)(c) of the Social Security (Personal Independence Payment) Regulations 2013 the Upper Tribunal is requested to consider whether the Tribunal has provided adequate reasons for its finding that the Appellant is able to undertake activities repeatedly notwithstanding his need to rest before and after carrying out activities."

The grant of permission to appeal was not, however, limited to those two issues.

2. I will set out the relevant aspects of the legislative scheme in more detail later in this decision, but it is worth setting out regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regs") at this stage. Regulation

4 is about the "*Assessment of ability to carry out activities*" and regulation 4(2A) and (4) within it provide as follows:

> "4:-(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….
> (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."

The First-tier Tribunal's decision

3. The FTT upheld the Secretary of State's decision of 8 January 2023 on 13 November 2023. It found the appellant only scored 2 points under daily living descriptor 5b (managing toilet needs) because he needed an aid or appliance to be able to manage his toilet needs. The appellant did not score any points under the mobility activities. The material parts of the FTT's Decision Notice read as follows:

> "5. The Tribunal has read the papers and heard oral evidence from the Appellant via the telephone link. The Tribunal is aware that the Appellant's personal circumstances have changed, though his disabilities continue as before due to Chronic Fatigue Syndrome. The Tribunal must consider his situation before the change, though he has confirmed that his routine has changed little since then.
>
> 6. The evidence indicates that the Appellant can carry out the various activities, though will need to rest afterwards and before repeating them. The Appellant urges the Tribunal to consider the cumulative effect of his symptoms, because his need to rest means that he cannot fill his day with activities. The PIP Regulations provide that each activity must be carried out safely, repeatedly (when reasonably required), and within a reasonable time period. The evidence indicates that he can do this for each activity, and for more than 50% of the time. The appeal must therefore be dismissed."

4. In its later statement of reasons for the decision the FTT said the following of relevance to the two issues before the Upper Tribunal on this appeal:

> "3. The Appellant asked for a Mandatory Reconsideration on 05/02/2023 by completing Form CRMR1, (page 57 to 62) He did not provide any further evidence. The basis of his disagreement was that he can only undertake 20 minutes of activity, and on a bad day he requires 30 minutes rest both before and afterwards, meaning that any activity takes 80 minutes. This is more than any other person would take. The Mandatory Reconsideration Notice was sent on 28/03 /2023 (page 63 to 67) which simply confirmed the decision, while acknowledging his restrictions.

4. [The appellant's] grounds for appeal are that he does not agree that he deserves 0 points because he is unable to carry out daily tasks repeatedly and in a reasonable time (as often as he used to do), that he has 5 bad days each week when he needs to rest for 30 minutes before and also after each 20 minutes of activity, which is twice as long as a person without his condition would take, and that this leads to cumulative fatigue.

20. In this case, it was relevant to see what changes had occurred during the period eg seeking to engage with people online, and the subsequent effect upon his daily life eg moving to live as part of a new enlarged family in a different county, some 83 miles away. From his evidence to the Tribunal it is apparent that at the time of the decision he had formed a relationship with his new partner, and also met her children. This makes his suggestion that he was unable, due to fatigue and anxiety, to perform any daily task, less credible.

21. He has been receiving the same level of medication for 6 years, which indicates that it is effective. He has not seen a specialist for several years. He accepts that he can cook and take nutrition - his diary indicates that he can cook and then eat, which is likely to take more than 20 minutes. He takes the same medication daily, and there is no reason for him to require prompting, or a dosette box - which he says he prepares himself. He can shower independently, and also dress himself. There is no evidence to support his claim that he needs to rest for so long after carrying out a task, so the Tribunal must consider whether his evidence is credible or not.

22. Resting before carrying out a task is not part of that task, and no reason has been advanced why this is necessary. At the time of the claim he had moved to look after his mother, though he has said that they each cooked separately and independently. The Tribunal finds these two statements to be contradictory. He can communicate and also read to the standard required for the benefit, as shown by his online dating, and also by the daily record which refers to the time after he had moved to be part of a couple. This also extends to social engagement, there being no suggestion that he has required prompting or support to do this. He does suggest that at times he is too fatigued to understand money or manage his budget- his evidence is of going to the local shop several times a week and there is no indication of debts.

23. He accepts that he can plan a journey, but says he cannot then follow the route. However, he can travel by public transport, on his own, and there is no suggestion of difficulty in moving to a new area. He has retained his Driving Licence, and while he does not have a car was able to hire one . He was walking for 15 minutes to visit his son, at the time when they both lived in Southend. If his evidence is to be believed, the very act of making the journey would negate the reason for it, because he would be too tired to do anything when he got there.

24. [The appellant's] suggestion of having to rest would make all of the activities unrepeatable and is inconsistent with his change of personal circumstances, which was occurring at the same time

25. The Tribunal considered all the evidence, but in particular the Appellant's oral evidence, which was given clearly and without hesitation. He spoke to the Tribunal for over one hour with no signs of fatigue.

> **The Decision**
>
> 27. The Tribunal agrees with the points awarded for the use of the stoma bag to assist his toilet needs. The Tribunal found no other points to award. The appeal was dismissed."

The Secretary of State's support for the appeal

5. The Secretary of State in a written submission of 13 June 2024 supports the appeal to the Upper Tribunal. In terms of the stated grounds on which permission to appeal was given, the core of the Secretary of State's support is in the following terms:

> "14. The Tribunal noted due to the claimant's health condition(s) (chronic fatigue syndrome) he "*accepted that he can carry out the daily tasks in isolation from each other, with a rest before and afterwards. Sometimes his rest period would take a whole afternoon*" and "*18. The difference between his good days and bad days is the amount of rest he requires before and afterwards…*".
>
> 15. In the findings section within the SOR the Tribunal noted:
>
> > "*22. Resting before carrying out a task is not part of that task, and no reason has been advanced why this is necessary.*"
>
> 16. Upon reading the SOR there appears to be insufficient findings made concerning the impact the claimants' conditions may have on him particularly the chronic fatigue syndrome and the symptoms/difficulties he may face as a result. Arguably the Tribunal appear to have not sufficiently explored such matters nor had sufficient regard to regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013, when assessing if the claimant could undertake activities of PIP "repeatedly" in light of his difficulties and the need to rest afterwards as noted.
>
> 17. There also appears to be insufficient findings to determine if due to the chronic fatigue the claimant can undertake activities of PIP on over 50% of the days in the required period in accordance with regulation 7.
>
> 18. As such, I submit that the Tribunal have not sufficiently determined that the claimant can undertake activities of PIP in accordance with regulation 4(2A) to an acceptable standard, repeatedly and have therefore erred in law."

The need for an oral hearing

6. At the stage of the Secretary of State made the above supportive submission, the appellant was unrepresented, and he was content for the appeal to be decided on the basis of the Secretary of State's submission.

7. However, I was not content to do so and directed an oral hearing of the appeal, for these reasons:

> "2. Having read the submissions on the appeal, I am not satisfied they grapple fully with the grounds on which permission was granted by the First-tier Tribunal. Most particularly, the submissions do not address whether, as a matter of law, resting before a PIP activity is undertaken falls (or not) to be taken into account under regulation 4(2A)(d) of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regs"). In other words, is the rest which may be needed before starting to undertake an activity part of the assessment of whether the claimant can satisfy (or carry out an activity) a PIP descriptor within a reasonable period of time? The First-tier Tribunal expressly excluded this 'before' time from counting under regulation 4(2A)(d), and this appeal (at least very arguably) needs to answer whether it was correct to do so. I cannot at present identify any clear argument from either party on this issue.
>
> 3. The Upper Tribunal's decisions in *PM v SSWP* (PIP) [2017] UKUT 154 (AAC), *CE v SSWP* (PIP) [2015] UKUT 643 (AAC) and *TR v SSWP* (PIP) [2015] UKUT 626 (AAC); [2016] AACR 23 may have some relevance to the issue described above."

The written arguments of the parties

The Secretary of State's arguments

8. The Secretary of State in her skeleton argument for the oral hearing continued to support the appeal being allowed. On the specific issues of law identified by the FTT when giving permission to appeal, the Secretary of State's case was, as summarised, as follows:

> "6……resting before starting one of the daily living activities, and equally pacing between the activities, forms no part of an assessment for an award of points under any of the descriptors of the PIP daily living or mobility activities. Both the activities and the descriptors in respect of each of them are self-contained and, properly construed, envisage no overlap between them. If an overlap were to be permitted, the obvious risk is that an assessment would give rise to double counting of points, for example, where having been awarded points under one activity for difficulties associated with that one, a further award of points for resting before starting the next activity would arise even though the difficulty might be the result of the previous activity, including its repetition or completion within a reasonable time, but having nothing at all to do with the claimant's ability to do another activity.
>
> 7. In so far as resting between activities is relevant at all to an assessment of a claimant's ability reliably to undertake the activities, it must focus only on the claimant's ability to undertake the particular activity repeatedly. Pacing or resting between activities has no relevance to the question whether an activity can be undertaken within a reasonable time period because the assessment in this respect must only focus on the time it takes to perform the particular activity.
>
> 24…..subject to it being shown that it is the result of a physical or mental health condition, resting while performing an activity may be relevant to whether the activity can be completed within a reasonable time. It is also accepted that a claimant's ability to repeat an activity repeatedly (such 8 as taking breakfast lunch and dinner during the day) is a relevant part of an assessment. Accordingly, if a person could not, because of chronic fatigue syndrome, repeat the activity of

preparing food having done it once within a 24 hour period, that would, in principle, amount to a relevant difficulty. However, in both these cases, the focus is on the same activity or a claimant's needs during the activity, such as the need to rest while performing the activity. It is not concerned with the need to rest between different activities, or before performing the activity in the first place.

28. While [*TR v SSWP* [2015] UKUT 626 (AAC)] and, equally, [*CE v SSWP* (PIP) [2015] UKUT 643 (AAC)] suggest that a difficulty arising before an activity is undertaken, where this is the result of a condition, is relevant to the PIP activities, the Respondent notes that the focus in these cases is always on the relevance of 'repeatedly' in regulation 4(2A). This is in line with the Respondent's analysis of the law set out below, that a person's need to rest between repeating an activity may be relevant to an assessment of whether a person can perform an activity reliably within a 24 hour period. However, there is nothing in these 3 cases to suggest that pacing activities, or resting between different activities, is relevant to a PIP assessment. This is almost certainly because pacing activities and resting between performing different activities is a perfectly normal way of performing the daily living and mobility activities for everyone. 30. The context and structure of the activities in the Regulations means that the focus of an assessment must always be on performing the activities themselves, rather than what is performed before or after them, subject to any issue arising from safely performing an activity after its conclusion.

31. While policy documents cannot determine the construction of legislation, it is worth observing that the original PIP consultation paper, at paragraph 4.18, brings within the concept of 'repeatedly' the notion that completing one activity 10 may adversely affect a person's "ability to subsequently complete other activities". This is substantially repeated in PIPAG.

32. In these respects, the consultation paper and PIPAG accept that it is relevant to have some regard to the impact on a person of performing the daily living activities. To this extent, a holistic approach should be taken to an assessment of a person's abilities. But this does not mean that resting before performing an activity or between different activities is normally part of an assessment. Rather, it only acknowledges that impacts on a person of performing activities will not be the same for everyone. It is not the case that there is one size fits all.

33…..[although in] *Secretary of State for Work and Pensions v. MM* [2019] UKSC 34, the UK Supreme Court when considering daily living activity 9 (engaging with other people), concluded that it is relevant to an assessment of a person's difficulties with this activity to consider a person's need for support or counselling before they engage with others…….this is inherently related to being able to perform some descriptors in activity 9, in particular 9(c). It does not follow that what happens before other activities are performed is therefore also relevant to an assessment of a person's ability to perform those other activities…..

35. The Respondent accepts that a person may not be able to undertake some activities without prompting or encouragement, for example, to get them into the frame of mind to undertake an activity. It follows that prompting before an activity is undertaken will be relevant to an assessment in some cases. However, this is only relevant if the 'prompting' is from another person. Similarly, 'supervision' requires the continuous presence of *another person*, implicitly, while the activity is

being undertaken. Nowhere do the Regulations envisage support by and for oneself to be relevant to an assessment of a person's ability to perform activities."

The appellant's arguments

9. The appellant was fortunate to be represented by the Free Representation Unit ("FRU") after I directed the oral hearing. Through FRU he invited the Upper Tribunal to decide that:

   (i) rest periods taken before an activity are to be considered for the purposes of regulation 4(2A)(d), and took the appellant outside of the "reasonable time" period required, and

   (ii) the FTT provided inadequate reasons for its finding that the appellant was able to undertake an activity repeatedly.

10. In support of these propositions, the appellant argued as follows:

> "5. The Appellant contends that he can only undertake one burst of activity at a time, lasting roughly 20 minutes on a good day, with 30 minutes of rest before and after. The more activities he performs in a day, the greater the degree of fatigue he experiences. The cumulative fatigue accrued by these activities is also a significant factor in the ongoing requirement for rest.
>
> 13. Case law takes a broad approach towards the way in which the Regulation 4(2A)(c-d) interact: *CE v SSWP* [2015] UKUT 643 at [§37], *TF v SSWP* [2015] UKUT 661 at [§7]. While each ground is taken separately, there is some overlap in approach. Furthermore, over the course of a day rest periods between activities can, to some extent, 'blur'. Resting after showering becomes part and parcel of resting before dressing, for example. A flexible approach to rest periods, for purposes either of the 'reasonable time' or the 'repeatedly' criterion is suggested, as the Tribunal thus takes full account of a claimant's daily life.
>
> 14. This is subject to the Tribunal's satisfaction that a claimant's resting is a **need** rather than a **preference**…..On the basis of what follows, there is authority for this approach.
>
> 15. The First-Tier Tribunal was wrong to conclude that 'resting before an activity is not part of an activity' [§22]. This is because:
> a. The dicta of a number of cases considering the mobility component of the award indicate that resting during, after and between an activity counts towards the length of time it takes to complete that activity.
> b. The Tribunal is invited to reason analogously and incorporate rest periods undertaken prior to an activity. There is authority for this based on *AE v SSWP* [2024] UKUT 381 (AAC)..and *KW v SSWP* [2024] UKUT 410...
>
> 16. **Firstly**, as per *TF v SSWP* [2015] UKUT 661, which concerned a claimant's ability to walk the required distance without a rest, [§6], '*matters such [...] the frequency and nature, including extent, of any rests required by a claimant, are relevant to the question of whether a claimant can complete a mobility activity descriptor 'to an acceptable standard'*".

17. As per that judgment, this '*inevitably links with two of the further relevant matters under regulation 4(2A): 'repeatedly' and 'within a reasonable time period*" [§7]. As such, the Upper Tribunal is invited to reason analogously: 'rest' and 'reasonable time' are connected. The Appellant's need to rest before is an exercise in 'pacing'. In order to reduce the time needed to rest *after* an activity, he gathers energy before.

18. This is supported by *KW v SSWP* [2024] UKUT 410 (AAC) ("KW"). The appellant experienced chronic pain and fatigue even on 'mild exertion'. The Upper Tribunal opined at [§24] that pain and implicitly fatigue '*can and often is relevant to a claimant's ability to carry out a PIP activity to an acceptable standard*'. It may '*also be relevant to whether the activity can be done repeatedly and within a reasonable time*.' [§24].

19. **Secondly**, that judgment states that there is '*no logical reason why the same approach should not be applied to the other PIP activities*' [§24]. Although the difference between resting while walking and resting prior is acknowledged, the above cases indicate that there is authority for a broad approach of the Tribunal towards fatigue and that this can be applied across a range of descriptors.

20. Furthermore, in *AE v SSWP* [2024] UKUT 381, it was found that a claimant's CFS, which left her unable to prepare a meal after a day of work could engage Regulation 4. The claimant was '*so tired that she [was] not able to function normally in the evening*' [§17]. As such, the effect of cumulative fatigue falls to be (and should have been) considered by the Tribunal.

21. There is as such no reason why the Upper Tribunal should not take account of fatigue experienced across the range of PIP activities, and logically, why resting prior to an activity should not be considered, if it is deemed necessary to do so.

22. The effects of a condition on a claimant's ability to undertake a task can be considered as part of the 'repeatedly' assessment in Regulation 4(2A)(c).

23. The approach to rest periods and collateral effect of a condition in *CE v SSWP* (PIP) [2015] UKUT 643 (AAC)…, provides a foothold for the Tribunal to account for rest periods taken in anticipation of an activity. The claimant, unable to properly function as a result of 'post-epileptic fugue' and fatigue, resulted in a finding of Regulation 4 extended beyond the points awarded by the First-Tier Tribunal. As such, the Upper Tribunal found that a claimant's '*inability to perform a function for part of a day*' as a '*direct consequence of a claimant's physical or mental condition*', can have an effect on '*a range of descriptors*' [§36].

24. The Tribunal illustrated this with the example of '*waiting for medication to take effect before washing, dressing and toileting*', which '*may well score points in relation to certain of the daily living activities and descriptors*', particularly if a claimant cannot, as a result, complete an activity as often as '*they would otherwise reasonably wish to do so*'. [§36].

25. It is accepted that *CE* makes something of an elision between the elements of Regulation 4: a claimant needing to rest before undertaking an activity can take them both beyond the requirements of '*reasonable time*' and prevent them from undertaking an activity '*repeatedly*'. *CE* notes that the Tribunal, when assessing

> the after-effect of the seizures, should have necessitated an assessment '*in accordance with the regulation 4 2(A) considerations including the "repeatedly" requirement as defined*' [§37]….
>
> 28. *TR v SSWP* [2015] UKUT 626…suggests that points may be awarded across a range of descriptors if '*the inability to perform the task or function [...] has some tangible impact upon a claimant's activity and functioning during a day*' [§32]. The Upper Tribunal utilised the example of waiting for medication to work '*so as to delay [a claimant's] going about his daily business [...] for a significant period*' [§32].
>
> 29. This impacts on the ability of a claimant to perform an activity 'repeatedly' [§34]. If a claimant cannot do an activity for part of the day as a direct result of their condition (demonstrated in [this] case by the need to rest), then the descriptor is satisfied for the whole of that day…..
>
> 31. The similarities between the case at hand and the examples raised in *CE* and *TF* indicate the Upper Tribunal should apply the same approach. Having made breakfast and lunch and undertaken a journey, as detailed at FtT p.76, the appellant is then unable to undress, wash, and make the final meal of the day due to the fatigue accrued. The First-Tier Tribunal's finding at [24] that 'having to rest would make all of the activities unrepeatable' is rather the point."

Relevant law

Statutory provisions

11. Part 4 of the Welfare Reform Act 2012 ("the WRA") created the social security benefit PIP. By section 77(2) of the WRA a person can have an entitlement to the daily living component of PIP or the mobility component of PIP, or both. As the FTT's grant of permission to appeal focussed on the daily living activities, I shall do so also in this decision. However, the issues of law raised in this decision may also extend to the mobility activities under the PIP legislative scheme.

12. Section 78 of the WRA deals with the daily living component of PIP and provides, insofar as is material, as follows:

> "**Daily living component**
> **78**:-(1) A person is entitled to the daily living component at the standard rate if—
> (a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition….
> .
> (2) A person is entitled to the daily living component at the enhanced rate if—
> (a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition….
>
> (4) In this Part "daily living activities" means such activities as may be prescribed for the purposes of this section.
> (5) See section…80…for provision about determining—
> (a) whether the requirements of subsection (1)(a) or (2)(a) above are met…"

13. Section 80 of the WRA has the heading "Ability to carry out daily living or mobility activities" and, again only insofar as is material, sets out:

> "**80**:-(1) For the purposes of this Part, the following questions are to be determined in accordance with regulations—
> (a) whether a person's ability to carry out daily living activities is limited by the person's physical or mental condition;
> (b) whether a person's ability to carry out daily living activities is severely limited by the person's physical or mental condition…
>
> (3) Regulations under this section—
> (a) must provide for the questions mentioned in subsection… (1)… to be determined, except in prescribed circumstances, on the basis of an assessment (or repeated assessments) of the person;
> (b) must provide for the way in which an assessment is to be carried out;
> (c) may make provision about matters which are, or are not, to be taken into account in assessing a person.
> (4) The regulations may, in particular, make provision—
> (a) about the information or evidence required for the purpose of determining the questions mentioned in subsections (1) and (2);
> (b) about the way in which that information or evidence is to be provided;
> (c) requiring a person to participate in such a consultation, with a person approved by the Secretary of State, as may be determined under the regulations (and to attend for the consultation at a place, date and time determined under the regulations)."

14. The decision in *TK v Secretary of State for Work and Pensions* (PIP) [2020] UKUT 22 (AAC); [2020] AACR 18, helpfully explains what is meant by a claimant's ability to carry out daily living activities being limited by their physical or mental condition. As Upper Tribunal Judge Markus KC explained at paragraphs [39]-[40] of *TK*:

> "39. As with DLA, there is a limit to the scope of section 78. The phrase "limited by the person's physical or mental condition" means that there must be a physical or mental cause of their limitation. A person must lack the physical or mental power or capability to perform the activity in question. A person will not qualify if the limitation on their ability to carry out an activity is due to their belief or habits (see paragraph 39 of *R (DLA)3/06*), choice or other circumstances such as their living arrangements or financial position (*SC v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0317 (AAC) at paragraphs 14-15). Although in practice a claimant's limitation will very often be a consequence of what might be described as a "health condition", it is not appropriate to add words to the statutory language. The unqualified use of the word "condition" reflects the aim of the legislation to focus on a functional approach to entitlement.
>
> 40. Moreover, there is nothing in the statutory wording which requires a physical or mental condition to be a direct cause of the limitation. As in relation to DLA (see R(DLA) 4/01 at paragraph 18), it is permissible to take into account a physical or mental condition which gives rise to some other factor which itself causes the limitation. In R(DLA) 4/01 the claimant's functional limitation was caused by anxiety which itself was a consequence of deafness. Ms Apps [counsel for the Secretary

> of State] gave the examples of a physical or mental condition which gives rise to lack of appetite or brain fog."

15. The details of the entitlement rules for PIP are found in the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regs").

16. Regulation 4 of the PIP Regs, as has been noted already, is concerned with the "*Assessment of ability to carry out activities*" and provides, relevantly, as follows (with 'C' meaning 'the claimant'):

> "4(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the [WRA], 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….
> (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….
> (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."

17. Regulation 5 of the PIP Regs provides for an assessment by reference to the daily living activities listed in Part 2 of Schedule 1 to the PIP Regs. Each applicable descriptor under each activity attracts specified points. A claimant will have limited or severely limited ability to carry out daily living activities where they score at least 8 or 12 points respectively.

Case law

18. A number of decision of the Upper Tribunal have been referred to in the parties' arguments and I shall seek to address those decisions here. I will start with the decisions to which I referred when directing an oral hearing of this appeal.

19. The first is the decision in *PM v SSWP* (PIP) [2017] UKUT 154 (AAC). The key paragraph in that decision is paragraph [20], but it does throw any light on whether resting *before* an activity is undertaken is (or is not) to be taken into account as a matter of law when determining whether a person who has claimed PIP can undertake a PIP activity within a reasonable time period. What paragraph [20] of the decision in *PM* is concerned with is the definition of "repeatedly" in regulation 4(4)(b) of the PIP Regs. Critically, *PM* is authority for the proposition that periods of rest *during* an extended walk (to the shops and then on to the park) may be relevant to

whether the PIP claimant can undertake the descriptors under mobility activity 2 "repeatedly". The Secretary of State accepts this. The Secretary of State also accepts that resting while undertaking a PIP activity may also be relevant to whether the claimant, as a result of their physical or mental condition, can carry out (i.e., complete) the relevant descriptor within a reasonable period of time.

20. The second decision is *CE v SSWP* (PIP) [2015] UKUT 643 (AAC). The claimant in that case suffered from intractable nocturnal grand mal epileptic seizures. Because of this, she had to rest and sleep for long periods after she had a seizure. The FTT awarded the claimant daily living descriptor 1(f) on the basis that the claimant could not safely either prepare or cook food. The Secretary of State's appeal to the Upper Tribunal was allowed, inter alia, on the basis that the FTT had not provided an adequate explanation for its decision. Having dealt with this and other issues concerning the statutory definition of "safely" within the PIP Regs, Upper Tribunal Judge Hemingway went on to address another error the FTT had made, which he described in paragraph [34] of the decision as follows:

> "…..it is important to note that [the FTT] did not appear to consider whether the claimant, the morning after a night in which she had experienced a nocturnal seizure, would be able to perform functions relevant to the daily living and mobility activities and descriptors repeatedly. As set out above, a person is only to be regarded as capable of performing a task or function if able to do so repeatedly. The definition, by way of reminder, is to the effect that the word means "as often as the activity being assessed is reasonably required to be completed". The claimant's evidence is, of course, that she is unable to do very much at all due to the adverse impact upon her of a seizure and the tiredness she feels as a result of it until late morning or midday. It seems to me it makes no sense to say a person is able to perform an activity as often as reasonably required if they cannot do so for a part of the day in which they would otherwise reasonably wish or need to do so.…"

21. This again is about "repeatedly". Nothing in *CE* is about completing a descriptor within a reasonable time period. However, in my judgement the above passage in *CE* is of importance in recognising that an inability to undertake an activity because of, for example, tiredness or extreme fatigue, at time when it would otherwise be reasonable for that activity to be undertaken, may mean that a descriptor or descriptors under that activity cannot be satisfied "repeatedly". This may therefore be another way, or <u>the</u> way, in which needing to rest before undertaking an activity is taken into account under the PIP legislative scheme.

22. This point is perhaps emphasised by what is said in paragraph [35] of *CE*:

> "…..I would accept, as I did in *TR v SSWP* (PIP) [2015] UKUT 626 (AAC) that any inability to perform a function for part of a day must be a direct consequence of a claimant's physical or mental condition and must be of some significance. Thus, a momentary inability to perform a function would not lead to a conclusion that a descriptor will apply. However, if the inability is such as to have some tangible impact upon a person's activity and functioning during a day then it might well do. By way of illustration, a person who, having awoken in the morning has to wait for a lengthy period for his or her painkilling medication to take effect before going about his daily business which might include such as washing, dressing and

> toileting, may well score points in relation to certain of the daily living activities and descriptors. Similarly, a person suffering a significant adverse reaction to a seizure, as this claimant says she frequently does, might also score points on that basis in relation to a range of descriptors."

23. Judge Hemingway was not in this passage in *CE* deciding that resting before an activity could be undertaken fell to be taken into account by calculating how long in terms of time it would take the claimant to "satisfy" (that is, complete) a descriptor under a PIP activity. No part of the analysis in *CE* is about regulation 4(2A)(d) of the PIP Regs and its "within a reasonable time period" test. However, what *CE* is authority for it seems to me, is that the need (because of the person's physical or mental condition) to rest before being able to undertake an activity, if that need is accepted by the decision maker, may fall to be taken into account in deciding whether the person can carry out the relevant descriptors under that activity "repeatedly".

24. I do not accept that the points I have highlighted above from *CE* are limited to the facts of that case or to people with epilepsy, as the Secretary of State argued. The illustrative examples given by Judge Hemingway in paragraph [35] of *CE* stand against this. Moreover, paragraph [34] of *CE* contains part of its *ratio* (what it was deciding). Nor do I consider, in relation to an argument made by the appellant, that paragraph [37] adds anything to *CE*'s analysis of the law. As I see it, all paragraph [37] contains is a forensic analysis of what the FTT ought to have done in its consideration of the evidence as a result of what Judge Hemingway had decided about "safely" and "repeatedly" in regulation 4(2A) and (4) of the PIP Regs.

25. The third decision I referred to in my oral hearing directions is *TR v SSWP* (PIP) [2015] UKUT 626 (AAC);[2016] AACR 23. Its key ratio is referred to in paragraph of paragraph [35] of *CE*. *TR*, too, is not about whether the "within a reasonable time period" test in regulation 4(2A)(d) of the PIP Regs. Its focus is again on "repeatedly". The following passages from *TR* are worth setting out:

> "32……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.

> 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."

26. Pausing at this point, it might be thought that *CE* and *TR* cover the appellant's case of needing to rest before he can undertake activities at the time it would be reasonable for him to carry out those activities.

27. The appellant sought, however, to rely on three other cases in support of his argument that resting which was needed before an activity could be undertaken fell to be taken into account in assessing whether the activity had been carried out within a reasonable time period.

28. The first case *TF v SSWP* [2015] UKUT 661 (AAC). I do not find anything of substance in *TF* which supports the appellant's argument. The reasons given by Upper Tribunal Judge Parker, as she herself said, were "brief". Moreover, the key focus of the decision, at least in terms of regulation 4(2A), was on pain and needing to stop for rest being relevant to whether the claimant could complete a mobility descriptor (under PIP mobility activity 2) "to an acceptable standard". Even within that context, however, the language of paragraph [6] of *TF* makes clear that what Judge Parker was addressing was stops *during*, and not before, the act of mobilising. Nor is there anything in paragraph [7] of *TF*, whether read with paragraph [37] of *CE* or not, which decides as a matter of law that a 'broad approach' should be taken to the way in regulation 4(2A)(c) and (d) of the PIP Regs interact.

29. Likewise, *KW v SSWP* (PIP) [2024] UKUT 410 (AAC) is about difficulties *doing* an activity due to pain. Indeed, *KW* is really only following *TF* on this point, and was not deciding (even by inference) that resting before carrying out an activity was relevant to the time in which the activity's descriptors could be completed.

30. The last case the appellant relied on is *AE v SSWP* (PIP) [2024] 381 (AAC). This appeal concerned a claimant with CFS. This left her unable to cook a meal from fresh ingredients after a day of work. Again, however, nothing in *AE* addresses, let alone decides, that resting before undertaking a PIOP activity is relevant to the assessment of time under regulation 4(2A)(d) of the PIP Regs. At best, in terms of its relevance to this appeal, *AE* simply follows Judge Hemingway's decisions in *TR* and *CE* about "repeatedly".

31. I should add in this discussion about case law that the Secretary of State also sought to rely on arguments about unnecessary 'double counting' following paragraph [14] of *SSWP v TMcL* [2016] UKUT 574 (AAC). As I understood the argument it was that "resting" between different PIP activities should be ruled out because the activities themselves do not overlap. Given, for the reasons I set out below, I have not accepted the appellant's argument that resting before an activity is undertaken has to be taken into account as part of assessing the time within which the descriptors

under the activity are completed, I need say no more about this argument. Paragraphs [56]-[59] of *MP v SSWP* (PIP) [2025] UKUT 240 (AAC) highlight some difficulties with the *lex specialis* argument which the Secretary of State was relying on here.

Analysis and conclusion

"Repeatedly"

32. I will take this ground of appeal first because in the end there was little, if anything, between the parties on it. Moreover, for the reasons I have given above when discussing the *CE* and *TR* cases, this ground of appeal may well cover off the 'need to rest before' issue with which the appellant is concerned.

33. It is important to bear in mind the terms on which the FTT gave permission to appeal and, in consequence, the issue of law on which it sought the Upper Tribunal's guidance. (Although the grant of permission to appeal was not limited, no further and legally separate grounds of appeal have been advanced by either party.) This ground is whether the FTT provided adequate reasons for its finding that the appellant was able to undertake activities "repeatedly" notwithstanding his need to rest before and after carrying out activities.

34. It is not disputed between the parties that the FTT failed to give adequate reasons for whether the appellant could carry out the PIP activities and descriptors in issue on the appeal "repeatedly". I agree with the parties on this.

35. Given the effect of decisions in *CE* and *TR*, in my judgement the Secretary of State is correct when she argues that "resting between activities is relevant [to a] claimant's ability to undertake the particular activity repeatedly". It must follow from this that resting before an activity is *repeated* may be relevant to a PIP claimant's ability to carry out the descriptors under that activity repeatedly. This is because, per paragraph [34] of *CE* and the statutory test of "repeatedly", the FTT had to take into consideration the appellant's reasonable need to complete the activity (or more accurately any of the descriptor(s) under the activity) again, and that then necessarily required it to assess the appellant's ability *after* he had previously been able to complete the activity. As a matter of fact, that may involve consideration of the appellant's ability *before* he may reasonably require to complete the activity again. However, that is a result of the application of the statutory "repeatedly" test in regulation 4(2A)(c) of the PIP Regs and is not because resting before carrying out a PIP activity is inherent in the activity[1].

[1] The wording of some of the PIP descriptors may require action or steps to be taken before the descriptor is carried out or completed. Most notably, points can be awarded if the PIP claimant needs prompting "to be able to" carry out a number of the PIP descriptors. Moreover, *SSWP v MM* [2019] UKSC 34; [2020] 1 All ER 829 held that the social support needed "to be able to engage with other people" need not be contemporaneous with the act of engaging. These are all example where matters may occur before the

36. The FTT therefore erred in a law in ruling out resting before carrying out a task for all regulation 4(2A) purposes. Furthermore, it erred in law in failing to show that it had applied the law as set out in *TR*, *CE* and *AE* in explaining why it had assessed that the appellant could "repeatedly" carry out the descriptors under the activities in issue on the appeal. It is important to note in this respect that in paragraph 6 of its Decision Notice the FTT appeared to find that the appellant would need to rest after carrying out PIP activities and before repeating them. That factual finding was not properly worked through or addressed (or explained away) by the FTT in its reasons for its decision or in any properly focused consideration by the FTT on whether the appellant could satisfy the descriptors in issue on the appeal "repeatedly": per regulation 4(2A)(c) of the PIP Regs.

37. It is on this basis that the appeal is allowed.

Within a reasonable time period and resting before the activity

38. As I have suggested above, the correct approach to determining whether the appellant could satisfy (i.e., complete) any of the descriptors in issue on the appeal "repeatedly", may well cover issues around whether the appellant needed to rest before carrying out a descriptor again. The appellant rightly accepts that that need for rest would have to arise from his physical or mental condition. To this extent, whether rest before an activity is undertaken is *also* relevant to whether the appellant could carry out the activity within a reasonable period of time may not matter in fact, or at least matter less. However, the issue of statutory construction has been raised by the FTT when giving permission to appeal. It also needs to be addressed in order to properly direct the new FTT to which this appeal is being remitted on the law.

39. In my judgement, resting before an activity or a descriptor under it is carried out is not part of the time within which the activity (or descriptor) is undertaken. This is for several interlocking reasons.

40. First, I reject the appellant's attempt to argue by analogy with the Upper Tribunal decisions which have addressed other criteria within regulation 4(2A), most notably the decisions which have addressed the "repeatedly test. Those decisions are all in rooted in the particular legislative provision with which they were concerned and are not authority for any wider legal principle about taking account of matters before an activity is undertaken.

41. Second, had it been intended that matters arising before the PIP activities are undertaken should generally be taken into account, such statutory intendment could have been provided for more easily and in clearer language. As I have noted in paragraph 35 above, the potential need to have regard to rest before a PIP claimant repeats the activity or descriptor is because of the requirement of regulation 4(2A)(c) of the PIP Regs. Further, where it has otherwise been necessary to consider actions

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activity is carried out or the descriptor may be satisfied. However, this arises because of the specific wording of particular descriptors.

before a descriptor is satisfied, the legislative text provides for this expressly (see footnote 1 above). No such language appears in regulation 4(2A)(d). Nor does it arise by necessary implication.

42. Third, the statutory language in sections 78(1) and 79(1) the WRA is about measuring the limitations (caused by their physical or mental condition) on a person's ability to carry out the daily living or mobility activities. That is a verb phrase which has its focus on the performance of the task (e.g. "taking nutrition" or "dressing and undressing") rather than steps anterior to the carrying out of the task. It is perhaps noteworthy that the appellant's arguments did not seek to grapple with the statutory language.

43. Fourth, consistently with section 80(1) and (3) of the WRA, assessing the "ability to carry out activities" is the heading to regulation 4 of the PIP Regs. Regulation 4(1) is concerned with whether the claimant has limited or severely limited ability to carry out daily living or mobility activities. Again, this has a statutory focus on the performance of the activities as the means of measuring the claimant's limitation rather than any wider focus.

44. Fifth, the language of regulation 4(2A)(d) is, in my judgement, just as focused on the claimant's ability to perform the activity. What is being assessed is the PIP claimant's ability to **carry out an activity**, and what that involves in terms of the descriptors within an activity is that the claimant will only **satisfy** a descriptor if they can do so **within a reasonable time period**. Logically, the word "within" can only be measured on the basis of a start and end point for satisfying the descriptor. Although regulation 4(4)(c) of the PIP Regs might seem to muddle up the activity and the descriptors under it, it seems tolerably clear that what is meant by "satisfying" the descriptor "within" a reasonable time period is the point at which the descriptor (or activity) is completed. That provides the end point. But it also in my judgement indicates the statutory intendment that the beginning point for measuring the "within" is when the activity or descriptor was started, because an act or activity cannot be completed unless it has been started. What regulation 4(2A)(d) is assessing is whether the PIP claimant can satisfy (and in this particular context this means complete) the descriptor within a reasonable time period. The only sensible means of measuring this, and thus of construing regulation 4(2A)(d) of the PIP Regs, is that it is concerned with measuring the time it takes the PIP claimant to complete the relevant activity or descriptor once they have started to undertake it (i.e., started to carry it out).

45. In answer to the FTT's grant of permission to appeal, the FTT did not err in law in excluding from its consideration the time spent before any relevant PIP activity or descriptor was undertaken in deciding whether the appellant could complete the activity or descriptor within a reasonable time period under regulation 4(2A)(d) of the PIP Regs.

Conclusion

46. However, for the reasons I have given in relation to "repeatedly" under regulation 4(2A)(c) of the PIP Regs, I allow the appeal and give the decision set out above.

Stewart Wright
Judge of the Upper Tribunal

Authorised for issue on 24 July 2025