



Neutral Citation Number: [2025] UKUT 307 (AAC)
Appeal No. UA-2025-000346-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

EW

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

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

Representation:

Appellant: Not represented

Respondent: Helen Hawley, Decision Making and Appeals (DMA) Leeds

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No.: SC147/24/00135

Digital Case No.: 1701171619594988

Tribunal Venue: Leeds (video hearing)

Decision Date: 27 August 2024

SUMMARY OF DECISION

41.1 Personal Independence Payment: general

1. This appeal is mainly about the proper approach to assessing a claimant's ability to carry out the activities contemplated by the descriptors set out in Schedule 1 to the PIP Regulations where the claimant complains of fatigue, and a need for prompting, as a result of a health condition.
2. In this case the First-tier Tribunal decided the claimant experienced fatigue not as a symptom of her health conditions, but rather as a consequence of her working a full-time job.

3. The Upper Tribunal allowed the appeal because the tribunal should have considered the claimant's ability to carry out the relevant activities at the times when it was reasonable for her to carry them out. It was reasonable for the claimant to go out to work, and where it was reasonable for the claimant to carry out an activity having completed a day's work, her ability to do should be assessed on that basis. **TR v SSWP** [2016] AAC 23, **AE v SSWP** [2024] UKUT 381 (AAC) and **GG v SSWP (PIP)** [2016] UKUT 0194 (AAC) followed.

Please note that 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

As the decision of the First-tier Tribunal involved the making of an error of law, it is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (the "**2007 Act**") and the case is **REMITTED** to the First-tier Tribunal under section 12(2)(b)(i) for rehearing before a differently constituted panel.

DIRECTIONS FOR THE REHEARING

1. The First-tier Tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
2. The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 27 August 2024.
3. In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: **R(DLA) 2 & 3/01**.
4. If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction 3 above).
5. The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.

REASONS FOR DECISION

What this appeal is about

4. This appeal is mainly about the proper approach to assessing a claimant's ability to carry out the activities contemplated by the descriptors set out in Schedule 1 to the PIP Regulations where the claimant complains of fatigue, and a need for prompting, as a result of a health condition.
5. In this case the First-tier Tribunal decided the claimant experienced fatigue not as a symptom of her health conditions, but rather as a consequence of her working a full-time job.
6. The Upper Tribunal allowed the appeal because the tribunal should have considered the claimant's ability to carry out the relevant activities at the times when it was reasonable for her to carry them out. It was reasonable for the claimant to go out to work, and where it was reasonable for the claimant to carry out an activity having completed a day's work, her ability to do should be assessed on that basis. *TR v SSWP* [2016] AAC 23, *AE v SSWP* [2024] UKUT 381 (AAC) and *GG v SSWP (PIP)* [2016] UKUT 0194 (AAC) followed.

Background

7. The Appellant (to whom I will refer as the "**claimant**") made a claim to a Personal Independence Payment ("**PIP**") by telephone on 4 May 2023. On 3 June 2023 the claimant provided the Secretary of State with a completed PIP2 questionnaire and evidence in support of her claim to experience difficulties with both daily living and mobility activities. The claimant participated in a face to face consultation with a healthcare professional on 23 August 2023, who reported to the Secretary of State recommending the award of 4 points for daily living activity 9(c), but no other points under any other descriptor in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the "**PIP Regulations**"). On 3 September 2023 a decision maker for the Secretary of State decided that the claimant scored 4 points in respect of daily living descriptor 9(c) and no points in respect of any other daily living or mobility descriptors, and was therefore not entitled to any award of PIP from 4 May 2023 (the "**SoS Decision**").
8. The claimant didn't agree with the SoS Decision and requested a mandatory reconsideration. However, the SoS Decision was confirmed on reconsideration and the claimant appealed to the First-tier Tribunal.
9. On 27 August 2024, a three member panel of the First-tier Tribunal (the "**Tribunal**") convened in Leeds to hear the appeal as a video hearing. Having heard evidence and submissions, the Tribunal dismissed the claimant's appeal and confirmed the SoS Decision (the "**FtT Decision**").

The permission stage

10. The claimant sought permission from the First-tier Tribunal to appeal to the Upper Tribunal on several grounds, but on 26 February 2025 District Tribunal Judge Ward refused permission to appeal.
11. The claimant then exercised her right to apply to the Upper Tribunal for permission to appeal and the matter came before me. I allowed the application.

12. In my grant of permission (which was addressed to the claimant) I said:

“6. Your representative, Mrs Woodhall, has raised concerns about the Tribunal’s decision-making in relation to the daily living activities of preparing food (activity 1), communicating verbally (activity 7), and making budgeting decisions (activity 10). She also criticises the Tribunal’s decision-making in relation to the first mobility activity.

7. Where the Tribunal explains its reasons for scoring your ability to carry out the daily living activities as it did (see in particular paragraphs 13 and 15 of its statement of reasons), the Tribunal appears to accept that you are restricted as a result of fatigue, but reasons that your fatigue results from your working full-time as an IT support technician rather than as a result of any health condition. It appears to have based its decision not to award any points for a need for prompting in relation to daily living activities on the fact that you have sufficient motivation to attend work for 37.5 hours a week, and it appears to have inferred from this that you would also have sufficient motivation to carry out your activities of daily living independently. I consider that its decision-making in this regard may involve an error of law.

8. In particular, its decision-making may not be consistent with the approach taken by Judge Hemingway in **TR v SSWP** [2016] AAC 23, and followed by Judge Stout in **AE v SSWP** [2024] UKUT 381 (AAC): when assessing a claimant’s ability to carry out an activity, the claimant’s ability must be assessed at a time of day when it is reasonable for them to carry it out, and in the context that the claimant will have spent their day doing activities that it is reasonable for them to have undertaken. As Judge Stout explained in **AE v SSWP** at §15:

“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.

9. I am persuaded that it is at least arguable that the FtT Decision involves errors of law and that those potential errors may have been material in the sense that, had they not been made; the outcome could have been different. This warrants a grant of permission to appeal to the Upper Tribunal. My grant of permission is unrestricted.”

The positions of the parties

13. Ms Hawley provided careful and detailed submissions on behalf of the Secretary of State supporting the appeal on the basis that the FtT Decision was in error of law for the reasons identified as arguable in the grant of permission. I was invited to set the FtT Decision aside and remit the matter to be reheard by another tribunal.

14. The claimant had no further comment to make in the light of the Secretary of State’s submissions.

15. Given the degree of agreement between the parties, I decided that the interests of justice did not require an oral hearing.

Why I have allowed this appeal

16. At the permission stage I had to be persuaded only that it was *arguable* that the Tribunal erred in law in a way that might have been material. At this stage the appeal can succeed only if I am persuaded that it did indeed err, and its error was material.
17. The claimant has a number of health conditions, which include autism spectrum disorder (“**ASD**”), attention deficit hyperactivity disorder (combined type) (“**ADHD**”), social anxiety, depression, complex post-traumatic stress disorder (“**PTSD**”), and dissociative episodes. She is prescribed Elvanse 50mg daily to help with the symptoms of her ADHD and Sertraline 50mg daily to help manage the symptoms of her anxiety and depression. In both her PIP2 questionnaire and her appeal form (on appeal to the Tribunal) the claimant reported difficulties with undertaking various daily living and mobility activities due to the impact of her physical and mental health conditions.
18. While the Tribunal appears to have accepted that the claimant experiences fatigue, it concluded that her fatigue was not related to a health condition but was instead due to her working full-time as an IT support technician (see paragraph 14 of the Tribunal’s statement of reasons).
19. The Tribunal’s rationale appears to be that if the claimant is sufficiently motivated to work 37.5 hours per week then she should also be sufficiently motivated to undertake the daily living activities of PIP, and would not require prompting in order to do so (paragraph 15 of its statement of reasons).
20. The Tribunal does not appear to have considered the guidance provided at paragraph 7 of the decision in **GG v SSWP (PIP)** [2016] UKUT 0194 (AAC), which states:

“7....The mere fact that a claimant might be sufficiently motivated to perform a task when there is specific or unusual impetus to do so does not, of itself, inform as to the overall position and the generality of the situation. So, it is not appropriate to limit the scope of the enquiry to such days. True an ability to perform a task without prompting when there is particular pressure to do so might be indicative of a claimant simply exercising a choice not to perform such a task on impetus absent days but that will not necessarily follow. What has to be undertaken is a more general and all-encompassing consideration. So, there needs to be an assessment, in such cases, of why it is that, on days when a claimant does not perform certain tasks, he/she does not do so. If it is because, without any specific impetus, he/she is not motivated to do so as a result of health difficulties and that such days exist for more than 50% of the time in the relevant assessment period, then absent other pertinent considerations, the relevant descriptor or descriptors will apply. That was not this tribunal’s approach, and I conclude that, in consequence, it did err in law.”
21. The Tribunal has not grappled within its decision notice or statement of reasons with the claimant’s evidence in her PIP2 questionnaire form (at pp.15-19) and in her grounds of appeal (at pp.4-5) where she details her difficulties with motivating herself due to her mental health difficulties and the impact and effects that her ASD and ADHD also has on her mental health and motivation when undertaking the daily living activities of PIP. The claimant reports relying on prompting from friends to help her with day-to-day activities. The Tribunal was not bound to accept this

evidence but given how central it was to the issues in the appeal it was obliged to explain what it made of the evidence and, if it rejected that evidence, to explain why it evaluated it as it did.

22. Given the Tribunal's acceptance that the claimant experiences fatigue, further findings were required regarding the impact and effect that the claimant's fatigue and lack of motivation had upon her day-to-day life and her ability to undertake the activities contemplated by the Schedule 1 descriptors. The Tribunal's findings are insufficient to support its conclusion that the claimant did not require prompting from another person in order to undertake the daily living activities of PIP to the standard required by regulation 4(2A) of the PIP Regulations.
23. In my grant of permission I said that the Tribunal's decision making may not have been consistent with the approach commended by Judge Hemingway in **TR v SSWP** and followed by Judge Stout in **AE v SSWP**. Applying the threshold applicable to a substantive appeal, I now find that the Tribunal did indeed err in law in its decision making, which was not consistent with **TR v SSWP** or **AE v SSWP**.
24. The First-tier Tribunal should have considered the claimant's ability to carry out the relevant activities at the times when it was reasonable for her to carry them out. PIP is a benefit that is available to people who work. It was reasonable for the claimant to continue to work despite her health difficulties. Where it was reasonable for the claimant to carry out an activity after having completed a day's work, her ability to carry out that activity should be assessed on that basis.

Disposal

25. Having decided to set aside the FtT Decision under section 12(2)(a) of the 2007 Act I have a discretion whether to remit the matter to the First-tier Tribunal for redetermination, or to remake the decision for myself.
26. Because further facts need to be found, and because the First-tier Tribunal with its expert members is best place to hear and evaluate the evidence, the appropriate disposal is for me to remit the matter to be determined afresh by a panel of the First-tier Tribunal.

Thomas Church
Judge of the Upper Tribunal

Authorised by the Judge for issue on 12 September 2025