



**Neutral Citation Number: [2024] UKUT 450 (AAC)
Appeal No. UA-2024-000064-PIP**

RULE 14 Order:

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Appellant in these proceedings.

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

BC

Appellant

- v -

Secretary of State for the Department of Work and Pensions

Respondent

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

Representation:

Appellant: Unrepresented

Respondent: Mr Denis Edwards, Counsel

On appeal from

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: SC154/23/00620

Tribunal Venue: Sutton (telephone hearing)

Decision Date: 3 July 2023

SUMMARY OF DECISION

Assessment of Functional Impairment and the Definition of “Aid” Under the Social Security (Personal Independence Payment) Regulations 2013

The decisions in *CW v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 197 (AAC) and *AP v SSWP* [2016] UKUT 0501 (AAC) do not establish that the ‘normality of behaviour’ is determinative of whether a device qualifies as an aid. Nor do they support a principle that a claimant cannot demonstrate functional impairment merely because the device used is also commonly employed by individuals without

impairments. Such an approach would unduly narrow the scope of what may constitute an aid and would be inconsistent with the statutory definition.

The regulations define an aid as ‘any device which improves, provides or replaces a claimant’s physical or mental function.’ The use of the word ‘any’ reflects the breadth of the definition, focusing not on the nature of the device itself, but on its functional role in assisting the claimant to perform the relevant descriptor task.

Accordingly, bath handles, though forming part of the bath structure and commonly present in many households, can constitute an aid where they are used to overcome a functional impairment. I am satisfied that where a claimant has evidenced a physical condition, and established that, but for the bath handles, he could not get into or out of a bath, the handles meet the definition of an aid. That is because they are a device which operates to overcome the functional impairment in question. The fact that the handles are part of the bath itself and that individuals without functional impairments also use them is an unnecessary distraction.

The central issue remains the assessment of the claimant’s level of disability in performing the descriptor task, and the identification of any device that is, or could be, used to mitigate the functional limitation.

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 3 July 2023 under SC154/23/00620 was made in error of law. Under section 12(2)(a) and (b)(i) 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 the following directions.

Directions

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

2. The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.
3. The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.
4. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS

The issues on this appeal

1. The Respondent in support of this appeal, adopts four of the five grounds upon which leave was granted. However, difficulty has arisen concerning PIP activity 4 (washing and bathing) in the following two respects:
2. First, whether a device can constitute an aid as defined in Social Security (Personal Independence Payment) Regulations 2013 (“the Regulations”), in circumstances where the device is a structural feature of the bath (i.e. bath handles). Does *CW v SSWP (PIP)* [2016] UKUT 197 (AAC) establish as a matter of general principle that any device which is normally used to carry out a function cannot constitute an aid. In this case, the Respondent invites the Upper Tribunal to conclude that fixed bath handles cannot constitute an ‘aid’

because they assist everyone getting into and out of a bath, not just those who have a functional limitation which prevents or limits them doing so.

3. Secondly, does an aid used by the claimant to get into or out of a bath (a grab rail), have the consequence of adapting a bath or shower? If the aid adapts the bath or shower, should it be discounted when assessing whether the claimant requires assistance to get into or out of an un-adapted bath (activity 4e)?
4. I am grateful to the Respondent for the supplementary submissions which are directed to the above issues.

The general scheme of the Welfare Reform Act 2012 and the Social Security (Personal Independence Payment) Regulations 2013

5. PIP is dealt with in Part 4 of the Welfare Reform Act 2012 (“the Act”). Section 77 introduces the allowance and establishes that a person may be entitled to one or both of its two components, namely “the daily living component” and “the mobility component”. Sections 78 and 79 of the Act set out the entitlement to PIP, providing that each component can be paid at one of two rates: at a standard rate for those with ‘limited ability’ or at an enhanced rate for those with ‘severely limited ability’.
6. Section 80 of the Welfare Reform Act 2012 provides that the question of ‘whether a person’s ability to carry out daily living activities or mobility activities is limited by the person’s physical or mental condition’ is to be determined in accordance with regulations.
7. Daily living activities are prescribed in the Social Security (Personal Independence Payment) Regulations 2013 (“the Regulations”) at Sch.1, part 2 and the mobility activities are prescribed at Sch.1, part 3 of the regulations. The tables for both components list the prescribed activities. Column 2 focuses on the ability of the claimant to carry out each activity on an ascending scale ranging from the ability to carry out the activity unaided to being unable to carry out the activity. Column 3, attributes points, according to the level of ability

measured in the descriptors; the greater the functional impairment of the claimant to carry out the activity the greater the number of points awarded.

8. The ascending descriptors measure whether the functional impairment to undertake the prescribed activity can be improved or overcome using an aid or appliance, supervision or prompting or assistance (as defined below). The lack of an ability or limited ability to carry out an activity must arise from a mental or physical cause. Physical will mean anything connected, with the claimant's bodily function including experiencing sensation such as pain, breathlessness or dizziness, while mental, includes any mental health condition, or intellectual or cognitive impairment (see *MR v SSWP (PIP)* [2017] UKUT 86 (AAC)).
9. Regulation 5 provides that the points attributed for each daily living are to be added together and, if the total is at least 8 but less than 12, the claimant has a "limited ability to carry out daily living activities," and is entitled to the standard rate. If the claimant has a total of 12 points or more, they will be classed as having "severely limited ability" and would be entitled to the enhanced rate. The above applies equally to mobility activities.

Interpretation under Regulation 2, Schedule 1, Part 1 of the Social Security (Personal Independence Payment) Regulations 2013

'Aid or appliance'

10. So far as it is material, an aid or an appliance means 'any device which improves, provides or replaces [your] impaired mental or physical function; and includes a prosthesis.'
11. Upper Tribunal Judge Jacobs, in *CW v SSWP (PIP)* [2016] UKUT 197 (AAC), said at 24:

Aid or appliance is defined by reference to whether it improves, provides or replaces the claimant's impaired *function*, *which* for convenience I describe as assisting in overcoming the consequences of a function being impaired. Putting all that together, an aid must help overcome

consequences of a function being impaired that is involved in carrying out an activity and is limited by the claimant's condition. To satisfy an aid or appliance descriptor, the claimant must need an aid to assist in respect of a function involved in the activity that is impaired.

12. In *CW*, Judge Jacobs analysed the reasoning of Judge Mark in *NA v SSWP (PIP)* [2015] UKUT 572 (AAC). As material to the issues in this appeal, Judge Mark said:

10. There is no definition of 'device'. The representative of the Secretary of State has drawn attention to the definition in the 6th edition of the Concise Oxford English Dictionary, 1975, as a 'contrivance, invention, thing, adapted for a purpose or designed for a particular function'. She also points out that it could be argued that a bed or chair are things invented and made for particular purposes or functions, but that it would be 'unusual and outside of normal English language and usage to describe a "bed" or a "chair" as a "device" or refer to it as "an aid" or "an appliance".' A perching stool or a bath or shower stool, she submits, are devices specifically for the purposes for which the claimant uses them, but that is not the purpose or function of a bed or chair, and they do not become devices and therefore aids because they are incidentally sat on, or used to rest one's foot on while dressing or undressing.

11. I am not clear why the definition in the 1975 Concise Oxford English Dictionary should be regarded as determinative with or without the qualification of what is usual or within normal English usage. The current Oxford English Dictionary includes various definitions of device, some of which are purely abstract. The expression must be construed here in the context of a person with an impaired physical or mental function which prevents them from undertaking certain activities without taking special measures to compensate for the impaired function. I note in this context that certain of the mobility descriptors refer to the need for an orientation aid. This is defined as a specialist aid designed to assist disabled people to follow a route safely. The reference to a specialist aid clearly indicates

that in general aids do not have to be specialist aids such as perching stools and shower stools.

12. It is unnecessary for me to determine exactly which forms of compensation may count as a device for that purpose. However, I cannot see why it should matter, if he or she cannot stand to prepare the meal in the usual way, whether a claimant uses a perching stool, improvises with a bar stool, or prepares the meal sitting at a table, either in an ordinary chair or in a wheelchair. The question is not whether other people might choose to sit to do all or some of the work but whether the claimant is unable to do so without sitting or perching provided that the sitting or perching replaces the claimant's impaired physical ability to stand. So too, it should not matter whether the claimant is using in the shower a special shower stool or is improvising with a garden chair. Any other conclusion would mean that tribunals would have to investigate, whenever perching stools or shower stools were used because the claimant could not stand, whether the claimant really needed them or whether they could cope with some other object such as an ordinary stool or chair. I do not consider that that degree of precision is required, or was contemplated by Parliament, by the word 'device' in the definition of 'aid or appliance'.

13. Another example may be with taking medication. I do not see why a device for taking medication has to be a physical object that is constructed for that purpose. The alarm system on a mobile phone could be set to go off at regular intervals during the day to remind the claimant to take medication so long as that improves, provides or replaces their impaired mental function.

14. So too with dressing and undressing, the question is not whether other people might choose to use a chair or a bed to assist when dressing or undressing, but whether a claimant is unable to dress or undress without using them or some other qualifying aid or appliance. I therefore conclude that the claimant did score 2 points under descriptor

6(b) 'Needs to use an aid or appliance to be able to dress or undress' and therefore scored a total of 8 points in respect of daily living activities and was entitled to an award at the standard rate of the daily living component of PIP."

13. Judge Jacobs observed at [29]:

This case raises the issue of an aid in the context of an activity that can be performed in a variety of ways by using different functions, even by people with no limitation. So, although it is possible for someone with no limitation to dress entirely while standing, many nonetheless sit for part of the time as a matter of convenience.

14. He goes on at [31] - [33] to conclude:

The claimant's entitlement depends on the extent to which they are limited in carrying out the everyday activities specified. That is what the legislation provides. It does not provide for entitlement if the claimant is only limited in carrying out the activity in a particular manner. This provides a focus for avoiding the extreme example I have just considered and for giving proper significance to the role that function plays in the definition of an "aid or appliance". The question is this: would this "aid" usually or normally be used by someone without any limitation in carrying out this particular aspect of the activity? If it would, the "aid" is not assisting to overcome the consequences of an impaired function that is involved in the activity and its descriptors. So, using an ordinary wooden spoon to stir hot food while it is cooking is using an "aid" in the everyday sense of the word, but it would not assist in overcoming the consequences of any loss of function, because it would be used anyway. But if the spoon had a special handle for someone with poor grip, it would be an aid for the purposes of activity 1 (preparing food). Gripping is a function involved in cooking and the use of a handle that improves grip makes the spoon an aid.

There is a difference between a person with has no limitation but who uses a spoon to stir hot food and one who uses a chair or a bed to sit during dressing. In the former case, it is not a matter of choice; no one stirs hot food with their fingers. In the latter case, it is a matter of choice or convenience, as it is possible for someone with full function to dress without sitting. They are, though, also similar in that they are both usual or normal ways of performing the activity. By employing them, the person is not demonstrating a limitation with the functions that are required for that aspect of the activity. Rather, the person is demonstrating a limitation with one manner of carrying out that aspect of the activity.

In summary, entitlement to a personal independence payment depends on the claimant having a condition that limits their ability to carry out particular activities. The need to use an aid is a measure of the extent of that limitation. Whether something is an aid depends on whether it assists in overcoming the consequences of a function being impaired in the carrying out of that activity. That function must be one that is required in order to carry out the particular aspect of an activity, not merely one of a range of functions that could be employed.”

15. In *AP v SSWP* [2016] UKUT 0501 (AAC), Judge Markus KC, endorsed the decision in *CW* observing at [18]:

The activities in Schedule 1 to the Regulations can be performed in a variety of ways. Dressing and undressing is no exception. A person who has little or no choice as to the manner in which they can carry out an activity but who can do it nonetheless, is not limited in doing so. I respectfully agree with Judge Jacobs’ reasoning at paragraph 31 and 32 of *CW*. Otherwise a claimant who can eat sitting down but needs an aid or assistance to eat standing up would qualify for points under activity 2, and a claimant who can sit in a bath but needs an aid or assistance to lie down in it would qualify for points under activity 4. Once that is understood, it can be seen that what is usual or normal is both a relevant and a necessary consideration. It provides the limits for what a claimant

can be expected to do and not to do (see Judge Jacobs' example at paragraph 30 of his decision) in order to undertake an activity.

16. She goes on to observe at [23] that:

CW is not inconsistent with Judge Mark's analysis in NA. His observation at paragraph 4 that it was irrelevant what other people might choose to do was made in the context of addressing the question whether an ordinary every day object could be an aid. In that context, it did not matter that such objects may be used by non-disabled people as a matter of choice. He was not focussing on the question of connection which arose in CW and arises here and so did not need to analyse the functions involved in the activity. For the reasons explained in CW and supplemented here, different considerations apply when deciding whether a person is able to perform the functions involved in an activity.

17. Regulation 4 provides that a person's ability to carry out an activity is to be assessed whilst wearing or using any aid or appliance that the person normally uses or could be reasonably expected to wear or use.

Supervision, prompting and assistance

18. Supervision, prompting and assistance is defined as follows:

"supervision" means the continuous presence of another person for the purpose of ensuring safety; "prompting" means reminding, encouraging or explaining by another person; and "assistance" means physical intervention by another person and does not include speech.

Regulation 4(2A) of the Social Security (Personal Independent Regulations) 2013

19. The Tribunal in its assessment of whether the aid or appliance, supervision, prompting or assistance ameliorates the functional impairment to carry out the activity, must draw into its analysis, Regulation 4(2A) of the Social Security

(Personal Independent Regulations) 2013 (see *NA v SSWP (PIP)* [2015] UKUT 572 (AAC)).

20. Regulation 4(2A) of the 2013 Regulations provides:

“(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;
- (d) within a reasonable time period; ...

Regulation 4(4) defines these concepts as follows:

- (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 provision under consideration in the present case

21. So far as it is material to the unsupported ground of appeal, Activity 4 (Washing and bathing) in the table provides:

Column 1 Activity	Column 2 Descriptor	Column 3 Points
4.Washing and bathing:	a. Can wash and bathe unaided.	0
	b. Needs to use an aid or appliance to be able to wash or bathe.	2
	c. Needs supervision or prompting to be able to wash or bathe.	2
		2

	d. Needs assistance to be able to wash either their hair or body Below the waist.	3
	e. Needs assistance to be able to get in and out of a bath or shower.	4
	f. Needs assistance to be able to wash their body between the Shoulders and waist.	8
	g. Cannot wash and bathe at all and needs another person to wash their entire body.	

22. Schedule 1, Part 1 defines the term ‘bathe’ in this activity as:

“bathe” includes get into or out of an unadapted bath or shower.

23. There is no definition of unadapted bath in the regulations. In *SP v SSWP (PIP)* [2016] UKUT 190 (AAC), Judge Rowley said this about ‘unadapted bath’ as provided in descriptor 4e:

“17. There is no express indication in descriptor 4e as to whether the assessment should be of a claimant’s ability to get in or out of an unadapted bath or shower.

18. The version of the descriptors which appears in the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) was not that which was originally drafted. The activity in the draft immediately preceding the regulations was headed “bathing and grooming,” and the concomitant descriptor to what is now 4e was in these terms: “needs assistance to bathe”. Following consultation, the structure and title of the activity and its descriptors

were changed to the way in which they appear in the Regulations. In particular, the word “bathe” does not appear in descriptor 4e.

19. That history may serve to explain why “bathe” is defined in Schedule 1 as: “includes get into or out of an unadapted bath or shower;” but there no reference in descriptor 4e as to whether the bath or shower is an unadapted one. Rather, the descriptor simply asserts that claimant must need assistance to be able to get in or out of “a” bath or shower.

20. Be that as it may, Ms Walker submits that, in line with the spirit of the activity, the bath or shower referred to in descriptor 4e must be an unadapted one. It is, she says, clear from the description of the activity and definition of “bathe” that the activity in general is assessing the actions involved in a standard bathroom.

21. Adopting a purposive approach, I accept Ms. Walker’s submission. A claimant’s functional abilities should be considered in relation to whether they need assistance to be able to get in or out of an unadapted bath or shower. “

The context in which the present issues arise

24. The Appellant, born on 20 November 1965, made a claim for Personal Independent Payment (“PIP”) on 20 June 2022. He was 56 years old at the date of the decision under appeal (20 June 2022). His medical conditions were recorded as essential hypertension, non-diabetic hyperglycaemia, bronchiectasis, benign prostatic hyperplasia, and chronic kidney disease stage 3.
25. The Respondent had awarded nil points for both components of Personal Independent Payment (“PIP”).
26. The Appellant was assisted at the FtT appeal hearing by his support worker, who also gave evidence.
27. The daily living activities in issue before the FtT were:

- Activity 1: preparing food
- Activity 2: taking nutrition
- Activity 3: managing therapy or monitoring a health condition
- Activity 4: washing and bathing
- Activity 6: dressing and undressing
- Activity 9: engaging with other people face-to-face
- Activity 10: making budgeting decisions

28. Mobility activity 2 was also an issue before the FtT.

The Findings of the First-tier Tribunal

29. The FtT allowed the Appellant's appeal to the extent that he was entitled to standard rate for the mobility component, satisfying mobility descriptor 2c '*can stand and then move unaided more than 20 metres but no more than 50 metres*'. For the daily living activities, he scored 2 points for 4b (washing and bathing) and 2 points for 6b (dressing and undressing) and therefore was below the threshold for entitlement to the daily living activities component of PIP.
30. Central to the FtT's reasoning for awarding the Appellant the above points, was his experience of breathing difficulties and breathlessness (see [21-24],[29] and [33] of the Statement of Reasons "SoR"). The FtT had before them medical evidence from a Consultant Chest Physician dated 27 June 2023, which confirmed that at the material time (20 June 2022), '*[BC] is a gentleman who was treated for pulmonary tuberculosis at [C] University Hospital in 2019. He completed treatment but has been left with very marked scarring in both lungs, with the right upper lobe almost completely destroyed.*'

The Appellant's Grounds of Appeal

31. The Appellant appealed the decision of the FtT. The nub of his challenge was the alleged failure of the FtT to consider the functional impact of his chronic kidney disease (swelling of extremities) on his ability to carry out the PIP activities. FtTJ King refused permission, identifying that the FtT had referred to this condition and his urinary urgency ([6], [9] of the SoR). Judge King observed

that the Appellant did not set out in his claim or in evidence that the swelling caused functional impairment.

Grant of Permission to Appeal

32. In my decision to grant permission to appeal (20 February 2024), I adopted Judge King's reasons for refusing permission to appeal on the ground pleaded. However, in the exercise of my own inquisitorial function, I was satisfied at the permission stage that the FtT arguably did err in law for reasons I summarise from my PTA decision, which were five-fold:
33. First, the FtT arguably failed to adequately consider Regulation 4(2A) when reaching findings on daily living activities 1 (preparing food), 4 (washing and bathing) and 6 (dressing and undressing) and mobility activity 2 (moving around). Secondly, the FtT failed to adequately consider 4e (requires assistance to get into or out of a bath or shower), in circumstances where the aid arguably adapted the bath (grab rail) and therefore should not have been taken into account. Thirdly, the FtT arguably failed to identify which aids could improve, provide or replace the Appellant's impaired function to dress and undress and give reasons explaining how the aid(s) did this. The fourth and fifth grounds can be taken together, the FtT arguably failed to consider material evidence when rejecting his evidence that he had trouble swallowing and making budgeting decisions.
34. It is only the second ground which is unsupported by the Respondent.

The Secretary of State's argument on the unsupported ground of appeal

35. The Respondent submits that the relevance of an aid or an appliance is directed only to whether it enables the individual to carry out an activity that they otherwise could not carry out. In so far as a feature such as handles on a bath, is present and could assist any person, irrespective of functional impairments, it could not constitute an aid or appliance for the purposes of the regulations, *CW v Secretary of state for Work and Pensions*_(PIP) [2016] UKUT 197 (AAC) relied upon at [31]-[33]:

36. Further, it was submitted that an ‘aid’ or ‘appliance’ which is used in the act of bathing or showering is not relevant to the definition of the bath or shower itself. Aids and appliances which are used in the act of bathing or showering assist a person with a limitation in performing the activities but have no implications for the structure of the bath or shower. The Respondent goes on to identify a variety of aids and appliances commonly used to enable a person to carry out the activity of washing and bathing, which are not and do not become permanent features of the bath (i.e. bath board, bath chair etc). Specifically, that a handrail attached to the wall above a bath or near it, or on the wall of a shower cubicle, does not adapt the structure of the bath or shower. Therefore, the question of whether the aid adapts the bath or shower does not arise.
37. The Respondent submits that when assessing a claimant’s ability to carry out all the descriptors within activity 4, in all cases, this will be measuring the claimant’s ability when using a standard, or ‘unadapted’ bath or shower. The Respondent observed that this submission is consistent with the analysis in *SP* and the PIP Assessment Guide for descriptor 4e. In circumstances where a claimant can only get into or out of a bath or shower using an aid or appliance, they will be awarded 2 points under 4(b). If an aid or appliance does not enable a claimant to get into or out of an unadapted bath, it is only at this juncture that consideration needs be given to whether assistance is required for them to do so. The latter reflecting a higher level of need, leading to an increase in points awarded.

Analysis and Reasons

Unsupported ground of appeal - Activity 4 Washing and bathing

What constitutes an ‘aid’

38. As Lord Upjohn observed in *Customs and Excise Commissioners v Top Ten Promotions Ltd* [1969] 1 WLR 1163, at 1171:

“It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look up examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies

definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament." [underlining added]

39. The purpose of the PIP legislative framework was stated by counsel for the Respondent in *MR v SSWP* (PIP) [2017] UKUT 0086 (AAC) at [40]:

"40. She referred to the Explanatory Memorandum to the PIP regulations, at paragraph 4 in particular, in which it is said that the new benefit is 'designed to help disabled people meet the additional costs arising from a long-term health condition or disability'.

40. The Respondent's submits that '[i]n so far as a feature is a structural characteristic of a bath which assists everyone, including people without a limitation, for example, handles on a bath, they are not aids or appliances for the purposes of the regulations because they do not assist only persons with a limitation on their functions.' In short, if a device assists everyone, a person cannot be said to be functionally impaired if they use that device when carrying out of the task. I do not accept this as a blanket proposition.
41. First, *CW* does not establish as a blanket principle that if a device is commonly used by non-disabled and disabled persons alike it cannot constitute an aid for the purposes of the regulations. That is an impermissible overstatement of what *CW* decided.
42. Judge Jacobs did not depart from the analysis of Judge Mark in *NA*. Judge Jacobs observed that an everyday object could constitute an aid provided the 'connection argument' is met. In short, the device is considered in conjunction with what it enables (i.e. that by using the device the claimant overcomes the functional impairment, which would otherwise prevent or limit the individual from carrying out the prescribed task).

43. It is axiomatic that if an object is an 'everyday' object it is likely to be used by the functionally impaired and non-functionally impaired alike. What Judge Jacobs held in *CW* was that an individual who sat on a bed rather than stood to get dressed, was unable to demonstrate 'a limitation with the functions that are required for that aspect of the activity. Rather, the person is demonstrating a limitation with one manner of carrying out that aspect of the activity.' This point was reiterated by Judge Markus KC in *AP*.
44. However, it will be recalled that Judge Jacob also referred in his analysis to items operating as an aid for a disabled person such as a shoehorn (see [26]). This being a common everyday item, used by those both with and without functional impairments. However, in respect of the latter it can improve, replace or provide for a functional impairment when attempting to put on a pair of shoes.
45. The cautionary observation as *Social Security Legislation 2024/25, Volume I: Non-Means Tested Benefits* (hereafter 'Volume I') at p.889 is apt and bears repeating:

There is a danger that, in focussing on the normality of behaviour in using devices, the point of the PIP Activities and Descriptors may be lost.

46. I do not read either *CW* or *AP* as intending or purporting that 'normality of behaviour' should be the cornerstone of determining whether a device constitutes an aid or not. Nor did the decisions establish as point of principle that an individual will inevitably fail to establish a functional impairment exists when carrying out a descriptor task, if the device they use to do so, is also commonly used to carry out the same task by persons who have no functional impairment. This would render a significant number of 'everyday' devices incapable of constituting an aid and would be inconsistent with the language of the definition itself.
47. The regulations define an aid is 'any device which improves, provides or replaces a claimant's physical or mental function.' [underlining added]. The descriptor task directs the decision maker to consider whether the PIP claimant

'needs to use an aid or appliance' to carry out the descriptor task. The definition of 'aid' adopts unrestrictive language in respect of the device itself, by the use of the term 'any'. The restriction or limitation within the definition is directed not at what the device is, but what it does for the PIP claimant, i.e. does it improve, replace or provide for the impaired functioning to undertake the descriptor task.

48. For the purposes of this ground of challenge, I am concerned with activity 4 (washing and bathing). The starting point is what does the task descriptor require of the individual (getting into and out of the bath) and what specific functioning is required to achieve this, the movement of a person outside of the bath, into the bath and thereafter the person moving from inside of the bath to outside of the bath.
49. Following the Respondent's submission to its logical conclusion, it begins with the uncontroversial proposition that activity 4 concerns the use of standardised furniture when assessing whether function is impaired when carrying out the descriptor tasks. I observe at this point that some standardised models of baths may come with fixed handles, and some may not. The Respondent accepts that where a PIP claimant has a standardised bath without any bath handles, and he needs some form of handle(s) to get into and out of the bath (i.e. a grab handle) that handle would constitute an aid (see [29] of supplementary submission). However, on the Respondent's submission, if a claimant's bath already has fixed handles, they could not constitute an aid assisting him getting into and out of the bath, even in circumstances where he would be unable to carry out the activity without using them. The rationale given for this is because persons without functional impairments would also use these handles to get into and out of the bath where they are affixed to the bath.
50. First, this approach leads to an irrational differentiation. The fact that functionally impaired and those without functional impairments alike may use fixed bath handles to step into and out of a bath should not operate as distraction from the core question of why the person with a stated functional impairment is using the bath handles.

51. Secondly, as stated above by their very nature every day devices will be used by people irrespective of any functional impairment. As *NA* illustrates everyday devices can operate as an aid. The Respondent's submission therefore is inviting a too restrictive interpretation on the definition of aid as to exclude any such everyday devices. I do not consider that the ratio in *CW* went that far. It may well be that where a PIP claimant relies on their use of a common everyday device as evidence of functional impairment it may have limited or no value in establishing that function impairment (see the wooden spoon analogy in *CW*). However, that remains a question of fact for the Tribunal exercising its inquisitorial function and assessing all the evidence before it.
52. I am satisfied that where a claimant has evidenced a physical condition, and established that, but for the bath handles, he could not get into or out of a bath, the handles meet the definition of an aid. That is because they are a device which operates to overcome the functional impairment in question. The fact the handles are part of the bath itself and that individuals without functional impairments also use them is an unnecessary distraction. The core issue remains which is understanding and measuring the level of the claimant's disability when carrying out a descriptor task and what, if any, device is or can be used to overcome it.

Aids and Unadapted Bath or Shower

53. To put it shortly the Respondent's submission is that an 'aid' cannot adapt a bath for the purposes of activity 4b. As observed by the Respondent there is no definition in the regulations of what 'unadapted' means. I can see the attraction in that submission given the task in question is whether a person needs an aid to get into and out of an 'unadapted bath'. However, whether a specific aid, when employed, consequently modifies a bath or shower, thus adapting that standard bath is a question of fact. Some aids may adapt the bath, and some may not.
54. However, the fact that an aid has the result of adapting a bath is immaterial to the assessment of activity 4 descriptors. The starting point for descriptor task 4b is that the bath is unadapted, what then follows is the question whether the

PIP claimant needs an aid to get into and out of that bath. If the claimant needs an aid to get into and out of the bath he is entitled to 2 points. The fact that the introduction of the aid, as a matter of fact, has the result of adapting the bath, is inconsequential for the purposes of assessing 4b in the light of the approach as set out at the beginning of this paragraph.

55. The descriptors for activity 4 are in ascending order of need. It is only necessary to consider whether a person requires supervision, prompting or assistance to get into and out of a bath, activity 4c and 4e respectively, if the claimant is unable to do so with either an aid or appliance (4b). For reasons provided above, the starting position is the bath is unadapted and even if an individual requires an aid in conjunction with supervision, prompting or assistance to be able to carry out the descriptor tasks, the same staged process applies for the purposes of assessing 4c and 4e (see above).

As applied to the facts as found in this appeal

56. In the light of my analysis above no error of law arises from the FtT's failure to consider whether the proposed grab handle rendered the bath adapted for the purpose of assessing 4e. As set out above, I am satisfied that even where the result of using an aid is that it adapts the bath, this is immaterial to the consideration of activity 4 descriptors.
57. Judge Markus KC considered Regulation 4(2A) in *PS v SSWP* [2016] UKUT 0326 (AAC):

11. What the Appellant was saying in his written and oral evidence was that he suffered pain when he walked, that he would walk slowly for a short distance despite the pain but that it would get worse until the pain would stop him. It could not properly be assumed that, because the Appellant managed to keep going for a certain distance, any pain he experienced while he was walking was not relevant. If a claimant cannot carry out an activity at all, regulation 4(2A) does not come into play. Where a person is able to carry out an activity, pain is clearly a potentially relevant factor to the question whether he or she can do so to an acceptable standard.

12. Although not legally binding, the approach set out in PIP Assessment Guide (2016), which provides guidance for health professionals in assessing claimants, reinforces my conclusion:

“3.2.5 The fact that an individual can complete an activity is not sufficient evidence of ability. HPs may find it helpful to consider:

...

- Impact – what the effects of reaching the outcome has on the individual and, where relevant, others; and whether the individual can repeat the activity within a reasonable period of time and to the same standard (this clearly includes consideration of symptoms such as pain, discomfort, breathlessness, fatigue and anxiety).”

13. This was also the approach taken by Upper Tribunal Judge Parker in CPIP/2377/2015 where she said of regulation 4(2A) and 4(4):

“6. ... Matters such as pain, and its severity, and 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’...

7. Whether a claimant can stand and then move to a particular distance ‘to an acceptable standard’, inevitably links with two of the further relevant matters under regulation 4(2A): ‘repeatedly’ and ‘within a reasonable time period’. As these terms are statutorily defined, unlike the phrase ‘to an acceptable standard’, then if a claimant fails to satisfy that statutory test in either respect, it is unnecessary to give consideration to ‘an acceptable standard’; however, it might still technically be possible for a claimant, who is unable to show that he cannot carry out an activity repeatedly or within a reasonable time period, yet notwithstanding to establish that he is unable to do so ‘to an acceptable standard’. Such instances must be rare but may exist; for example a claimant who forces himself to walk quickly and repeatedly, through stoicism, despite a very high level of difficulty caused by matters such as pain, breathlessness, nausea or cramp.”

58. The FtT recognised the Appellant had limitations to mobility and daily living activities 4 and 6, caused by breathing problems and breathlessness. For example, the FtT accepted that due to breathing problems he found it difficult to bend and this affected his ability to manoeuvre himself into the bath. While recording the submission made that he required assistance to get into and out of the bath, they concluded that he could carry out this activity with the use of an aid only, i.e. a grab rail. However, they failed to assess this activity daily living activities through the lens of regulation 4(2A) and assess whether an aid was sufficient to ensure he could to this activity to an acceptable standard

and/or whether the aid was able to over his functional impairment. This regulation 4(2A) failing arises in respect of daily living activities 1 and 6 as well as mobility activity 2. The failure of the FtT to consider the impact of breathlessness on the Appellant's ability to prepare food, wash and bathe, and dress and undress to an acceptable standard was a material error of law.

59. Similarly, the FtT erred in failing to adequately consider the impact of breathlessness on his ability to mobilise unaided more than 20 metres but no more than 50 metres. The evidence before them was that he struggled to walk due to breathlessness. The FtT did not inquire at what point he became breathless when walking. Further, the evidence was that he walked slowly and took lengthy breaks, the FtT erred in failing to inquire and evaluate whether he could walk the descriptor distance in a reasonable time. The FtT was not relieved of the requirement to consider the application of regulation 4(2A) simply because it, or any element of it, had not been mentioned in terms by the Appellant. The provision was put in issue by the evidence itself.
60. The lack of regulation 4(2A) analysis is compounded by the Appellant's evidence that he suffered from fatigue and pain (grounds of appeal against the Respondent's decision) which impacted on all the above activities. The FtT materially erred by failing engage with this evidence and make findings on it.
61. The Appellant's evidence (see PIP2 questionnaire and grounds of appeal against the Respondent's decision) was that he was constantly coughing which gave him a sore throat and impacted on his ability to swallow. The FtT erred in failing to consider Appellant's evidence of the consequential impact of constant coughing in the context of his historic TB when they rejected his account of having difficulty swallowing.
62. Finally, the Appellant's evidence was that his poor concentration and specifically his difficulty in budgeting was caused by fatigue related to his medical condition(s). The FtT failed to take this evidence into account when assessing whether he required prompting or assistance. I observe that the FtT

accepted both his and his support worker's evidence that she assisted him to organise his finances.

Conclusion

63. For the reasons given above, the appeal succeeds. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.
64. The Appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether his appeal will succeed on the facts before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Michelle Brewer

Judge of the Upper Tribunal

Authorised by the Judge for issue on 13 November 2024

This decision was authorised for re-issue for the purpose of reporting on 4 November 2025