

Neutral Citation Number: [2026] UKUT 390 (AAC)
Appeal No. UA-2025-001687-PIP

RULE 14 ORDER: 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. Failure to comply with this order may be contempt of court and could lead to a fine, imprisonment or other sanction.

This order does not prevent the use of any information or documents by any court or tribunal in subsequent proceedings in this case.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

RKE

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

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

Representation:
Appellant: Represented himself
Respondent: Ms S. Hennessy, Decision Making and Appeals, DWP

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC335/25/00170
Tribunal: Judge C. Chapman, Mrs K. Ponte and Dr S. Reandi
Tribunal Venue: Luton
Decision Date: 16 May 2025

SUMMARY OF DECISION

Personal Independence Payment (41) and daily living activities (42).

The appeal concerns a claimant who reported worsening symptoms of Crohn's disease affecting daily living activity 5 (managing toilet needs). The First-tier Tribunal relied on

a recent UC85 report produced for a work capability assessment and there was no recent PIP assessment report.

The First-tier Tribunal materially erred in law by failing adequately to explain why the appeal could fairly be determined on the papers and by failing properly to apply regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013. MS v SSWP (PIP) [2024] UKUT 185 (AAC) applied. The decision was set aside and remitted to a differently constituted First-tier Tribunal.

The Upper Tribunal gives guidance about the extent to which work capability assessment evidence concerning incontinence may assist in determining entitlement to PIP, given the differences between the statutory tests.

The Upper Tribunal also reminds parties there is a defined meaning of "manage incontinence" in daily living activity 5, as highlighted by the representative for the Secretary of State for Work and Pensions.

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) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the First-tier Tribunal for rehearing by a fresh tribunal.

DIRECTIONS

A. The case is remitted to the First-tier Tribunal to consider afresh at an oral hearing. The First-tier Tribunal is to make enquiries with RKE about the most suitable method of having that hearing, including a remote video or telephone hearing, before it lists the appeal.

B. The new Tribunal should not involve any of the panel members previously involved in considering this appeal on 16 May 2025.

C. The new Tribunal must not take account of circumstances that did not apply at the relevant date of the Secretary of State's entitlement decision. Later evidence can be considered as long as it relates to the circumstances at the time of that decision: see R(DLA) 2/01 and R(DLA) 3/01.

D. If the parties have any further written evidence to put before the Tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.

E. The Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal.

F. Copies of this decision, the permission to appeal decision and the submissions on behalf of the Secretary of State (dated 30 March 2026)

shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.

These Directions may be supplemented by later directions by a tribunal judge, registrar, or case worker, in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. I have made an anonymity order in this case. The appellant did not ask for one but his case started at a point in time where the Upper Tribunal's practice was to informally anonymise its final decisions. I describe him as "RKE". These letters have been chosen at random and do not relate to the appellant's name.

2. On behalf of the Upper Tribunal, I apologise to the parties, in particular, to RKE for the time taken to decide this appeal. There was a problem with an alert on the Upper Tribunal's system in terms of how the appeal was assigned back for a final decision to be made.

Factual background

3. RKE has diagnoses of Crohn's Disease and anxiety and depression. He was first awarded personal independence payment ("PIP") in around 2014. He has been in receipt of PIP since at least 2018, comprising the daily living and mobility components, at the standard rate. RKE's award was extended by the Department for Work and Pensions ("DWP") on 11 January 2021, as a result of the COVID-19 pandemic affecting being able to reassess PIP claimants. His PIP award was extended until 15 September 2023. On 15 April 2023, DWP awarded RKE PIP, again awarding him both the daily living and mobility components, and both at the standard rate. DWP had awarded RKE 8 points for daily living activities and 10 points for mobility activities. His PIP award ran from 17 April 2023 to 16 April 2027. None of the PIP entitlement decisions made after 2018 involved RKE undergoing a medical assessment.

4. On 04 October 2024, RKE contacted DWP and reported that the symptoms connected with his Crohn's disease were worsening. DWP therefore looked again at RKE's entitlement to PIP. RKE provided DWP with an award review form ("AR1") dated 18 October 2024. DWP did not carry out a medical assessment of RKE.

5. On 13 November 2024, DWP decided to supersede (which means to change) RKE's PIP award. DWP did not change the number of points RKE scored, or the activities for which he scored them. DWP decided RKE's circumstances had changed and made him an award of the PIP daily living and mobility components at the standard rate from 13 November 2024 until 12 November 2028. Although the rate of RKE's PIP award had not changed, the dates of award had.

6. On 21 February 2025, RKE lodged an appeal with the First-tier Tribunal. It was determined by a First-tier Tribunal ("FTT") on 16 May 2025, on the basis of the

papers in the FTT appeal bundle. The FTT decided RKE scored 8 points for daily living activities (descriptors 1.b, 4.b, 5.b, 6.b) and 10 points for mobility activities (mobility descriptor 2.d). The FTT therefore confirmed DWP's decision and refused RKE's appeal.

The Upper Tribunal decision granting permission to appeal

7. On 04 March 2026, I granted RKE permission to appeal. I decided the following appeal grounds were arguable with a realistic prospect of success.

8. Explaining the decision to proceed on the papers: The FTT may not have given adequate reasons for why it decided RKE's appeal on the papers. The FTT stated at paragraph 2 of the Statement of Reasons that RKE had asked for his appeal to be determined without a hearing and there was no indication he had requested otherwise since lodging his appeal. The FTT stated it decided the requirements of rule 2 and 27 of the Tribunal Procedure Rules (meaning the applicable FTT Rules 2008) were satisfied in that it was able to determine the appeal and that it could do so fairly and justly.

9. Applying ***DT v SSWP (UC) [2019] UKUT 268 (AAC)***, the FTT must acknowledge explicitly that it has considered both whether the parties have consented to a decision being made without a hearing *and* that it can fairly decide the appeal without holding one, and to explain why. In ***DT***, Upper Tribunal Judge Wright also explained this duty is a continuing one which extends up to the point after the FTT has evaluated all the paper evidence and is on the point of making its decision on the appeal.

10. At times in its written reasons, the FTT appeared to remark on the absence of clear evidence about an issue. Examples were in paragraph 34 ("*he has not described what assistance he has received from others*"), paragraph 37 ("*He did not say that changing his pad and cleaning himself…took a long period of time*") and paragraph 44 ("*has not clearly explained why he needs to be accompanied*"). The FTT also stated at paragraph 13 that the only medical evidence about RKE's condition was a letter dated 20 September 2022. The reasoning gave the impression the FTT may have felt there was insufficient evidence to resolve specific matters but had still gone ahead to decide RKE's appeal on the papers.

11. Nor did the FTT have a recent PIP assessment report about RKE. The most recent PIP assessment dated from 2018. The only other medical assessment in the FTT bundle was a Universal Credit (UC85) report completed on 13 January 2025. That report was designed for a different benefit, for which toilet needs were assessed differently to PIP. These matters suggested the FTT had limited evidence about RKE's ability to carry out the PIP activities at the date of DWP's entitlement decision on 13 November 2024.

12. Applying ***DT***, it was unclear that the FTT had considered its continuing duty to consider whether it could fairly and justly decide the appeal on the papers right up to the point of making its decision. Nor did the FTT appear to have done enough to explain *why* it considered it was fair and just to determine RKE's appeal on the papers.

13. Applying regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 ("the 2013 Regulations") when determining RKE's

appeal: The FTT wrote at paragraph 24 of the Statement of Reasons that the UC85 showed RKE had little or no bowel control, suffered bowel incontinence every day and wore full thickness pads daily. The FTT referred to full voiding that the pads could not contain, resulting in leakage, at least once a week and that he had to carry spare pads and a change of clothes with him to manage this. The FTT referred to RKE having a "can't wait" card for toilet use and an incident where he rushed to a service station toilet, but it was out of service, so RKE soiled himself badly even while wearing his pads.

14. The FTT decided at paragraphs 37 and 38 of its Statement of Reasons that RKE did not need to take more than twice the time it would take someone without Crohn's to toilet and clean himself afterwards. This addressed the requirement in regulation 4(2A)(d) (within a reasonable time period) but did not address whether RKE could manage the activity to an acceptable standard (regulation 4(2A)(b)). Given RKE's difficulties with toileting, it was not necessarily clear that using aids (pads and a can't wait card) would allow him to manage PIP activity 5 to an acceptable standard. The FTT may not have addressed all of regulation 4(2A) in deciding this part of RKE's appeal. Alternatively, it may have failed to explain adequately why it concluded he could manage that PIP activity to an acceptable standard with aids or adaptations (descriptor 5.b, which the FTT awarded RKE).

The parties' submissions

15. Ms Hennessy represents the Secretary of State in the appeal to the Upper Tribunal. She has provided helpful written submissions dated 30 March 2026. Ms Hennessy supports the appeal on the basis the FTT has made material errors of law, summarised below, and invites me to remit it to a new Tribunal to decide.

16. Explaining why it determined the appeal on the papers: Ms Hennessy submits that paragraph 2 of the FTT's Statement of Reasons fails to explain adequately why it was fair and just to proceed with a paper hearing and it therefore failed to provide an adequate explanation that it had correctly applied rules 2 and 27 of the FTT Rules 2008. Ms Hennessy also submits the FTT made an error of law by proceeding with determining the appeal on the papers without considering adjourning for further evidence or for an oral hearing. Ms Hennessy refers to what the FTT recorded in the Statement of Reasons about missing or uncertain evidence (see paragraph 10 above). She submits the FTT made no consideration of whether, applying the overriding objective, it would be in the interests of justice to adjourn for an oral hearing or allow further evidence to be obtained instead.

17. Applying regulation 4(2A) of the 2013 Regulations when deciding RKE's appeal: Ms Hennessy submits the FTT erred both in its factual findings and providing adequate reasons for its decision.

18. The starting point is that the FTT made factual findings that RKE has chronic Crohn's disease and suffers from pain, fatigue and weakness, limiting his ability to carry out daily living activities and to walk long distances (paragraphs 13 and 14 of Statement of Reasons).

19. On 16 January 2018, a healthcare professional recorded RKE describing, for his PIP, the following:

> *"He reports of being able to lower and rise from the toilet independently and unaided. He reports of being able to clean himself after toileting independently and unaided He reports of faecal incontinent and this can*

> *have 2 times a week as he has loss of bowel control due to his bowel condition. He reports of only using incontinent pads, which he purchases, only when he is outside of the house where there is a lack of access to toilet facility. He reports of having a medical card which allows his to have easier access to toilet facility when out."*

20. This report was, however, over 6 years old. In the AR1 form dated 18 October 2024, RKE explained how his condition had deteriorated since 2023: "*Controlling my bowel has got progressively worse. I cannot control it*". In response to the question about how managed daily living activity 5, RKE wrote: "*I cannot manage it. I need constant assistance from friends/family to help me manage incontinence of my bowels*".

21. The FTT dealt with the lack of a recent PIP assessment report by taking into account the UC85 medical report produced for Universal Credit (UC) purposes on 13 January 2025, soon after the outcome decision about RKE's PIP entitlement. The FTT decided it could take into account the UC85 evidence: *"because it was so soon afterwards that it did not signify a change of circumstances but provided evidence that was sufficiently proximate to the date of the decision to be relevant to the circumstances at the date of the decision*" (paragraph 29 of Statement of Reasons).

22. The FTT stated, at paragraph 37 of the Statement of Reasons, that RKE did not experience leakage from his incontinence pads on most days. Ms Hennessy observes this appears to be based on its finding at paragraph 24 of the Statement of Reasons that: "*At least once each week, during waking hours, he has episodes of full voiding which the pads cannot contain, resulting in leakage*". Ms Hennessy suggests the FTT may have made that finding based on the 2025 UC85 report, which noted leakage occurring at least once a week.

23. Ms Hennessy points out the UC85 report represented part of an assessment of whether RKE had limited capability for work and work-related activity (LCWRA). The descriptor RKE needed to satisfy to demonstrate he had LCWRA for UC purposes was descriptor 8 of Schedule 7 to the Universal Credit Regulations 2013 ("the UC Regulations 2013"):

> "*8 At least once a week experiences:*
>
> *(a) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or*
>
> *(b) substantial leakage of the contents of a collecting device sufficient to require the individual to clean themselves and change clothing"*

24. Ms Hennessy submits the healthcare professional completing the UC85 report may have recorded RKE experiencing leakage from his incontinence pads at least once a week because that was the test for descriptor 8. She submits the healthcare professional completing the UC85 report would not have been asked to apply the specific requirements for PIP, including regulation 7 in terms of the frequency of difficulties managing toilet. While the UC85 report documented three incidents in a two-week period it did not state they were the only incidents of incontinence during that period. Nor did it state they were the typical frequency for these difficulties.

25. Ms Hennessy highlights evidence in the bundle suggesting RKE: "*has accidents on a daily basis & needs help when this happens*" (mandatory reconsideration telephone call, page D of bundle). In his SSCS1 appeal form, RKE stated: "*I need constant help with my incontinence and am unable to control my bowel, which is daily…I need an aid or help when going to the toilet, such is the discomfort and pain*.". Ms Hennessy observes that the UC85 report recorded that RKE: "…*opens his bowels 10 times a day and is incontinent daily*" and: "*He reports it's very painful to open bowels every time*.". The FTT had not addressed this evidence specifically.

26. Ms Hennessy therefore submits the FTT failed to make proper factual findings and provide adequate reasons for deciding RKE did not experience leakage on the majority of days.

27. Ms Hennessy highlights specific examples that had been given of where RKE experienced leakage. The FTT set them out at paragraph 25 of the Statement of Reasons. They included the incident mentioned in the UC85 report: "*when he was in Sainsbury's and had to leave his trolley in the middle of the store to go to the toilet to wash and change*". They included another incident from a statement submitted by RKE (at Addition A, page 1): "*when out driving and needing the toilet so he managed to get to a service station but the toilet was out of service so he soiled himself badly even though wearing his pads*".

28. Ms Hennessy cites ***MS v SSWP (PIP)*** [2024] UKUT 185 (AAC), ("***MS***") which considered whether an incontinent claimant could be assessed as satisfying descriptor 5.b to an acceptable standard and within a reasonable time period under regulation 4(2A)(b) and (d) of the 2013 Regulations. Upper Tribunal Judge Wikeley stated the following at paragraphs 11 to 12:

> *"11. As regards an acceptable standard, Tribunal's explanation seems to be focussed exclusively on what is or is not covered by the term "cleaning oneself afterwards". It does not in terms appear to address whether Mr S can attain an acceptable standard in doing so, given the practical circumstances and difficulties he so vividly describes.*
>
> *12. As regards reasonable time, there is no finding beyond that Mr S can manage his cleaning in a reasonable time period. But as Mr S argued at the oral permission hearing, the issue is not what he can do with his arms and hands but rather what he has to do by way of cleaning afterwards when compared with what a person without such a disability has to do, having been to the toilet (and as such the Tribunal may have lost sight of the respective time differential involved). I have to say Mr S seems to me to be at an extreme end of the spectrum of having difficulties with daily living activity 5. Given the likely time involved in cleaning up, especially when on the road at work, I am struggling to see how it could not take him at least as twice as long as a person without his disability. On that basis it is at least arguable that he should qualify for 8 points under descriptor 5f."*

29. Taking into account the supermarket incident recorded in paragraph 25 of the Statement of Reasons (see paragraph 26 above), Ms Hennessy points out the fact RKE washed '*as much as he could'* in a public toilet and had to leave the supermarket without completing his shopping might indicate he could not complete the activity to an acceptable standard. She argues the FTT should have considered this but failed to do so. She draws attention to Judge Wikeley's

observations in paragraph 12 of ***MS*** that where the extent of an incident suggests it would require more cleaning up afterwards than for a person without the disability, and was being done in a public toilet, it is hard to see how it would not take at least twice as long.

30. Ms Hennessy draws attention to the FTT's remark at paragraph 37 of the Statement of Reasons that RKE had not reported that changing his pad and clothing took a long period of time or more than it would take a person without Crohn's disease. Ms Hennessy argues that RKE may not have known that the time taken to clean himself and change, and how it compared to the time taken by other people, was relevant to what the FTT needed to consider.

31. Ms Hennessy therefore argues that the FTT failed to make proper findings of fact and provide adequate reasons for determining RKE could manage his incontinence to an acceptable standard or within a reasonable time period with the use of incontinence pads.

32. Paragraph 35 of the Statement of Reasons stated that in order to meet any of the higher scoring descriptors in daily living activity 5, RKE would have to show he reasonably required assistance. Ms Hennessy points out the FTT should have been considering whether RKE satisfied descriptor 5.e (needs assistance to be able to manage incontinence of either bladder or bowel). He was describing experiencing chronic incontinence and that fell to be considered. Had he satisfied descriptor 5.e, RKE would have scored 6 points, giving him 12 points overall for daily living activities, and entitlement to the enhanced rate of the daily living component.

33. Instead, the FTT decided it was: "…*not satisfied that [RKE] had, or reasonably needed physical intervention from another person in order to manage his toilet needs safely, to an acceptable standard, repeatedly, and within a reasonable time period as required*" (paragraph 36 of Statement of Reasons). Ms Hennessy points out the FTT appeared to use "*toilet needs*" interchangeably with "*manage incontinence*" throughout its written reasons, despite these terms being defined separately in Schedule 1 to the 2013 Regulations:

> *"manage incontinence" means manage involuntary evacuation of the bowel or bladder, including use a collecting device of self-catheterisation, and clean oneself afterwards;*
>
> *"toilet needs" means-*
>
> *(a) Getting on and off an unadapted toilet;*
>
> *(b) evacuating the bladder and bowels; and*
>
> *(c) cleaning oneself afterwards."*

34. Ms Hennessy broadly agrees with the FTT's reasoning that RKE had said he needed assistance to manage his bowel incontinence but had not described what assistance he received. She argues, however, that this meant the FTT needed to enquire into this issue and make proper factual findings concerning the assistance RKE received or reasonably required. Ms Hennessy also points out that it is not clear from reading the Statement of Reasons whether the FTT considered how the pain RKE experienced when opening his bowels, or the previously noted (and accepted) fatigue and weakness associated with his

condition, might impact his ability to manage involuntary evacuations of his bowel and then clean himself afterwards.

35. Ms Hennessy argues that rather than addressing this, the FTT appeared to draw an adverse inference from the fact that: "*Even when discussing his difficulties with the healthcare profession in January 2025, he did not describe receiving assistance from others in this respec*t" (paragraph 34 of Statement of Reasons). She reiterates, however, that the FTT relied on part of a UC85 report that was considering a different descriptor (set out at paragraph 23 above).

36. Ms Hennessy agrees with the observation I made when granting RKE permission to appeal that UC and PIP are assessed differently and it is not clear that RKE was asked the right questions (in the UC85) about carrying out the specific PIP activities, or whether his own explanation of the difficulties he faced would have been enough if he did not know what he needed to explain to the FTT.

37. Having seen MS Hennessy's submissions, RKE responded explaining he was not aware he could submit another PIP claim if his condition worsened over time. RKE describes this claim made nearly two years ago as significantly affecting him, physically and mentally. He expresses hesitation about going through this process again. RKE also describes an incident two weeks earlier (than 17 April 2026) when he tripped on a curb while rushing to use a public toilet and broke his ankle. He argues this highlights the daily struggles he experiences from his condition.

Why there was no oral hearing of this appeal

38. Neither party asked for an oral hearing of the appeal. I took these preferences into account and considered the appeal file. I decided the interests of justice did not require an oral hearing. The parties accept the FTT made material errors of law. It is not necessary to have an oral hearing in order to determine that the FTT did make material errors of law. I therefore determined the appeal on the papers. It was proportionate to do so.

My decision

39. At the permission stage, I only needed to be persuaded that it was arguable with a realistic (as opposed to fanciful) prospect of success that the FTT had made an error of law in a way that was material. At this substantive stage, I need to be satisfied that the FTT made one or more errors of law that were material.

40. Having considered the evidence and the FTT's reasoning for myself, I am satisfied that the FTT made material errors of law in relation to the appeal grounds addressed at paragraphs 16 to 36 above. They are material because if the FTT had not made them, it may have awarded RKE sufficient points to award him the daily living component at the enhanced rate.

41. I agree with, and endorse, Ms Hennessy's remarks that this case raises very similar considerations to ***MS***, where the description of the incontinence involved begged the question whether the claimant could manage it within a reasonable timescale and to an acceptable standard. Applying its inquisitorial duty, the FTT needed to explore those matters for itself, rather than relying on what was not said in the appeal bundle, especially given its duty to continuously consider whether, applying rules 2 and 27, it could properly determine the appeal on the papers right up to the point of making its decision.

The interchangeability of work capability evidence with PIP evidence when assessing entitlement to PIP

42. This issue arises because the FTT relied on the evidence in the 13 January 2025 UC85 report. The activity assessing incontinence for purpose of the work capability assessment in UC and in employment and support allowance (ESA), focuses specifically on the voiding or evacuation involved in bladder or bowel incontinence. The activity focuses on loss of control, the extent of the evacuation or voiding and the frequency with which this occurs. This can be seen in activity 9 of Schedule 6 to the UC Regulations 2013 which will score 15 points where a claimant:

> *(a)* ***At least once a month [frequency]*** *experiences:*
>
> *(i) Loss of control leading to* ***extensive evacuation*** *of the bowel and / or* ***voiding [extent]*** *of the bladder; or*
>
> *(ii) Substantial leakage of the contents of a collecting device,*
>
> ***sufficient to require cleaning and a change of clothing [consequences]***
>
> ***[my emphasis in bold and in the square brackets]***

43. Activity 8 in Schedule 7 to the UC Regulations 2013 places the same focus on frequency, extent and consequences of the loss of control of the bladder and / or bowel but increases the required frequency to at least once a week.

44. The focus of the wording used acknowledges that loss of control of the bladder and / or bowel with this frequency, to this extent, and with such consequences, breaches the natural dignity a claimant might be expected to enjoy while in a workplace. Experiencing it to a level where a claimant has to change their clothing indicates it is too substantial to expect the claimant to manage their condition in a workplace. This is why experiencing it once a month scored 15 points, which meets the threshold for having limited capability for work, and experiencing it once a week would meet the threshold for having LCWRA.

45. A claimant scores 6 points under the work capability assessment if they do not actually experience this level of incontinence with monthly frequency, but the majority of the time is at risk of experiencing it to the same extent (extensive evacuation or voiding) and with the same consequences (requiring cleaning and changing clothing). This contributes to the overall 15 points for limited capability but does not of itself satisfy the test.

46. While an ESA85 or UC85 report prepared close in time to a PIP entitlement decision may give helpful evidence about whether a claimant has reported difficulties with managing incontinence, it cannot be used interchangeably with what one would expect a PIP medical assessment to cover. The two tests deal with the same bodily activity but focus on quite different considerations.

47. As Ms Hennessy points out, the UC85 report was not prepared for the purpose of identifying the full frequency of incontinence difficulties relevant to PIP. A

reference in the UC85 report to incontinence occurring '*at least once a week'* should not be treated as a finding that it occurred no more frequently. As this highlights, while the evidence in the UC85 report was helpful, it could not replace the need for a timely assessment of RKE's incontinence difficulties relevant to PIP, including frequency, the time taken to manage it and the extent to which it could properly be managed (regulation 4(2A) considerations). I agree with Ms Hennessy's observation that the effect of pain in performing the activity is also relevant to assessing it in terms of regulation 4(2A).

48. Furthermore, PIP activity 5 includes specific definitions of "*manage incontinence*" and "*toilet needs*", which fall to be applied when considering a claimant's ability to carry out the activity to the level set out in specific descriptors. Both DWP and a First-tier Tribunal should always have in mind the specific wording of the activity involved.

49. It is, of course, appropriate for the FTT to consider what wider evidence was available in an appeal to help it resolve the issues it has to decide. This includes evidence in ESA85 or UC85 reports where available and they relate to the relevant period being considered. These represent, however, evidence that might be helpful, but is not necessarily conclusive. The FTT must therefore evaluate the potential limitations of evidence produced for a benefit involving a different statutory assessment, when resolving the issues specific to PIP entitlement. It must be particularly cautious about relying on the frequency or nature of the difficulty being experienced as proof for PIP, when it may simply represent the point at which counting or recording that difficulty for the purpose of the work capability assessment, may properly end.

50. In RKE's case, the limitations caused by the combination of a historic PIP assessment report from 2018 and a recent UC85 report that focused on a different test, left the FTT with a difficult task of working out what was useful but also why it might only provide a certain amount of assistance. The fact no PA4 assessment report had been produced since 2018 means that since that date, RKE had not been asked the questions directly relevant to evaluating his ability to manage his incontinence for PIP purposes.

51. The award review form (AR1) RKE was asked to complete is brief and focuses on what has changed from before. It would not be obvious from this that RKE needed to talk about the sorts of matters relevant to regulation 4(2A). Relevant questions might have come up in his UC85 assessment, but incidentally, since they were not required to carry it out correctly. The FTT relied on the fact RKE had not provided evidence about the time taken to manage his incontinence or what assistance he required from other people. However, he arguably would not know that this was required of him. With its inquisitorial role, it remained for the FTT to address those matters, even though RKE (and DWP) had not.

Conclusion, including disposal

52. Having decided the FTT's decision involved material errors of law, it is appropriate to exercise my discretion to set aside the Tribunal's decision dated 16 May 2025 under section 12(2)(a) of the Tribunals, Courts and Enforcement

Act 2007. Section 12(2)(b) of that Act requires me to either remit the case to the First-tier Tribunal with directions for its reconsideration or to remake the decision.

53. Neither party asks me to remake the FTT's decision, and I consider it would be inappropriate to do so. The FTT failed to make adequate factual findings about the effects of RKE's medical conditions and how they affected his functional ability to carry out PIP activities. This includes assessing the nature and extent of his incontinence, together with the pain and fatigue involved in managing it. It requires medical and disability expertise. The First-tier Tribunal is best placed to evaluate the evidence, including using its medical and disability expertise, and to make appropriate findings of fact.

54. I therefore remit RKE's appeal for rehearing before a new First-tier Tribunal. It will make a fresh decision about the correct level of his entitlement to PIP with effect from the appropriate supersession date, whether that is 13 November 2024 (DWP's decision date) or 04 October 2024 (the date RKE reported a change in his circumstances).

55. I have remitted the appeal for an oral hearing. This can be done as a remote video or telephone hearing, instead of a hearing at a tribunal venue, if RKE would find it easier to take part that way. My direction A on page 2 of this Decision, directs the First-tier Tribunal to liaise with RKE to find the most suitable way to hold the oral hearing. I encourage RKE to take part in the hearing, as it will be very helpful for the First-tier Tribunal to hear from him directly. He can also submit written evidence dealing with how frequently he was experiencing his incontinence in late 2024, how this affected him and how long it took to manage it, including cleaning himself afterwards.

56. Although I have set aside the FTT's decision dated 16 May 2025, I do not make any findings, or express any view, about what levels of PIP RKE should be entitled to receive. The next Tribunal will need to hear evidence, make its own findings of fact, and provide its reasoning for the decision it reaches.

Judith Butler
Upper Tribunal Judge

Authorised for issue: 11 October 2026