

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/1534/2016

Before: A. Rowley, Judge of the Upper Tribunal

Decision:

I allow the appeal. As the decision of the First-tier Tribunal (made on 4 February 2016 at Aldershot under reference SC321/15/00252) involved the making of an error in point 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 tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

1. There are a number of issues on this appeal, most of which are fact-specific to the case. My decision may, however, be of more general interest in relation to daily living activity 7 of the Personal Independence Payment (“communicating verbally”). I consider what the activity is concerned with, and what is included within the definition of “communication support.”

Background

2. The claimant, who was born in 1978, has bilateral sensorineural hearing loss, which is moderate to severe. She wears two hearing aids but they do not fully compensate for her hearing loss, particularly when there is background noise. The claimant began to learn to sign after leaving school, but did not progress beyond level 1. In 2013 she was diagnosed with anxiety.

3. Having made a new claim for a Personal Independence Payment (“PIP”), on 16 March 2015 the claimant was assessed by a Health Professional, in whose opinion she satisfied only daily living descriptor 7b (because she needed to use hearing aids to be able to hear). A decision maker agreed, and made a decision on 25 March 2015 awarding the claimant 2 points under daily living descriptor 7b and 0 points under the mobility activities. That meant that the claimant was not entitled to an award of PIP under either the daily living or the mobility component. She appealed to the First-tier Tribunal.

4. The claimant’s appeal was heard on 4 February 2016. She was represented at the hearing by Ms Oxlade of deafPLUS. Whilst a sign language interpreter was present at the hearing the claimant did not rely on her. Instead, she relied on a combination of lip-reading and her residual hearing. Of course, as the tribunal acknowledged in the Statement of Reasons, the room was quiet, the tribunal members were not too far away, the claimant could see their faces and they spoke clearly.

5. The tribunal refused the claimant’s appeal. It, too, decided that the claimant scored only 2 points under descriptor 7b. The claimant appeals to the Upper Tribunal with the permission of District Tribunal Judge Sutherland Williams. I have been greatly helped by the written submissions of Ms Helen Haws of the Surrey Welfare Rights Unit and Ms Irina Franckevic, the Secretary of State’s representative. Whilst Ms Franckevic, accepts that the tribunal made some errors of law, she submits that they were not material ones, and so she does not support the appeal.

The statutory provisions

6. By section 78(1)(a) of the Welfare Reform Act 2012 a person is entitled to an award of the daily living component of PIP at the standard rate if (amongst other things) their “ability to carry out daily living activities is limited by the person’s physical or mental condition.” Similarly, section 79(1)(b) provides that a person is entitled to an award of the mobility component of PIP at the standard rate if (amongst other things) their “ability to carry out mobility activities is limited by the person’s physical or mental condition.”

7. The activities are set out in Parts 2 and 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. They must be read together with regulations 4 and 7 of the Regulations. That means that a claimant can only be taken as satisfying a descriptor if they are able to carry out the activity safely, to an acceptable standard, repeatedly, within a reasonable time period, on over 50% of the days of the required period.

Activity 7: Communicating verbally

| Column 1 Activity | Column 2 Descriptors | Column 3 Points |
|------------------------------------|---|----------------------------------|
| 7. Communicating verbally | a. Can express and understand verbal information unaided | 0 |
| | b. Needs to use an aid or appliance to be able to speak or hear | 2 |
| | c. Needs communication support to be able to express or understand complex verbal information | 4 |
| | d. Needs communication support to be able to express or understand basic verbal information | 8 |
| | e. Cannot express or understand verbal information at all even with communication support | 12 |

Paragraph 1 of Part 1 of Schedule 1 to the 2013 Regulations contains some important definitions.

“**basic verbal information**” means “information in C’s native language conveyed verbally in a simple sentence.”

“complex verbal information” means “information in C’s native language conveyed verbally in either more than one sentence or one complicated sentence.”

“communication support” means “support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into a non-verbal form and vice versa.”

8. A number of points may be made in relation to this activity. It is concerned with a person’s ability to express and/or understand verbal information in their own native language. It is clear from the definition of “communication support” that verbal information can include information that is interpreted from verbal into a non-verbal form and vice versa. It includes, for example, speech interpreted through sign language.

9. If a person can express and understand verbal information unaided, they will not score any points under this activity. So, if a deaf person is able to speak in a way that is understandable, and is able to lip-read so that they can understand verbal information to an acceptable standard, they will come within descriptor 7a and will not score points.

10. The activity distinguishes between “basic” and “complex” information, the former being that which is conveyed in a simple sentence, and the latter that which is conveyed in either more than one sentence or one complicated sentence. The “PIP Assessment Guide: A DWP guidance document for providers carrying out assessments for Personal Independence Payment” contains a helpful example which illustrates the distinction. “I would like tea please” would constitute basic information, whilst “I would like tea please, just a splash of milk and no sugar, as I always have sweeteners with me for when I go out” would fall within the definition of complex information.

11. The definition of “communication support” has similarities with that of “social support” under activity 9 (see below). It has been decided that social support provided by family and friends who are directly experienced in assisting the particular claimant may qualify as “social support” (*PR v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 584 (AAC), approved and followed on this point in *SL v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0147 (AAC)). By parity of reasoning, in my judgment “communication support” can be provided not only by those trained or experienced in communicating with people with specific communication needs generally, but also by family and friends who are directly experienced in communicating with the claimant alone.

12. “Communication support” can be provided in a number of different ways. In the case of a person with a hearing impairment it may, as I have said, take the form of speech interpreted through sign language. Further examples would include a speech to text reporter or lip speaker. There may well be others.

13. It may be that a claimant does not have access to communication support which they nevertheless need. Such support can be expensive and, in some instances, unaffordable. However, it is the underlying need which is being assessed. Thus, a claimant will score points under descriptor 7c or 7d, as appropriate, if they currently manage to express or understand verbal information in a way that is not to an acceptable standard, but would be with appropriate communication support.

14. I mention in passing that as “communication support” means support “from a person” it seems to me that (contrary to the claimant’s case) watching television only with the aid of subtitles would not come within the definition.

Activity 9: Engaging with other people face to face

| Column 1 Activity | Column 2 Descriptors | Column 3 Points |
|--|--|----------------------------|
| 9. Engaging with other people face to face | a. Can engage with other people unaided | 0 |
| | b. Needs prompting to be able to engage with other people. | 2 |
| | c. Needs social support to be able to engage with other people | 4 |
| | d. Cannot engage with other people due to such engagement causing either- (i) overwhelming psychological distress to the claimant; or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person. | 8 |

Again, paragraph 1 of Part 1 of Schedule 1 to the 2013 Regulations contains some definitions:

“**engage socially**” means “(a) interact with others in a contextually and socially appropriate manner; (b) understand body language; and (c) establish relationships.”

“**social support**” means “support from a person trained or experienced in assisting people to engage in social situations.”

15. Although “engage socially” appears in the interpretation provisions of Part 1 of Schedule 1 to the Regulations, the expression does not appear in activity 7 (or, for that matter, any other activity). However, it seems to be settled that the definition serves to identify the factors that might be involved in assessing a claimant’s ability to engage with other people.

16. In *HB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0160 (AAC) I decided that when considering whether a claimant can engage with others, a tribunal should consider not only their ability to engage with people they know well, but also their ability to engage with people generally. A similar approach was taken by Upper Tribunal Judge Markus QC in *HJ v Secretary of State for Work and Pensions* [2016] UKUT 0487 (AAC).

The relationship between Activities 7 and 9

17. Whilst not strictly relevant to this decision, it should be noted that the tasks covered by activities 7 and 9 are different, and it is important to delineate the differences. Activity 7 measures an ability to vocalise and understand information; activity 9 measures an ability to function in a social environment. The kind of support which is necessary in relation to one activity will be different from, and not necessarily

be sufficient to satisfy, the other (*Secretary of State for Work and Pensions v GJ (PIP)* [2016] UKUT 8 and *HB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0160 (AAC)).

Discussion

Activity 7

18. The tribunal found that the claimant's ability to communicate was undoubtedly restricted, and that even with her hearing aids she was reliant on lip-reading. Moreover, the tribunal accepted that the claimant had difficulties with lip-reading. It recognised that lip-reading required optimal conditions of light and positioning; the person being lip-read must face the lip-reader, not turn away and not put their hand in front of their mouth; there must not be too great a distance between the two; accents, moustaches or people with a stutter could present a problem; some people were clearer with their lip movement than others; group discussions were inevitably more challenging than one-to-ones. The tribunal recognised that such difficulties could not be underestimated. Further, it acknowledged that some of the claimant's difficulties relating to her ability to communicate could be "overcome, or at least eased, by communication support."

19. The tribunal then fell into error. Having (rightly) found that "communication support" encompassed signing, the tribunal went on to find that the communication difficulties it had identified could not be overcome or eased by signing as the claimant was not conversant with it. Thus, said the tribunal, the presence of a sign language interpreter would not assist, and so the claimant could not come within the terms of descriptors 7c or d. However, as I have said above, "communication support" can be provided in a number of different ways, and is not limited to a sign language interpreter. In restricting its considerations to the claimant's limited ability to sign, and in failing to explore whether other means of communication support may have helped, the tribunal erred in law.

20. Furthermore, the tribunal found that the informal help which the claimant received from certain friends could not constitute "communication support," as in its view what was contemplated by the term was help from someone who, though not trained, had acquired expertise in giving support to individuals with communication difficulties on a regular basis, perhaps through a voluntary organisation, and that would usually exclude family and friends. This, said the tribunal, was consistent with the use of the word "people" in the definition of "communication support." A similar argument was considered and, in my judgment, rightly rejected by Upper Tribunal Judge Hemingway in *SL v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0147 (AAC) in the context of "social support." In the light of my decision that "communication support" can be provided by family and friends who are directly experienced in communicating with a claimant alone, in finding as it did the tribunal erred in law.

21. Ms Franckevic urges me to find that the tribunal's errors were not material ones, as the claimant would be likely to score only 4 points under activity 7c and that would not be sufficient to qualify for an award of the daily living component. Ms Haws, meanwhile, submits that this contention is purely speculative, and that it is at least possible that the claimant might satisfy descriptor 7d (which scores 8 points) on over 50% of days. On balance I agree with Ms Haws. Further findings will have to be made. Accordingly, I set aside the tribunal's decision and remit the matter to be re-heard by a new tribunal.

The other grounds of appeal

22. In the circumstances it is not strictly necessary for me to deal with the other grounds of appeal. I will, however, make some brief comments upon them.

23. In relation to activity 9, the tribunal erred in failing adequately to consider the claimant's ability to engage with people generally. Ms Franckevic agrees that it also erred in finding that "social support" could not be provided by friends or family. However, given its findings on the claimant's level of anxiety (which were findings which were open to the tribunal to make on the evidence before it), on balance I find that these errors were not material to its decision.

24. The claimant argues that the tribunal made inadequate findings with regard to daily living activities 1 and 4 because it failed to consider her ability to perform the activities to an acceptable standard. She submitted that she could allow a pan to boil dry, or leave a kitchen or bath tap running because she did not hear it and would forget or be distracted. The tribunal found that the claimant could avoid such potential problems by remaining in the kitchen or bathroom if she felt that she could not trust her memory or she may become distracted. In my judgment they were findings which were open to the tribunal to make on the facts of the case, and there was no error of law.

25. The claimant submits that the tribunal erred in its consideration of mobility activity 1 ("planning and following journeys"). It was part of her case that, given her hearing impairment, she could not safely follow the route of an unfamiliar journey on foot without another person, as she had problems crossing roads at unfamiliar locations. In the light of the recent decision in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC) this issue is a relevant one under mobility descriptor 1d. The tribunal's failure to address it constituted an error of law.

Conclusion

26. For the reasons given above the tribunal erred in law and I set its decision aside. As fresh findings of fact are required I remit the case to be reheard by a new tribunal.

Directions to the new tribunal

27. I give the following directions to the new tribunal. They may be added to or amended by a District Tribunal Judge.

28. The new tribunal should not involve any judge or other member who has previously been a member of a tribunal involved in this appeal. It must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. It must consider all aspects of the case entirely afresh.

29. In particular, in its consideration of activity 7 the tribunal must assess the claimant's ability to understand basic or complex verbal information to an acceptable standard without communication support. It must determine what, if any, communication support is needed by the claimant (whether or not she presently has access to it). If it finds that she needs communication support, the new tribunal will bear in mind that such support may be provided by those such as friends or family who are experienced in helping the claimant with communication, as well as those

who are trained or otherwise experienced in communicating with people with specific communication needs.

30. I must emphasize that the new tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different conclusion to that of the previous tribunal.

31. The new tribunal must not take account of circumstances that were not obtaining at the time of the decision: see section 12(8)(b) of the Social Security Act 1998.

32. If the claimant has any further written evidence to put before the new tribunal, this should be sent to the new tribunal within one month of the date of the letter sending out this decision.

33. For the sake of completeness, I should add that the fact that this appeal has succeeded on a point of law says nothing one way or the other about whether the claimant's appeal will succeed on the facts before the new tribunal.

A. Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 13 December 2016