

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CPIP/3739/2016

**Before:** M R Hemingway: Judge of the Upper Tribunal

**Decision:** As the decision of the First-tier Tribunal (made on 2 September 2016 at Ashford under reference SC322/16/01391) 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 tribunal for re-hearing by a differently constituted panel.

**DIRECTIONS:**

- A. The tribunal 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.
- B. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim (made through his appointee) that was made on 19 January 2016 and refused on 25 April 2016.

**REASONS FOR DECISION**

**The issues**

1. This appeal is concerned only with the descriptors linked to daily living activity 1 (Preparing food). It raises issues concerning the ability to prepare or cook a simple meal to an acceptable standard (see regulation 4(2A) and 4(4) of the Social Security (Personal Independence Payment) Regulations 2013) and how an inability to read, tell the time or use timer switches might impact upon an ability, in particular, to cook a simple meal.

**The legislation**

2. Personal independence payments were introduced by the Welfare Reform Act 2012. They consist of two components but this appeal relates only to the daily living component which is governed by section 78. According to that section, a claimant is entitled to the daily living component of personal independence payment ("PIP") at the standard rate if that claimant's ability to carry out daily living activities is limited by the person's physical or mental condition and if they meet what is known as "the required period condition" (not something I need to elaborate on for the purposes of this decision). There is entitlement to the enhanced rate where the claimant's ability to carry out daily living activities is severely limited and the other conditions just mentioned are met. Entitlement is established by the scoring of points under activities and descriptors which are to be found, in the case of the daily living component of PIP, within Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 ("PIP Regulations"). The pertinent part, for the purposes of this appeal, is as follows:

Activity	Descriptors	Points
1. Preparing food.	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8

3. There are some definitions of relevance contained within Schedule 1 as follows:

“assistance” means physical intervention by another person and does not include speech;

“Cook” means heat food at or above waist height;

“Prepare”, in the context of food, means make food ready for cooking or eating;

“Simple meal” means a cooked one-course meal for one using fresh ingredients;”

Regulation 4 is also relevant:

**“Assessment of ability to carry out activities.**

4. - (1) ...

(2) ...

(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.
- (3) ...
- (4) In this regulation –
- (a) ‘safely’ means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
  - (b) ‘repeatedly’ means as often as the activity being assessed is reasonably required to be completed;
  - (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.”

4. “C”, as used in the PIP Regulations is an abbreviation for claimant.

### **The background**

5. The claimant, whose wife is his appointee, was born on 13 October 1969. He claimed PIP on 19 January 2016 and it appears that his application form, known as form PIP2, was completed for him by his appointee. His medical conditions are listed in that form as being irritable bowel syndrome, depression and anxiety, dyslexia, asthma and arthritis. There was also evidence to suggest that around the time of completion of the form he was being assessed for possible autistic spectrum disorder. It was later to be asserted, on his behalf, that he has learning difficulties as a consequence of which he cannot read and has difficulty in telling the time. As to his ability to prepare and cook food it was written in form PIP2 “I need help reading instructions as I cannot read. I can be very clumsy so sometimes need to be supervised”. On 18 April 2016 he attended a “face-to-face consultation” with a health professional. It is recorded that he told the health professional that he was able to peel and chop vegetables and was able to cook a “fry-up” but that he was not able to “read the boxes for instructions”. That must be a reference to cooking instructions or recipes which appear upon food packaging. The health professional, though, did not think that the claimant required any assistance with preparing and cooking food and wrote:

“Reported difficulty with preparing food due to a reading problem and being clumsy is not covered by this descriptor. He does not have a diagnosed upper limb impairment, and in the social history he stated he likes to ride a bike which indicates adequate limb power and good dexterity. He is managed in primary care for his mental health, and at MSE [the face-to-face assessment] he had adequate concentration and did not need prompting.

Therefore he is able to prepare a simple meal for one reliably.”

6. On 25 April 2016 the Secretary of State decided that the claimant scored only 2 points under the activities and descriptors concerned with the daily living component and no points at all under the activities and descriptors concerned with the mobility component. No points were awarded under the descriptors linked to the activity of “Preparing food”. The upshot was that his claim for PIP was refused. In seeking a mandatory reconsideration it was asserted on his behalf that he could not cook a simple meal unaided “as he cannot read instructions or recipes”. However, the decision was not altered in any way as a result of the mandatory reconsideration and the claimant, through his appointee, appealed to the First-tier Tribunal (“the tribunal”).

7. The appeal was heard on 17 August 2016. The claimant attended, accompanied by his appointee, and gave what appears to have been quite extensive oral evidence. The tribunal allowed his appeal, concluding that he was entitled to 9 points in relation to the daily living component and 8 points in relation to the mobility component. That meant he was awarded the standard rate of each component. 4 points were awarded under daily living descriptor 1e on the basis that he would need supervision or assistance to either prepare or cook a simple meal. It is perhaps worth noting that certain of the other points awarded were on the basis that he needed help to understand complex written information, to make complex budgeting decisions and to plan the route of a journey. Thus, the award of those other points also recognised the problems he had as a result of the learning difficulties. Pausing there, given the tribunal’s finding that he could not read at all, it might be thought surprising that he had not received 4 points under daily living descriptor 8d on the basis he would need prompting to understand basic written information as opposed to the 2 points he received under 8c. The tribunal explained why it was not selecting descriptor 8d by saying the award it was making was appropriate because although the claimant could not read, he could understand signs, symbols and some numbers. However, the ability to do that does not seem to me to touch upon eligibility for points under 8d. Nevertheless, even if he had received 4 points rather than 2 in relation to that, if the Secretary of State is right in asserting (in effect) that he should not have scored points at all under activity 1, then he would still be below the threshold for an award of the standard rate of the daily living component.

8. The tribunal, in its statement of reasons for decision (“statement of reasons”) made findings to the effect that the claimant suffered from dyslexia, had attended a special needs school, had left that school without qualifications, was unable to read words, but was able to recognise some numbers and some letters albeit not reliably. It found, on my reading, that he needed assistance to cook a meal. As to why, it said this:

“ 26. [The claimant] said he needed supervision when cooking as he was unable to read instructions. The HCP noted he was able to peel vegetables and could do a fry-up. [The claimant] told the tribunal that he was able to cook but had to ask his wife for help. He wasn’t able to read packets or cooking instructions nor could he read the numbers on the cooker so was unable to set temperatures. The tribunal was satisfied that as [the claimant] was unable to read and struggled with numbers he would need assistance to cook a simple meal for one. The help he required was for another person to physically intervene by switching on cookers and turning on timers and was more than just prompting since telling the temperature or setting to use wouldn’t be sufficient as he couldn’t then recognise the numbers for himself. He also needed to be given verbal instructions about both how to cook and how long to do so. The Tribunal awarded 4 points.”

### **The permission stage**

9. The Secretary of State asked the tribunal to grant permission to appeal its own decision. The grounds focused solely upon the tribunal's reasoning with respect to daily living activity 1. It was suggested that the finding that the claimant was able to prepare a fry-up was significant because that demonstrated an ability on his part "to prepare fresh ingredients such as eggs, bacon and sausage". It was further contended that cooking is "often a sensory and instinctive act and as such for the majority of the time reading is not required". The author of the grounds observed, by way of illustration as to the latter proposition that it is possible to see that a pan of water which might be used to cook vegetables is boiling and it is possible to know if a chicken has been properly cooked when its "juices are clear". The tribunal, in reaching the conclusions that it had, had failed to appreciate that cooking was a sensory and instinctive act. There was a further point taken to the effect that since the claimant had told the tribunal he was able to use a timer if shown how, he would also be able to learn to control the temperature gauge of an oven or a microwave.

10. Permission to appeal was granted by a District Tribunal Judge of the First-tier Tribunal who observed:

"This point as to the importance for a particular Appellant to be able to read instructions and understand numbers when cooking a simple meal needs resolution.

However it may also be the case that the Tribunal has not made sufficient findings as to whether his wife (or another person) is continuously present for the purpose of ensuring the appellant's safety and also whether that other person has to intervene physically when assisting."

11. Permission having been granted, I issued directions. In response to those, the claimant's appointee told me that he had now been diagnosed with Asperger's syndrome and she submitted evidence showing that the diagnosis had been made on 5 September 2016. She also made some factual assertions regarding his difficulties and expressed disquiet as to how long the appellate process had taken so far. The Secretary of State asserted that "cooking skill" was not a part of the test and argued that the ability to prepare a fry up pointed to an ability to prepare "a variety of different simple meals". Neither party sought an oral hearing of the appeal before the Upper Tribunal.

### **My reasoning**

12. It is in light of the above that I must now determine this appeal. I have decided against holding an oral hearing because neither party has sought one, because the parties' respective positions have already been set out in the documentation before me and because I consider that I am able to justly decide the appeal without one.

13. To start with it is worth saying something about what it was that the tribunal was actually deciding. Firstly, it is apparent from what it had to say at paragraph 26 of its statement of reasons that it was deciding the claimant had difficulties with the cooking process rather than with the tasks involved in preparing food for cooking. That is evident from its concentration upon matters relating to the timing of the cooking process and the temperature at which foods have to be cooked. Secondly, on my reading (as already indicated) the tribunal was deciding, in the context of daily living descriptor 1e, that it was assistance rather than supervision (despite its use of that word in the opening sentence of paragraph 26) that the

claimant needed. Indeed it stated “he would need assistance to cook a simple meal for one” (my underlining) and it went on to explain that there would be a requirement for another person to physically intervene by switching on cookers and turning on timers for him. Of course, the definition of “assistance” includes physical intervention by another person. Thirdly, despite a reference to safety in the grant of permission and a further reference in the appointee’s post-grant submission, the tribunal was not, on my reading, concluding that the claimant could not cook a simple meal safely. Rather, it seems to me, it was concluding that either he could not do so at all without assistance or, I think more likely, that he could not do so “to an acceptable standard” (see regulation 4(2A)(b) of the PIP Regulations). That would seem to follow from its conclusion that he would have difficulty in knowing how long to cook the food for in that undercooked or overcooked food would not, at least unless the overcooking or undercooking was to a minimal extent, would not be food cooked to an acceptable standard. I do not discount the possibility that, for example, undercooking certain foods might lead to food poisoning and a consequent health risk, but it does not seem to me that that was a part of this tribunal’s thinking in the context of this appeal.

14. A key issue raised by the appeal is whether or not the ability to read, tell the time and hence be able to understand and follow cooking instructions and use such as timers can be taken into account at all in considering whether points should be awarded under the relevant descriptors. On one reading, the submission of the Secretary of State goes so far as to say such never can be because of the view that cooking is a sensory and instinctive act. In other words, what is being argued is that it is not necessary to have regard to instructions or devices to know when food has been cooked because the person doing the cooking can tell.

15. It has to be borne in mind that the test only relates to the cooking of a “simple meal”. A fry-up, which the claimant in this case can manage, would seem to fall squarely within that category. However, it does seem to me (and nothing is said to the contrary by the Secretary of State) that in principle where a claimant has limited intellectual incapacity which results in his only being able to prepare and cook a very restricted range of dishes that, of itself, will have a bearing upon the question of whether that claimant is able to do so to an acceptable standard. It would seem absurd if, to continue to harp on about the fry-up for a moment, one were to conclude that a claimant who for some reason was able to produce such a meal but no other type of meal at all, would be regarded as able to prepare and cook to an acceptable standard. I stress that since I have not had argument as to this particular point, I do not regard myself as formally deciding or finally settling it. But, the Secretary of State has not argued, in this appeal, that the accepted fact of his being able to cook the fry up means, of itself, that he can cook a simple meal for the purposes of the relevant activity and descriptors even if he can cook no other sort of meal at all. That argument could easily have been put in that way had the Secretary of State wanted to.

16. There are, very obviously, a number of ways a person will be able to tell if food has been properly cooked or has been cooked for an appropriate period of time, without the use of such as a clock or a timer or without having read some instructions. Many items of food, such as some types of meat and some types of fish, will change colour or appearance during the cooking process and it might be possible to tell, from that alone, whether an item has been cooked sufficiently. It might be possible to tell from the smell of the food as it is cooked. It might be possible to tell from inserting a knife into the food. It might be possible to tell from tasting a very small portion of it. It seems to me very likely, in general, that at least a

combination of all of those and possibly some other obvious steps which I have not thought of, might potentially lead to a properly informed conclusion as to whether an item of food has been properly cooked or not. Further, whilst a person cooking a particular type of food for the first time may not initially be aware of how long to cook that food for without either a written instruction or recipe or a verbal indication from another person who already knows, it may well be the case that such information, if used once, can then be remembered without further recourse to the same source of information.

17. So, there will be persons who are unable to tell the time, use timers, or read but who will be able to, nevertheless, prepare and cook simple meals to an adequate standard. On the other hand, the inability to do those things might point to an intellectual deficit of significance which might at least raise the possibility that a person impaired to that extent might not be able to properly use the range of alternative suggestions I have made above regarding how to tell when food has been properly cooked. What these considerations lead to, in my judgment, is a conclusion that it cannot simply be said, one way or the other, that an inability to read or tell the time is or is not relevant to the ability to prepare and cook food. But it might be. Everything will turn on the circumstances and particular difficulties of the individual claimant. Where it is asserted by or on behalf of a claimant that there is an inability to cook consequent upon an inability to read or tell the time, careful findings will have to be made as to what can, nevertheless, be achieved given the nature and extent of that claimant's particular problems.

18. In this particular case, the tribunal did not investigate the possibility of the claimant being able to prepare and cook a simple meal without an ability to read, tell the time or use timer switches. So, whilst it did not err in thinking that such an inability might be relevant, it made insufficient factual findings. I have decided, therefore, to set its decision aside.

19. Since there are further facts to be found the appropriate course is for me to remit so that matters may be considered entirely afresh by a new and differently constituted tribunal. There will, therefore, be a complete re-hearing. The new tribunal will not be bound, in any way, by any of the findings of the previous tribunal.

## **Decision**

20. The decision of the tribunal made on 2 September 2016 involved the making of an error of law and is set aside. The case is remitted for a complete rehearing before an entirely differently constituted tribunal.

**(Signed on the original)**

M R Hemingway  
**Judge of the Upper Tribunal**

**Dated:**

**29 June 2017**