

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

DECISION

This appeal by the claimant succeeds. I set aside the decision of the First-tier Tribunal made under reference **SC276/16/00001** and I refer the matter to the First-tier Tribunal for a fresh hearing.

REASONS

Background

1. This case concerns a decision of the Secretary of State on 22 January 2016 that the claimant was not entitled to either component of Disability Living Allowance ('DLA'). The claimant appealed, with his mother acting as appointee, and the FTT allowed the appeal on 18 April 2016, finding that the claimant was entitled to the lowest rate of the care component as he needs attention from another person for a significant portion of the day in connection with his bodily functions. The claimant appeals against that decision to this Upper Tribunal.
2. Leave to appeal was given by Judge Rowley on 5 September 2016 on the grounds argued by the claimant. The Secretary of State does not support the appeal. Neither party seeks an oral hearing, and one is not necessary.
3. The grounds of appeal are that the FTT misapplied the law:
 - (1) in finding that the night time care conditions had to be met on most nights of the week;
 - (2) in finding that the claimant could use incontinence pads at night, negating the need for assistance in changing sheets;
 - (3) in failing properly to explain why award was reduced despite lack of change in condition.
4. The claimant was aged 11 at the date of the decision. He has been diagnosed with eosinophilic colitis, and has chronic constipation with overflow. He requires considerable care from his mother relating to his diet, medication, and night-time soiling and bed wetting. He had previously been awarded the highest rate of the care component until February 2016 on the basis that he needed attention with bodily functions at short intervals though the day and also needed attention with bodily functions more than once a night or once for a prolonged period. He has never been awarded the

mobility component and no issue arises on appeal in relation to mobility.

The First-tier Tribunal

5. The evidence in front of the FTT included the following:
 - a. The claimant's renewal form (p138) said that the claimant's sheets had to be changed at least every night 'as there is smell of faeces and urine', and that he was 'always' having accidents. Managing continence every night took 60-180 minutes, giving him painkillers once every night took 15 minutes, and settling him twice a night took 180 minutes (p137).
 - b. The claimant's GP reported in a letter dated February 2016 (p2) that the claimant was up every night either soiling or wetting his bed due to ongoing faecal incontinence, and abdominal pain.
 - c. A letter from representatives (p4) says *'he does not sleep well at night due to severe pain. He takes pain killers but needs soothing to sleep, particularly after he soils himself. He wakes three times a night, approximately an hour and a half each time is needed to soothe him back to sleep..his mother states that he wakes up in pain most nights and needs his legs massaging and soothing back to sleep. Although this varies, this can take between 1 and 3 hours a night depending on the severity of the pain'*.
 - d. The claimant's mother told the FTT that the position was the same at the time of the FTT hearing as it had been in January (ie noting had changed from the evidence summarised above).
 - e. At the FTT the Record of Proceedings (p163) shows that the claimant's mother's evidence included: *'The claimant was up a lot in the night, 3/4 hrs, lots of difficulty getting back to sleep. In the night he's messed the bed, at 2/3am I have to change the bed. I was up with him last night. In the last week he has slept through no nights. It might be 2am he'll get up and go into toilet upstairs. I hear water going, he's always calling me, mum my legs hurt my tummy hurts. I go to him, I say he should have his medicine. I am in his room for a couple of hours. Most nights this happens, maybe two nights in last week this happened. He's up more than once a night. It happens so often. Maybe one night this week he's messed himself, it's gone through into the sheets. He always calls me.'*
6. The FTT's findings as set out in the Statement of Reasons for not awarding the middle or highest rate of the care component are set out from paragraph 10 of the Statement of Reasons (p184). In relation to night time care the FTT summarised the oral evidence and concluded at paragraph 11:

'the claimant's mother's attention to the claimant's needs did not amount to prolonged or repeated attention in connection with his

bodily functions as it was not happening most of the time. Therefore, we were not satisfied that at night, the claimant reasonably required attention with his bodily functions that was substantially in excess of that which would be required by a child of the same age in normal physical and mental health’.

The Law

7. A person is entitled to the care component of DLA for any period ‘*throughout which*’ he or she meets certain conditions (section 72(1)).
8. To satisfy the night care conditions for DLA for help with personal care a person must be so severely disabled physically or mentally that they need help from another person at night, either:
 - a. prolonged or repeated attention at night in connection with bodily functions; or
 - b. someone to be awake during the night for a prolonged period or at frequent intervals in order to avoid substantial danger to themselves (Social Security Contributions and Benefits Act 1992, Section 72(1)(c)).
9. Sleeping is a bodily function, and so ‘attention’ can include soothing a child back to sleep (R(A)3/78).
10. Children under 16, as this claimant is, can qualify for the care component if they satisfy the ordinary care entitlement conditions and:
 - a. their requirements are substantially in excess of the normal requirements of persons of his age; or
 - b. they have substantial requirements which younger children in normal health may also have but which children of their age in normal health would not have (section 72(1A)).
11. A number of cases have considered whether there is a requirement for a claimant to meet the care conditions for the majority of the time in order to qualify.

R(A) 2/74

12. *R(A) 2/74* was a case where a person required attention for three nights of the week; attention which was agreed to meet the DLA night time care criteria. The issue was whether such care, for under half of the week, could satisfy the phrase (in previous parallel legislation) ‘*a period throughout which*’. In that decision it was noted that an approach had grown up in which decision-makers applied the work ‘*ordinarily*’ to every condition, finding that conditions were not met unless they were ordinarily met.

13. The Commissioner held (para 32):
'there happen to be particular reasons why the use of words such as 'normative' or 'normally' or 'ordinarily' are in my opinion undesirable in this context. There is a real danger of their being interpreted as necessarily involving a rigid arithmetical approach'.
14. The Commissioner held that it would be wrong to reject the claimant's entitlement on an arithmetical basis that care was only required on 3 nights of the week:
'the claimant in this case required attention for at least 10 hours on more than 150 nights in the year, more than half of which hours, incidentally, were after midnight and therefore part of the following 24 hours, and it was for the delegate to decide whether it would be a misuse of the English language to hold on those facts alone that at night she [met the care condition].'

The Commissioner decided:

'I think that the delegate should take a broad view of the matter, asking himself some such question as whether in the whole circumstances the words of the statute do or do not as a matter of the ordinary usage of the English language cover or apply to the facts'.

Moyna

15. The point was also addressed by the House of Lords in *Secretary of State for Work and Pensions v. Moyna* [2003] UKHL 44:

*'18. That leads on to the second point, which is that the test says nothing about how often the person should be able to cook. It would have been easy for Parliament to say that a person should be able to cook daily or six times a week or whatever. Instead, the statute approaches the question of frequency in a different way. Section 72(2) contemplates that one should be able to say of someone **throughout** a nine month period that he is a person whose disability is such that he cannot cook a main meal. What does this mean? One possible construction is that if there was a single occasion during the period when a remission in his disability would have allowed him to cook a meal, it cannot be said that throughout the period he was unable to do so. But the Secretary of State does not contend for this construction and I do not think that it would be right. That is not because one occasion is de minimis but because the test does not in my opinion function at that day to day level. It involves looking at the whole period and saying whether, in a more general sense, the person can fairly be described as a person who is unable to cook a meal. It is an exercise in judgment rather than an arithmetical calculation of frequency.*

19. I therefore agree with the Commissioner that the question involves taking “a broad view of the matter” and making a judgment. The standard of motor abilities required by the cooking test is not so precise as to allow calibration by arithmetical formula. In the present case, I think that the Court of Appeal attached too much weight to the fact that in her claim form Mrs Moyna had ticked the box “1–3 days” for the extent to which she needed help with heavy pans, cutting vegetables and so forth. In answering the generalised question of whether Mrs Moyna could fairly be described as a person unable to cook, it may be relevant to consider not only the number of occasions on which she says she would need assistance but also the reasons why it would be needed..’

R(DLA) 5/05

16. In *R(DLA) 5/05* the Chief Commissioner heard two linked appeals, reviewed the authorities and held:

‘Although the criteria in the various subsections of section 72(1) are discrete and very different, the comments of Lord Hoffmann [in Moyna] inform the general approach to each. In respect of each, an exercise in judgment has to be made taking “a broad view of the matter”, ie taking account of all relevant factors. In respect of none can a determination be made upon an arithmetical formula or by reference to an invariable benchmark.’ [para 9]

‘As I indicate above, a determination as to whether a criterion has been satisfied cannot be made by reference to an inflexible benchmark. Therefore, for example, in relation to whether the night-time criteria of section 72(1)(c)(ii) are satisfied, although no doubt the number of nights upon which a claimant requires “prolonged or repeated attention” is a relevant factor which a decision-maker must take into account, a claimant does not automatically fail to satisfy that condition merely because (eg) he does not satisfy the criteria for at least a majority of the nights of the week. Similarly, a person may satisfy the requirements of a provision “throughout” a period, even if he does not satisfy the statutory criteria for a majority of the days of the week.’ [para 12.1].

Decision

17. The legislation and case law are clear. The correct test for the FTT to apply in relation to the night time care component regarding a child who requires attention is:

- a. was there a period throughout which the claimant was so severely disabled physically or mentally that, at night, he required from another person prolonged or repeated attention?
 - b. was that attention in connection with his bodily functions?
 - c. were the extra conditions relating to children in 72(1A) met?
18. There is no requirement that the claimant's needs are met most nights, or most of the time. The phrase 'most of the time' does not appear in relation to the care component (although it appears in s73(1)(d) relating to one aspect of the mobility component). There is no requirement that the claimant's needs are met more than half of the nights in any given week, and an arithmetical approach is not consistent with either legislation or case law. Instead, a tribunal should make factual findings as to the nature and frequency of night time attention requirements, and consider in the round whether the test above is met. A claimant who requires prolonged and repeated attention one night a month is almost certainly not 'so severely disabled throughout the relevant period' as to satisfy the condition. A claimant who required prolonged and repeated attention every night almost certainly will be. A claimant who requires prolonged and repeated attention on some nights may be: that is a judgment for the tribunal.
19. The government's decision makers' guide (Volume 10, Ch 61) sets this out clearly:
- 'The "period throughout which" condition is met if a person satisfies the conditions of entitlement to either component, in a general sense, throughout the relevant period. The DM should take a broad view, look at the whole period and determine whether the claimant can fairly be described as satisfying the conditions of entitlement. This does not mean that care needs have to be required on*
1. *any particular day and/or night **or***
 2. *a specific number of days and/or nights each week.*
- Taking the whole period into account involves an exercise in judgement rather than a simple arithmetical calculation of frequency.'*
20. The FTT in this case fell into error of law in its approach to the night time care criteria. The FTT, in finding that '*the claimant's mother's attention to the claimant's needs did not amount to prolonged or repeated attention in connection with his bodily functions as it was not happening most of the time*' erroneously added a condition that attention requirements had to be met most of the time. A full reading of the FTT's explanation suggests that FTT were applying an arithmetical test: that the night-time care test was only met

satisfied if it was met for more than half of the nights in a week. The FTT did not apply the correct test, in error of law.

21. The FTT failed to give adequate reasons for its findings that the extra condition applying to children in s72(1A) was not met. It is not clear what findings the FTT made about the normal requirements of children of the same age, particularly in relation to being assisted with continence problems at night.
22. The FTT's approach to the evidence also fell into error. The claimant's mother said that she had attended the child for incontinence 'maybe once' in the previous week, and had 'maybe two or three' nights when she spent hours settling him because of pain. She had previously described, both in documents and to professionals, having to attend to her child every night. Given that she said that the child's condition had not changed, the FTT should not have made factual findings based on the previous week alone: there was no exploration of, or findings as to whether the previous week was unusual.
23. The decision is set aside and there will be a re-hearing. It follows that it is not necessary to consider the remaining grounds of appeal. However, the new FTT may be assisted by the following points:
 - a. In relation to the use of incontinence pads, a tribunal will be assisted by consideration of CDLA/1295/2010 and considering whether the claimant would still require attention to change the pad and clean himself, even if the sheets did not require changing;
 - b. In considering the additional test for children in 72(1A), a tribunal will be assisted by the careful analysis of Judge Marcus QC in *BM v SSWP (DLA) [2015] UKUT 18 (AAC)*.
24. The case will be an oral hearing listed before a differently constituted panel. The new panel will make its own findings and decision on all relevant matters and will consider all aspects of the case afresh. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course.

Upper Tribunal Judge Kate Brunner QC

Signed on the original on 12 January 2017