DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Gray **CPIP/663/2017**

Decision: This appeal by the claimant succeeds.

Having given Permission to appeal on 16 March 2017 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Taunton and made on 9 November 2016 under reference SC 186/16/01096. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Directions

1. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.
2. The case will be listed as an oral hearing in front of a freshly constituted tribunal. The appellant is advised to attend.
3. She should be aware that the new tribunal will be looking at her health problems and how they affected her day-to-day life in relation to the qualifying periods for entitlement to a Personal Independence Payment, but that it must not take into account matters which did not obtain at the date that the decision under appeal was made 16 March 2016. That does not mean than later matters are never relevant, but their relevance is limited to them shedding light on what the position was likely to have been at that time.
4. The new panel will make its own findings and decision on all relevant descriptors. They should note that no fresh claim has been made in the interim.

Reasons

Background

1. This case concerns entitlement to a Personal Independence Payment (PIP). The appellant suffers from certain physical problems and mental health difficulties which are set out in the Statement of Reasons produced by the presiding judge of the First Tier Tribunal (FTT), but which I do not need to relate here. She claimed PIP on 13 October 2015 when she was aged 31. She had previously been in receipt of the lowest rate of the care component of Disability Living Allowance.

2. An initial decision was made on her PIP claim that she did not score any points under either the activities of daily living or the mobility activities in the schedule to the Social Security (Personal Independence Payment) Regulations 2013 (the

regulations hereafter). An appeal was lodged, and a final hearing took place at the FTT on 9 November 2016. The FTT found that she merited some points but not enough for an award of either component. She scored 6 points under the daily living descriptors (1b (preparing food) 2 points; 2b (taking nutrition) 2 points; 9b (engaging with other people face to face) 2 points) and 4 points under the mobility descriptor 2b, for difficulties moving more than 200 metres. A minimum of 8 points in the relevant category is necessary for an award of either component at the standard rate.

3. Permission having been refused by a District Tribunal Judge at the FTT the application was renewed before me.

Proceedings in the Upper Tribunal

4. I granted permission to appeal saying:

1. The appeal below concerned possible entitlement to a Personal Independence Payment (PIP). The grounds of appeal say that the tribunal misinterpreted the law as it applies to a fluctuating condition. It also makes the point that an activity must be carried out safely and as reasonably necessary, and that where it cannot be performed part of the day it is deemed that it cannot be done at all. These are valid points. I am not convinced that the FTT ignored them or applied the law wrongly, but I think that it is arguable.
2. From the statement of reasons prepared by the judge it is clear that the tribunal had regulations 7 and 4 of the Social Security (Personal Independence Payment) Regulations 2013 in mind, because they are set out. It is not clear, however, whether they assessed the applicant's ability to do the various tasks in issue in light of the criteria explained by Upper Tribunal Judge Hemingway in TR-v-SSWP [2015] UKUT 626 (AAC).
3. The statement of reasons says clearly at [16] that the applicant prepared and cooked a main meal for her son daily, whilst her mother would prepare a meal for the two of them. It is not clear to me from my reading of the papers where the evidence appears that would support such a finding. That may taint the findings in relation to cooking, although I bear in mind that the opinion of the healthcare professional was that the appellant should be able to cook, because she did not appear to have relevant limitations in that field, a point implicitly accepted by the FTT.
4. The appellant also prays in aid her previous award of DLA, however the tests under PIP are quite different, and even though she was entitled to a DLA payment because of difficulties preparing a main meal, that is not a passport to points under the cooking element of the new benefit. The grounds of appeal seem to make the point that the applicant may be unsafe in the kitchen because she is accompanied by her young son, who has hyperactivity problems, which makes it unsafe for her to cook. The Secretary of State is asked to comment upon the extent to which the test is a functional one, and whether, or the extent to which, it takes personal conditions into account.
5. As to the mobility component I feel that the points made have less force, but I do not close any argument down.

5. I directed submissions which are now to hand. Neither party has requested an oral hearing; I do not think one is necessary in the interests of justice as I am able to decide the matter fairly on the basis of the papers before me.

The arguments of the parties

The appellant

6. The appellant has added to the arguments put forward in her grounds of appeal, (which I summarise in my grant of permission above) following the submission of the Secretary of State. She makes the observation that a case referred to by the Secretary of State is not relevant because it deals with different health problems

to her own. She disagrees with the argument put forward that because she drove to the medical assessment she must have been fatigued by that exertion and the healthcare professionals report should be read in that light, that is to say, as an assessment of her in a state of fatigue. She says she rested for 20 minutes in the waiting room, and ate a snack before the assessment. She says that she needed to rest after it also. These are evidential matters, and not legal matters, which she will have an opportunity to explain to the fresh tribunal.

The respondent

7. The Secretary of State by his representative A. Gilfoyle opposes the appeal arguing that the reasons were sufficient, the tribunal implicitly having relied upon the PIP consultation report completed by the healthcare professional.

8. The appellant's point as to variability, or fluctuation in the severity of her symptoms, which I set out in my grant of permission, is dealt with by pointing out that at the consultation she explained that every day was a bad day; there were no good days, and therefore the results of the medical examination could be treated as typical, and they did not show significant functional problems. As I have commented in relation to the appellant's point above, this is really a submission on the evidence and the way it should or could be interpreted rather than an analysis of the way the tribunal actually dealt with it and explained itself.

9. In relation to the question I asked in granting permission as to the extent to which the test of ability is a functional one or takes into account personal conditions, the Secretary of State answers that it matters not what the personal conditions of a claimant are or involve; the test should be a standard benchmark of functional ability and broadly the same whoever is being assessed. The decision of Upper Tribunal Judge Levenson in *ZI-v- Secretary of State for Work and Pensions* (which seems not to have been published, but bears the file reference CPIP/1532/2015) the relevance of which is disputed by the appellant, is cited in support of that argument.

10. As to the mobility component, it is argued that the tribunal fairly weighed the evidence before it in coming to the conclusion that the appellant did not suffer from significant anxiety as to score points under mobility activity 1, given that there appears to be no diagnosis of anxiety, and it is not mentioned in her letter which lists and describes her other conditions at pages 44 to 45.

What I make of the arguments

11. I disagree with the appellant that the Secretary of State's point in relation to her level of fatigue has no merit. It is a legitimate submission to make as to the way in which the FTT should interpret the evidence of the healthcare professional, which the tribunal rehearing the case must consider alongside her evidence of very considerable difficulties in concentration and performance of tasks and her contention that she had rested prior to the examination and needed to do so again afterwards.
12. I agree with the appellant, and the point seems to be accepted by the Secretary of State, as to the absence of an evidence base for the finding in respect of how

the task of cooking is carried out at the appellant's home. Given the appellant's evidence in the claim pack as to her difficulties cooking that may have been a material error. In common with the Secretary of State's representative I could not entirely read the handwritten record of proceedings, but it does not seem to support the statement made that she cooked daily for her son.

13. I agree with the Secretary of State's explanation in respect of the position of the appellant's child in an assessment of her abilities to perform the various descriptors. The decision of Judge Levenson is relevant and it is appended to the Secretary of State's submission to me which will be before the fresh FTT. It establishes the principle that the test is as to a person's physical and mental capacity to cook, whether or not they actually do so.
14. The fact that someone does not cook may be due to preference or habitual family arrangements, or it may be indicative of real problems in the task. If somebody says that they do not cook because it would not be safe for them to do so that assertion must be considered in the light of the evidence as to the extent of their physical or mental health problems, and that argument is put forward here. However it is also said that the appellant cannot cook because she needs to do something else, (look after her son) and that is not relevant in a calibration of any difficulties that she might have if she were to cook.
15. Any difficulties in cooking because of the presence of a small child must be ignored because the test is not concerned with the practicalities of preparing and cooking food, but with the capability of so doing, and, to be relevant, any difficulties must arise out of a physical or mental condition.
16. I disagree with the Secretary of State that the reasons provided by the FTT were sufficient. I deal with that in detail below.

The main error of law

17. I am setting the decision aside because, although the statement of reasons on a superficial reading seemed to cover the necessary ground, on closer examination its findings and explanations for them are wholly inadequate.
18. The finding in respect of preparing food, for example, at paragraph 16 is *"The tribunal formed the view on the available evidence that the appellant could, if she chose to, prepare and cook a simple meal for herself most of the time. In forming this view the tribunal took note that the appellant used adapted cutlery to assist in the process of chopping vegetables and cutting up food due to pain in her hands. For this reason the tribunal is satisfied that the appellant satisfied activity 1(b) in that she needed to use an aid or appliance to be able to prepare or cook a simple meal for herself and accordingly awarded two points."* That implicitly accepts the appellant's evidence that she needed to use special equipment, but it does not deal with her contention that she could not cook because she lacked concentration and could not safely deal with pans on the hob. It is simply ignored. That level of difficulty, if accepted, would suggest a higher point scoring descriptor, so it was important for the tribunal to deal with the assertion.
19. In dealing with Activity 9 (engaging with others face to face) at paragraph 20, the appellant's account is set out, which is essentially that she did not go out socially, because she needed to keep up her energy for the needs of her son who had ADHD and an autistic spectrum disorder. Because of that she was said to find social situations exhausting. Further she said she had difficulty attending school

meetings, finding it hard to put words together because of brain fog, and was accompanied to these by her mother. The part of the healthcare professional's report dealing with activity 9 is then summarised as saying that the appellant's reported difficulty engaging with others was inconsistent with the functional history which showed that she went shopping, could ask for help if she needed it and attended GP appointments alone. It is also set out that she was said to have maintained adequate eye contact and rapport during that consultation. The statement of reasons then goes on to say that the tribunal, having considered all relevant evidence, was satisfied that she needed prompting to be able to engage with others and accordingly awarded two points under activity 9b.

Why this was insufficient

20. A recitation of the evidence followed by an indication of how many points are awarded is neither a finding of fact nor a reason for the conclusion arrived at. A finding of fact can only result from subjecting the evidence to analysis and reasoning; it is not sufficient to set out the evidence and say that having considered it the tribunal was satisfied that the terms of a particular descriptor was met; the 'because' element is lacking. That element should explain what the tribunal accepted or rejected and why.
21. In the activity 9 example the FTT needed to engage with the conflict in the two contrasting evidential positions. It needed to resolve that conflict, using perhaps evidence of ability or difficulty in other spheres and evidence as to the extent of the treatment the appellant was receiving to help it decide upon the extent of any likely functional difficulty. It was necessary to consider whether the appellant's stated lack of social engagement since moving to the area a couple of years previously was due to her choice in prioritising the needs of her son; that is to say would she like to go out socially but could not due to his needs, or did she not socialise due to her difficulties, physical, mental or a combination of the two. If the latter, what level of assistance did she require within the terms of activity 9 in order to engage socially, using case law where necessary as to the interpretation of that activity.

22. Although aspects of activity 9 as drafted are not defined, a term which is, "engage socially" should be used as a guide to what engaging face-to-face might involve. (*HJ-v-SSWP (PIP) [2016] UKUT 7 (AAC))*. It means to interact with others in a contextually and socially appropriate manner, understand body language and establish relationships, and these considerations must be applied in relation to activity 9. *SF-v-SSWP (PIP) [2016] UKUT 543 (AAC))* indicates that an ability to engage with professionals on a necessary basis is insufficient; *AM-v-SSWP(PIP) [2017] UKUT 7 (AAC)* explains that engaging with other people face to face concerns small groups, rather than dealing with crowds and *SL-v-SSWP [2016] UKUT 147 (AAC)* confirms that experienced family or friends might provide social support. Those examples are not exhaustive.

Concluding remarks

23. The tribunal's task is to make an assessment of the probable level of the appellant's functional abilities within the activities of the schedule to the regulations based upon the entirety of the evidence. Whilst bearing in mind that people react differently to ill-health and to medication intended to be of benefit, it

will assess the probative value of the different parts of the evidence using its expert knowledge as to what level of functional disability is likely given the particular diagnoses and the level of treatment, as well as other evidential tools such as plausibility, inconsistency and its own common sense. In setting out its findings it is necessary to indicate what evidence is accepted or the extent to which certain evidence is accepted, and the reasons for the conclusions arrived at.

24. I would add only that given the nature of the appellant's stated problems the FTT will need to decide whether any of the activities set out in the schedule are affected by the level of her fatigue, and to what extent, with consideration given to the terms of regulation 4 in relation to the quality of performance of the activities in addition to the rule set out in regulation 7 as to the need for performance to be affected for the majority of the time. As to the application of regulation 7 the decision of Upper Tribunal Judge Hemingway in *TR-v-SSWP (PIP) [2015] UKUT 0626 (AAC)* may be pertinent. It establishes that if a claimant is unable to perform an activity for part of a day that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34]. The application of these regulations and that case will largely depend upon the extent to which the appellant's explanation of her level of functional activity is believed, and she should be aware that whether or to what extent her account is accepted, or whether it, or aspects of it, are deemed improbable is a matter for the judgment of the tribunal. I make that point in the light of some of the written material in the bundle which suggests that the position she puts forward must be accepted. For those reasons she should understand that the fact that her appeal has succeeded at this stage on a point of law is not to be taken as any indication as to what the tribunal might decide as to the facts in due course.

Paula Gray

Judge of the Upper Tribunal **Signed on the original on 27 July 2017**