

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/1578/2017

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: Since the decision of the First-tier Tribunal (which it made at Liverpool on 22 February 2017 under reference SC068/16/04218) involved the making of an error of law it is set aside. The case is remitted for a complete rehearing before a differently constituted panel of the First-tier Tribunal.

This decision is made under section 12 of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS:

- A. The tribunal must undertake (by way of an oral hearing) 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 her claim that was made on 23 June 2016 and decided on 6 September 2016.

REASONS FOR DECISION

1. Both the claimant and the Secretary of State have, through their respective representatives, expressed the view that the decision of the tribunal involved the making of an error of law. The Secretary of State has urged me to set aside the tribunal's decision and to remit for a complete rehearing before an entirely differently constituted panel. The claimant has not objected to that proposed course of action. But, the Secretary of State, having accepted that the tribunal erred in one specific way in which I had suggested it might have done when I granted permission, has not dealt with certain other issues raised in the grounds of appeal and, indeed, in my grant of permission. The claimant's representative urges me to consider addressing those matters in this decision despite the Secretary of State's support for the appeal on a different basis because "it is believed that there are issues of general importance to First-tier Tribunals which require Upper Tribunal guidance". I have seriously considered doing as the claimant's representative suggests. However, I have decided that it is not appropriate for me to do so. I will explain that below.

2. The claimant was previously in receipt of the lowest rate of the care component of disability living allowance. In consequence of the process by which disability living allowance is being replaced, for most claimants, by personal independence payments (PIP) it became necessary for her to make a claim for PIP. She did so on 23 June 2016 and on 6 September 2016 the Secretary of State decided there was no entitlement to either component. It was said, at that stage, that she qualified for two daily living points under daily living descriptor 1(b) (Needs to use aid or appliance to be able to either prepare or cook a simple meal) and two points under daily living descriptor 6b (Needs to use an aid or appliance to be able to dress or undress) but no other points at all. The Secretary of State then, at the

claimant's request, went on to undertake a mandatory reconsideration which led to an award of two further points under daily living descriptor 2(b)(i) (Needs to use an aid or appliance to be able to take nutrition). But that still did not lead to entitlement to either component. The claimant, remaining dissatisfied, appealed to the tribunal. She was represented by Citizens Advice Sefton and that organisation has continued to represent her throughout the Upper Tribunal proceedings too. The tribunal dismissed the appeal concluding that she was entitled to six daily living points and no mobility points. But the six disability points awarded were not quite the same as those which had been awarded after the mandatory reconsideration. That is because the tribunal concluded that no points ought to be awarded under the descriptors linked to activity 2 but that 2 points ought to be awarded under daily living descriptor 4(b) (Needs to use an aid or appliance to be able to wash or bathe).

3. The tribunal prepared its statement of reasons for decision (statement of reasons) on 13 March 2017. At paragraph 5, by way of explanation as to why it felt able to remove the points which had been awarded under daily living descriptor 2(b) it said this:

“Mr Lister [the claimant's representative before the First-tier Tribunal] is an experienced representative and his submission helpfully focused the tribunal's attention on the issues in contention. However, as an experienced representative he must have been aware that on appeal to a First-tier Tribunal the tribunal has the power to consider whether an existing award of points is justified, and that in addition to awarding further points the tribunal may conclude that an award of points by the decision maker was incorrect. Although representatives often assume that points awarded by the decision maker can be 'banked' and the tribunal will simply consider whether further points should be awarded for other descriptors, the tribunal is not required to take this approach. Where the evidence justifying an existing award of points is clear, then in practice the tribunal is very unlikely to question it. However, where, on the available evidence, there are reservations as to whether an existing award of points is justified the tribunal is entitled to consider whether, on the whole of the evidence, the points awarded are correct. Accordingly, in [the claimant's] case the tribunal looked specifically at daily living descriptors, 1 (preparing food), 2 (Taking nutrition), 4 (washing and bathing) and 6 (dressing and undressing).”

4. The tribunal went on to explain, at paragraph 16 of its statement of reasons, its view that no points ought to be awarded under daily living activity 2. It is not necessary, for the purposes of this decision, for me to set out that paragraph but, essentially, it thought despite her having reduced grip the evidence pointed towards an ability on the claimant's part to cut up food. It is also worth mentioning, at this stage, that with respect to daily living activity 1 the claimant's representative had not (neither in a written submission nor in oral submissions) asserted that any higher scoring descriptor than 1(b) applied; that the tribunal whilst noting that concession had gone on to consider the matter in any event (although perhaps more briefly than it would otherwise have done); and that it had concluded because of what it found to be reduced pinch and power grip in the right hand and slightly reduced grip in the left hand coupled with restricted movement and weakness of the right arm that the claimant would struggle to peel and chop vegetables. So, it concluded that she would “need to use aids” to prepare or cook a meal “reliably and repeatedly”. So it agreed that 1b was the appropriate descriptor for that activity.

5. Permission to appeal was sought. I granted permission. The grounds and my grant raised issues as to the extent to which, if at all, a tribunal when deciding a claimant could accomplish a relevant task by using aids (and I suppose appliances) had to specify what sort of aid or appliance it had in mind. Of course, if a tribunal was wrong in deciding a relevant task might be accomplished by the use of an aid or appliance it might potentially go on to award

points under a higher scoring descriptor within the relevant activity. Further, since it was contended in the grounds that the tribunal, on its findings, ought to have awarded points under daily living activity 1(e) (Needs supervision or assistance to either prepare or cook a simple meal) I raised the issue of the representative at the tribunal not having sought further points under daily living activity 1 over and above those already awarded. In granting permission I suggested that, in addition to what had been contended in the grounds, the tribunal might have erred through taking away previously awarded points without giving a specific indication that it was contemplating doing so notwithstanding that the claimant did have a representative.

6. The Secretary of State's representative, in a brief written response to the appeal, accepted that the tribunal had erred through failing to warn the claimant of the possibility of taking away previously awarded points. On that basis I was invited to set aside the tribunal's decision and to remit for a complete rehearing. It was explained that since any other errors that the tribunal might have made would be subsumed by a rehearing, it was not considered necessary to address the various other points which had been raised in the grounds. The claimant's representative, as indicated, did not oppose remittal. But in a helpful written reply he urged me to give guidance concerning what he called the "specify aids" point and the "inquisitorial function" point which relates to the question of whether a tribunal is entitled to accept a concession with respect to potentially applicable descriptors made by an experienced/competent representative.

7. I am satisfied that the tribunal erred in law through failing to indicate the possibility of its removing previously awarded points, notwithstanding the presence of the claimant's representative.

8. The tribunal did not actually ask itself whether the question of entitlement to two points under descriptor 2(b) was a matter raised by the appeal. The Secretary of State had awarded those points and the claimant's representative, in a written submission to the tribunal, had expressly indicated that it was accepted that that was the correct award under that particular activity. But, this was not a case where the Secretary of State had actually made an award of PIP. The claimant, in pursuing his appeal, was seeking to establish entitlement to the daily living component. Looked at in one way it might be argued that, since there was agreement between the parties about the appropriateness of the award of two points under that particular descriptor, that discrete issue was one not raised by the appeal (see section 12(8)(a) of the Social Security Act 1998, which provides that a tribunal "need not consider any issue not raised by the appeal"). On the other hand it may be thought that what was raised by the appeal was, more broadly, the correctness or otherwise of the Secretary of State's conclusion that there was no entitlement to the daily living component and hence what descriptors were or were not satisfied. Pausing there, though, even if that is right, it does not mean that a tribunal when faced with such a situation is actually obliged to consider all descriptors as a matter of course including those which were not subject to any challenge on appeal (see the comments of Upper Tribunal Judge Wright at paragraph 9 of his decision in *EG v SSWP (PIP)* [2015] UKUT 0275 (AAC)).

9. The significance of all of this is that had the tribunal considered the entitlement to two points under daily living descriptor 2(b) as not being an issue raised by the appeal it would have had to exercise a conscious discretion to consider it at all. But it had said nothing about the exercise of any such discretion in its statement of reasons. So, assuming the issue was not one raised by the appeal it might have fallen into error on that basis. But, whilst I prefer the

wider view that what was raised was the entitlement to points in relation to the daily living descriptors I have not found it necessary to decide the point for the purposes of this appeal.

10. Assuming the matter was one raised by the appeal, it was still necessary for the tribunal to comply with its duty to act fairly. Such a duty might be said to arise through general principles of fairness and natural justice, through the need to comply with the requirements of Article 6 of the European Convention on Human Rights and through what is contained in its Rules of Procedure concerning “overriding objective”. For my part I am not sure that Article 6, in this situation, adds anything to the general duty to act fairly. But be that as it may, the tribunal did end up taking away the points previously awarded by the Secretary of State under daily living descriptor 2(b) without actually intimating to the claimant or his representative that it was contemplating such a course of action. That does beg the question as to whether it did not act fairly. The point is a material one because, given that it did decide to award 6 daily living points, had it not taken those 2 points away that would have led to entitlement being established.

11. The tribunal does not make it clear, in its statement of reasons, as to at what point it realised that the removal of those 2 points might be a possibility. But its approach seems to have been that, whenever the concern might have been identified, there would be no need to indicate that such was in its contemplation because the claimant had the assistance of an “experienced representative”. That was because it took the view that it would be appropriate to assume that any such representative would be aware of the tribunal’s powers to remove points previously awarded and would have given appropriate advise. Perhaps, though, there is something of an inconsistency in the tribunal stating that and then, in the same paragraph of its statement of reasons (set out above) observing that representatives often assume that points awarded by the decision maker can be “banked”. Perhaps at that point the tribunal had in mind inexperienced representatives or perhaps it was saying that even experienced ones who are aware of the full range of the tribunal’s powers nevertheless make such assumptions. But in my judgment the tribunal was wrong in taking the view that it need not indicate its contemplating the removal of points simply because a claimant has an experienced representative.

12. In this context, I appreciate that there are circumstances where a tribunal is able to rely upon a representative which it knows to be competent and experienced, to fulfil various tasks. It may well have been right in taking the view that it could assume that such a representative would, in general terms, explain to his or her client the range of a tribunal’s powers on appeal including the power to remove points and, indeed, to remove an award in certain circumstances. Indeed I touched upon such matters in *MW v SSWP (PIP)* [2016] UKUT 0540 (AAC). But nevertheless, it simply goes too far to say that the duty to act fairly is complied with without some form of indication being given, once the risk is crystallised in the tribunal’s mind, regarding the taking away of points which have been previously awarded. What should follow thereafter will, of course, depend upon the circumstances. Here, it might have been the case that if such a warning had been given the representative would have been able to indicate, perhaps after a brief adjournment to consult his client, that it was intended to proceed notwithstanding the risk. There might be some cases where an adjournment to a different date would be the proper and fair course of action in circumstances where any warning given by the tribunal might lead to its being thought that further medical or other evidence ought to be obtained. There might be circumstances where, even if an adjournment to a different date is sought, a tribunal could legitimately take the view that fairness would not dictate that such

would be granted if it thinks that the issue is a simple and straightforward one which does not require further evidence and which the representative is capable of dealing with.

13. But, here, the tribunal did err in law through failing to act fairly. That is why I have decided to set aside its decision.

14. I have decided not to say very much about the other issues which the claimant's representative invites me to give guidance upon. That is for a number of reasons. Firstly, my having decided to dispose of the appeal on a different basis, anything I would have to say as to those matters would not be binding. Secondly, the Secretary of State has not as yet put his view regarding the "specify aids" point or the "inquisitorial function" point. There would be potential unfairness in my issuing guidance in the absence of the Secretary of State's view. Thirdly, whilst that is not an insuperable problem because I could direct further submissions, that would result in delay which is something which the claimant herself may not welcome.

15. But I will just make these brief comments. In the circumstances of this appeal it seems to me that it would have been perfectly permissible for the tribunal to have relied upon the stance of the experienced representative before it that the appropriate award under daily living activity 1 was 2 points under 1(b). It could legitimately have said it accepted the concession and then, subject to there being anything unusual, have said no more. Indeed, the claimant's representative agrees that in general terms where such a concession has been made by an experienced representative a tribunal is entitled to rely upon it. I agree with him, though, that the position might be different, even if such is relied upon initially, if evidence then comes to light during the hearing which manifestly calls the correctness of such concession into question. I also agree that if a tribunal, rather than accepting a concession decides to look into the matter for itself then it is obliged to give adequate reasons for any conclusion upon the matter it reaches.

16. As to the "specify aids" point though, I am inclined to say even less. There may be issues to be explored at some point regarding any need that there might or might not be for a tribunal, in giving reasons, to give at least some sort of indication as to what aids or appliances it has in mind in circumstances where it is being asserted by or on behalf of a claimant that a particular task cannot be undertaken even with aids or appliances such that a higher scoring descriptor is being sought. But, if so, it seems to me that should be done in a case where, unlike here, there has been full argument before the Upper Tribunal. This is not such a case.

17. In light of all of the above the claimant's appeal to the Upper Tribunal is allowed and the case is remitted to the tribunal for a complete rehearing.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated

21 November 2017