IN THE UPPER TRIBUNAL **Case No.** CPIP/3130/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made on 25 July 2017 at Newcastle-upon-Tyne under reference SC228/16/01619) involved the making of an error of law, it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted panel.

This decision is made under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS:

A. The tribunal must (by way of an oral hearing) 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 that was made on 18 November 2016.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the decision of the Secretary of State under appeal: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

D. The Secretary of State is to provide to the First-tier Tribunal, within one month of the issuing of this decision of the Upper Tribunal, copies of all documentary evidence which was used when the claimant was most recently awarded disability living allowance. Alternatively, if the Secretary of State no longer possesses such material or is otherwise unable to produce it, that should be confirmed to the First-tier Tribunal, along with a full explanation, within the same time scale.

REASONS FOR DECISION

The background

1. The claimant has epilepsy which the First-tier Tribunal (the tribunal) described as being "uncontrolled". There was evidence suggesting that he would experience something in the order of two grand mal fits (also known as generalised tonic-clonic seizures) per week and a variable number of petit mal fits (also known as absence seizures) within a similar period. He also claimed to suffer from depression but was not, at any material time, receiving any medical input in connection with any such condition. He has not claimed to have any other health problems.

2. The claimant was receiving a disability living allowance consisting of the highest rate of the care component and the lower rate of the mobility component. However, as a result of that benefit being replaced by personal independence payments (PIP) it became necessary for him to make a claim for PIP. He did so on 18 November 2015. On 10 May 2016 the Secretary of State decided his entitlement to disability living allowance would end on 7 June 2016 and that he was not entitled to PIP. He sought a mandatory reconsideration but that did not result in the decision being changed.

3. Since this appeal is concerned only with daily living activity 1 (preparing food) and its associated descriptors, I will limit myself to that. In his customer questionnaire, which he was asked to complete as part of the process of claiming PIP, the claimant wrote "I only cook in the microwave as I have a fear I will have a seizure while cooking on a cooker hob. I have awoken on the kitchen floor from a blackout many times. If I cooked on the hob and black out the food could burn and cause a fire". It was also said on his behalf that he would "thrash around" when in the midst of a grand mal fit.

Some relevant legal provisions

4. The relevant activity and the relevant descriptors are in this form:

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

5. There are also relevant definitions contained in Part 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations). These are as follows:

> 'assistance' means physical intervention by another person and does not include speech;
>
> 'cook' means heat food at or above waste height;
>
> 'prepare' in the context of food, means make food ready for cooking or eating;

'supervision' means the continuous presence of another person for the purpose of ensuring C's safety;

'simple meal' means a cooked one course meal for one using fresh ingredients."

6. Regulation 4 is also relevant:

"**4. Assessment of ability to carry out activities**

(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, the Act, whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.

(2) C's ability to carry out an activity is to be assessed –

(a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or

(b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use. (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) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activity.

(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; and

(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."

The tribunal's decision

7. The tribunal allowed the claimant's appeal but not to the extent that he would have liked. It awarded him 6 daily living points under descriptors 1e and 4c, the latter being linked to the activity of washing and bathing. But that was not sufficient to enable him to reach the 8 point threshold for even the standard rate of the daily living component of PIP. However, it awarded him 12 points under mobility descriptor 1f on the basis that he could not safely follow the route of a familiar journey without another person. All of those points were awarded in consequence of his uncontrolled epilepsy. The 12 mobility points meant that he was entitled to the enhanced rate of that component. The award made by the tribunal was for a fixed period from 8 June 2016 to 7 January 2018.

8. The tribunal, in its statement of reasons for decision (statement of reasons) accepted that the epilepsy was uncontrolled and that the claimant experienced both grand mal and petit mal seizures (paragraph 21 of the statement of reasons). It found that the seizures would occur "with little if any warning" (paragraph 23 of the statement of reasons). It observed that for a person with uncontrolled epilepsy there would be an "obvious risk of harm" in carrying out the activities of preparing food and of washing and bathing. So it thought, and I think for good reason it has not subsequently been challenged on this, that there had to be a connection between the performing of the task or tasks identified in the descriptor or descriptors in issue and the arising of the risk. It then said:

> " 28. There was an obvious and real risk that he could injure himself whilst cooking. He would require supervision and assistance to prepare or cook a simple meal and consequently scored under descriptor 1(b)."

9. Pausing there, the tribunal clearly meant to specify descriptor 1(e). That is clear from the context and also from its having identified descriptor 1e as being the applicable one in its decision notice. Indeed both representatives involved in this appeal to the Upper Tribunal have proceeded on that basis. The tribunal then went on to deal with what was perhaps a rather ambitious argument put by the claimant's representative (Mr P Capon) to the effect that, as I understand it, the claimant should score maximum points in relation to all activities because he "was at risk of having a seizure whatever he did". In addressing that the tribunal commented, once again, that cooking and bathing had obvious risks for someone prone to seizures. So, once again, it had in mind, at least on my reading, the need for a connection between the task and the risk. It then added the comment "Medical professionals who came to the appellant's assistance would be experienced in dealing with people who had epileptic fits".

10. The tribunal went on to explain why it did not think there were any mental health difficulties of significance.

The appeal to the Upper Tribunal

11. The claimant, through his representative, applied for permission to appeal to the Upper Tribunal which I granted. The contention in the grounds was that the tribunal had erred because in deciding that daily living descriptor 1e applied and 1f did not, it had failed to consider the risk to any person who might seek to assist or supervise the claimant when preparing food. The rationale, as explained by Mr Capon, was that if the claimant was, for example, using sharp knives or dealing with hot liquids (such as boiling water) at the point of onset of a seizure, then a person who was present and who was responding to that by way of intervention would, as a result of the thrashing about, be putting himself/herself at risk.

12. Mr R Whitaker, now acting on behalf of the Secretary of State, has provided a written submission in which he argues that the tribunal did err through failing to consider, in light of the content of regulation 4(2A) of the PIP Regulations, whether a person supervising or assisting the claimant in the context of the descriptors with which this appeal to the Upper Tribunal is concerned, could carry out such supervision or assistance whilst themselves remaining safe. He also asserted that the tribunal was in error in failing to adequately explain the nature of the risk it thought the claimant might face when preparing and cooking food and in failing to consider whether any mitigating step might be taken including the use of a microwave oven. He urges me to set aside the tribunal's decision and to remit for a rehearing.

13. The claimant's representative, unsurprisingly in the circumstances, did not offer further argument and did not oppose Mr Whitaker's suggestion of remittal.

Analysis

14. PIP was introduced by the Welfare Reform Act 2012 ("the Act"). According to section 78 of that Act a person is entitled to the daily living component at the standard rate if, amongst other things, that person's ability to carry out daily living activities is limited by the person's physical or mental condition. Where that person's ability is severely limited there will be entitlement to the enhanced rate. There are similar requirements contained within section 79 of the Act with respect to the standard and enhanced rate of the mobility component.

15. The potentially relevant descriptors in the context of this appeal are daily living descriptors 1c, 1e and 1f. Since the claimant scored 6 daily living points, if he had been found to satisfy descriptor 1f rather than 1e, he would have scored 8 daily living points and would have qualified for the standard rate of the daily living component.

16. Where it becomes necessary to consider whether an activity can or cannot be carried out safely, as the term is used in regulation 4(2A)(a) of the PIP Regulations, it must be asked whether there is a real possibility that could not be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. Both the likelihood of the harm occurring and the severity of the consequences are relevant (*RJ, GMcL and CS v SSWP (PIP)* [2017] UKUT 105 (AAC). The meaning of "safety" in the above definition of "supersession" is to be approached consistently with "safely" in regulation 4(4)(a). Again, that was stated in *RJ*.

17. I remind myself of the particular ground of appeal advanced by Mr Capon. However, I have concluded that the tribunal went wrong in law simply through giving inadequate reasons to explain how it reached the conclusion that daily living descriptor 1e applied. That did, in

fact, have the consequence that it did not make sufficient findings for it to identify whether or not it would have to consider the safety of any person assisting or supervising the claimant when preparing food. But the real point is that of the inadequate findings.

18. The tribunal, as indicated, accepted that the claimant suffered from uncontrolled epilepsy. It made some findings as to the frequency of seizures as noted above and significantly, it said that they would occur “with little if any warning”. That probably was intended to translate as a conclusion that there would, at least sometimes, be no useful warning at all. I mean useful in the sense of affording time for the claimant, unaided, to desist from what he was doing before the onset of actual risk. That seems to be why the tribunal thought there was “an obvious and real risk” of the claimant injuring himself when cooking and with the consequence that he would “require supervision and assistance to prepare and cook a simple meal”.

19. Although literally paragraph 28 of the statement of reasons reads that way, I am not in fact certain whether the tribunal was intending to decide that both supervision and assistance would be required or whether it was simply saying that one or the other would be. But anyway, it made no findings as to, with respect to any assistance it might have been finding was required, the stage or stages in the overall process of preparing and cooking a simple meal, where that assistance would be needed. It made no findings as to the precise nature of the assistance it had in mind. With respect to supervision (if it was concluding such was needed) it did not explain why it thought it was needed or how it thought that it would help. It did not explain how it thought either, or a combination of the two, would result in the claimant being able to undertake the procedure safely in the regulation 4(2A)(a) sense.

20. In looking at what it did say and in looking at the findings it did make, it seems to me very likely that the tribunal had in mind the risk that would arise if the claimant were to attempt to chop and peel vegetables using sharp utensils and to deal with hot items, boiling water and other such tasks associated with cooking. It is of course very easy to see that a claimant who was to have a seizure without a useful warning whilst undertaking such tasks might sustain serious harm. But it may be, in appropriate cases, that such risk may be obviated or much reduced by the provision of particular assistance. Assistance, as defined, means physical intervention (but not speech). Such physical intervention by another person to carry out discrete components of the overall process of preparing and cooking a simple meal such as chopping vegetables and handling hot items might depending on the circumstances remove the risk. But, of course, again depending on the circumstances, it might not. With respect to supervision in isolation, that is to say without assistance, I am finding it difficult to envisage how that might help a person who would be attempting the sorts of hazardous tasks referred to above in the event of that person suffering, without a useful warning and without any visible indications of the onset of a seizure detectable to another, at least a grand mal fit. There is scope for the harm which might be suffered to be immediate in such circumstances and whilst a person present might be able to help by physically intervening to prevent further harm (which I suppose would then amount to assistance rather than supervision) or calling for medical assistance, such a person might well not be able to prevent the actual initial occurrence of harm. These were really all questions which the tribunal had to consider having made appropriate findings.

21. I would also observe in passing and as Mr Whitaker points out, that the tribunal did not appear to consider whether any risk might be reduced by the use of a microwave oven (see daily living descriptor 1c). It may have been necessary for it to have made findings as to that

though there is also the obvious point that such would not assist with respect to risk generated through the chopping and peeling of vegetables. But the bottom line is that the tribunal simply did not make sufficient findings to enable it to properly select the appropriate descriptor within the relevant activity.

22. Insofar as it is now relevant I will return to Mr Capon's specific concern as expressed in his grounds of appeal. As already noted, he has in mind a scenario whereby the claimant is engaged in preparing and cooking food and has a seizure such that a person present has to intervene at that point. He puts it this way "the risk to them (that is the other person) of being injured by a knife, hot liquids etc. is as real as the risk to [the claimant] and so it should be accepted that 1f should be applied in this case". I can certainly see that if another person intervened at the point where knives were being used or hot liquids were being handled and where the claimant would flail and thrash around, there would very likely be a risk to the other person if that person does, indeed, attempt to intervene. I would accept that if through assisting or supervising, the other person was actually putting himself/herself at risk then the supervision or assistance should not be taken into account. That might be for a number of reasons. I do not see that the legislation envisages a person supervising or assisting if doing so leads to a risk to that person. Very fairly and understandably, Mr Whitaker agrees with that proposition. Additionally, and whilst this is now obiter, the definition of "safely" in regulation 4(4)(a) of the PIP Regulations refers to harm not only to a claimant but also "to another person". So it could not be said, if it were to be found that there would be intervention by another which was reasonably required and which would lead to the sort of risk identified in *RJ* (a real possibility of harm that could not be ignored) arising, that a relevant task was being performed safely.

23. Having said the above though, the scenario envisaged by the claimant's representative does appear to overlook the facility of precautionary assistance. It is not the case that matters are to be considered only on the basis that intervention will take place at the point where a direct risk of harm has actually arisen. So if, on properly made findings, a tribunal concludes that the sort of assistance I have referred to above would extinguish or adequately reduce risk but still lead to the claimant being able to safely prepare and cook a meal, then it may decide that the appropriate descriptor might be 1e rather than 1f. But it is also important to bear in mind that there might come a time when, in the circumstances of a particular case, the provision of assistance is so frequent and/or lengthy that it amounts to the effective taking over by another of the whole of the process. If that situation does arise then it might properly be concluded that 1f is satisfied. But it all depends on the circumstances and on the findings.

24. The above explains why I have decided that the tribunal did err in law.

Disposal

25. In consequence of the above I have decided to set aside the tribunal's decision. Since there are further facts to be found I have decided to remit.

26. There will, therefore, be a rehearing before a differently constituted tribunal. The rehearing will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of all of the evidence before it including any further written

or oral evidence it may receive. It may, as a result of my directions, have before it the written material which was considered when the most recent award of disability living allowance was made. That is, of course, assuming such evidence has not been destroyed.

27. Since the claimant is represented I am sure that he will have been informed of this. But nevertheless, it is only fair that I point out to him that one consequence of my having set aside the tribunal's decision is that the Secretary of State's decision of 10 May 2016 to the effect that he is not entitled to PIP is restored. That will, therefore, represent the tribunal's starting point, but of course not necessarily its end point, at the rehearing. I would observe, though, that there has been no subsequent challenge to the part of the tribunal's decision which related to the mobility component. I also note that the tribunal only made an award up to 7 January 2018. But the tribunal rehearing the appeal, if it makes an award, might decide to do so for a longer period. It may be that, in any event, the claimant has made a fresh claim on or after 7 January 2018 but I am not told about that one way or the other.

28. This appeal to the Upper Tribunal then succeeds on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **26 March 2018**