IN THE UPPER TRIBUNAL **Appeal No.** CPIP/383/2018
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Perez

Decision

1. The claimant's appeal is allowed.

Daily living component

2. The part of the decision of the First-tier Tribunal dated 18 October 2017 (heard under reference SC228/17/00913) relating to managing therapy or monitoring a health condition is set aside. I award two daily living points under descriptor 3c for needing assistance to be able to manage therapy (application and removal of prescribed compression bandage) that takes no more than 3.5 hours a week. For the conclusion of the First-tier Tribunal on the daily living component, I substitute my own conclusion that the claimant therefore has eight daily living points (when the two I am awarding are added to the six the First-tier Tribunal gave) and so is entitled to the daily living component at the standard rate.

Mobility component

3. The part of the decision of the First-tier Tribunal dated 18 October 2017 (heard under reference SC228/17/00913) relating to the mobility component is set aside. The mobility component part of the case is remitted to the Social Entitlement Chamber of the First-tier Tribunal, for rehearing in accordance with the directions at paragraph 11 of this decision.

Background

4. In giving permission to appeal, I said (page 172)—

> "**Introduction**
>
> 3. The tribunal accepted that the claimant has the conditions she said she has (paragraph 14, page 146). So it accepted that she has, among other things, osteoarthritis of the knee, right knee replaced, right ankle fused, cervical spondylosis, chronic osteomyelitis of the lower leg, arthralgia of multiple joints, left knee replaced and arthritic changes in her upper body (CQ page 22).
>
> **Arguable errors of law**
>
> Managing medication or therapy
>
> *Removing compression bandages*
>
> 4. The tribunal arguably erred in law in relation to removing the compression bandage (prescribed by a consultant, page 74). The tribunal

accepted that the claimant had said in her PIP form (albeit under dressing and undressing, page 35) that she needed help to take her compression bandage off (paragraph 19, page 147). She had also said on page 25 that on removing "these" "leg and ankle very badly swollen". But it then rejected her oral evidence that she needed such help on the ground that her oral evidence was inconsistent with her PIP2 form and her account to the HCP (paragraph 20, page 147).

5. The claimant's oral evidence of needing assistance to take off the compression bandage was not however inconsistent with what she had said at page 35 of her PIP2 form. The fact that she put this on page 35 rather than on the managing treatments page did not mean she had not said it.

6. Her oral evidence was not inconsistent with the HCP record either. That record did not say anything about arrangements for removing the compression bandages (pages 74 and 76). Removing bandages is arguably just as much part of managing them as putting them on. The tribunal arguably should have explained why it did not accept that the evidence that the claimant needed help removing them (both in the CQ and orally) did not satisfy activity 3.

Putting on compression bandages

7. In any event, the tribunal arguably erred in law in failing to deal with the evidence that it "is painful in her right knee" when the claimant puts the compression bandages on by herself. Arguably, doing an activity with pain is not doing it to an acceptable standard for the purposes of regulation 4 (as for example with moving around in PS v SSWP UKUT [2016] 0326 (AAC), CPIP/665/2016, copy enclosed). The tribunal arguably should have said why that evidence did not mean that points were scored for needing help with putting on the bandages, even if the claimant did not actually use such help.

8. The tribunal arguably should also have considered whether putting the bandages on with pain meant that that activity was not done safely (regulation 4).

9. It arguably further erred in law in failing to consider whether the "long time" it took the claimant to put the compression bandages on "due to her hands and wrists, and also bending and moving" (paragraph 20, page 147) was no more than twice as long as a person without her limitations would take (regulation 4(2A)(d) and 4(c)). The tribunal was wrong to say that "no difficulties putting the bandage on were identified" to the HCP. The HCP had recorded that the claimant had said "although this is painful in her right knee" (page 76). The tribunal arguably could not therefore justify failing to consider regulation 4 in relation to putting on the bandage on the ground that evidence putting regulation 4 in issue was not accepted because inconsistent with other evidence.

Both putting on and removing compression bandages

10. Moreover, the tribunal's rejection of any difficulty with regard to reaching the ankle to apply or remove the bandage was arguably inconsistent with its acceptance that the claimant needed an aid or appliance to reach her feet for washing and bathing (paragraph 27, page 148).

Materiality

11. The above errors were arguably material for the following reasons.

12. First, although the tribunal went on to consider issues of power and grip (paragraph 21, page 147), its erroneous finding that there was inconsistent evidence was part of its reasoning regarding the compression bandages.

13. Second, if the bandage were considered "therapy", at least two points would be available for managing it (under descriptor 3c), and possibly more if it took more than 3.5 hours per week. Those two points would take the total to eight (the tribunal having awarded six, page 142), and so result in an award of standard rate daily living component.

Proposed disposal of daily living component

14. In view of the evidence I have cited, I am minded to find that I have enough to find that the claimant needs help to both put on and remove the prescribed compression bandage, because of the pain in her knee when she reaches to her ankle. This pain would apply equally to removing the bandage, especially given that the ankle is more swollen when it comes to removing the bandage at the end of the day. I am minded to accept this evidence because it is not inconsistent with other evidence and is consistent with the conditions the tribunal accepted the claimant has. This would not require a finding on whether grip or power made help necessary. It would also not require a finding as to whether it takes the claimant more than twice as long to remove and apply the bandage as someone without her limitations.

15. If the bandage is not medicated, then I propose finding that it is therapy rather than medication. The evidence is not that it is medicated, but either party may point me to evidence to the contrary. If it does not take more than 3.5 hours per week to apply and remove the bandage, I propose to find that descriptor 3c is met – needing assistance to manage therapy – and so to award two points and therefore standard rate daily living component. If the claimant says it does take more than 3.5 hours per week, then she needs to say so in her reply. I would in that case propose remitting for the First-tier Tribunal to consider that evidence and make a finding on it, and so I would not then award two points and standard rate daily living component myself.

Moving around

16. The tribunal arguably erred in law in failing to consider whether moving around was done without pain PS v SSWP UKUT [2016] 0326 (AAC), CPIP/665/2016). It expressly considered "repeatedly" (and also "reliably" which is not in regulation 4) but did not consider "to an acceptable standard" (paragraphs 46, 47, 48 and 50).

17. The claimant's evidence was that—

> "I cannot take strong pain killers – I get a lot of side effects and have to cope with what I can tolerate as best I can plus other alternatives ie Tens machine, hot-cold packs, pain relief creams etc." (page 126 letter 6/10/17).

18. The claimant is a registered pharmacist (page 76). It is plausible that she would be aware of - and open to - a full range of alternatives, without being assumed to be pain free because of that.

19. The claimant's evidence was also that—

> "I have also been advised the more active I am the better it will be. On my consultant and physio's recommendation I try and do pilates, aqua and yoga…my pain threshold has increased" (page 48).

20. In other words, her gym activities and other attempts to keep active are not necessarily indicative of moving around without pain. Activities being done with pain was a real issue in view of all of the claimant's own evidence and the medical evidence.".

Upper Tribunal appeal

Upper Tribunal submissions

5. The parties agreed, for the reasons in paragraphs 3 to 13 of my grant of permission, to my setting aside the part of the tribunal's decision relating to daily living activity 3, to my replacing that part with an award of two points under descriptor 3c for managing therapy, and to my substituting my own conclusion that the claimant is therefore entitled to the daily living component at the standard rate. They agreed also to my setting aside the part of the tribunal's decision relating to the mobility component, for the reasons in paragraphs 3 and 16 to 20 of my grant of permission, and to my remitting the mobility component for re-determination by a completely differently constituted panel of the First-tier Tribunal.

Upper Tribunal findings

Daily living component

6. In relation to the daily living component, I find that the tribunal materially erred in law in the ways identified in paragraphs 4 to 13 of my grant of permission, for the reasons in paragraphs 3 to 13 of my grant of permission (consideration of compression bandages).

7. In view of the medical conditions mentioned in paragraph 3 of my grant of permission which the tribunal accepted the claimant has, and of the evidence and factors mentioned in paragraphs 4 to 10 of my grant of permission, I find that the claimant needs help to both put on and remove the prescribed compression bandage. This is because I accept that she has pain in her right knee when she reaches to her ankle. There is no reason why this pain would not apply equally to removing the bandage, and I find that there is at least the same amount of pain in the right knee on removing the bandage. This is especially so given that I accept that the ankle is more swollen when it comes to removing the bandage at the end of the day. The reason I accept the claimant's evidence on all of this is because it is not inconsistent with other evidence, it is consistent with the conditions the tribunal accepted the claimant has, and the Secretary of State is content for me to accept her evidence on these points.

8. I find that the compression bandage is not medicated; neither party suggested otherwise in response to the question on that in my grant of permission, and the evidence did not suggest that it was. I find therefore that it is therapy rather than medication. I find that it does not take more than 3.5 hours per week to apply and remove the bandage, since neither party suggested otherwise in response to the question on that in my grant of permission.

9. I find therefore that descriptor 3c is met because the claimant needs assistance to be able to manage therapy that takes no more than 3.5 hours a week. I therefore award two daily living points under descriptor 3c, taking the total to eight, meaning entitlement to standard rate daily living component.

Mobility component

10. In relation to the mobility component, I find that the tribunal materially erred in law in failing to consider whether moving around was done without pain in light of PS v SSWP UKUT [2016] 0326 (AAC), CPIP/665/2016, for the reasons in paragraphs 3 and 16 to 20 of my grant of permission.

CASE MANAGEMENT DIRECTIONS

11. I direct as follows—

(1) Only the mobility component part of the case is remitted (sent back) to the First-tier Tribunal.

(2) The mobility component part of the case must be reheard afresh by a completely differently constituted panel of the First-tier Tribunal.

Rachel Perez
Judge of the Upper Tribunal
18 April 2018