

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CPIP/2039/2017

**Before:** Mr E Mitchell, Judge of the Upper Tribunal

**Decision:** The decision of the First-tier Tribunal (18 April 2017, Southampton, file reference SC 266/16/00320) involved the making of errors on points of law. It is **SET ASIDE** under section 12(2)(a) and (b) of the Tribunals, Courts and Enforcement Act 2007 and the case is **REMITTED** to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

**REASONS FOR DECISION**

**Summary of the aspect of this appeal with potentially wider relevance**

1. One part of the reasons for my decision may be of wider relevance. According to the First-tier Tribunal, most people have difficulty reaching their upper spinal area. That is fair enough. I disagree, however, with the next stage in the Tribunal's reasoning, which is that, in the light of the population's general difficulty in reaching the upper spinal area, no one can secure PIP assessment points for an inability to wash the upper back.

2. The First-tier Tribunal may well be right about the population's general difficulty in reaching the upper spinal area. However, the relevant PIP assessment activity area does not test ability to reach that area. It tests ability to wash (and bathe). People without any disability can wash their upper back without difficulty by, for example, rubbing a soapy sponge above that area and then rinsing off. They will end up with a clean back without ever having made direct contact with the upper spinal area. The Tribunal's approach meant that it did not properly consider the key issue, which, here, was whether the Appellant needed assistance to wash her body between the shoulders and waist.

**The grounds of appeal**

3. In this case, the First-tier Tribunal granted Mrs B permission to appeal to the Upper Tribunal. The Tribunal's determination states:

" The Upper Tribunal is invited to consider whether it can be inferred from the statement of reasons that the Appellant could with suitable aids dress and undress within a reasonable time period. Should the First-tier Tribunal have stated how long they would have expected it to take a person without a limiting condition to perform this activity and whether, in order to perform it in no more than twice this time, the Appellant required any, and if so what, aids beyond those which she is recorded as using" .

4. As I observed when giving case management directions, it was not entirely clear from the First-tier Tribunal' s determination whether it granted permission to appeal on the other grounds advanced by Mrs B' s representative. It would assist the Upper Tribunal if salaried judges of the First-tier Tribunal, when granting permission to appeal to the Upper Tribunal, make it clear whether permission is granted on limited grounds.

5. To clarify the scope of the appeal, I directed that the grounds of appeal also included the grounds advanced in Mrs B' s notice of appeal to the Upper Tribunal, that is the arguments that:

- (1) The First-tier Tribunal' s finding that Mrs B was able to wash her back using her right arm was not supported by any evidence;
- (2) The Tribunal made no finding as to whether Mrs B was able to dry her back without assistance;
- (3) The Tribunal' s finding that the time taken for Mrs B to walk certain distances was not twice as long as it would take a person without her limitations was not supported by any evidence;
- (4) The Tribunal failed to determine whether it accepted Mrs B' s evidence about her walking speed;
- (5) The Tribunal failed to determine an issue raised by the appeal, that is whether Mrs B could walk 20 metres as often as reasonably required

6. The Secretary of State supports this appeal. In her view, the First-tier Tribunal erred in law by:

- (1) Giving inadequate reasons for its finding that Mrs B was able to wash her back if she used a long-handled aid;
- (2) Giving inadequate reasons for its finding in relation to daily living activity 6 (dressing and undressing); it was not clear whether Mrs B' s use of easy-to-wear clothes was considered a " reasonable alternative" ;
- (3) Making inconsistent findings in relation to activity 6: " it is difficult to reconcile the number of adjustments the claimant makes with the FtT' s conclusion that she can dress to an acceptable standard" ;
- (4) Giving inadequate reasons for its findings about Mrs B' s ability to mobilise: " it is difficult to ascertain how standing to cook or using a wheelchair to get around determines that the claimant can walk 20 metres but no more than 50 metres within the requirements of regulation 4(2A) [of the PIP Regulations]" .

7. The Secretary of State invites the Upper Tribunal to set aside the First-tier Tribunal' s decision and remit her appeal against the Secretary of State' s decision as to her PIP entitlement to that tribunal for re-hearing. Mrs B' s representative, Mr Glenn Brooks of South Wales Benefits Service, does not dispute that invitation.

### **The outcome before the First-tier Tribunal**

8. The First-tier Tribunal decided that Mrs B was entitled to the standard rates of both PIP components, daily living and mobility. In relation to daily living activities, the Tribunal determined that Mrs B scored 10 points comprised of 2 points for difficulties preparing or cooking food, 1 point for difficulties managing therapy, 3 points for difficulties washing and bathing; 2 points for difficulties managing toilet needs and 2 points for difficulties dressing and undressing. In relation to mobility activities, the Tribunal determined that Mrs B scored 10 points because she satisfied the descriptor " can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres" . Entitlement to the enhanced rate of either component requires a score of at least 12 points.

### **The legislation**

9. Entitlement to PIP depends on a person scoring at least eight points for either daily living or mobility limitations under the PIP assessment set out in the Schedule to the Social Security (PIP) Regulations 2013. As just mentioned, at least 12 points are required for the

enhanced rates. Points are allotted to descriptors which set out various modes of carrying out, or not carrying out, specified daily living and mobility activities. To the extent that it is necessary to do so, the descriptors in issue, and the general provisions that frame their application, are described below.

## **Conclusions**

### *Washing and bathing*

10. Before the First-tier Tribunal, Mrs B' s case, and the relevant evidence, in relation to washing and bathing was as follows:

- (a) the PIP claim form said Mrs B needed to use an aid to wash and bathe herself, and also needed help from another person to do so. She used a shower in a ground floor wet room room because she was unable to get out of her upstairs bath. The wet room was fitted with safety rails and a shower seat. On bad days, her granddaughter helped her wash and, once a week, a friend washed her hair. The repetitive motions involved in hair-washing aggravated pain in her neck and shoulders and she had previously dislocated her shoulder while washing her hair;
- (b) the DWP-commissioned Healthcare Professional (HCP) reported that, during Mrs B' s consultation, she said she could wash herself " OK" most days but needed help to wash her hair;
- (c) in Mrs B' s written submission to the tribunal, she argued the HCP failed to consider whether she could wash her back; she had tried to use a long-handled brush but it was ineffective.

11. The First-tier Tribunal found:

- (a) descriptor 4(e) was satisfied (" needs assistance to be able to get in or out of a bath or shower" : 3 points);
- (b) " most people cannot access their upper spinal region" and " if someone needs an aid or appliance or requires assistance simply to reach their upper spinal region this is insufficient in itself to score points as the majority of people experience the same restriction" .

12. Here are my conclusions on this aspect of the appeal:

- (a) I do not disagree with the First-tier Tribunal's opinion that most people are probably unable to access their upper spinal region. However, this PIP assessment activity is not concerned with ability to reach the upper spinal area; it is concerned with ability to wash and bathe;
- (b) In my view, people without a physical limitation are able to get sufficiently close to the upper spinal area to enable them to wash their upper back effectively without having to use an aid by, for example, rubbing a soapy sponge above that area and then rinsing off. By doing so, they will end up with a clean back without having made direct contact with the upper spinal area. That is why the majority of the population would score zero points under this PIP assessment activity;
- (c) The Tribunal decided that descriptor 4(f) was not satisfied. The descriptor reads "needs assistance to be able to wash their body between the shoulders and the waist" (4 points). It seems to me that the Tribunal decided descriptor 4(f) could not possibly be satisfied because Mrs B's asserted inability to reach the upper spinal area was shared with the general population and so, for PIP purposes, no one needs assistance to wash the upper back. The Tribunal's approach involved a misdirection in law;
- (d) The first issue to be addressed was whether Mrs B could wash her back herself if she used an aid or appliance. If so, descriptor 4(f) would have been excluded (and, since only the highest scoring descriptor is taken into account, any need to use an aid or appliance, which scores 2 points, would not have improved Mrs B's score). The Tribunal's reasons do state that Mrs B could use an aid to wash her upper back (although that issue should have been irrelevant if the Tribunal was correct to find that, since most people need an aid to do this, it cannot count for PIP purposes). However, that finding is itself unreasoned. The Tribunal did not explain why it rejected Mrs B's argument that a long-handled brush was ineffective;
- (e) If Mrs B was unable to wash her upper back herself, even with an aid or appliance, the Tribunal would then have needed to consider whether she needed assistance to be able to wash her upper back. By focussing on ability

to reach the upper spinal area, rather than ability to wash the body between shoulders and waist, the Tribunal misconstrued descriptor 4(f);

- (f) In my view, no separate issue arises concerning Mrs B' s ability to dry her back. Even if it is assumed that the ability to wash incorporates the ability to dry, the activities are so closely related in functional terms that, at least in this case, an ability to perform the former activity would inevitably include an ability to perform the latter.

### *Dressing and undressing*

13. Before the First-tier Tribunal, Mrs B' s case, and the relevant evidence, in relation to dressing and undressing was as follows:

- (a) her PIP claim form said she needed to use an aid to dress and undress, as well as help from another person. She was unable to fasten buttons and so wore clothes with less challenging fasteners such as zips and Velcro. It took her around 20 minutes in " dressing/undressing" due to joint inflexibility and the need to take rests for pain to subside. Dressing was even more difficult after a bad night' s sleep;
- (b) the HCP reported that Mrs B said she struggled with her brassiere and her granddaughter helped her with that;
- (c) the HCP' s opinion was that Mrs B had normal pinch grip, as assessed by a physical examination, in both hands so should be able to use buttons and laces, although the HCP also reported that she found Mrs B' s right hand could only reach to the small of her back. While Mrs B declined a left shoulder examination, her ability to drive daily suggested, according to the HCP, that her functional range was greater than demonstrated " today" . The HCP' s opinion was that Mrs B could dress her upper body using aids;
- (d) Mrs B' s written submission to the First-tier Tribunal argued the HCP did not listen when she tried to explain how long dressing and undressing took. And, had she been asked, she would have said that she drove using her right arm holding a special knob. Without Mrs B' s granddaughter' s help in pulling the sleeves of garments down her arms, dressing would take considerably longer and involve significant pain;

- (e) Mrs B' s friend supplied a written statement that she had to help her take coats on and off.

14. My conclusions on this aspect of the appeal are as follows:

- (a) I note that the First-tier Tribunal found that, while Mrs B was ' slower' in dressing and undressing, with aids she could dress and undress without the need for assistance. The Tribunal decided that daily living activity descriptor 6(b) applied – " needs to use an aid or appliance to be able to dress or undress" (2 points);
- (b) I decide that inadequate reasons were given for the Tribunal' s findings;
- (c) from the Tribunal' s statement of reasons, it is not clear whether, with aids, Mrs B' s pace of dressing and undressing would increase. Aids, on the Tribunal' s analysis, would avoid the need for assistance but this still left the question whether, even with aids, she could dress and undress within a reasonable time period (" 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" : regulation 4(2A) & (4) of the Social Security (PIP) Regulations 2013). The failure to address that question meant inadequate reasons were given.

15. I have difficulty understanding the Secretary of State' s arguments concerning whether (a) easy-to-wear clothes were a " reasonable alternative" ; and (b) the number of adjustments made undermined the conclusion that Mrs B could dress to an acceptable standard. The Tribunal found that Mrs B needed to " use zips, Velcro, poppers and elastic" but most of our clothing incorporates such features. Since I have decided that the Tribunal' s dressing and undressing conclusion contained other errors on points of law, I shall not delay matters by seeking clarification of the Secretary of State' s argument.

### *Mobility*

16. Mrs B' s case, and the relevant evidence, in relation to mobility before the First-tier Tribunal was:

- (a) the PIP claim form said Mrs B was unable to state how far she could walk, with aids, since it was variable. She used an aid or appliance to walk as well as a wheelchair

at times. Mrs B added she was in constant pain, which made walking most uncomfortable, and could not walk " any distance" without a crutch. On bad days, she had to use two crutches or a mobility scooter due to the risk of falling. Walking was very tiring, made worse by anxiety that she might trip and fall. Mrs B' s mobility car had a special left foot " flip accelerator" due to pain in her right leg;

- (b) the HCP reported that Mrs B said she could walk using one or two crutches for 10 minutes before having to rest for 30-60 minutes, and usually used one crutch or a wheelchair in the supermarket. She collected her granddaughter from school each day walking for 10-15 minutes from a car park to school with two rests during the journey; Mrs B thought a ' normal person' could do the walk in 4-5 minutes;
- (c) subsequently, Mrs B emailed the DWP to deny that she told the HCP she could walk for 10 minutes on crutches, rather she made it clear that her walking ability was dependent on her variable pain levels. She also complained that the HCP failed to record her regular trips and falls and her " chronic pain" whenever she walked;
- (d) Mrs B' s written submission to the First-tier Tribunal argued the 10 minute walk referred to by the HCP involved walking past 10 houses, which would take a normal person less than one minute, and the school walk took far longer in the afternoons, typically 15-20 minutes;
- (e) Mrs B' s friend supplied a written statement that, when walking, Mrs B " can be ready to drop" and she had seen her fall on a number of occasions, her walking speed was very slow, slower even than the friend' s 71 year old mother and less than half the speed of a person without her problems;
- (f) The Tribunal' s record of proceedings indicates that Mrs B gave oral evidence that she would fall to the ground twice a week and, on even ground, she could walk, with crutches, for 5 minutes or so at a toddler' s pace.

17. The Tribunal' s conclusions as to Mrs B' s mobility, in paragraph 28 of its statement of reasons, contain no real findings of fact nor any indication as to whether it accepted Mrs B' s evidence about very limited walking distances. The Tribunal recites certain of the evidence followed by the conclusion that " in the circumstances the Tribunal found that the Appellant had the ability to move around and that in respect of distance could for the majority of time complete a distance of more than 20 metres but no more than 50" . The



Tribunal made insufficient findings of fact to support its conclusions and/or gave inadequate reasons.

### **Determination and disposal of the appeal**

18. The First-tier Tribunal's decision is set aside because it involved errors on points of law. Mrs B's appeal against the Secretary of State's decision of 2 October 2016 is remitted to the First-tier Tribunal for re-determination. The next tribunal must address all issues arising on Mrs B's appeal afresh. It follows that the next tribunal may not, in its reasoning, take into account the findings of fact and other conclusions of the tribunal whose decision I have set aside.

### **Directions**

#### **I direct as follows:**

- (1) Mrs B's appeal against the Secretary of State's decision of 2 October 2016 is remitted to the First-tier Tribunal for re-determination.
- (2) The Tribunal is to hold a hearing before re-determining Mrs B's appeal.
- (3) The Tribunal panel that re-determines Mrs B's appeal must not include any person who sat on the Tribunal panel that decided her appeal on 18 April 2017.
- (4) If Mrs B wishes to rely on any further written evidence or arguments, they are to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued. Mrs B is reminded that the law prevents the Tribunal from taking into account circumstances that did not exist at 2 October 2016, when the decision under appeal was taken, although the Tribunal may take into account post-decision evidence if it is relevant to the circumstances at 2 October 2016.

**Apart from directions (1) and (3), the above directions are subject to any case management directions of the First-tier Tribunal.**

**(Signed on the Original)**

Mr E Mitchell

**Judge of the Upper Tribunal**

**15 April 2018**

