IN THE UPPER TRIBUNAL **Appeal No.** CPIP/2098/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

DECISION

The appeal is dismissed.

Any errors of law made by the First-tier Tribunal were immaterial to the outcome.

REASONS

1. The appellant brings this appeal against the First-tier Tribunals (the Tribunal's) decision with my permission.

2. The F-tT decided that the appellant was not entitled to either component of Personal Independence Payment (PIP). The original grounds of this appeal related to a missing document leading to an asserted breach of natural justice, and an error in construing the requirements of descriptor 4e (needs assistance to be able to get in or out of a bath or shower) citing Upper Tribunal Judge Rowley's decision in *SP v SSWP* [2017] UKUT 0190. The representative also submitted that the Tribunal erred by failing to consider whether the appellant could carry out activities in a reasonable amount of time as required by regulation 4(2A) and 4 Social Security (Personal Independence Payment) Regulations 2013, having regard to the Tribunal's acknowledgement that 'it takes the appellant 'a long time' to accomplish some descriptors. In a later submission, the appellant's representative referred to a possible error of law based on the Tribunal's decision that the appellant did not need an aid to dress or undress. The appellant's evidence was that he needed to sit in order to dress or undress and accordingly could be said to require an aid or appliance to do so (activity 6).

3. The Secretary of State supported the appeal to an extent. He submitted hat the decision should be set aside on the basis of a breach of natural justice because a document upon which the HCP appeared to have based her decision was not in the bundle. He agreed that the Tribunal had erred in the way it dealt with descriptor 4e having regard to *SP v SSWP,* but also agreed with my tentative view that this would be immaterial since the appellant still would not have scored sufficient points for an award of the daily living component. He rejected the submission that the appellant required an aid or appliance to dress and undress having regard to the decision of Upper Tribunal Judge Jacobs in *CW v SSWP* [2016] UKUT 0197. The Secretary of State did not deal with the slow speed issued. The Secretary of State submitted that the matter be returned to the First-tier Tribunal for further findings of fact on

4. Had I allowed the appeal and remitted the matter to the F-tT, neither party would have required further reasons. I have, however, decided that

(i) the asserted breach of natural justice was not made out in the circumstances/was immaterial;
(ii) the error in relation to descriptor 4e was immaterial because it could not have

affected the outcome;

(iii) the decision in *CW v SSWP* decided the issue that sitting on a bed did not constitute use of an aid/appliance to dress or undress; and

(iv) the appellant could not possibly succeed on the issue of taking 'a long time' for some activities and thereby score points for further descriptors.

An elephant in the room

5. It appears that, at least for the purposes of the PIP claim, neither the HCP nor the decision maker were aware that the appellant was working 5 days per week, 5 hours per day as a mechanic at a garage. He had been working at the same garage for the last 26 years.

6. The HCP and Secretary of State were unaware of these facts because the appellant did not disclose them. Indeed, he told the health care professional (HCP) at his examination that *he does not work and last worked years ago as a mechanic* (p46).

7. However, medical evidence he produced to the Tribunal pursuant to directions referred to the appellant being in work (pages 90 and 102). The Tribunal picked up on this and explored it at the hearing, where they described it as 'the elephant in the room' (Record of Proceedings, pp 131, 133-134). The appellant then told the Tribunal that that he worked 5 days per week, 9am – 2pm and had worked at the same place for 26 years.

8. He told the Tribunal that his work involved carrying out MOTs on vehicles at a what he asserted to be a small garage. He had to walk back and forth to the cars (p131), put details in a computer, come back out, check the lights and tyres, go underneath the car when it was lifted, check the back, head light aim, and when the car was back down, check for emissions. This required him to plug a cable into the exhaust, 'shove a pipe in', and go back to computer, taking 45 minutes all in. He was on his feet for 30 to 35 minutes to do the MOT. He would not sit for long but claimed to sit 8/10 times' during the process, then sit to complete a checklist (p133). He asserted that he carried out maybe two MOTs a day and for the rest of the time he would 'doss about' (p134).

9. I note that the Tribunal accepted, in relation to the mobility component, that the appellant could move more than 50 m but no more than 200m.

Ground (i) The asserted breach of natural justice

10. The appellant's representative was concerned that the HCP referred several times to an item of 'further evidence' dated 12 May 2016, which was not contained in the submission bundle. The HCP's comment on that item of evidence occurred in respect of two descriptors, and was limited to the words 'the further medical evidence did not support the level of restriction reported' with no further details.

11. In granting permission, I asked whether this might be an item that the appellant had sent with the CQ (Claimant Questionnaire) which was signed on the same date. The representative checked the notes and file, but could not find anything to suggest they sent further evidence, and the appellant himself could not recall sending anything else. The Secretary of State was also unable to turn up anything but it is unlikely that

the Department would have commissioned any further medical evidence bearing exactly the same date as the CQ.

12. I have therefore examined the medical records closely to see if the medical case could be understood fairly without the missing document. I find that they can, by looking at the medical records and correspondence around May to July 2016. It is worth pausing to note that the Tribunal which adjourned for medical evidence did so because the appellant's unusual gait, poor balance and unclear speech could not be explained by the medical conditions listed in the existing papers. The appellant told that Tribunal that he had been this was not only since July (2016) but for the last 10 years and that he had had a recent brain scan.

13. The medical history shows that in early 2016, the appellant appears to have suffered some minor falls (p105) which led to his having various hospital appointments and tests. On 29 May 2016 (p90) the GP's surgery received a letter from a clinic. Its contents are not noted, but it was entered on their system on 7 June. On the same date, the appellant was seen by a physiotherapist who alerted the GP to a previous head injury that the appellant suffered, a CT scan of the brain that was abnormal, and previous alcohol issues. As a result, the GP requested a MRI of the head and spine plus a pathology report. The results were back on 8 July 2016 and these were explained to the appellant in August, when he finally attended the surgery (90 – 92). These are the only medical events at and around that time. They point towards a particular concern regarding brain abnormalities

14. I find it more than likely that, insofar as there was any further evidence dated 12 May 2016, it must have related to the concerns over the falls and worries about brain abnormality that had re-emerged around that time.

15. Even if I am wrong, the single piece of missing evidence would have been eclipsed by extensive medical records the Tribunal actually had before it, which showed the medical concerns at the relevant time. The reality was that the Tribunal had all of the medical evidence it reasonably required to make a fair decision. Its inadvertent failure to notice that a document was missing was in the circumstances immaterial.

16. I can see no reason to justification in these circumstances for setting the decision aside on this ground.

The Activities

17. The Tribunal awarded the appellant points in respect of only two daily living activities: descriptor **1b** (preparing food) – needs to use an aid or appliance (2 points), and descriptor **4b -** needs to use an aid or appliance to be able to wash or bathe **(**2 points). The minimum number of points to support an award of either component is 8 points from the activities comprising that component so the appellant fell 4 points short.

18. **Activity 1 - Preparing food:** the Tribunal accepted that the appellant had difficulty with this activity because he had a bad back which, it accepted, prevented him from standing a long time. But even if the appellant did take more than twice as long to carry out activity 1 (preparing food), he still would only be entitled to 2 points, so the asserted error was immaterial.

19. That is sufficient to deal with the ground of appeal. However, I have come to the conclusion that the Tribunal erred in law, on the evidence before it, in awarding any points at all. This is because it failed to analyse the evidence rationally.

20. For the purposes of my comments, which are *obiter dicta,* I can only assume the Tribunal had a perching stool, a 'bar stool' or even a chair in mind as an aid for this activity.

21. The evidence regarding the appellant's work pattern indicated that he was able to stand to carry out procedures requiring a variety of physical manoeuvres including sitting standing, and rising from sitting at frequent intervals, which took around 45 minutes in all.

22. Apart from needing the perching stool/bar stool/chair to minimise standing time, the Tribunal found there was nothing to prevent him from using a conventional cooker. The aid overcame any problem of standing for a long time.

23. There was no credible evidence to suggest that the appellant needed prompting (which would only give him two points anyway), or that he needed supervision or assistance to prepare or cook a simple meal (4 points). There was no aid solved his problem.

24. Preparing and cooking food normally involves a wide range of actions. It is a commonplace of cooking that the cook will sit or stand to prepare food, cook it or wait until it is ready on the hob. The position the cook chooses depends on the amount of food he is preparing, the intensity of watchfulness required, the cooking time and waiting time for the food to be ready. A wide range of simple meals for one person, as stipulated for this activity, can be prepared and cooked in 20 - 30 minutes without needing the cook to be standing over it or perching next to it during the process. Frying meatballs or a piece of steak need some short-term watchfulness, but one would no more stand over and watch a pot of spaghetti boiling on the hob than watch over an item cooking in an oven.

25. The logic of *CW v SSWP* [2016] UKUT 0197 applies to preparing and cooking food for the purposes of activity 1 as it does to dressing and undressing. This means that the way in which the Secretary of State, health care professionals, welfare advisers and tribunals assess the need for using a perching stool needs to be revisited. I set out [25] – [33] of *CW v SSWP* in full and have placed key paragraphs in bold. Upper Tribunal Judge Jacobs stated:

> 24 The 2012 Act defines entitlement by reference to a claimant's limited ability to carry out daily living *activities*. The limitation must be caused by the claimant's physical or mental *condition*. The activities are set out in Schedule 1 to the 2013 Regulations. Every activity is divided into a series of descriptors each of which carries a number of points. The points scored provide the measure of the limitation on the claimant's ability to carry out the activity. They depend on the nature of any intervention that the claimant needs in order to carry out the activity. In the case of aids, the descriptors are always in the form: the claimant 'Needs to use an aid or appliance to be able to …' What follows depends on the nature of the activity. *Aid or appliance* is defined by reference to whether it improves, provides or replaces the claimant's impaired *function*, which for convenience I describe as assisting in overcoming the consequences of a function being impaired. Putting all that

together, an aid must help to overcome consequences of a function being impaired that is involved in carrying out an activity and is limited by the claimant's condition. To satisfy an *aid or appliance* descriptor, the claimant must need an aid to assist in respect of a function involved in the activity that is impaired.

25 The claimant's representative argues that the claimant needs to sit on account of her physical condition, and is using the bed as an aid to overcome her impaired ability to stand and balance. That, he argues, is all that the claimant has to prove to score the points. I do not accept that argument, because it fails to analyse the functions involved, in this case, in the activity of dressing and undressing.

26 All of the daily living activities involve a number of functions. It is likely that an aid will assist with some of those functions but not all of them. A hearing aid, for example, helps with hearing but not with speaking (Activity 7). It is possible that an aid may be entirely beneficial. A claimant who has difficult bending may find it helpful to use a long handled shoe horn. This is entirely beneficial in that it avoids the need to bend and involves no detriment. On the other hand, an aid may not be entirely beneficial. A hearing aid may pick up and amplify background noise. The aid is beneficial, but it is not without its problems.

27 I accept the Secretary of State's argument that there must be some connection between the aid and the activity or descriptor. This is always made clear by the language of the descriptors. The representative's example of a hearing aid is a good illustration. It is relevant to Activity 7b, which refers to needing to use an aid 'to be able to … hear', because it assists with hearing, which is a function that is relevant to communicating verbally. But it is not relevant to Activity 8b, which refers to needing to use an aid 'to be able to read or understand … written information', because it is not a function that is involved in reading or understanding signs, symbols and words, any more than it is involved in preparing food (Activity 1) or washing and bathing (Activity 4).

28 What degree of involvement or connection must the function have in relation to the activity? The hypothetical activities of playing the cello and the flute help the representative to make his argument. But they have, of course, been chosen because they provide clear examples to illustrate a point. It is more difficult to apply the Secretary of State's approach to some of the real legislation. In part, this difficulty arises from the nature of the activities. The personal independence payment activities differ from the employment and support allowance ones, at least those that apply to physical disabilities, in Schedule 2 to the Employment and Support Allowance Regulations 2008. The latter each centre around particular functions, such as the use of the hands or arms. In contrast, the personal independence payment activities each centre around an everyday activity that may involve a parcel of functions.

29 **This case raises the issue of an aid in the context of an activity that can be performed in a variety of ways by using different functions, even by people with no limitation. So, although it is possible for someone with no limitation to dress entirely while standing, many nonetheless sit for part of the time as a matter of convenience.**

30 It is often possible, as the claimant's representative submits, to find strategies to avoid the need for an aid altogether. To take an example from dressing and undressing, a claimant could avoid any problems with sitting or standing by lying on the floor to dress and undress. I accept the representative's argument that that approach would render the references to an aid otiose, at least for some activities. I am sure that the Secretary of State's representative did not intend to go that far, but the example shows that it is not

appropriate to require that the function in respect of which the claimant uses the aid be absolutely essential to carrying out the activity.

31 **The claimant's entitlement depends on the extent to which they are limited in carrying out the everyday activities specified. That is what the legislation provides. It does not provide for entitlement if the claimant is only limited in carrying out the activity in a particular manner. This provides a focus for avoiding the extreme example I have just considered and for giving proper significance to the role that function plays in the definition of an 'aid or appliance'. The question is this: would this 'aid' usually or normally be used by someone without any limitation in carrying out this particular aspect of the activity? If it would, the 'aid' is not assisting to overcome the consequences of an impaired function that is involved in the activity and its descriptors. So, using an ordinary wooden spoon to stir hot food while it is cooking is using an 'aid' in the everyday sense of the word, but it would not assist in overcoming the consequences of any loss of function, because it would be used anyway. But if the spoon had a special handle for someone with poor grip, it would be an aid for the purposes of Activity 1 (preparing food). Gripping is a function involved in cooking and the use of a handle that improves grip makes the spoon an aid.**

32 **There is a difference between a person with has no limitation but who uses a spoon to stir hot food and one who uses a chair or a bed to sit during dressing. In the former case, it is not a matter of choice; no one stirs hot food with their fingers. In the latter case, it is a matter of choice or convenience, as it is possible for someone with full function to dress without sitting. They are, though, also similar in that they are both usual or normal ways of performing the activity. By employing them, the person is not demonstrating a limitation with the functions that are required for that aspect of the activity. Rather, the person is demonstrating a limitation with one manner of carrying out that aspect of the activity.**

33 **In summary, entitlement to a personal independence payment depends on the claimant having a condition that limits their ability to carry out particular activities. The need to use an aid is a measure of the extent of that limitation. Whether something is an aid depends on whether it assists in overcoming the consequences of a function being impaired in the carrying out of that activity. That function must be one that is required in order to carry out the particular aspect of an activity, not merely one of a range of functions that could be employed.**

26 I consider that, unless a claimant is unable to stand safely for more than a few minutes, he is unlikely reasonably to require a perching stool.

27 **Activity 4 - Washing and bathing:** The appellant stated expressly in his CQ that he had a walk-in shower and said so again at the hearing (p135). The Tribunal was entitled to accept that that was true. The Tribunal nevertheless fell into error in its construction of this activity, though the error is immaterial.

28 Judge Rowley decided in *SP v SSWP* [2017] UKUT 0190 that, in construing the scope of descriptor 4e, the word 'or' was disjunctive. She also decided that the test was whether the claimant could get in and out of an unadapted bath, in other words, an old-fashioned bath with a shower attachment of some sort over it. So it is necessary to be

able to get in and out of the bath, whether to bathe or shower. The Tribunal therefore fell into error by considering only the type of bathing equipment that the claimant actually had, that is to say, a walk-in shower.

29 In this case, however, the Tribunal considered that the appellant had difficulties with falls because of his balance, and required an aid. Presumably this would be a rail, which the appellant said he had acquired, and a mat, which he had also acquired. Since then, he was 'okay' (p135) to get in and out of the shower safely. A rail and a mat would obviate safety issues with a bath as well..

30 This leaves the question of whether the appellant could get in and out of the bath without the assistance of another person. The Tribunal did not consider this problem because it confined itself to the problems of a walk-in shower. If it had considered the problem, the obvious answer to the appellant's problem would be that, if a rail was not enough, a bath board or bath stool would be a standard solution. In other words, another form of aid. It is far from clear that he would need the assistance of another person, but even if he did, he would only have been entitled to one more point under 4e. He would still fall far short of the minimum qualifying number of points for the daily living component.

31 I cannot see that the amount of time it took to get in and out of the bath would have made any difference since it was accepted that he needed an aid anyway.

Activity 6 - Dressing/undressing

32 Judge Jacobs' decision in *CW v Secretary of State for Work and Pensions* settled this issue, and having been brought to the attention of the appellant's representative, he does not disagree.

33 **Is there a second elephant in the room?** The appellant was previously entitled to DLA at the lowest rate of the care component and the higher rate of the mobility component (section A of the Secretary of State's Submission). On the basis of the evidence disclosed at the hearing, the Secretary of State may wish to revisit entitlement to DLA and, indeed, any other benefit he received which was based on disability or incapacity for work.

(Signed on original)

S M Lane
Judge of the Upper Tribunal
(Dated) 21 June 2018