

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Before Upper Tribunal Judge Brunner QC

This appeal by the claimant is dismissed.

The decision of the First-tier Tribunal reference **SC123/17/00682** involved no material error on a point of law. The First-tier Tribunal's decision stands.

REASONS

ISSUE

1. The central issue in this case is the interpretation and application of the definition of "aid or appliance" in the Social Security (Personal Independence Payment) Regulations 2013 ('the Regulations').

THE CLAIM AND APPEAL TO THE FIRST-TIER TRIBUNAL

2. The claimant made a claim to PIP on 13 March 2017. She had previously been in receipt of Disability Living Allowance with the lower rate mobility and lowest rate care components. She completed a PIP Questionnaire in which she set out various health difficulties including recurrent urinary tract infection, anxiety and depressive disorders, and Graves disease. The Secretary of State decided on 19 June 2017 that the claimant was not entitled to Personal Independence Payment ('PIP'), finding that no points were awarded for either of the components of PIP. On reconsideration, the Secretary of State found that various descriptors applied, but not sufficient to meet the threshold for PIP. The claimant appealed to the First-tier Tribunal.
3. The First-tier Tribunal ('FTT') on 28 June 2018 refused the claimant's appeal. Although the FTT awarded 7 points for the daily living descriptors, and 4 points for mobility descriptors, that was insufficient to meet the thresholds for the daily living and mobility components of PIP. The FTT did not award any points in relation to Activity 5, managing toilet needs.
4. The claimant had claimed that she needed to use an aid to manage toilet needs: she wrote that *'I need to use a special bottle (recommended by Bladder Health UK) and wipes to clean myself. This takes me a lot longer than if I didn't have bladder and kidney problems'*. The FTT explored that issue at the hearing. The parts of the Record of Proceedings which record the claimant's evidence about this issue (p161 and p165) reads:

'Urinary problems- special wash bottle- at times use toilet need to be careful with hygiene. Bladder health charity recommends toilet routine. Wash-water-

use baby wipes- no risk of bacteria being introduced. Cleaning routine for both water and bowels- use sterilised water’.

‘Not discussed with professionals- use it- still have problems so provided letter from urology. Mr L Has bottle reduced incidents? Nowhere near as frequent. Helps- to use bottle and wet wipes too.’

5. I take the extracts above to mean that the claimant told the FTT that she used a bottle with sterile water, and wipes, to clean herself after both urinating and defecating, and that regular use of that technique had reduced the number of urinary tract infections.
6. The FTT made a number of findings about the claimant’s toilet needs. Relevant passages of the Statement of Reasons include (p175):

‘13. The Appellant had had urinary problems for some years. To manage her urinary tract infections the Appellant took antibiotics and followed a particular hygiene routine washing her with sterile water after using the toilet. This had been suggested by a bladder health charity.

....

32. Similarly no points could be awarded for managing toilet needs. We looked very closely at this activity and the terms of the descriptors. We considered in detail whether the Appellant used the bottle and the sterile water in the terms of the activity, as set out below:-

- (a) getting on and off an unadapted toilet*
- (b) evacuating the bladder and bowel;*
- (c) cleaning oneself afterwards.*

We had to determine whether the Appellant could satisfy the terms of the descriptor in ‘cleaning oneself afterwards’. However, we concluded that the use of the bottle and the water was not an ‘aid or appliance’ which ‘improves or replaces the Appellant’s impaired physical or mental function’, as defined in the Regulations.

33. We did not accept that the use of the bottle and water amounted to an aid in managing toilet needs. We did not accept that the Appellant’s ability to use the toilet was impaired physically or mentally. She was often affected by urinary tract infections. Nevertheless she was physically and mentally able to manage the act of using the toilet and all the necessary and usual cleaning routines without significant difficulty. She used this particular hygiene routine together with antibiotics to avoid infections.

34. It seemed to us more likely that if points could be awarded for this hygiene routine at all, it would be under the activity of managing medication or therapy. It was clearly not managing medication and so description 3(b) could not apply. Descriptor 3(c) deals with managing therapy, but requires a finding that the Appellant needs ‘supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week’. The Appellant was

able to manage this routine herself, as she stated in the claim pack. She did not need supervision, prompting or assistance to use the bottle and water for washing herself. Accordingly, we were not able to award points for this activity.'

APPEAL TO THE UPPER TRIBUNAL

7. The claimant appealed to the Upper Tribunal. The grounds submitted were in outline:
 - (1) The Statement of Reasons does not confirm why the use of a bottle in bottle washing cannot be considered an aid for toileting. It could be, because it is an aid which improves an impaired function, which is the recurrent urinary tract infections.
 - (2) There was no consideration of the use of a hot water bottle as an aid to evacuation.
 - (3) There was no consideration of the time it takes the claimant to clean herself.

8. Permission to appeal to the Upper Tribunal was given on 11 June 2019 by Judge Ramshaw. The grant of permission included these observations:

'The appellant's grounds of appeal, as drafted by her representative, are that the Tribunal erred in combining the use of a bottle and antibiotics and considering this under managing medication. The use of the bottle is inextricably linked to the act of toileting (in particular cleaning oneself afterwards). The Tribunal erred in rejecting the use of the bottle as an aid and failed to provide reasons. The appellant asserts that the impaired function is recurrent urinary tract infections. The bottle is an aid that improves that impaired function. The Tribunal did not consider the use of the hot water bottle or the wipes at all. The Tribunal erred in failing to consider how long the appellant takes to clean herself. Reference is made to case CPIP/3404/2016.

....

I consider that it is arguable that the use of the bottle and sterile water is an aid which helps to overcome the consequences of an impaired function- either on the basis that recurrent urinary tract infections is an impaired physical function or, in my view a more likely consideration, that the bladder and urinary tract have impaired functionality as a result of recurrent urinary tract infections (if accepted medically that this was the case).'

9. The Secretary of State does not support this appeal, and makes the following submissions (p198), in summary:
 - (1) It is possible that one could consider that the claimant's bladder and urinary tract have impaired functionality, by being susceptible to repeated urinary tract infections.
 - (2) The claimant's method of cleaning herself does not amount to the use of an aid. In [2016] AACR 44 Judge Jacobs concluded that there was a range of normal or usual methods by which one could complete an activity,

such as sitting on a bed to dress. Using one of the normal methods does not amount to using an aid or appliance. Cleaning oneself with water is a normal or usual way to manage cleaning after toileting and therefore is not using an aid or appliance.

- (3) The bottle washing technique is not reasonably required. Although it was recommended by a charity Bladder Health, the medical professionals do not mention it. As there is no direct medical recommendation for this individual it is a preference but is not reasonably required.
 - (4) The water and bottle cannot amount to an aid within the definition in Regulation 2 of the Social Security (Personal Independence Payment) Regulations 2013 ('the Regulations') which defines an aid as 'any device which improves, provides or replaces C's impaired physical or mental function'. The bottle is a container for the water and is not an aid. The water performs the function of reducing the chance of infection but is not a device.
10. The claimant has made further submissions (p205), in summary:
- (1) Bottle washing is not a usual way to clean oneself after using the toilet and its use is linked to reducing infections.
 - (2) The impaired function is the urinary tract infection, or the claimant's immunity which is affected by Graves' disease. The bottle washing removes some of the bacteria that an unimpaired immune system would remove itself.
 - (3) The dictionary definition of 'device' includes 'a method that is used to produce a particular effect'. The technique of bottle washing is a device.
 - (4) Regulation 4 requires consideration of whether a person can complete an activity within a reasonable time period to an acceptable standard. It takes the claimant extra time to use the technique, as does the use of other aids such as a hot water bottle.
11. Neither party requests an oral hearing and an oral hearing is not required as I have all of the information I require on the papers to decide all of the issues in this appeal.

THE LEGISLATION

12. A claimant is entitled to the standard rate daily living component of PIP under s78a of the Welfare Reform Act 2012 where '*the person's ability to carry out daily living activities is limited by the person's physical or mental condition*'. The Regulations set out various activities, and descriptors relating to each activity, which measure a person's ability to carry out those activities.
13. Regulation 4 governs the way in which ability to undertake each activity is to be assessed, and the relevant parts read as follows:
"Assessment of ability to carry out activities

4. – (1) For the purposes of ... section 78 ... of the Act, whether C has limited or severely limited ability to carry out daily living 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; and

(d) within a reasonable time period.

14. The relevant activity here is Activity 5 in the Regulations, which reads '*managing toilet needs or incontinence*'. Toilet needs is defined as: '*(a) getting on and off an unadapted toilet; (b) evacuating the bladder and bowel; and (c) cleaning oneself afterwards*'.
15. The descriptor in issue is 5b '*needs to use an aid or appliance to be able to manage toilet needs or incontinence*'.
16. Under Regulation 2 of the Regulations, an aid or appliance '*means any device which improves, provides or replaces C's impaired physical or mental function*'.

CASE LAW

17. The meaning of 'aid and appliance' has been considered in a number of different cases. I have shortened the phrase 'aid or appliance' at points in this judgment to 'aid'. In *NA v SSWP (PIP)* [2015] UKUT 572 (AAC) Judge Mark considered the claimant's use of a chair to sit on in order to dress and undress. Judge Mark held that although a chair has another primary purpose it could still be a device which improves the claimant's physical function. Judge Mark determined that the question to be answered was whether the claimant could dress in accordance with regulation 4(2A) without using the aid.
18. In *CW v SSWP* [2016] UKUT 0197 Judge Jacobs also dealt with a case where a claimant needed to sit on a bed to dress, and the issue was whether the bed was an aid. Judge Jacobs agreed with Judge Mark that an aid does not have to be specifically designed for the purpose for which it is used. The case focussed on this point:

"19...in order to be relevant, an aid or appliance must relate in some way to the particular activity. I call this the connection argument. The difficulty is to define what the connection is."

19. The key passages where the 'connection argument' is explored are as follows:

"24...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....

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....

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.”

20. Judge Jacobs returned to the ‘connection argument’ in *RB V SSWP [2016] UKUT 0556 (AAC)*. The issue in that case was whether a nebuliser was an aid or appliance that enabled the claimant to manage his medication. The claimant’s argument was that the nebuliser delivers a precise dose of medication in a form that the claimant can absorb and is used when the patient cannot administer the medication in any other manner, which amounted to using an aid in managing medication. Judge Jacobs rejected that argument. He noted that *‘It is essential to identify the function that is impaired’* (para 16) and explained further in the following paragraphs:

“17. In this case, the claimant’s representative has based his case on breathing. That is wrong. The function being tested by Activity 3b is the management of the medication. The relevant function is not the shortness of breath; that is why he needs the medication. The relevant function has to be found in the management of that medication.

18. Some medication can only be delivered by the use of a device. Someone with diabetes may have to use a syringe to deliver their insulin. Their use of the syringe does not indicate that their ability to carry out the daily living activity of managing medication is limited by their physical condition, as required by section 78(1)(a) of the Welfare Reform Act 2012. What it indicates is that the medication can only be delivered in a particular way. The syringe does not improve, provide or replace any function relevant to the management of the insulin for the purposes of the definition in regulation 2.

19. The position is different if the claimant experiences problems with using a syringe. A claimant who has dexterity problems, visual impairment or needle anxiety will need to use one of the devices on the

market that assist them by improving or replacing the impaired function that arises from their condition.

20. There are two ways of looking at the claimant's use of the nebuliser. One way is to see it as just a means of delivering the medication required, just like an inhaler or a syringe. Looking at it in this way, the use of the nebuliser does not indicate any limitation on the claimant's ability to carry out the activity of managing his medication. So this approach does not work on the legislation. The claimant's representative has suggested a different approach. He says that the nebuliser is needed because it delivers the medication as a fine mist that is more effective than an inhaler for someone who cannot take a deep enough breath. This argument founders on the tribunal's findings. The claimant can and does use an inhaler and he only uses the nebuliser when he is in bed, when he denies being breathless. So this approach does not work on the evidence."

DISCUSSION

What is the 'impaired function'?

21. In this case, there is no dispute that the bottle with sterilised water was capable of being an aid, whether it was an everyday object or not. The issue was whether it meets the definition of 'any device which improves, provides or replaces C's impaired physical or mental function'. The argument identified by Judge Jacobs as the 'connection argument' is at the heart of that question.
22. In this case both the claimant and the Secretary of State submit that the 'impaired function' is an impaired bodily function. The various suggestions made in submissions are that the impaired function could be the impaired urinary tract or bladder which is prone to infection, or the impaired immune system, or even the infection itself.
23. That is an incorrect approach. The function for the purposes of Regulation 2 is the claimant's impaired physical or mental function which affects her ability to carry out a particular activity. It is not an impaired bodily function considered in the abstract. In some cases, that may not create a difference on the facts, but it is an important distinction which in this and many other cases will be the crux to determining whether an object really is an aid for a particular claimant and a particular activity.
24. As Judge Jacobs explained in *CW v SSWP* [2016] UKUT 0197, whether something is an aid depends on whether it assists in overcoming the consequences of a function being impaired in the carrying out of the relevant activity. In that case, the relevant function was the claimant's impaired ability to stand and balance while putting on clothes, which affected her ability to carry out the activity of dressing. In the case of in *RB V SSWP* [2016] UKUT

0556 the claimant's impaired breathing was not an impaired function for these purposes because it did not affect the claimant's ability to carry out the activity of managing medication (although Judge Jacobs left open the possibility at paragraph 20 that in some circumstances a claimant's inability to take a deep breath may be an impaired function, in which case a nebuliser would be capable of being an aid).

25. The relevant activity in this case is managing toilet needs, and specifically managing cleaning oneself after using the toilet, under Activity 5. An impaired function in being unable to reach one's bottom to clean would be relevant. An impaired function in dexterity which made it impossible to handle toilet paper would be relevant. All of those are impairments to a function of a claimant which affects her ability to carry out the particular activity.
26. In this case, there was no relevant impaired function. The claimant had no mental or physical limitation with the act of cleaning herself. She could have cleaned herself without difficulty. A propensity to infection does not affect the claimant's ability to manage cleaning herself. The matters which the parties in this case contend were 'impaired functions' have no connection to the relevant activity, and are therefore not capable of amounting to a relevant 'impaired function' for the purposes of the definition of 'aid'. The application of the definition of 'aid' in these circumstances falls at the first hurdle.

Is the 'impaired function' required in order to carry out the activity?

27. There is a further aspect to the definition of 'aid'. Judge Jacobs held in *CW v SSWP* [2016] UKUT 0197 [para 33] that there must be an impairment to a function which is required for carrying out the activity, and not required just for one manner of carrying out the activity. Thus in *CW v SSWP* [2016] UKUT 0197 it was held that the bed was not an aid because the claimant's ability to sit while dressing was not impaired. The bed assisted with the impaired function of standing to dress, but that was not a function required to carry out the activity of dressing.
28. The point did not arise in this case. If, as I have found, there is no relevant impaired function, then the question of whether that impaired function is required for carrying out the activity was not reached.
29. However, I address one aspect of the Secretary of State's submissions which touch on this issue. The Secretary of State submits that using water to clean oneself is one of the normal manners of cleaning oneself after going to the toilet. The use of water generally is not to the point. The claimant in this case used a bottle with sterilised water to clean herself, including after urinating. That is not one of the 'usual and normal' ways to carry out the activity. A bottle, and sterilised water, is not usually used by someone without a limitation in those circumstances. That, however, cannot make it an aid where,

as here, the first stage of the test is failed because there is no relevant impaired function.

Does the object improve, provide or replace the impaired function?

30. The next step is to consider whether the object in question 'improves, provides, or replaces' a relevant impaired function.
31. As an example in this context of Activity 5, there are long-handled devices which can assist those who do not have the dexterity or strength to clean themselves using toilet paper in the usual way. Such an object plainly 'improves' the impaired function: it directly compensates for the reduced ability and make it easier or possible for the person to carry out the activity of cleaning themselves.
32. In this case, this step is in one sense not reached, because there is no relevant 'impaired function' which any aid could improve. However, it is a useful test to check that the 'impaired function' has been identified accurately. The bottle was not used to compensate for a difficulty with performing the act of cleaning. It was used to improve personal hygiene, in order to reduce the incidents of urinary tract infection. The use of the bottle was, in effect, a preventative therapy. It was linked to the management of the claimant's health condition, not to the management of toilet needs.

THE FTT'S DECISION RE. AID

33. In this case, the FTT did not err. Indeed, the FTT applied exactly the approach above. At paragraph 32 of the Statement of Reasons the FTT set out the relevant activity, and the definition of aid. Having turned its mind to the correct question, the FTT reached the inevitable conclusion that '*we did not accept that the appellant's ability to use the toilet was impaired physically or mentally*'. The FTT noted that '*she was physically and mentally able to manage the act of using the toilet and all the necessary and usual cleaning routines without significant difficulty. She used this particular hygiene routine together with antibiotics to avoid infections*'. The FTT thus turned its mind to the correct question, which was whether there was a relevant impaired function. It is plain that the FTT applied the correct test, that the impaired function had to be connected to the activity. The FTT identified that there was no relevant impairment in a function which affected the activity. The FTT also considered whether the aid improved any relevant impaired function, and identified that the purported aid did not improve any function related to cleaning. The FTT thus determined that the bottle and wipes were properly considered as a therapeutic treatment to ward off infection, not as part of the process to clean urine or faeces after going to the toilet. The FTT applied the correct test, reached a conclusion which was entirely supportable on the evidence, and explained its reasons adequately, so that it is possible to understand the basis for their conclusion.

34. The FTT went on at paragraph 34 of the Statement of Reasons to consider whether the use of the bottle could engage any descriptors relating to management of a health condition, and correctly determined that it could not. That is plain from the descriptors in Activity 3, because 'aid or appliance' only engages a descriptor where it is linked to managing medication, not managing therapy.
35. The FTT's approach was entirely correct and its conclusions well reasoned. There was no requirement for anything further.

FURTHER POINTS

36. A number of further points have been raised in submissions, which I deal with below.
37. The claimant's submits that the process of using the bottle, rather than the bottle itself, is an aid. It is noted that one definition of 'device' includes 'process'. That is ingenious but unsupportable. The normal meaning of the word 'device' is an object which serves a particular purpose. The phrase 'aid or appliance', which within the regulations is something which is worn or used (regulation 4(2)) cannot sensibly be read as including a process. In any event, this point does not arise because there is no relevant impaired function which the bottle, or the use of the bottle, could have improved.
38. The claimant raises the issue of the length of time which the process took, in the context of regulation 4, which is set out above. It is submitted that the FTT failed to take account of the fact that the appellant's cleaning routine was longer than other people's because of the use of the bottle, wipes, and sometimes a hot water bottle. While it would have been ideal for the FTT to consider the application of regulation 4, given that it had been raised, the omission was not material. It follows from the FTT's finding that the use of the bottle with water was a form of therapy and not linked to any difficulty with the cleaning routine that time spent using the bottle was not relevant to the application of regulation 4 to Activity 5.
39. The claimant raises the issue that the FTT did not address the use of a hot water bottle as an aid. The submissions to the FTT focussed on the use of the sterilised water bottle as an aid, and did not mention the hot water bottle (p134). It does not appear to have been mentioned at the oral hearing in the context of the toilet regime. The FTT, unsurprisingly, did not address the use of hot water bottle in the Statement of Reasons. Again, the omission was not material. Use of the hot water bottle was raised in the claimant's form (p23) and the request for mandatory reconsideration (p104). It is mentioned in the context of the claimant's husband providing assistance in the form of pain relief when the claimant has a urinary infection. There was no evidence to support the claimant's representative's submission to this tribunal that the hot

water bottle helped with urination. Given that the FTT applied the correct approach to the definition of an aid, the FTT would have been bound to conclude that the hot water bottle was not an aid. A failure to consider the use of the hot water bottle could not have had a material effect on the FTT's decision.

40. Finally, the Secretary of State submits that the sterilised water bottle could not have been an aid because it was not recommended by a health professional. An aid does not have to be prescribed. The existence or absence of evidence about whether an object is recommended by a health professional is part of the information which a tribunal would consider when applying the definition of aid, but it is not a test.
41. There was no material error of law by the First-tier Tribunal in this case, and their decision stands.

Upper Tribunal Judge Kate Brunner QC

Signed on the original on 16 October 2019