IN THE UPPER TRIBUNAL **Appeal No. CPIP/455/2017**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

TK

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge K Markus QC

Decision date: 17th January 2020

Representation:
Appellant: Mr Tom Royston (counsel) instructed by Child Poverty Action Group
Respondent: Ms Katherine Apps (counsel) instructed by Department for Work and Pensions

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 23 July 2016 under number SC168/16/00942 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**
3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**
4. **The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is the 5th January 2016. Any further evidence, to be relevant, should shed light on the position at that time.**

5. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The Appellant ('TK') is a young man (19 years old at the date of the Secretary of State's decision) who suffers from a range of health conditions: cystic fibrosis, pancreatic insufficiency, chronic pseudomonas, chronic staph aureus and asthma. He had been in receipt of the middle rate of the care component of disability living allowance, the last award having commenced on 18th March 2014.
2. On 1st October 2015 TK made a claim for Personal Independence Payment ('PIP'). He completed a claim form and submitted medical evidence in support of his claim. He was assessed by an ATOS physiotherapist on 15th December 2015. On 8th January 2016 the Secretary of State notified him that his DLA would end on 2nd February 2016 and that he was not entitled to PIP. He had been assessed as scoring no points for either the daily living or the mobility component. That was the decision which the Appellant appealed to the First-tier Tribunal.
3. The First-tier Tribunal found that TK scored 2 points for each of descriptor 1c and 3c, and so he was not entitled to PIP. I gave TK permission to appeal in relation to the tribunal's approach to activities 1 and 3. Although I expressed doubts about TK's grounds in relation to activity 2, I did not refuse permission to appeal in that regard. Following the provision of written submissions by both parties, as to which TK was assisted by the Cystic Fibrosis Trust, and in the light of the difficulty and importance of some of the issues raised, I directed an oral hearing. By the time of the hearing the Secretary of State's position was that the First-tier Tribunal had erred in law and that the case should be remitted to another tribunal for reconsideration. However, the parties were not entirely agreed as to the basis on which the appeal should be considered. Following the hearing, with my permission counsel sent further written submissions addressing issues that had arisen in the course of the hearing. I am grateful to counsel for all their written and oral submissions.

Legal Framework

4. Personal Independence Payment ('PIP') replaced disability living allowance ('DLA') for people aged between 16 and 64 years. Entitlement to the care component of DLA is governed by section 72 of the Social Security Contributions and Benefits Act 1992, and the basic conditions are as follows:

(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which—

(a) he is so severely disabled physically or mentally that—

(i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients; or

(b) he is so severely disabled physically or mentally that, by day, he requires from another person—

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(c) he is so severely disabled physically or mentally that, at night,—

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him."

5. The Welfare Reform Act 2012 provides for PIP. Section 78 governs entitlement to the daily living component as follows:

"(1) A person is entitled to the daily living component at the standard rate if—

(a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and

(b) the person meets the required period condition.

(2) A person is entitled to the daily living component at the enhanced rate if—

(a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; and

(b) the person meets the required period condition."

6. Detailed provision for determining whether a person meets the above conditions is made by the Social Security (Personal Independence Payment) Regulations 2013 ('the Regulations'). Relevant provisions are:

"4(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of 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….

(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….

(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.”

7. Regulation 5 provides for an assessment by reference to the daily living activities listed in Schedule 1, whereby each applicable descriptor attracts specified points. A person has limited or severely limited ability to carry out daily living activities where they score at least 8 or 12 points respectively.

8. At the time of the Secretary of State’s decision in the present proceedings the relevant activities in Schedule 1 and the applicable points were as follows:

Column 1 ***Activity***	***Column 2*** ***Descriptors***	***Column 3*** ***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
2. Taking nutrition.	a. Can take nutrition unaided.	0
	b. Needs – (i) to use an aid or appliance to be able to	2

	take nutrition; or (ii) supervision to be able to take nutrition; or (iii) assistance to be able to cut up food.	
	c. Needs a therapeutic source to be able to take nutrition.	2
	d. Needs prompting to be able to take nutrition.	4
	e. Needs assistance to be able to manage a therapeutic source to take nutrition.	6
	f. Cannot convey food and drink to their mouth and needs another person to do so.	10
3. Managing therapy or monitoring a health condition.	a. Either – (i) does not receive medication or therapy or need to monitor a health condition; or (ii) can manage medication or therapy or monitor a health condition unaided.	0
	b. Needs either – (i) to use an aid or appliance to be able to manage medication; or (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.	1
	c. Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week.	2
	d. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week.	4
	e. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 7 but no more than	6

14 hours a week.	
f. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 14 hours a week.	8

9. Some of the above terms are defined in Schedule 1:

   "*"cook"* means heat food at or above waist height;…

   "manage medication or therapy" means take medication or undertake therapy, where a failure to do so is likely to result in a deterioration in C's health;…

   "prepare", in the context of food, means make food ready for cooking or eating;

   "prompting" means reminding, encouraging or explaining by another person;

   "simple meal" means a cooked one-course meal for one using fresh ingredients;…

   "take nutrition" means –

   (a) cut food into pieces, convey food and drink to one's mouth and chew and swallow food and drink; or

   (b) take nutrition by using a therapeutic source;"

Facts

10. TK had provided a number of documents in support of his claim for PIP. This included a letter from a support service manager at the Cystic Fibrosis Trust which explained the importance of a high calorie and high protein diet, the need for additional vitamins and supplements, and TK's struggle to maintain a healthy body weight. The letter said that TK needed help with preparing meals and needed prompting to ensure that he eats as, despite his high nutritional needs, he rarely felt hungry. There was no standard dose for pancreatic enzyme supplements and his mother would help him calculate the correct dosage. The Trust said that if left to his own devices TK could not cook a simple meal and would not take the high quality nutrition his medical condition required. The letter went on to explain the daily physical care regime which included autogenic drainage and use of a PEP mask (to assist with mucus clearance). It said that physical care of the respiratory tract, which was an important part of the treatment, was difficult to carry out effectively, and that people would benefit from the support of intensive treatment form another person, usually a member of the family. It said "[TK]'s mother prompts and encourages him to complete his treatment and supervises him to ensure he is carrying it out properly." The letter also described the substantial quantity of medication taken by TK, and that his mother assisted him in preparing this medication and prompted him to ensure he took all prescribed medication at appropriate intervals. TK used nebuliser equipment which required significant maintenance. His mother assembled the unit after each use (twice a day), cleaned it in warm water and detergent, rinsed and sterilised it and then reassembled it. He also needed help during the night

because he frequently woke up coughing and required help from his mother to take his inhaler.

11. Although this letter was seen by the healthcare professional, her assessment report contained little detail about these issues. The healthcare professional concluded that no descriptors applied to TK. In relation to activity 1, she said that he had no physical problems, had good concentration, and could "make a simple meal like a sandwich or make noodles if his mum is not around". In relation to activity 3 she wrote:

    "Reported problems. Informal observation showed no cognitive problems and good memory and concentration. Also stated today he is able to remember to take his medication at the right time and right dosages if his mother is not around. Therefore it is reasonable to suggest he can complete this task unaided."

12. The Secretary of State decided that TK was not entitled to either component of PIP, having awarded him no points. The decision was unchanged on mandatory reconsideration and TK appealed to the FTT. His mother sent written representations. She said that she prepared high calorie and nutritious meals, that his appetite was poor and he constantly needed encouragement to eat. She also explained that TK often lacked the energy and motivation to prepare and cook a meal or to eat. She explained the extent of his treatment and physiotherapy regime and that, without supervision, prompting and support, he could not comply. She explained the risks of missing treatment and that he struggled to accept his condition and the benefits of doing treatment long term. She explained that the therapy took a significant amount of time and the effort involved, that TK was sometimes too fatigued to carry out the therapy properly and that most of the time he had "lack of motivation to complete the longer tasks such as preparing, cleaning and sterilising nebulisers, physiotherapy and order medication etc."

13. A treatment timetable was provided which showed that TK spent just over 9 hours each week undertaking his therapy and taking medication, and that his mother spent 8 hours 40 minutes each week on a variety of support tasks described as "encouraging, prompting and preparing". The latter included mixing medication, preparation and assembly of the nebuliser, washing and general care of it, and reminding, prompting and encouraging TK. It included reminding and encouraging him to do physiotherapy, drawing up dosages of tablets and making sure he had taken them at the appropriate time.

14. A letter was provided from the social worker to the cystic fibrosis team at Kings College Hospital, explaining the importance of TK's "intensive daily home treatment regime", that he needed regular support every day from his mother, and that "He finds it hard to focus on his illness and the facts about it, so without constant prompting and encouragement from his family, would not be good at taking care of himself".

15. After an oral hearing at which TK and his mother gave evidence, the First-tier Tribunal awarded him a total of 4 points: 2 for descriptor 1c (cannot cook a simple meal using a conventional cooker but is able to do so using a microwave) and 2 points for descriptor 3c (needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week). The Statement of Reasons included the following:

"6. …[TK] suffered low self-esteem as a result of his condition and relied on his mother for support…Keeping well was time and effort-consuming needing lots of encouragement.

7. We accepted that the conditions from which [TK] suffered gave rise to the need for an intensive daily home treatment regime, close attention to appropriate diet, and regular monitoring of medication, in order to minimise the risk of infection and to stay well. We further acknowledged that [TK's] youth and his reluctance to accept his condition, would have an impact on his motivation to adhere to a strict regime to keep well, eat appropriate and to be compliant with what was, on any view, an onerous daily schedule. As a teenager [TK] understandably had a degree of self-consciousness about his health problems which we also took into account.…

9. In relation to food preparation, we accepted that at times [TK] was fatigued, had limited motivation to prepare appropriately nutritious food and did not always have much appetite. That said, he was able to make simple food such as a sandwich or noodles, and he was able to cut and heat up food in a microwave. He could prepare a drink. He lacked the knowledge to prepare a full meal but in his own words "was learning" how to do this. As a matter of fact he relied on his mother to cook more substantial and nutritious food. In all the circumstances we concluded that two points were justified under activity 1c.

10. Turning to managing therapy, the Tribunal accepted Ms [K]'s evidence that as a teenager, [TK] was not always motivated to be compliant with the extensive therapy regime and medication that his conditions required to keep him in optimal health. This was evidenced by the fact that, when on holiday away from his family, [TK] did not undertake some aspects of the daily regime that he might otherwise have done in his home environment. The necessary daily treatment and preparation of equipment lasted up to one and a half hours, and there was a need to maintain scrupulous hygiene in relation to the equipment used. We accepted that as a matter of fact he received extensive assistance from his mother, but considered there were some aspects of the treatment, including preparation and sterilisation of equipment, that he ought to be able to carry out as a 19 year old himself. We reminded ourselves that it is the time taken to supervise, prompt or assist with managing the therapy that counts for the purposes of the descriptor, rather than how long the therapy takes: JT v SSWP [2015] UKUT 664 (AAC) (CPIP/1679/2015). Taking all the circumstances into account two points were justified under activity 3c.

11. [TK]'s appetite was low on occasion, requiring some encouragement from his mother, but we concluded that nevertheless he ought to be able to take adequate nutrition both inside and outside the home even if, as a "typical" teenager, he did not always make the healthiest choices, and resorted to fast foods. He spent two weeks on holiday abroad, away from the family (albeit in the company of a responsible adult). He described being able to make appropriate food choices based on the nutritional content of the available food. This was consistent with an ability to adequately monitor manage [sic] his own nutrition needs independently for the majority of the time."

Discussion

Activity 1

16. Although the FTT did not specifically address the processes involved in activity 1, it is clear from its findings at paragraph 9 that it had concluded that TK had the physical and cognitive skills to perform the activity. Making "simple food such as a sandwich or noodles" or preparing a drink, did not amount to preparing and cooking a simple meal as defined, but the tribunal also found that TK was able to "cut … food", and that the only limitation on his ability to prepare a full meal was his lack of knowledge. As is clearly established in case law (see *Secretary of State for Work and Pensions v KJ (PIP* [2017] UKUT 358 (AAC) to which I refer in greater detail below) lack of experience, training or inclination to cook is not sufficient for the purposes of activity 1. There was nothing in the evidence before the FTT to suggest that TK was limited in his ability to learn to prepare food and, as the FTT found at paragraph 12, he had no diagnosed cognitive difficulty.

17. In the light of the findings made by the FTT, I cannot see on what basis it found that descriptor 1c applied. The descriptor does not appear to have been applicable on the evidence and it did not fit the case advanced by TK. He had not asserted that he was not able to cook using a conventional cooker. He had claimed that he needed either prompting (descriptor 1d) or supervision or assistance (descriptor 1e) to prepare or cook a simple meal. The FTT did not address either of these descriptors.

18. For these reasons I find that the FTT's decision as to activity 1 was made in error of law. However, even if the FTT had approached matters correctly on the evidence, I struggle to see how it could have found that descriptor 1d applied. Moreover I do not consider that TK's case in respect of descriptor 1e was particularly strong, but this may have been because in his submissions and evidence he focussed more on the difficulties in preparing a meal which met his particular dietary requirements than on the processes of preparing food as explained in *KJ*. TK had provided evidence that his fatigue limited his ability to prepare and cook food, and I cannot say that a tribunal could not find that one of the descriptors relied on applied.

Activity 2

19. The evidence before the FTT had been that TK required a high calorie diet and that it was a symptom of his medical condition that he often did not feel sufficiently hungry to eat the amount required. Without prompting he would not eat enough. As Mr Royston put it, TK would cease the activity of taking nutrition before it was completed or adequately executed or he would not repeatedly complete the activity to the required standard.

20. The Secretary of State conceded that the FTT's reasons do not show whether it accepted or rejected TK's evidence in that regard. The tribunal addressed a different point, about whether he made healthy food choices. However, the Secretary of State does not accept that any descriptor in activity 2 would have applied even if this aspect of TK's factual case was accepted.

21. The meaning of "take nutrition" in activity 2 was considered by Upper Tribunal Judge Wright in *MM and BJ v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 490 (AAC), [2017] AACR 17. He decided that, in the light of the

statutory definition, the words were focussed on the *act* of eating and drinking and not on the nutritious qualify of what was being eaten or drunk. It followed that the requirement in regulation 4(2A) to be able to perform the activity to an "acceptable standard" did not call for assessment of the nutritious quality of the food. It was the act of eating and drinking which the claimant had to be capable of doing to an acceptable standard. Judge Wright found that a need for prompting to eat sensibly and nutritiously did not satisfy descriptor 2d.

22. The present case is factually different from those considered by Judge Wright. The difficulties raised by TK were not about the nutritious quality of the food that he ate. He claimed that, as a result of his medical condition, he required prompting to eat a sufficient quantity of food to satisfy his calorific requirements. Without the prompting he would stop the activity of eating before he had consumed enough. In addition, or alternatively, he would not eat sufficiently frequently to satisfy his needs. Taking nutrition comprises cutting food, conveying it to the mouth, chewing and swallowing it. Those actions are of necessity performed repeatedly. At each meal they are repeated until the meal is complete. A person will eat a number of meals and/or snacks during the day in order to eat sufficient. This is not a matter of judging the nutritional quality of what is consumed; it is a description of the essence of taking nutrition. To take an extreme example, a person who is able to complete the task only once cannot be said to be capable of taking nutrition.

23. Regulation 4(2A) requires a person to be able to perform an activity "repeatedly" , which means "as often as the activity being assessed is reasonably required to be completed". That definition does not import an objective test of how often an activity needs to be performed: *PM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0154 (AAC) at paragraph 20. Different people need to eat different amounts, but as a minimum a person must be able to take sufficient food to meet their needs. It is a reasonable requirement that they are able to repeat the action of taking nutrition often enough to do so.

24. The DWP's PIP Assessment Guide states as follows in relation to descriptor 2d:

> "Prompting' means reminding, encouraging or explaining by another person.
>
> Applies to claimants who need to be reminded to eat (for example, due to a cognitive impairment or severe depression), or who need prompting about portion size. Prompting regarding portion size should be directly linked to a diagnosed condition such as Prader Willi syndrome or anorexia."

25. Of course the Guide is not a statement of the law and in any event it does not provide any legal analysis underlying this rather bald proposition. However, I note that it is consistent with my analysis above.

26. Finally, as discussed in more detail below, the legislation requires that any limitation is a result of the Claimant's physical or mental condition. That is a matter which will need to be addressed by the next tribunal in relation to this activity, as in relation to all activities which are in issue, on the evidence.

<u>Activity 3</u>

27. The Secretary of State agreed that the FTT erred in relation to activity 3, on the basis that the FTT did not make clear factual findings as to what TK's condition

limited him from doing as opposed to what he actually did, and did not address the case advanced by TK.

28. The concession was properly made. The FTT did not explain on what basis it found that TK could carry out some of the tasks involved in managing his therapy but not others. It did not make a finding as to how much time was required to provide him with supervision, prompting or assistance and did not explain the basis on which it found that what was required by TK did not take more than 3.5 hours per week. Moreover, the FTT did not consider the evidence which suggested that TK may have been unable to complete his daily regime without assistance because of depression and fatigue. The FTT noted that there was no diagnosed mental health condition, but did not address other evidence relating to his claimed mental health difficulties. The FTT noted that TK would tire more easily than others and, when it considered mobility, noted that he experienced fatigue but made no specific findings as to the impact of this on his ability to carry out his therapeutic regime.

29. The above is a sufficient basis on which to allow the appeal in relation to activity 3. However, there remained important differences between the parties as to how the next tribunal should approach the requirements of activity 3 in a case such as the present. TK did not rely only on depression and fatigue. He also submitted that, even if FTT found that he was mentally and physically capable of carrying out each of the tasks involved in his therapy, the regime as whole was too onerous for him (or any person) to carry out without assistance. It was in effect a claim that it was unreasonable for a person to be able to carry out the regime alone.

30. The first basis of TK’s case in relation to activity 3 presents little difficulty in terms of legal analysis. Depression is clearly, on any analysis, a mental condition. Fatigue is either itself a mental and/or physical condition or, in TK’s case, may be a consequence of the underlying physical condition of cystic fibrosis and so would be within the scope of section 78. The Secretary of State agreed that non-medical consequences of a medical condition or of the treatment for a medical condition would themselves be within section 78. That is consistent with the approach of the Tribunal of Commissioners in *R (DLA) 4/01* at paragraph 18.

31. The alternative way in which he put his case is less straight forward. The issue is whether activity 3 covers assistance which is required not because a claimant is physically or mentally impaired in respect of the performance of the tasks comprising the activity but because the nature of the activity itself calls for assistance. It involves consideration of how “limited by the person’s physical or mental condition” in section 78 of the Welfare Reform Act 2012 is to be interpreted and applied.

32. Substantially the same phrase, “limited…as a result of C’s physical or mental condition” is used in the PIP Regulations. The connectors “by” (in section 78) or “as a result of” in regulation 4, make it clear that there must be a link between the limitation on the person’s ability to carry out the activities and their physical or mental condition. As Upper Tribunal Judge Wright said in *KJ* [2017] UKUT 358 (AAC) at paragraph 20, section 78 means that “the limitation on the ability to carry out the activity must be as a result of the person’s physical or mental condition.”

33. Judge Wright went on to observe that “the balance of authority seemed to suggest that “condition” meant “an adverse mental health or physical health

condition", although he also noted that a contrary argument was suggested but not resolved in *Secretary of State for Work and Pensions v LB (PIP)* [2016] UKUT 0530 (AAC) at paragraph 47. Judge Wright did not need to resolve this issue as it did not arise directly for determination in the cases on which he relied in that paragraph.

34. In considering the meaning of the PIP legislation with which this appeal is concerned, it is helpful to start with the legislation governing DLA, the benefit which PIP replaced. Section 72 of the Social Security Contributions and Benefits Act provided for entitlement to the care component of DLA where a person was "so severely disabled physically or mentally that" they required help as specified in that section. Entitlement to the mobility component under section 73 also required physical or mental disability. In *R (DLA) 3/06* the Tribunal of Commissioners held that "disability" was entirely concerned with "functional deficiency" and was distinct from a "medical condition". The Tribunal explained:

> "39. However, the scope of sections 72 and 73(1)(d) is not of course unlimited. For the relevant provisions to apply, the claimant must be disabled, ie have some functional incapacity or impairment. He must lack the physical or mental power to perform or control the relevant function. Therefore, excluded from the ambit of the provisions would be, for example, attention needs resulting from religious beliefs or cultural habit …
>
> 40. In a number of previous cases, the alleged disability was some form of behavioural difficulty (in *R(A) 2/92*, "irresponsible behaviour" in the form of violent and dishonest criminal acts). It will be apparent from what we have said that, in our judgment, behaviour cannot itself be a disability – but it may be a manifestation of a disability, namely an inability to control oneself within the accepted norms of behaviour. Therefore, in our view, in *R(A) 2/92* the correct approach was not to have sought a specific diagnosis of a serious mental illness, but to have asked whether it was in the claimant's power to avoid behaving as he did. If it was not in his power to avoid that behaviour, he would be "disabled" within the terms of sections 72 and 73(1)(d), although it would be a separate question as to whether that disability was severe enough to entitle him to benefit."

35. Section 78 of the Welfare Reform Act 2012 and the PIP Regulations are different in many respects from that of the statutory provisions for DLA. But there is one significant similarity which is that the detailed provisions show that the approach in PIP is also entirely a functional one. Section 78 provides that PIP entitlement turns on what a person is or is not able to do. The assessment under regulations 4 and 5 is of a person's ability to carry out the activities in Schedule 1. Indeed the functional approach to PIP is more clearly apparent in these statutory provisions than it was in the DLA legislation.

36. Ms Apps, without objection by Mr Royston, relied on some background legislative materials to show that the legislative purpose of PIP was indeed to place greater emphasis on the functional approach. I am satisfied that these materials may be admitted in order to identify the context of the legislation and its purpose (*R (CJ and SG) v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 324, [2018] AACR 5 at paragraph 39).

37. The Government said in the forward to its response to the consultation on DLA reform in April 2011 (Cm 8051) that the aim was for people "not to be labelled by

a condition, but to be judged for what an individual can do not what they can't". One of the consultation questions had been whether some health conditions or impairments should mean automatic entitlement to benefit. The Government rejected this in its consultation response, saying:

> "…we do not think it right that we should judge people purely on the type of health condition or impairment they have, labelling individuals in this way, and making blanket decisions about benefit entitlement. We recognise that people lead varied and often complex lives, with differing circumstances and needs – they do not fit neatly into boxes. We believe that Personal Independence Payment should reflect this, providing support tailored to these personal circumstances. We are designing an assessment that will treat people as individuals and consider the impact of health condition or impairments on their everyday lives."
>
> (paragraph 29 of the response to Question 5)

38. The focus on actual impairment was also manifest in the Explanatory Notes to the Bill which stated:

> "364. Sensory, intellectual and cognitive impairments may be relevant to a person's physical or mental condition and therefore to the question of whether the person's ability to carry out daily living activities is limited or severely limited."

39. As with DLA, there is a limit to the scope of section 78. The phrase "limited by the person's physical or mental condition" means that there must be a physical or mental cause of their limitation. A person must lack the physical or mental power or capability to perform the activity in question. A person will not qualify if the limitation on their ability to carry out an activity is due to their belief or habits (see paragraph 39 of *R (DLA)3/*06), choice or other circumstances such as their living arrangements or financial position (*SC v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0317 (AAC) at paragraphs 14-15). Although in practice a claimant's limitation will very often be a consequence of what might be described as a "health condition", it is not appropriate to add words to the statutory language. The unqualified use of the word "condition" reflects the aim of the legislation to focus on a functional approach to entitlement.

40. Moreover, there is nothing in the statutory wording which requires a physical or mental condition to be a *direct* cause of the limitation. As in relation to DLA (see *R(DLA) 4/01* at paragraph 18), it is permissible to take into account a physical or mental condition which gives rise to some other factor which itself causes the limitation. In *R(DLA) 4/01* the claimant's functional limitation was caused by anxiety which itself was a consequence of deafness. Ms Apps gave the examples of a physical or mental condition which gives rise to lack of appetite or brain fog.

41. The limits of section 78 are clearly illustrated by two decisions which considered the relevance of illiteracy. In *Secretary of State for Work and Pensions v IV (PIP)* [2016] UKUT 0420 (AAC) and *KP v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0030 (AAC) the Upper Tribunal explained that some people are unable to read because they have a mental condition that limits their ability to read or has prevented them from learning to do so, while others cannot read because they have never learned to do so. As section 78 requires a limitation to be caused by a physical or mental condition, only the former is relevant.

42. The approach of Judge Wright in *KJ* is consistent with this analysis. Judge Wright emphasised that the assessment must be on what a claimant is able to do rather than choice, and on what help a claimant needs rather than what is actually received. At paragraphs 41 to 43 he said that there were two principal questions. The first was to establish what the claimant's physical or mental condition(s) is (or are). I note that here Judge Wright placed the adjective "health" in brackets, as (it seems to me) an acknowledgment that it remained an open question whether that qualification was apt. The second question was to identify the activity the claimant is limited in his ability to carry out due to his condition (and its effects). I do not consider that Judge Wright intended that the two questions could only be answered in the order in which he set them out or otherwise to establish a rigid decision-making framework. The approach in any particular case will depend on the circumstances but always, as Judge Wright said, focussing on "the physical and mental processes needed to be able to carry out the activity or be limited in so doing".

43. A decision for the purposes of section 78 is, in accordance with the Regulations, based on an assessment of which descriptors apply. Where the descriptors in issue are those relating to a need for assistance, a useful way of approaching the assessment is to identify what assistance the claimant needs in order to be able to carry out the activity and why the claimant needs the assistance. It will then be possible to say whether the claimant needs it because of their physical or mental condition. See, to similar effect in the context of activity 9, the discussion by Lady Black in *Secretary of State for Work and Pensions v MM* [2019] UKSC 34, [2019] PTSR 1476 at paragraphs 30 and 38.

44. I turn then to consider the application of these provisions to activity 3. In many cases, a person will have a physical or mental condition which directly limits their ability to carry out the activity. That condition may be the same as the condition which gives rise to the need for the therapy, but not necessarily. For example, a person may require therapy for a physical health condition but their ability to manage the therapy may be limited because they have a learning disability. As long as the assessment focusses on what the claimant is physically and mentally capable of, any limitation on their functional ability which is caused by a physical or mental condition will be relevant.

45. Section 78 calls for consideration of the reason why a person has limited ability to carry out an activity (rather than why they need to carry out the activity). All of the activities in schedule 1 are things that everyone does in normal daily life. Activity 3 is the only activity which relates to daily living activities which are only done by people with a health condition. This does not change the underlying analysis of the statutory provisions but it does affect the way in which those provisions apply to this activity. The tasks within activity 3 are all carried out by reason of a person's health condition. If a claimant needs assistance in carrying out those tasks, it can be said that the need arises from their physical or mental condition.

46. This is the position even where a claimant is not physically or mentally impaired in performing the tasks involved in managing their therapy but where, nonetheless, they require assistance to do so because of the nature of the tasks themselves. An example discussed at the hearing was a person who required kidney dialysis. The Upper Tribunal was not presented with evidence as to the requirements for home dialysis, and the discussion of this example proceeded on the assumed basis that at least some forms of dialysis required the assistance of another

person. Even if the person having the dialysis was physically and mentally capable of performing the individual tasks involved and so could do it for another person, they could not safely set themselves up on dialysis without the assistance of another person. Their need for assistance arose from their physical condition.

47. There was some discussion by counsel of the *obiter* comments of Upper Tribunal Judge Mesher in *SSWP v LB (PIP)* [2016] UKUT 0530 (AAC) at paragraph 47, referred to by Judge Wright in *KJ*. Judge Mesher suggested said that a person could qualify for PIP even though they did not suffer from any physical or mental disablement, disorder or disease and that "if a consequence of some aspect of the claimant's physical or mental condition that is well within the range of normality and would not commonly be described as a disablement contributes to some need within the scope of the activities in Schedule 1 to the PIP Regulations, that need must be taken into account." If Judge Mesher was intending to introduce an able-bodied comparator into the assessment, that would not be correct. I consider that his comments can be understood as an application the approach which I have explained. The example which Judge Mesher went on to consider in that paragraph (I have not set it out here) was really no more than an example of a physical condition as an indirect cause of a need for assistance.

48. Once the assessment of activity 3 is understood as I have set out, there is no conceptual difference between the two ways in which TK claimed to satisfy activity 3. Even if TK was able to manage each of the individual elements of his therapy unaided, the question is whether he could not manage all of this therapy unaided throughout each day, in accordance with regulation 4(2A). There may have been a number of reasons why he could not do so, for example depression, fatigue, or because he was overwhelmed by the scale and nature of the task. Ms Apps accepted that, in principle, activity 3 could apply on any of these bases. They all arose from his physical or mental condition. The question would simply be one of fact, that being whether he *needed* the assistance claimed and how long it took.

49. The correspondence to which I have referred from the Cystic Fibrosis Trust suggested that a need for assistance with a treatment regime was widely experienced by cystic fibrosis sufferers rather than being specific to TK. In evidence provided for the purpose of this appeal, the Trust has explained that most cystic fibrosis sufferers face psychological difficulties with consequent low rates of adherence to therapy. Their publication, "Standards of Care and Good Clinical Practice for the Physiotherapy Management of Cystic Fibrosis" (April 2017), identified a number of influences and barriers to adherence. Some of the factors identified in the Trust's publication relate to irrelevant matters such as knowledge, domestic circumstances and lifestyle. Specifically to TK, there is the letter from Kings College Hospital stating that he found it hard to focus on his illness. It will be for the next FTT to decide whether and how those circumstances (amongst others) affected TK's ability to manage his therapy and whether he needed assistance, and I express no view on that.

DLA evidence

50. I do not agree with Mr Royston that, in accordance with my decision in *CH and KN v Secretary of State for Work and Pensions* [2018] UKUT 330 (AAC) at paragraphs 77-85, the FTT was required to explain its conclusion regarding

activity 3 in the light of the previous award to TK of the middle rate of the care component of DLA. A decision that TK needed "frequent attention throughout the day in connection with his bodily functions" (the basis the DLA award) was not apparently inconsistent with the FTT's conclusion that TK needed supervision, prompting or assistance to be able to manage therapy for up to 3.5 hours per week. In any event, the DLA files were not available. There was no evidence as to the basis of the DLA award which could have explained any difference from the PIP award.

Conclusion

51. In the light of the above, this appeal is allowed and remitted to another tribunal to be considered afresh in accordance with the Directions set out at the start of this decision and with the guidance which I have given.

Signed on the original
on 17th January 2020

Kate Markus QC
Judge of the Upper Tribunal