



Neutral Citation Number: [2024] UKUT 378 (AAC)

Appeal No. UA-2024-000163-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

MK (by his appointee, FM)

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Stout

Decided on consideration of the papers

Representation:

Appellant: Kester Dean, Kester Disability Rights

Respondent: Helen Hawley, DMA Leeds

On appeal from:

Tribunal: First-Tier Tribunal (Social Entitlement Chamber)

First-tier Tribunal Case No: SC309/22/0063

Digital Case No: 1654768755267324

First-tier Tribunal Venue: Kidderminster

First-tier Tribunal Hearing Date: 17 October 2023

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.

SUMMARY OF DECISION

PERSONAL INDEPENDENCE PAYMENT (Keyword Number)

This case concerns a claim to PIP made on behalf of a young person by their appointee. The young person had previously been entitled to Disability Living Allowance, but the Secretary of State decided he was not entitled to PIP, and the First-tier Tribunal agreed. The Upper Tribunal holds that the First-tier Tribunal erred in law in a number of respects in not addressing the legislative provisions, making insufficient findings of fact and giving inadequate reasons for its conclusions. One ground of appeal, however, failed. Although the First-tier Tribunal had erred in law in regarding time spent cleaning and sterilising therapy equipment as being not part of the time spent supervising, prompting or assisting the appellant to manage therapy for the purposes of Daily Living Activity 3, in this case the error was not material.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) 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 this decision and the following directions.

DIRECTIONS

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 17 October 2023.**
- 3. The appellant is reminded that the new First-tier Tribunal can only consider the appeal by reference to their health and other circumstances as they were at the date of the original decision by the Secretary of State under appeal (namely 7 March 2022).**
- 4. If the appellant has any further written evidence to put before the First-tier Tribunal relating to that period, including any further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.**
- 5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or First-tier Tribunal Judge.

REASONS FOR DECISION

Introduction

- 1. The appellant's main health conditions are Primary Cilary Dyskinesia (PCD), hearing loss and low mood. PCD is a rare inherited lung disorder.**
- 2. The appellant appeals against the First-tier Tribunal's decision of 17 October 2023 refusing the appellant's appeal against the decision of the Secretary of State of 7 March 2022 that the appellant was not entitled to Personal Independence Payment (PIP).**

3. The appellant was previously in receipt of the lowest rate of the care component (only) of Disability Living Allowance and when he reached 16 years old, his appointee was invited to make a claim to Personal Independence Payment (PIP), which they did by telephone on 25/10/2021. The Secretary of State awarded the appellant 6 points on the daily living activities (descriptor 3e) and 0 (zero) points on the mobility activities. On appeal, the First-tier Tribunal agreed and dismissed the appellant's appeal.
4. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 11 May 2023.
5. Permission to appeal was granted by the First-tier Tribunal in a decision issued on 25 January 2024. I made further observations about the appeal and gave directions that were approved for issue on 18 March 2024.
6. The Secretary of State has responded to the appeal and indicates that she supports it. The appellant's representative has made submissions in response and invites me to give a reasoned decision on the appeal.
7. Both parties are content for me to deal with the matter on the papers, and I am satisfied it is appropriate to do so. For the reasons set out below I allow the appeal. I do not deal with every point raised by the parties because it was unnecessary to do so given that the points I have dealt with are sufficient to mean that the decision of the First-tier Tribunal must be set aside and the matter remitted for a fresh hearing.
8. I take each ground of appeal in turn.

Ground A – Daily Living Activity 3 (managing therapy or monitoring a health condition)

9. People with PCD are less able to protect their respiratory system, tend to get recurrent chest infections and have difficulty moving mucus. PCD can also lead to ear problems such as glue ear. Treatment for the condition includes chest therapy to clear the chest, which involves the use of an acapella device three times a day alongside taking medication, which includes inhalers. The appellant invited the First-tier Tribunal to award 8 points for daily living descriptor 3f - Needs supervision, prompting or assistance to be able to manage therapy that takes more than 14 hours a week. The Tribunal awarded 6 points for descriptor 3e – needs supervision, prompting or assistance to be able to manage therapy that takes more than 7 but no more than 14 hours a week.
10. Upon considering the evidence before them in particular the letter dated November 2021 from a Children's PCD Specialist Nurse [pp.57-59], which detailed the claimant's therapy regime, the First-tier Tribunal calculated at [19]

that the help that the appellant required with therapy was about 8.75 hours per week.

11. The Tribunal went on at [20] to express doubts about whether the cleaning regime required after each therapy session was part of the therapy. Despite its doubts, it calculated how long the cleaning and sterilisation would take and calculated that it would add about a further 4 hours each week, taking the total number of hours to 12.75 hours per week. It awarded descriptor 3e accordingly.
12. The appellant's Ground A focuses on what the First-tier Tribunal says at [20] of its SoR about doubting that the cleaning regime could amount to therapy and argues that this might constitute an error of law. The Secretary of State agrees that the cleaning regime is part of managing therapy. The Secretary of State states: "any essential cleaning and maintenance of the acapella device should be treated as a part of the therapy regime, as this is required to prevent the claimant acquiring an infection, which may have a significant effect on his health due to his serious lung condition (PCD)."
13. I agree with the parties. "Therapy" is defined in Part of Schedule 1 to the Regulations as:

therapy to be undertaken at home which is prescribed or recommended by a— (a) registered – (i) doctor; (ii) nurse; or (iii) pharmacist; or (b) health professional regulated by the Health Professions Council, but does not include taking or applying, or otherwise receiving or administering, medication (whether orally, topically or by any other means), or any action which, in C's case, falls within the definition of "monitor a health condition"
14. "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
15. It seems to me that the definition of 'managing therapy' in the Regulations is capable of encompassing the activity of cleaning and sterilising the therapeutic equipment. That is part of what is required in order to manage the therapy, since (to quote the definition in the Regulations) "a failure to do so is likely to result in deterioration in C's health". In terms of the time that the activity of managing therapy takes for the purposes of the Regulations, it is established (and the parties agree) that what the Tribunal needs to consider is how long the supervision, prompting or assistance that is required to manage the therapy takes, not how long the delivery of the therapy takes: see *MF v SSWO CPIP*

1679/2015 quoted in *HH v SSWP (PIP)* [2015] UKUT 558 (AAC) at [16]-[18] per Judge Williams.

16. However, I do not agree with the parties that this error of law in the Tribunal's decision is material. This is because I consider that the Tribunal's estimate of the time it takes to manage the appellant's therapy was a conclusion that was open to it on the facts and in which it has properly focused on the time taken to provide the supervision, prompting and assistance as required by the legal authorities.
17. Ground A is therefore dismissed.

Ground B: Daily living activity 7 – Communicating verbally

18. The First-tier Tribunal accepted that the claimant had a hearing loss in his right ear and that he had been provided with a hearing aid to improve his hearing. The First-tier Tribunal upon considering the evidence before them found that the claimant did not satisfy any of the point scoring descriptors within daily living activity 7 and provided the following reasons at paragraph 33 of the SoR for their conclusions on this matter:

“33. [Claimant] was prescribed a unilateral hearing aid in 2021. He did not start wearing it until September 2022. The medical evidence from 2 audiology reviews was that the hearing in one ear was normal. The hearing in the other would fluctuate depending on the level of congestion, which in turn could be related to ear infections. Nothing in the evidence suggested that such periods of exacerbations were anything close to the majority of days. Even if they were, the hearing loss was still unilateral. Whilst the tribunal had no doubt that the hearing aid would be helpful, we could not go as far as to say that it was needed in order to enable the claimant to hear.”

19. The Secretary of State in her submissions observes that the First-tier Tribunal in reaching their conclusion above have not made any reference to or commented upon the letter from H Rehman [p.113], who has known the claimant from early childhood where they indicate the claimant's fluctuating hearing loss has impacted on his speech and states the following:

“His speech and hearing have been a problem, he often talks and it is not clear, and this has often had an impact [on his]

behaviour. Now that he is almost approaching adulthood his hearing and speech is having a negative impact.

He feels that he does not fit in with the rest of his peers because he cannot communicate.

I know his parents are supporting him and helping through this but often need support as they have another son with the same thing.”

20. The Secretary of State further points out that, in a letter dated 23/01/2019 from the Children’s PCD Team [pp.108-112] there is reference to a diagnosis of speech delay [p.108], which appears supportive of Mr Reham’s evidence concerning the claimant’s speech difficulties (repeated above).
21. The Secretary of State submits that, in light of this evidence, it was incumbent upon the First-tier Tribunal to use their inquisitorial duty to make further findings as to the impact of the claimant’s hearing loss on his speech and whether this affects his ability to communicate with others, as this would then have allowed the First-tier Tribunal to consider more fully whether the claimant satisfied any of the point scoring descriptors within daily living activity 7. I submit that this is a material error of law.
22. I agree with the parties that the Tribunal has in relation to this activity failed to give adequate reasons. In addition to the points identified by the Secretary of State, I observe that the Tribunal at [33] has not addressed communication descriptors 7c or d at all and thus has provided no reasons for why they were found not to be met.
23. Although the definition of “complex verbal information” in Part 1 of Schedule 1 to The Social Security (Personal Independence Payment) Regulations 2013 (the 2013 Regulations) is just “information in C’s native language conveyed verbally in either more than one sentence or one complicated sentence”, while “basic verbal information” is “information in C’s native language conveyed verbally in a simple sentence”, I am satisfied that the Tribunal’s error is material. That is because there was evidence and argument advanced by or on behalf of the appellant that he had difficulty expressing or understanding “complex verbal information” as defined. The Tribunal needed to deal with that evidence and give adequate reasons for its conclusions.
24. This is a material error as without the errors the appellant may have been awarded an additional 2 or 4 points. This ground of appeal is allowed.

Ground C – Daily Living Activity 10 – making budgeting decisions

25. The First-tier Tribunal concluded in paragraph 35 of the SoR that upon considering the evidence before them the claimant did not satisfy any of the

point scoring descriptors within the activity. In reaching this conclusion the First-tier Tribunal appears to have concentrated and relied upon the claimant's ability to make simple budgeting decisions noting that he was:

"...able to deal with small amounts of money. He knew when he did not have enough money to buy his lunch, he can check his change and knows to report back to his mother if he has any left over. He understands that buying things like sweets and chocolate requires money."

26. The appellant argues that: (i) the First-tier Tribunal failed to address the definition of "complex budgeting decisions" in Part 1 of Schedule 1 to the 2013 Regulations, i.e. "decisions involving (a) calculating household and personal budgets; (b) managing and paying bills; and (c) planning future purchases"; and (ii) that the First-tier Tribunal has wrongly treated delay to the appellant's development of independence skills as a result of Covid in the same way as it would an 'ordinary' childhood developmental issue, rather than being a difficulty attributable to his physical or mental condition.
27. I agree with the appellant and the Secretary of State that the First-tier Tribunal has failed to direct itself by reference to the definition of "complex budgeting decisions" in the Regulations and has failed to make sufficient findings of fact about the appellant's abilities in this regard or to give adequate reasons for its conclusion that he can "manage complex budgeting decisions unaided" and thus scores zero points on this activity.
28. I further consider that the Tribunal has in this part of its decision failed adequately to explain why it considered that the nature of the delay to the appellant's development of independence skills as a result of Covid was a normal childhood developmental issue. The evidence suggests that the appellant, given the nature of his needs, will have been significantly more affected than an ordinary child and that the difficulties he continued to experience are specific to his needs.
29. This is a material error as without the error the appellant may have been awarded an additional two points. This ground of appeal is allowed.

Ground D – Mobility Activity 1 – planning and following journeys

30. The First-tier Tribunal found that the appellant did not satisfy any of the descriptors within mobility activity 1 and provided the following reasoning for this conclusion in paragraph 36 of the SoR:

36. We accepted that [claimant] does not go out much by himself. He rarely walks to school by himself, but it is an hours walk and he's used to having a lift from his father. He can find his

way around school and we are not persuaded that he has a learning difficulty. He can also make his way to the local shop by himself. We accept that he experiences low mood, but there was no persuasive evidence that he experienced overwhelming psychological distress. The independence in going out alone that a teenager of his age would have been likely to develop had been curtailed due to his increased risk during the covid 19 pandemic. We were therefore not persuaded that any of the point scoring descriptors applied.

31. The appellant argues that: (i) the First-tier Tribunal has failed to address the actual descriptors (in particular as to ability to plan and follow familiar and unfamiliar routes); and (ii) again, that the First-tier Tribunal has wrongly treated delay to the appellant's development of independence skills as a result of Covid in the same way as it would an 'ordinary' childhood developmental issue, rather than being a difficulty attributable to his physical or mental condition.
32. The Secretary of State submits, and I agree, that the First-tier Tribunal has wrongly focused upon the claimant's cognitive ability to follow a route of a journey, relying on evidence that he was able to "*...make his way to the local shop by himself...*", which would be a familiar journey to him, without making any findings as to whether he would be able to follow the route of an unfamiliar journey unaided as mobility descriptor 1d requires. That in itself is an error of law.
33. The Secretary of State also refers to the decision in *MH v SSWP* [2016] UKUT 0531 (AAC), [2018] AARC 12 determined that the meaning of "follow the route" is not restricted to navigation; instead, it connotes "*making one's way along a route*" which involves more than just the task of navigation:

36... The phrase "follow the route," when given its natural or ordinary meaning, clearly includes an ability to navigate but we do not consider that it is limited to that. Navigation connotes finding one's way along a route, whereas "follow a route" can connote making one's way along a route or, to use one of Ms Scolding's dictionary definitions, "to go along a route" which involves more than just navigation...

37...We therefore consider that the use of the word “navigate” in DA and HL, taken from the Secretary of State’s submissions in those cases, may sometimes be unhelpful to the extent that it glosses the statutory wording. It tends to focus too closely on a person’s ability to find his or her way along a route, whereas a need to be supervised in order to make one’s way along a route safely is as important.

34. The Secretary of State submits, and I agree, that it is unclear from the Tribunal’s reasoning in [36] of the SoR how they reached the conclusion that the appellant is able to plan and follow the route of an unfamiliar journey unaided given that the claimant “...*does not go out much by himself.*” The First-tier Tribunal has simply not identified any evidence, or explained why it has concluded, that the appellant can follow the route of an unfamiliar journey unaided. The fact that he might have developed a greater ability in this respect had it not been for his increased risk requiring greater shielding during the Covid-19 pandemic is not a reason for not applying the regulations. The question for the Tribunal was what was the appellant’s level of functioning at the time of the Secretary of State’s decision. The fact that he might have developed further given different life chances was irrelevant.
35. This is a material error as a properly reasoned decision may have resulted in the appellant being awarded 10 points on the mobility activities.

Conclusion

36. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal subject to the directions above.

Judge Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 26 November 2024