



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2024-000526-PIP
[2024] UKUT 407 (AAC)**

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

Between: GD Appellant
and
The Secretary of State for Work and Pensions Respondent

Before: Upper Tribunal Judge Perez

Decision date: 7 December 2024
Decided on consideration of the papers

Representation:

Appellant: Joe Power, Kirklees Law Centre
Respondent: Nicole Kaninda, Department for Work and Pensions, Decision Making and Appeals

DECISION

1. Mr GD's appeal is allowed.
2. The First-tier Tribunal decision dated 17 April 2023 (heard under reference SC007/23/00388) is set aside. The case is remitted to the Social Entitlement Chamber of the First-tier Tribunal, to be reheard in accordance with the directions at paragraph 27 of this decision.

REASONS FOR DECISION

Introduction

3. The claimant, Mr GD, appeals to the Upper Tribunal with my permission dated 20 June 2024. That permission was given on the papers.

Factual and procedural background

Secretary of State's decisions

4. The claimant had a previous award. It was made on 2 April 2020 by the Secretary of State's decision maker, and awarded personal independence payment from and including 7 February 2020. That award gave the enhanced rate for the daily living component (with 14 points) and the standard rate for the mobility component (with 10 points). The 14 daily living points comprised 12 points for being unable to express or understand verbal information at all even with communication support¹ (descriptor 7e), and two points for needing prompting to engage with other people (descriptor 9b). The 10 mobility points were for being unable to follow the route of an unfamiliar journey without another person, assistance dog or orientation aid (mobility descriptor 1d). That award had been based on recommendations in a "Review report form PA3" report dated 26 March 2020 from a healthcare professional. The report contained the healthcare professional's recommendations based on reviewing the claimant's completed PIP questionnaire and on the healthcare professional's medical knowledge. The claimant was not seen by a healthcare professional for that 2020 report.

5. On 1 September 2022, the claimant contacted the Department for Work and Pensions. This was to add sleep apnoea and post-covid syndrome to his PIP claim. That contact prompted an unplanned review.

6. On 8 December 2022², the decision maker received a new healthcare professional report (page 100). This time, the healthcare professional had seen the claimant, at an assessment centre. This new report indicated a level of needs different from those reflected in the previous decision; the report said the claimant can hear well with his bilateral hearing aids, whereas the claimant had previously been awarded 12 points for not being able to hear, in essence.

7. On 5 January 2023, the decision maker made a supersession decision (page 147), under regulation 26 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (S.I. 2013/381). This new decision superseded the decision which had made the previous award. The supersession was done on the ground of receipt of medical evidence from a healthcare professional. That supersession decision gave four daily living points: two for needing to use an aid or appliance to be able to wash or bathe (descriptor 4b), and two (down from 12 under descriptor 7e) for needing to use an aid or appliance to be able to speak or hear (descriptor 7b). The supersession decision gave zero mobility points (down from 10 for planning and following journeys). In a mandatory reconsideration dated 6 February 2023 (page 164), the supersession decision was upheld. This was both in terms of which points for which activities, and in terms of outcome.

Appeal to the First-tier Tribunal

8. The claimant appealed to the First-tier Tribunal.

¹ "communication support" means support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into a non-verbal form and vice versa": Part 1 of Schedule 1 to the regulations.

² The decision maker's submission to the First-tier Tribunal gave 2020 as the year on pages D and G. But the report starting on page 100, to which the submission referred, has 2022 as the year.

9. His grounds of appeal to the First-tier Tribunal were that: “I don't understand why it was declined because I used to get PIP because I can't hear. It was awarded for 10 years. I made a change because I wanted to add that I have post covid syndrome and sleep apnea [sic]. The decision maker refused all the points that I had for my hearing which I don't understand why because hearing can't approve like that since I have it from childhood. I hope you understand my situation. Thanks”.

10. The First-tier Tribunal made the following findings of fact—

“9. Mr [GD] was 59 years old at the date of decision on 05/01/23. He lives in a flat with his wife and son.

10. Mr [GD] was working as a welder up until he became ill in February 2021. He attempted a phased return but only lasted around 3 weeks and last worked in March 2022. The welding fumes made his breathing worse. He is still employed but not working at the date of decision.

11. Mr [GD] has bilateral moderate to severe hearing loss, and wears 2 hearing aids. He can hear well when wearing his aids.

12. Mr [GD] has severe obstructive sleep apnoea which affects his sleep. He tried using a CPAP machine at night but stopped using it at the end of 2022. He has no daytime symptoms from sleep apnoea.

13. Mr [GD] got Covid-19 in February 2021. He was admitted to St James University hospital on 19/02/21 with a persistent cough, shortness of breath on exertion and nausea. He was discharged on 25/02/21 but then admitted to Leeds General hospital on 28/02/21 where he stayed until 04/03/21. He was treated for hospital-acquired pneumonia and was later referred to the Long Covid Rehabilitation Service. He attended the clinic in 2022 and treatment was very effective in reducing his symptoms.

14. Mr [GD] also has hypertension and suffered a non-ST-elevation myocardial infarction (NSTEMI) in February 2021. He had a blocked artery and was started on heart medication. After heart monitoring at home, he did not require surgery. He used his GTN spray 3 times between February and December 2022.

15. Mr [GD] has type II diabetes, managed by his GP's surgery and with medication.

16. Mr [GD] can drive safely without restrictions or any problems.

17. Mr [GD] visits the supermarket every 3 to 4 days and walks around for about 15 minutes. He tries to walk to his family's house weekly and can manage 300 to 500m slowly and with rests.

18. Mr [GD] speaks very little English. His first language is Czech and he requires translation.”.

11. The First-tier Tribunal went on to award four daily living points: two under descriptor 4b for washing and bathing, and two under descriptor 7b for communicating. The First-tier Tribunal said about those activities—

“26. 4- Washing and Bathing

27. Mr [GD] did not claim problems with this activity on his 2020 claim form, pages 38 to 39. However, on his review form in 2022 he said he was affected by steam and breathlessness, page 95. He told the healthcare professional he was showering and bathing independently, and daily, page 123. Whilst no points had been awarded in the original decision under this activity, we agreed with the healthcare professional on 08/12/22, and awarded 2 points in respect of aids under 4b. This was due to his hearing impairment and the fact he would have to remove his aids to bathe or shower³. Once removed, he would not be able to hear properly so other aids would be needed, such as a visual fire alarm. We took into account the steam, but Mr [GD] could open a window or use a fan to reduce this. He did not require prompting or assistance and was showering daily, page 178.”

“32. 7 – Communicating

33. Mr [GD] has bilateral moderate to severe hearing loss, and wears 2 hearing aids, page 210. He was awarded 12 points under 7e on paper assessment, without being seen or heard. 7e reads ‘cannot express or understand verbal information at all even with communication support’. The tribunal noted that Mr [GD] attended a face-to-face assessment on 08/12/22 and he was accompanied by his son. He told the assessor he could barely hear anything without his hearing aids, but he could hear very well wearing them, page 124. On page 125 the assessor recorded that Mr [GD] used his son as a language translator, but he had no issues understanding or communicating with his hearing aids in. His speech was clear and he had no communication difficulties throughout the assessment. This was corroborated in the ESA assessment on 19/12/22, less than 3 weeks before the date of decision. He used his son to translate in Czech, but managed to provide answers to all questions. In the medical letter dated 28/07/21 at page 195, it states Mr [GD] used his daughter to translate into Czech as he spoke little English. In the medical letter dated 01/07/22 at page 112, again Mr [GD] communicated well using a Czech language interpreter on Language Line. There were no other communication difficulties other than the language barrier. It is clear from all of the evidence where Mr [GD] was seen face to face, that he could hear well when wearing his hearing aids. The 12 points under 7e were not justified in our opinion. We awarded 2 points under 7b and agreed with the healthcare professional on 08/12/22.”.

12. I do not include what the First-tier Tribunal said in relation to the other daily activities. It awarded zero points for those. My 20 June 2024 decision included findings that there were no arguable errors of law as to daily living. Those findings have not been challenged.

13. As to the mobility component, the First-tier Tribunal said—

“1. Mobility

2. 1 – Planning and following a journey

3. Mr [GD] said in his 2020 claim form that he got confused outdoors and he felt nervous and anxious, mainly in unfamiliar places, page 53. He was awarded 10 points under 11d on the basis of hearing impairment, page 73. This was a decision made by the DWP on papers alone, without speaking to Mr [GD]. He told the healthcare professional in 2022 that he wouldn’t go anywhere new on his own as he lacked confidence and would ask his son to accompany him, page 124. He further stated he could hear traffic approaching when walking, but would need to have his car windows down to hear traffic whilst driving. The tribunal noted that Mr

³ Applying [KT and SH v Secretary of State for Work and Pensions \(PIP\): \[2020\] UKUT 252 \(AAC\)](#).

[GD] was working as a welder up until he became ill. He was driving without any problems, and he was able to hear well when wearing his hearing aids. His long covid treatment had been very effective. He had no cognitive issues and no significant mental health problem. Whilst we accepted he might be nervous and anxious on a new journey, we agree with the healthcare professional's opinion at page 138. As a driver, you have to deal with diversions or new road layouts, which could involve travelling on unfamiliar routes. We found that for the majority of time Mr [GD] could plan and follow the route of any journey, and accordingly we could not award points. We found that the 10 points awarded previously under 1d were awarded incorrectly on the basis that Mr [GD] could not hear well when wearing his aids. This was not the case as could be seen from all of the evidence before us today.

4. 2 – Moving Around

5. In his 2020 claim form, Mr [GD] ticked the 50-200m box and said he sometimes got breathless when walking, pages 54 to 55. He was not awarded any points under this activity in the original award. On the award review form in 2022 he ticked the 20-50m box citing breathlessness, page 99. He told the healthcare professional in 2022 that he could walk 15 minutes before needing to rest due to fatigue, page 124. He also said his long covid treatment had been very effective. He told the ESA Doctor in December 2022 that he could walk slowly for 100m before resting due to fatigue, breathlessness and weakness, page 177. Mr [GD] had walked through Leeds to get to the assessment centre, with multiple breaks, page 178. He could continue walking after a short rest. He went on to say he goes to the supermarket every 3 to 4 days and could walk around 15 minutes taking breaks, page 179. He also walked to his family's house weekly, and could manage 300 to 500m slowly. He could walk for 20 minutes. He could manage 100m at a time before a short rest. We note the DWP decision maker did not award points in respect of mobility. We were surprised by this, as the PIP's healthcare professional had recommended 4 points under 12b on the basis of 50-200m. We agreed with this, as Mr [GD] had been observed walking 30m normally and without breathlessness, page 125. He had been given exercises and was building up his tolerance. We found that for the majority of time, he could walk distances of 100m before resting for a short period and repeating this. He could walk slowly for around 15 minutes, which supports distances in excess of 50m.

[...]

14. We gave weight to the ESA85. It was around 3 weeks before our date of decision and had been conducted by a Doctor. Whilst Mr [GD] had been placed in the support group on the basis of mobilising less than 50m, he had repeatedly said he could walk 100m before resting. We note he had walked from the town to the assessment centre, with multiple breaks, and appeared drenched in sweat, page 181. He had clearly walked a significant distance. However, he was not breathless on assessment. When seen on 08/12/22, he had walked completely normally for 30m with no breathlessness at all. We preferred the opinion of the PIP's assessor.”.

14. The First-tier Tribunal concluded (at its second paragraph 13 and second paragraph 6)—

“**13.** We found that there were grounds to supercede [sic] the original award, as Mr [GD] had been seen face-to-face in 2022 and it was clear he could hear whilst wearing his hearing aids.”

“**6.** As 4 points were awarded in respect of daily living activities 4(b) and 7(b), and 4 points for mobility 12b, the appeal fails.”.

15. The First-tier Tribunal refused to set aside its appeal decision and refused permission to appeal to the Upper Tribunal against the appeal decision.

Permission to appeal to the Upper Tribunal

16. The claimant applied to the Upper Tribunal for permission to appeal to the Upper Tribunal in respect of both components.

17. On 20 June 2024, I gave the claimant permission to appeal to the Upper Tribunal. This was for arguable errors of law as to mobility activity 2: moving around.

Submissions

18. The parties have both agreed: (i) to my finding that there were the errors of law set out at paragraphs 20 to 24 of this decision, (ii) to the First-tier Tribunal decision being set aside for the reasons in those paragraphs, and (iii) to the Upper Tribunal referring the case for redetermination of both components entirely afresh by the First-tier Tribunal.

Law

19. At the relevant time, regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/377) provided—

“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.

(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.

(3) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(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”.

Analysis

Errors of law

20. The First-tier Tribunal erred in law in relation to moving around.

21. The claimant had ticked the 20-50m box in his award review form. The First-tier Tribunal rejected that his walking was so limited. It said (its second paragraph 5 and second paragraph 14)—

“5. In his 2020 claim form, Mr [GD] ticked the 50-200m box and said he sometimes got breathless when walking, pages 54 to 55. He was not awarded any points under this activity in the original award. On the award review form in 2022 he ticked the 20-50m box citing breathlessness, page 99. He told the healthcare professional in 2022 that he could walk 15 minutes before needing to rest due to fatigue, page 124. He also said his long covid treatment had been very effective. He told the ESA Doctor in December 2022 that he could walk slowly for 100m before resting due to fatigue, breathlessness and weakness, page 177. Mr [GD] had walked through Leeds to get to the assessment centre, with multiple breaks, page 178. He could continue walking after a short rest. He went on to say he goes to the supermarket every 3 to 4 days and could walk around 15 minutes taking breaks, page 179. He also walked to his family’s house weekly, and could manage 300 to 500m slowly. He could walk for 20 minutes. He could manage 100m at a time before a short rest. We note the DWP decision maker did not award points in respect of mobility. We were surprised by this, as the PIP’s healthcare professional had recommended 4 points under 12b on the basis of 50-200m. We agreed with this, as Mr [GD] had been observed walking 30m normally and without breathlessness, page 125. He had been given exercises and was building up his tolerance. We found that for the majority of time, he could walk distances of 100m before resting for a short period and repeating this. He could walk slowly for around 15 minutes, which supports distances in excess of 50m”

“14. We gave weight to the ESA85. It was around 3 weeks before our date of decision and had been conducted by a Doctor. Whilst Mr [GD] had been placed in the support group on the basis of mobilising less than 50m, he had repeatedly said he could walk 100m before resting. We note he had walked from the town to the assessment centre, with multiple breaks, and appeared drenched in sweat, page 181. He had clearly walked a significant distance. However, he was not breathless on assessment. When seen on 08/12/22, he had walked completely normally for 30m with no breathlessness at all. We preferred the opinion of the PIP’s assessor.”.

22. Here the First-tier Tribunal erred in law in failing to make adequate findings for the purposes of regulation 4(2A). The First-tier Tribunal failed throughout the passages cited

at paragraph 21 above to make a finding as to time and distance together. It made a finding either as to time or as to distance (and in one instance, it made no finding as to either). But both time and distance were needed to establish speed of walking for “*within a reasonable time period*” for regulation 4(2A)(d) and for “*to an acceptable standard*” for regulation 4(2A)(b). The First-tier Tribunal also failed to make findings as to the number of breaks required and how soon into each episode of walking (how soon in terms of both time and distance) the break was needed, and how long the claimant would have to wait to be able to repeat the activity.

23. I am splitting up the passages cited at paragraph 21 above to demonstrate each instance of these failures—

- (1) “*He told the healthcare professional in 2022 that he could walk 15 minutes before needing to rest due to fatigue, page 124*”. The First-tier Tribunal mentioned the time but not the distance travelled in that time.
- (2) “*He told the ESA Doctor in December 2022 that he could walk slowly for 100m before resting due to fatigue, breathlessness and weakness, page 177*”. This time, the First-tier Tribunal mentioned distance but not the time taken.
- (3) “*Mr [GD] had walked through Leeds to get to the assessment centre, with multiple breaks, page 178. He could continue walking after a short rest*”. The First-tier Tribunal mentioned neither time nor distance here, whether for the total journey or for the time and distance covered before each rest.
- (4) “*He went on to say he goes to the supermarket every 3 to 4 days and could walk around 15 minutes taking breaks, page 179*”. The First-tier Tribunal did not say what distance the claimant can cover in 15 minutes. Nor did it say how far and in what time period the claimant can walk before taking a break. A finding as to the length of each break was also needed if the total time he took was to be taken as indicating a certain pace.
- (5) “*He also walked to his family’s house weekly, and could manage 300 to 500m slowly*”. The First-tier Tribunal mentioned no time period, nor whether breaks were needed, nor whether the claimant could do it repeatedly.
- (6) “*He could walk for 20 minutes. He could manage 100m at a time before a short rest*”. The First-tier Tribunal made no finding as to how long it took the claimant to walk the 100m.
- (7) “*We found that for the majority of time, he could walk distances of 100m before resting for a short period and repeating this. He could walk slowly for around 15 minutes, which supports distances in excess of 50m*”. The First-tier Tribunal made no finding as to how long it took the claimant to cover 100m. The First-tier Tribunal gave no explanation, either, of why “*slowly*” in this claimant’s case “*supports distances in excess of 50m*”.
- (8) “*Whilst Mr [GD] had been placed in the support group on the basis of mobilising less than 50m, he had repeatedly said he could walk 100m before resting. We note he had walked from the town to the assessment centre, with multiple breaks, and appeared drenched in sweat, page 181. He had*

clearly walked a significant distance". This too did not say how long it took the claimant to walk a distance before needing a break. And it gave insufficient consideration to the evidence, which the First-tier Tribunal appeared to accept, that the claimant had been drenched in sweat on arrival at the assessment centre.

- (9) "*When seen on 08/12/22, he had walked completely normally for 30m with no breathlessness at all*". This did not say what the First-tier Tribunal considered to be "*normally*", or whether breaks were needed.

24. The First-tier Tribunal hearing was a paper hearing. But, if that tribunal had needed more information to be able to make the findings I say are lacking, the tribunal could have adjourned for an oral hearing or so as to put questions in writing.

Disposal

25. Both parties agreed to remittal of both components. I consider remittal appropriate for findings of fact to be made afresh on both components.

Conclusion

26. It is for all of the above reasons that I allow the appeal, set aside the First-tier Tribunal decision, and remit the case to a freshly-constituted panel of the First-tier Tribunal, for redetermination entirely afresh

CASE MANAGEMENT DIRECTIONS

27. I therefore direct as follows—

- (1) The case is to be redetermined entirely afresh (both components) by the First-tier Tribunal.
- (2) The First-tier Tribunal panel which rehears the case must contain no-one who was on the panel which decided the case on 17 April 2023.

Rachel Perez
Judge of the Upper Tribunal
7 December 2024