



NCN: [2024] UKUT 410 (AAC)

Appeal No. UA-2024-000665-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between

KW

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Fitzpatrick

Decided on consideration of the papers

Representations:

Appellant: Mr Spriggs, Sunderland Council Welfare Rights.

Respondent: Ms Elhakim, DMA, Leeds.

On appeal from:

Tribunal: FTT (SEC)

Tribunal Case No: SC 236/22/00556

Tribunal Venue: Sunderland

Decision Date: 27.11.23

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

1. In considering Activity 9 Engaging with other people face to face, it is important both to take a holistic approach to the assessment of the evidence rather than focus on one area such as the appellant's employment and to consider Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013 where Engage socially is defined as (a) interact with others in a contextually and socially appropriate manner;(b) understand body language; and (c) establish relationships see also *HA v SSWP (PIP)* [2018] UKUT 56 (AAC)

2. Where an appellant states they have difficulty doing an activity due to pain it is important to make careful findings of fact and consider the application of Regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 see also *CPIP/2377/2015*, *PS v SSWP* [2016] UKUT 0326 (AAC) and *LB v SSWP* [2024] UKUT 338 (AAC).

3. When considering an application for an adjournment or postponement it is important to consider the triumvirate of issues outlined in *MA v SSWP* [2009] UKUT 211 (AAC) (CA/1546/2009) namely (i) the benefits of an adjournment (ii) the reason the party is not ready and (iii) the impact of an adjournment on the other party and the Tribunal system as a whole. It would be exceptional for an adjournment that would otherwise be granted to be refused solely on account of the needs of the system as a whole

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. The appeal against the Secretary of State's decision of 21st June 2022 is remitted to the First-tier Tribunal for re-determination.
2. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.
3. If the claimant wishes the First-tier Tribunal to hold an oral hearing before her remitted appeal is determined she must make a written request to the First-tier Tribunal to be received by that Tribunal within one month of the date on which this decision is issued.
4. If the claimant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.
5. Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.
6. The parties are reminded that the law prevents the First-tier Tribunal from taking into account circumstances not applying at the date of decision (section 12(8) of the Social Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if it says something relevant about the circumstances at the date of decision.

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

REASONS FOR DECISION

Introduction

1. This is an appeal against the decision of the First Tier Tribunal (FTT) of the 27th of November 2023 in which the FTT confirmed the decision of the Secretary of State of the 21st of June 2022 that the appellant was not entitled to either component of Personal Independence Payment (PIP), having scored four points for the daily living component and zero points for the mobility component.
2. I granted permission to appeal on 19th June 2024 and the respondent has supported the appeal on two out of the 3 grounds of appeal advanced by the appellant. I broadly agree with the respondent's submissions, and given the recurring nature of these issues I consider it may be helpful to set out the reasons for my decision.

Factual background

3. The appellant made a new claim to PIP on 01/02/2022 and submitted a PIP2 questionnaire form dated 23/02/2022. A telephone consultation was carried out with a Healthcare Professional (HP) on 28/05/2022. A decision letter was issued on 21/06/2022 informing the appellant that she scored 6 points for daily living descriptors: 1b, 4b and 6b and 0 points for the mobility component of PIP. As the appellant did not meet the minimum 8-point threshold for an award at the standard rate she was not entitled to PIP from 01/02/2022.
4. The appellant requested a Mandatory Reconsideration (MR) of that decision. However, following the MR the claimant was notified in a letter dated 22/07/2022 that she scored 4 points for daily living descriptors 1b and 4b and 0 points for the mobility component of PIP. The claimant then lodged an appeal against her PIP decision, with HM Courts and Tribunals Service (HMCTS).
5. Following the appeal hearing held on 27/11/2023, the Tribunal refused the appeal and confirmed the Secretary of State's decision.

Legal framework

6. The appellant's representative has advanced a number of grounds on which they argue the FTT is in error of law. These can be divided into 3 broad categories. The first relates to potential breach(es) of the FTT procedural rules in terms of the FTT's decision to refuse an adjournment request and proceed in the absence of the appellant, specifically rules 2 and 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. The second ground pertains to insufficient findings of fact and adequate reasons being provided by the FTT specifically in relation to Part 1 of Schedule 1 to the Social Security (Personal Independence Payments) Regulations 2013 daily living activity 9, Engaging with other people face to face. The third ground relates to the FTT potentially misdirecting itself on the law in the context of its interpretation of the application of Regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013.

The First-tier Tribunal's decision

7. Following the appeal hearing held on 27/11/2023, the FTT refused the appeal and confirmed the Secretary of State's decision awarding the appellant 2 points for activity 1b Preparing food and 2 points for activity 4b Washing and bathing. Both sets of points were awarded for use of an aid.

The grounds of appeal and the parties' submissions

8. The appellant's grounds of appeal are set out at paragraph 6 above. The respondent supports the appeal on the basis of the second and third grounds of appeal advanced but not the first which relates to the FTT's consideration of the appellant's (through her representative) application to adjourn and the decision to proceed in the absence of the appellant.

Analysis

Activity 9 Engaging with other people face to face

9. I will deal firstly with the second ground of appeal, the FTT's consideration of the appellant's ability to engage with other people face to face. The appellant suffers from anxiety, depression, Raynaud's, fibromyalgia, chronic regional pain

syndrome, gilbert syndrome and lower back pain as noted by the FTT from the PIP2 questionnaire form; (paragraph 33 of the written reasons).

10. Ms W claimed difficulties with undertaking most daily living and mobility activities of PIP. Specifically, regarding daily living activity 9 she reported that she struggles meeting new people and becomes distressed, she doesn't like going somewhere new as she feels scared and doesn't feel safe and would avoid such situations.
11. The HP noted that the claimant is prescribed anti-anxiety medications and has previously attended talking therapies which was effective.
12. The HP also notes the following:

"Her family are her main support, and they speak daily. She feels she gets nervous around people, her confidence is affected due to her physical issues. She has struggled with new and unfamiliar people for many years. She will avoid going to new places and meeting new people although she will go to appointments independently and can speak up without difficulty. She is a receptionist in a GP surgery so has interaction with patients but can find this difficult on days when her pain is really bad. She has a couple of close friends, they will visit her which she enjoys and she will go for a coffee when her friend has access to a car as walking distance is difficult for her..."

13. When considering this activity, the FTT at paragraph 47 of the written reasons noted that the claimant was working 4 days a week as a receptionist, which would involve seeing people, dealing with multiple activities often at the same time further noting that it:

"...requires significant motivation and concentration. It is likely to involve having to deal with patients who are agitated. It is highly pressured. The ability to perform this job day in day out is inconsistent with someone with significant problems relating to motivation or forgetfulness. It is also completely inconsistent with somebody who claims to struggle to meet new people...The skills an individual is able to exercise in this environment crosses over into everyday life. They are an indicator of the abilities, in general, of the individual concerned. The tribunal used this information to conclude what the appellant will be capable of undertaking generally outside work...Consequently there is no reason why what somebody does in the workplace should not be taken into account. It is often very relevant".

14. The Tribunal went to conclude the following:

"The observations of the assessor and the nature of the job means the tribunal finds the appellant does not have a mental health condition that affects her ability to deal with other people...The appellant sees her family regularly. She confirmed she is able to go to appointments independently and speak up without

difficulty. She has close friends. They visit her. She goes out for a coffee with a friend...If there was the level of difficulty-the need for prompting-she claims to have then the job she does would be impossible" (written reasons, para 48).

15. The Tribunal noted that the only reasonable adjustment appeared to be the appellant's workstation.
16. Whilst the Tribunal noted that it accepted the observations of the mental state assessment provided by the HP, I agree with the submissions of the respondent in that it made *presumptions* of her ability to engage with other people face to face *based largely on her employment*. There is nothing wrong per se with the FTT taking relevant and genuinely comparable activities into account (*JM v SSWP [2024] UKUT 283 (AAC)* and (*JMcD v Department for Communities (PIP) [2019] NCom 4*) in the context of the appellant's employment provided this is not to the exclusion of other areas of the appellant's life. The FTT, in my respectful view, has failed to consider what may be entailed when the claimant engages with people face to face *generally outside the work environment* and whether she is doing so in accordance with regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013, independently, or not. It also seems to me that the Tribunal did not properly consider the specifics of what daily living activity 9 involves when considering her ability to undertake this activity. "*Engage socially*" is defined in Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013, as:

- (a) interact with others in a contextually and socially appropriate manner;*
- (b) understand body language; and*
- (c) establish relationships*

17. I note the comments of Judge Rowley in *HA v SSWP (PIP) [2018] UKUT 56 (AAC)* with which I agree:

"13. It is now widely accepted that the definition of "engage socially" in Part 1 of Schedule 1 to the Social Security (Personal Independence Payments) Regulations 2013 applies to daily living activity 9, even though the expression does not actually appear within the terms of the activity or its descriptors. The expression is defined as meaning: "(a) interact with others in a contextually and socially appropriate manner; (b) understand body language; and (c) establish relationships". If a claimant is unable to satisfy these criteria, it follows that (s)he is unable to engage with other people "to an acceptable standard" (regulation 4(2A)(b)).

16. In my judgment it was incumbent on the tribunal to consider the claimant's ability to satisfy the three components of the phrase "engage socially", and to make adequate findings of fact as to the nature and quality of his interactions with other people (HJ v SSWP [2016] UKUT 0487 (AAC))

.....the term "engage socially" is not limited to such people (known to the appellant). Rather, a tribunal must consider a claimant's ability to engage with people generally, and not just those people they know well (HJ v SSWP [2016] UKUT 0487 (AAC)). The tribunal did not address whether the claimant's ability to engage with those listed by it showed that he was able to engage with people generally, rather than just those whom he knew well. That, also, constituted an error of law."

18. Following the limbs of the definition set out at paragraph 17 above , I am satisfied the FTT has failed in its inquisitorial duty to make sufficient findings of fact to determine whether the appellant was able to undertake this activity in a contextually and socially appropriate manner and had the ability to establish relationships independently and/or whether she may have needed prompting or social support in order to do so. The FTT failed to consider this issue in an appropriately holistic manner and axiomatically failed to make sufficient findings of fact on which to base its decision. As such I find the FTT to be in error of law on this ground.

Regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013

19. As noted above at paragraph 9 the appellant suffers with a number of physical health conditions and reported to the HP that she experiences chronic pain, which is consistent pain and weakness, with fatigue "*on even mild exertion*". The HP also noted that her pain relief medications are not effective. The HP further noted difficulties that the appellant reported to experience as a result of her conditions when undertaking various activities of PIP.

20. Ms W also reported difficulties she experienced in her PIP2 questionnaire form when undertaking activities of PIP such as, when cutting her food up "*because my wrist hurts and struggles to grip cutlery*", "*I sometimes struggle cleaning myself...because my fingers and wrists sometimes lock and this causes pain...I sometimes wet myself if I'm not able to make it to the toilet in time because of my back pain and breathlessness*".

21. In its statement of reasons, the Tribunal has come to conclusions such as:

"Reference is made to fibromyalgia and chronic pain syndrome. However, this does not prevent the appellant from carrying out the functions of receptionist..." (written reasons, para 51).

22. At paragraph 63 of its statement of reasons the FTT opines:

"The legislation envisages a claimant carrying out the descriptors in pain or discomfort. Parliament deliberately excluded pain or discomfort from the PIP legislation. Pain is not included in any of the descriptors. It is not one of the components of regulation four..... It means an ability to carry out a descriptor can be undertaken with pain or discomfort".

23. In my respectful judgment, this is a problematic starting point for the FTT to approach the issue of the relevance of pain in terms of the ability to complete a PIP activity. Leaving aside the issue of divining what Parliament may or may not have intended, it takes no cognisance of the caselaw pertaining to this issue. It is now well established that pain (if accepted) can and often is relevant to a claimant's ability to carry out a PIP activity to an acceptable standard and, in my view, it may also be relevant to whether the activity can be done repeatedly and within a reasonable time. I note in particular the approach taken by Upper Tribunal Judge Parker in *CPIP/2377/2015* where she said of regulation 4(2A) and 4(4):

"6. ... Matters such as pain, and its severity, and the frequency and nature, including extent, of any rests required by a claimant, are relevant to the question of whether a claimant can complete a mobility activity descriptor 'to an acceptable standard'..."

This was quoted with approval by Upper Tribunal Judge Markus KC in *PS v SSWP [2016] UKUT 0326 (AAC)* who went on to consider the relationship between acceptable standard, repeatedly and within a reasonable time. For the purposes of this decision, it is not necessary to consider this in detail, however, this approach to the consideration of the relevance of pain in the context of being able to perform a PIP activity in accordance with Regulation 4(2A) has been recently underscored by Upper Tribunal Judge Perez in *LB v SSWP [2024] UKUT 338 (AAC)* albeit in the context of mobility, but I see no logical reason why the same approach should not be applied to the other PIP activities. In my respectful view the FTT failed in its inquisitorial duty to make sufficient findings of fact in relation to how the pain claimed by the appellant impacted on her ability to carry out a number of PIP activities in accordance with Regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013. On this basis the FTT is in error of law. I would add the FTT's starting point for the consideration of the relevance of pain (paragraph 23 above) is sub optimal

as it appears both to make assumptions about legislative intentions and appears somewhat blinkered to the application of Regulation 4(2A).

Adjournment and proceeding without the appellant

24. This is the appellant's remaining ground of appeal and given my conclusions in relation to the other grounds, it will not materially affect the outcome of this case. For the sake of completeness however I note rule 2 relates to the overriding objective to ensure each case is dealt with fairly and justly. Rule 31 pertains to proceeding in a party's absence:

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

25. The FTT has discretion both in relation to whether to (i) adjourn the hearing at the appellant's/representative's request and (ii) whether to proceed with the hearing in the absence of the appellant, but this discretion must be exercised judicially. In this case I am satisfied the FTT has done so. It gave significant consideration to these matters in its statement of reasons and it has considered issues in relation to the adjournment application including, inter alia, the information provided in the application to adjourn, the views of the other party, the number of previous adjournments and the reasons, the age of the case, the fact the case had been listed for a full session and the value (and scarcity) of Tribunal time, the likely time when the case could be relisted and the impact on other Tribunal users generally. I agree with the FTT that no one is *entitled* to an adjournment as of right. I would simply add that when considering applications for adjournment it is helpful to consider the triumvirate of issues set out by Upper Tribunal Judge Jacobs in *MA v SSWP [2009] UKUT 211 (AAC) (CA/1546/2009)* with the first consideration being the benefit of an adjournment, secondly why the party was not ready to proceed and finally the impact of an adjournment on the other party and the Tribunal system as a whole. I agree with Judge Jacobs's view that it would be exceptional for an adjournment that would otherwise be granted to be refused solely on account of the needs of the system as a whole. The FTT must then go on to consider whether it is in the interests of justice to proceed with the hearing in the appellant's absence. While less explicit consideration has been given to this issue in the written reasons I am satisfied, in the particular circumstances of this case, the FTT had sufficient grounds to come to the view it could fairly proceed in the appellant's absence, I note in particular that FTT

bundle is over 400 pages in length and contains extensive medical evidence. It was also clear the appellant and the representative had received notification of the hearing date.

Conclusion

26. 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.

What happens next

27. I have found that the First-tier Tribunal erred in law as set out above. The First-tier Tribunal's decision is set aside.
28. The Secretary of State has suggested the Upper Tribunal remit this case to the First-tier Tribunal for re-hearing and, given further findings of fact are required, it is appropriate to remit the case back to the FTT. As a matter of law, the next tribunal cannot, in its reasoning, take into account the findings of fact or conclusions of the tribunal whose decision I have set aside. The undetermined grounds of appeal are just that – undetermined.
29. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view on this case. That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

Edell Fitzpatrick
Judge of the Upper Tribunal

Authorised by the Judge for issue on 7th December 2024