

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**PERSONAL INEPENDENCE PAYMENT**

Application by the claimant for leave to appeal  
and appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 29 July 2019

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.
2. The decision of the appeal tribunal dated 29 July 2019 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
3. I am unable to exercise the power conferred on me by Article 15(8)a of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
4. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

5. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

### **Background**

6. The appellant made a claim to PIP from and including 16 August 2017. On 1 November 2017 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 16 August 2017. Following a request to that effect the decision dated 1 November 2017 was reconsidered on 12 December 2017 and was changed. The revised decision was that the appellant was entitled to the standard rate of daily living component from 8 December 2017 to 8 October 2021 but was not entitled to the mobility component of PIP from and including 16 August 2017.
7. The appeal tribunal hearing took place on 29 July 2019. The appellant was present, was accompanied by his daughter and was represented by Ms Quinn of Community Advice Services. There was a Department Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 1 November 2017 as revised on 12 December 2017. The appeal tribunal did apply a descriptor from Part 3 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the decision maker had not applied. The score for this descriptor was insufficient for an award of entitlement to the mobility component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.
8. On 24 April 2020 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). The application was received outside of the prescribed time limits for making such an application. On 4 June 2020 the Legally Qualified Panel Member (LQPM) determined that special reasons did not exist to extend the time limits for making the application and rejected it.

### **Proceedings before the Social Security Commissioner**

9. On 20 August 2020 a further application for leave to appeal was received in the office of the Social Security Commissioners. The appellant was represented in this application by Mr McCloskey of the Law Centre (Northern Ireland). On 3 September 2020 observations on the application were requested from Decision Making Services (DMS). In written observations dated 2 October 2020, Ms Patterson, for DMS, opposed the application for leave to appeal. The written observations were shared with the appellant and Mr McCloskey on 5 October 2020.

On 30 October 2020 written observations in reply were received from Mr McCloskey which were shared with Ms Patterson on the same date.

10. On 4 November 2020 I accepted the late application for special reasons.
11. Following an earlier postponement, an oral hearing of the application took place on 15 March 2022. The appellant was represented by Mr Hawkins and the Department by Ms Patterson. I am grateful to both for their carefully-prepared oral and written submissions.

### **Errors of law**

12. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
13. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

## The submissions of the parties

14. In the Case Summary prepared for the oral hearing of the application, Mr Hawkins set out the following submissions:

**Ground 1** - Activity 4: The tribunal erred in the calculation of descriptor points. Alternatively, it has failed to give adequate reasons to explain its conclusions.

It is submitted there is a conflict between the findings of the tribunal that the appellant needs to use a shower seat and rails in the bathroom, and the conclusion that (the appellant) can get in and out of an unadapted bath.

The contested descriptor 4(e) states *Needs assistance to be able to get in or out of a bath or shower*. Schedule 1, Part 1 of the PIP Regulations (NI) 2016 defines "bathe" as including getting into or out of an unadapted bath or shower. *SP v SSWP*, now reported as [2016] AACR 43 held that the use of "or" in the definition of bathe is to have a disjunctive meaning. As a result, the tribunal were required to go beyond the Appellant's use of the shower in his home and consider the ability to use the bath. *SP v SSWP* further held that the bath under consideration must be unadapted.

In essence the tribunal had determined that aids were necessary in the form of a bath rail to get in and out of the bath and therefore the bath is adapted in order for him to be functionally capable of doing so. However, as outlined above, the criteria for 4(e) requires the consideration of the ability to do so with an unadapted bath. We therefore continue to submit that, had the findings been correctly applied to the law, (the appellant) would have scored 3 points from descriptor 4(e). In the alternative the tribunal have inadequately explained an outcome to the contrary.

**Ground 2** - Activity 5: The tribunal failed to provide adequate reasons to explain why it awarded no additional points.

It is submitted that the tribunal's reasons are insufficient to explain why it concluded the appellant could manage toileting and continence without assistance. The tribunal noted the Capita form completed by the GP dated 26 September 2017 and recorded: *'This refers, amongst other things, to Appellant needing help with bags, washing etc.*

The tribunal is said to have considered a note from (the appellant's) GP dated 24 November 2017. This note refers to how the appellant *'complained about the bag leaking during the night and his son had to help.'*

In the Record of Proceedings, the appellant gives oral evidence that *'Stoma bag is the main difficulty. Hole In the stoma bag and a couple smaller. If bend it spills.'* He is also asked if the bag bursts. His response is *'Yes. Told the Doctor that it was coming off all the time. Tried different bags.'* Later in the Record of Proceedings, the Appellant states he cannot change the bag himself. When asked why, he replies: *'Can't spray around bag to attach it. Fell off a couple of times. Need help all the time with the bag.'*

In the Statement of Reasons, the tribunal records: *'The Tribunal has taken all evidence into account and prefers to rely on the clinical findings/specialist's reports and find that they enable a reliable assessment to be made as to functional ability.'*

We rely on *CB/08-09(/B)* and the requirement that the tribunal should provide an explicit explanation of why it has rejected the evidence supportive of the appeal.

*60. The reason for my rejection of the DMS submission is that there is a clear duty on appeal tribunals to undertake a rigorous assessment of all of the evidence before it and to give an explicit explanation as to why it has preferred, accepted or rejected evidence which is before it and which is relevant to the issues arising in the appeal.*

*61. In R2/04(DLA) a Tribunal of Commissioners, stated, at paragraph 22(5):*

*' . . . there will be cases where the medical evidence before a particular tribunal will be unsatisfactory or deficient in an important respect. It will often be open to the tribunal hearing such a case to reject the medical evidence for that reason. Indeed, it will sometimes be its duty to do so. However, and in either case, the tribunal cannot simply ignore medical evidence which is not obviously irrelevant. It must acknowledge its existence and explain its reasons for rejecting it, even if, as will often be appropriate, such reasons are fairly short. We repeat, the decision whether a person*

*suffers from a particular medical condition is a matter for the tribunal. That body must have regard to the whole of the evidence, including the medical evidence. Where it rejects medical evidence it must, unless the reasons are otherwise apparent, explain why it does so. Anything less is likely to result in an appeal being brought on the grounds that the tribunal has not given adequate reasons or that its decision is against the weight of the evidence.'*

We also highlight that the Statement of Reasons separately state:

*The Tribunal found nil of significance, in respect of the period under consideration, in the General Practitioner Medical Records presented which would cast doubt on the Disability Assessor's clinical findings.*

It is submitted that the tribunal has failed to resolve a conflict between the Appellant's evidence and the Doctor's evidence which supports a conclusion that assistance is necessary for the Appellant to manage toileting and incontinence, and the decision of the tribunal that the Appellant only needs aids and appliances to manage this activity.

The decision maker and the tribunal made findings in conflict with the Disability Assessor's clinical findings and listed evidence in the GP records which explicitly conflicted with the Disability Assessor's findings. It is submitted the Tribunal cannot adopt both the position that there were no conflicts in the evidence and that it assessed and addressed the conflicts it alternatively found.

**Ground 3** - The tribunal stated that the evidence from the Appellant's GP and report of the Disability Assessor were not in conflict. It is submitted such evidence did conflict, and that the Tribunal failed to address these differences, especially in relation to the ability to mobilise.

The tribunal concludes that the GP evidence is not in conflict with the Disability Assessor's report and that the GP evidence supports their conclusions. However, the initial application from the Appellant was refused by the Department. It was only after the submission of additional medical evidence from the Appellant's Doctor,

that (the appellant) was awarded Standard Rate of the Daily Living Component.

In the Record of Proceedings, the Appellant makes reference to using devices such as a mobility scooter and a rollator. Reference is also made to using a handrail and a shower seat in the bathroom, amongst other aids and appliances.

It is submitted the Tribunal failed to explicitly address the use of many prescribed aids and the GP evidence, and how this apparently conflicts with the conclusions that the clinical findings/specialist report supported the conclusions the Tribunal reached.

**Ground 4 - Mobility Activity 1:** The problems and accidents caused by the wearing of a colostomy bag causing overwhelming psychological distress.

The Tribunal accept the Appellant would have some restriction in interacting due to having a colostomy bag. In the Record of Proceedings, the Appellant has reported incontinence; regular accidents with the stoma bag; that he has a fear of the stoma bag coming off and that his daughter would help him with the bag. The Tribunal notes that in his claim form the Appellant listed anxiety and needed encouragement. The Tribunal also records a note from the Doctor on 24 November 2017 that the Appellant *'advised that he, the Appellant, was having "a lot of anxiety and depression ...."*. He was commenced on anti-depressant medication. The Tribunal has rejected this evidence, determining that the physical and mental health difficulties were not at a level that would prevent the Appellant planning and following a journey himself and without company.

We would highlight the specific wording of descriptor 1 (b), which relates to the ability to undertake any journey to avoid overwhelming psychological distress. The Tribunal made a finding of fact that he may like company when out but did not explain why. For example, it is not clear if the Tribunal concluded such a preference arose from anxiety about needing assistance with the colostomy bag.

Even if the Appellant has capacity to plan and follow a journey, the Tribunal has not explained if he needs prompting to go outside and undertake his journey. It is submitted that the physical condition relating to accidents with the colostomy bag could give rise to overwhelming psychological distress should an accident occur in public.

This was already found to be a reason for restricted social contact and a need for prompting.

The reason why company may have been preferred was relevant to determining if a passive presence from another person would have assisted the Appellant to plan and follow journeys. *AA v SSWP (PIP)* [2018] UKUT 339 (AAC) is relied upon.'

15. In her case summary, Ms Patterson made the following submissions in response:

'Regarding point (i), the tribunal awarded a total of 11 points for daily living activities, set out in the decision notice dated 29/7/19, consisting of the following: 1b (2 points), 3(b)(i) (1 point), 4(b) (2 points), 5(b) (2 points), 6(b) (2 points), and 9(b) (2 points). This reflected the tribunal's findings that, due to limitations caused by significant health conditions, (the appellant) would require an aid in order to undertake these activities, but that any higher scoring descriptors were not applicable. I would submit that it may have been helpful if the tribunal's findings related specifically to each disputed activity. However, the Statement of Reasons contains clear and detailed reasons explaining its analysis. It has stated it feels (the appellant) is not as restricted as stated. I would contend that the tribunal made sufficient findings as to its choice of descriptor 4(b) rather than 4(e).

Turning to point (ii) - sufficiency of reasons for conclusions in Activity 5. I note that in the Statement of Reasons, the tribunal, after making the finding that (the appellant) requires aids in respect of several activities, states '*It is not accepted that any descriptor attracting higher points is appropriate as the Tribunal is of the view that Appellant is not as functionally restricted as claimed or that he satisfies the criteria in relation to the higher scoring descriptors.*' In the Record of Proceedings it is recorded that (the appellant) stated he would have frequent accidents and problems with his colostomy bag but that he has not been referred back to the stoma nurse. The tribunal has stated it believes the extent of restriction has been overstated, which it is entitled to do. It has also noted that the GP comment constitutes what (the appellant) has reported to the GP. The tribunal addresses the issue of (the appellant) requiring help due to weakness in his right hand – '*Appellant complained about his right hand but there was little to be found in the General Practitioner Medical Records which would suggest that function was as limited as indicated by the*



*Appellant.* I would contend that the tribunal has justified its conclusion that (the appellant) requires an aid but not assistance in order to perform activity 5.

Regarding point (iii), the Disability Assessor's original report recommended that 4b, 5b, 6b and Mobility activity 2b were applicable. The additional medical evidence submitted by (the appellant) was considered alongside the original report and led to the Supplementary advice note dated 4/12/17 which recommended that further points were applicable – 1b and 9b. This was because: *'Anxiety is supported by the GP letter and it is likely therefore that 9b is reasonable...the GP outlines the health history and likely breathless, which is likely to require aids for cooking. There is no reported mental health referral, therefore prompting being supported by medication alone is not likely.'* Mr McCloskey references the GPFR of 15/3/13 which notes 'shortness of breath on exertion and pain', the previous award of high rate mobility Disability Living Allowance and the rollator and mobility scooter. The PA6 quoted above shows that the award of benefit at MR stage was not in respect of limitation in the mobility activities – this is consistent with the tribunal stating that the GP evidence is not in conflict with the DA's findings. The DA's found that (the appellant) is limited in his ability to move around such that *'he would be able to stand and move more than 50 metres but no more than 200 metres, either aided or unaided'*. I would contend that this is in keeping with the GP evidence cited, with consideration given to the fact that DLA and PIP are separate benefits and there is no direct link between the criteria of each, nor onus on the tribunal to explain a failure to award the high rate of PIP when the same rate had been decided on an earlier DLA claim. (JF-v-DfC (PIP) [2019] NICom 072 applies). The tribunal has come to the same conclusion and I would contend it was entitled to do so.

Point (iv), relating to Mobility Activity 1(b), the tribunal includes these excerpts: *'As for mental health there was nothing by way of psychiatric report, counselling, Community Psychiatric Nurse input, or from other mental health services during the period the Tribunal is considering.'*

And, referring to the GP letters: *'There was nil of significance relevant to the date under consideration to indicate significant problems with forgetfulness, memory loss, fatigue or otherwise such as to impact on the criteria to the extent to enable higher points to be scored.'* The

decision quoted by Mr McCloskey refers to the onus on a tribunal to make findings as to why a claimant that it has found to meet descriptor 1(b) does not meet the higher scoring descriptors – i.e. if the claimant requires prompting to undertake a journey in order to keep his/her level of anxiety below the threshold of overwhelming psychological distress, then it must be explained how the same claimant would not require accompaniment whilst on the journey in order to avoid overwhelming psychological distress then occurring. In (the appellant's) case, the tribunal has made specific findings that *'The Tribunal did not accept that in respect of the period under its consideration that the Appellant's mental health and/or physical health were at a level which would prevent his planning and following a journey unaided.'* It has indicated that (the appellant) *'spoke about being anxious, breathless all the time, light headed, afraid of bag coming off.'* it is clear that this is the tribunal's reasoning for thinking that (the appellant) may like company when outside. Again I would contend that the tribunal's findings are reasonable given that there is no evidence anywhere in the papers that (the appellant) would have suffered overwhelming psychological distress. I do not agree that it erred in law.'

## **Analysis**

### *Jurisprudence relevant to the first ground of appeal*

16. In *SP v SSWP* ([2016] AACR 43), ('SW'), the Upper Tribunal considered the wording of activity 4 in Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013, as amended ('the 2013 Regulations'). The wording of activity 4 in the 2013 Regulations is the same as the wording of activity 4 in Part 2 of Schedule 1 to the Personal Independence Payment (Northern Ireland) Regulations 2016, as amended ('the 2016 Regulations'). Upper Tribunal Judge Rowley said the following at paragraphs 10 to 31:

#### **'Disjunctive or conjunctive?'**

This is not the first time the Upper Tribunal (or its predecessors, the Social Security Commissioners) has had to grapple with the word "or" in the benefits legislation. Two common themes emerge from the cases. First, descriptors are to be "read in a reasonable everyday sense, and are not to be approached as a work of over-refined legal draftsmanship which they are not" (R(IB) 3/02 at [20]). Secondly, the meaning to be attached to "or" is very much context specific (see, for

example, *WC v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 304 (AAC); [2016] AACR 1 at [12]).

The issue in this case may be put in this way. If the word “or” is used in the disjunctive sense, then if a claimant needs assistance to get in or out of just one of a bath or shower, descriptor 4e will be satisfied. In tabular form it would be expressed thus:

Does the claimant need assistance to get in or out of a <b>bath</b> ?	Does the claimant need assistance to get in or out of a <b>shower</b> ?	Does the claimant score points under descriptor 4e?
YES	YES	YES
YES	NO	YES
NO	YES	YES

On the other hand, if the word “or” is used in the conjunctive sense, “or” would effectively mean “and.” In those circumstances a claimant would come within the terms of descriptor 4e only if they needed assistance to be able to get in or out of a bath, *and* needed assistance to be able to get in or out of a shower. If they could do one of these, they would not qualify. In tabular form it would be expressed thus:

Does the claimant need assistance to get in or out of a <b>bath</b> ?	Does the claimant need assistance to get in or out of a <b>shower</b> ?	Does the claimant score points under descriptor 4e?
YES	YES	YES
YES	NO	NO
NO	YES	NO

The starting point is to look at the actual words used. Ms Walker submits that the word “or” is not ambiguous in the context of descriptor 4e. It is, she submits, clearly being used in the disjunctive sense.

I agree. As a matter of plain English the word “or” is disjunctive. Without more, it is a word ordinarily used to join alternatives. The position may be different if, say,

words appearing on either side of “or” render the word capable of also meaning “and”. This may be the case in the context of, for example, a negative: “To say that a person cannot do A or B means, if I may be forgiven a statement of the obvious, that he cannot do either of those things; in other words he can do neither.” (R(IB) 3/02 at [23]). That is not the case here.

I accordingly conclude that the word “or” is used in descriptor 4e in the disjunctive sense. Accordingly, if a claimant cannot do one of the activities of (i) getting in or out of a bath or (ii) getting in or out of a shower, they will satisfy descriptor 4e.

I should, perhaps, add that whilst I have not relied on the DWP’s *Guidance document for providers carrying out assessments for Personal Independence Payments*, I nevertheless note that my interpretation of “or” in the context of descriptor 4e is consistent with what is said in it.

#### **Unadapted bath or shower?**

There is no express indication in descriptor 4e as to whether the assessment should be of a claimant’s ability to get in or out of an unadapted bath or shower.

The version of the descriptors which appears in the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) was not that which was originally drafted. The activity in the draft immediately preceding the regulations was headed “bathing and grooming,” and the concomitant descriptor to what is now 4e was in these terms: “needs assistance to bathe”. Following consultation, the structure and title of the activity and its descriptors were changed to the way in which they appear in the Regulations. In particular, the word “bathe” does not appear in descriptor 4e.

That history may serve to explain why “bathe” is defined in Schedule 1 as: “includes get into or out of an unadapted bath or shower;” but there no reference in descriptor 4e as to whether the bath or shower is an unadapted one. Rather, the descriptor simply asserts that claimant must need assistance to be able to get in or out of “a” bath or shower.

Be that as it may, Ms Walker submits that, in line with the spirit of the activity, the bath or shower referred to in descriptor 4e must be an unadapted one. It is, she says,

clear from the description of the activity and definition of “bathe” that the activity in general is assessing the actions involved in a standard bathroom.

Adopting a purposive approach, I accept Ms. Walker’s submission. A claimant’s functional abilities should be considered in relation to whether they need assistance to be able to get in or out of an unadapted bath or shower.

In passing, I note that my conclusion is again consistent with the DWP’s guidance document, referred to above, which expressly makes it clear that descriptor 4e is intended to apply to the use of a standard bath or shower.

#### What if the claimant has an adapted bath or shower?

How should a decision-maker or tribunal approach a case in which a claimant has an adapted bath or shower? For obvious reasons, the presence and use of such bathroom furniture may well be an indication that the claimant’s lack of functional ability means that they need assistance to be able to get in or out of a bath or shower. But it does not necessarily follow that the presence of, and use by, the claimant of an adapted bath or shower will always mean that the claimant will satisfy descriptor 4e. After all, a claimant may choose to have an adapted bath or shower installed simply to make it easier for them to get in or out of it, but their functional limitation is not such they reasonably need it. Or, as in this case, the adapted bath or shower may have been installed by a previous occupier of the claimant’s home. It is, therefore, incumbent on a tribunal to explore the reasons why a claimant has the adapted bath or shower, and what, if any, its link is to their lack of functional ability.

Such issues will have a bearing on the issue which the tribunal will have to decide. That question is, in my judgment, whether a claimant who has an adapted bath or shower needs assistance to be able to get in or out of an unadapted bath or shower. I have concluded that this is the appropriate question for two main reasons.

First, I bear in mind that a personal independence payment (PIP) assessment focuses on the functions involved in getting in or out of an unadapted bath or shower, and on the claimant’s ability to perform those functions. It was, surely, Parliament’s intention that the nature of the assessment for PIP must be the same for all claimants.

Secondly, an analogy may be drawn with the circumstances envisaged by Upper Tribunal Judge Jacobs in *PE v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 309 (AAC); [2016] AACR 10 where, in the context of activity 6 (“dressing and undressing”) he said that “the limitations on what clothing a claimant can cope with cannot be used to lower [the] standard. For example: a claimant who cannot manage buttons or laces cannot be tested by reference to their ability to dress in clothes fastened by Velcro. That would mean that the more disabled the claimant is in respect of an activity, the more difficult it would be to satisfy the descriptors.”

Similarly, in my judgment, a claimant who is unable safely to get in or out of an unadapted bath or shower should not be tested by reference to their ability safely to get in or out of an adapted one which they reasonably need, for that, too, would mean that the greater the functional limitation, the harder it would be to come within descriptor 4e.

I accordingly conclude that a tribunal should measure a claimant who has an adapted bath or shower against a hypothetical test of an unadapted one.

### Summary

Pulling together what I have said above, when considering whether a claimant satisfies descriptor 4e, a tribunal must decide whether he or she needs assistance to be able to get in or out of a bath or shower. The need for assistance to get in or out of only one of these will do. Of course, the questions must be asked through the prism of regulation 4(2A). The issue of safety (regulation 4(2A)(a) and 4(4)(a)), in particular, may be relevant.

Whether or not the claimant satisfies descriptor 4e must be determined by reference to an unadapted bath or shower.

If a claimant in fact has and uses an adapted bath or shower, questions should be asked as to the reasons why he or she does so. Installation following an occupational therapy assessment may, self-evidently, be a powerful indicator.’

17. At paragraph 32, Judge Rowley noted the evidence which was before the appeal tribunal as follows:

'The evidence before the tribunal was that the claimant used a walk-in bath with a shower above. This would, of course, fall into the category of an adapted bath. It was, in fact, installed by a previous occupant of his home. The claimant explained on his PIP2 form that he could not get in and out of a "normal" bath, because of what he described as the problems with his back, and the pain involved in raising his leg over the side of the bath. He explained that he did not often take a bath in his walk-in bath, as it meant he would have to sit in cold water until the bath emptied and he was able open the door to get out ...'

18. A health care professional who had examined the appellant noted that he could get in and out of his walk-in bath independently and so, in her opinion, he did not score any points under descriptor 4e. In his explanation for his decision to award only two points under activity 4 (for descriptor 4b) the decision maker also relied upon the fact that the claimant had a walk-in bath.
19. The reasons of the appeal tribunal for its findings on activity 4 were as follows:

"20. The Secretary of State decided that [the claimant] needed an aid or appliance to wash or bathe. He argued that he needed assistance from another person to wash either his hair or his body below the waist. In a sense this is academic, as both descriptors carry 2 points. However, [the Health Professional] found that he had a good range of movements. In particular, he had 140° abduction, whereas one needs only 90° in order to wash one's hair. He has the benefit of a walk-in bath (left by a previous tenant) and we would expect him to be able to bend to wash his lower body most of the time. If we are wrong about this, he can use an aid such as the long-handled sponge recommended by [the Health Professional]."

20. Judge Rowley noted that having observed that the appellant had a walk-in (adapted) bath, the appeal tribunal did not explore with him whether he needed assistance to be able to get in or out of an unadapted one even though the appellant had raised this on a form used as part of the Departmental information-gathering process. At paragraph 35 Judge Rowley stated that the appellant:

'... did not appear to pursue it further before the tribunal, perhaps because the indication from the Health Professional's report and decision-maker's decision was that he would be assessed on his ability to get in or out of his walk-in bath. Be that as it may, pursuant to its inquisitorial function the tribunal should have investigated

whether the claimant needed assistance to be able to get in or out of an unadapted bath. Its failure to do so amounted to an error of law.’

21. Judge Rowley concluded, in paragraph 36, that having found that “or” is used in the disjunctive sense, the tribunal’s error was a material one, for if the claimant needed assistance to be able to get in or out of, an unadapted bath (irrespective of his ability to get in or out of an unadapted shower), the appellant would have scored the vital extra point to take his total to eight.
22. The decision in *SP* is reported in the Administrative Appeal Reports. As a decision on a question of significant legal principle, it is binding on decision makers and appeal tribunals. As a reported decision it has greater prominence in having decided difficult issues, contributed to the coherent operation of the law and, most significantly, provided practical guidance to decision makers and appeal tribunals. I adopt and accept the reasoning and analysis of Judge Rowley, which, in my view, properly reflects the law in Northern Ireland.

*The evidence before the appeal tribunal relevant to activity 4*

23. The appellant completed and signed a form headed ‘Personal Independence Payment – How your disability affects you’ on 10 July 2017. At page 16 he ticked a box to indicate that he needed help to wash and bathe. On page 17 he was asked to provide additional information about the difficulties which he had with washing and bathing. In this section he stated ‘I do not need any help when washing or bathing.’
24. In a report dated 26 September 2017 the appellant’s General Practitioner recorded that the appellant needed help with washing.
25. The appellant was examined by a health care professional on 9 October 2017 at his home. In the report of the examination it is noted that:
  - The appellant had a separate shower and bath
  - Under the heading ‘Washing and Bathing’ that the appellant ‘stands in the shower, cannot bend over to wash lower limbs due to pain in hernias on bending forward. Cannot get into bath due to fear of slipping and falling’
  - ‘He was unable to touch his toes from a seated position or knees from standing due to pain in his abdomen on bending. His abdomen was observed to appear distended and swollen. He has functional grip in both hands to use an aid. There was no evidence of lower limb restriction or poor balance. Therefore it is likely that he needs to use an aid to be able to wash or bathe reliably.’



- The healthcare professional opined that descriptor (b) of activity 4 was applicable i.e. that the appellant needs to use an aid or appliance to be able to wash or bathe.
26. The appellant's spouse, who at the time was acting on his behalf, raised a complaint about the conduct of the assessment conducted by the health care professional and the outcome report. The complaint is detailed and makes specific reference to certain of the activities in Part 2 of Schedule 1 to the 2016 Regulations. There is no discrete reference to activity 4.
27. The appellant attended the oral hearing of the appeal, was accompanied by his daughter and was represented. In the record of proceedings for the appeal tribunal hearing the following exchange is recorded:

**'Appellant:** Box. I get confused. (One box at the time?) They are put in a box. (Can you remember to take them?) No, reminded. Wife on holiday last week and I forget to take them to 9 pm.

(Washing, bathing ... ?) Have a shower. (Do you have rails?) Hand rail and shower seat. Have a seat over one year.

**Daughter:** One and a half years.

**Appellant:** Over a year and help. (No mention of that?) Had a rail but not a seat. Stand in the shower. (Can you wash okay?) Not really. (You had no stool at the time?) No. I got it in January 2018. (Why did you get a seat?) Another operation. In fact in twice. (After the second operation you got the seat?) I think I had it before it. (Someone actually helps you to wash?) I did - some help undress, shower. (Reminded to shower?) All the time.'

*The statement of reasons for the appeal tribunal's decision*

28. The appeal tribunal produced a detailed and carefully-prepared statement of reasons. For the purposes of these proceedings, the relevant extracts are as follows:

'There is no doubt that the Appellant has had a significant number of medical complaints and Tribunal has considered how the combined complaints impact on the criteria. The Tribunal had regard to the Disability Assessors report bearing in mind the complaint. The Tribunal found nil of significance, in respect of the period under consideration, in the General Practitioner Medical Records presented which would cast doubt on the Disability Assessor's clinical findings. Some restriction

was noted, for example, restriction due to hernia and pain in left shoulder. Appellant complained about *his* right hand but there was little to be found in the General Practitioner Medical Records which would suggest that function was as limited as indicated by the Appellant. As for mental health there was nothing by way of psychiatric report, counselling, Community Psychiatric Nurse input, or from other mental health services during the period the Tribunal is considering.

The points allocated by the Tribunal largely mirror those of the Decision Maker save the Tribunal gave an additional point in respect of the dosette box which was considered reasonable.

The medical records presented refer to x-ray of chest on 6 November 2017 and it is noted that the record indicates no acute lung or heart disease. A submission on behalf of the Appellant refers to General Practitioner letter dated 24 November 2017 and which correspondence is already in the submission papers. Although this post-dates the date at which the Tribunal is considering relevant circumstances it is very close to the relevant date and gives a relevant history. The letter does not specifically address the criteria with which we are dealing but refers to information, for example, which the Appellant stated in relation to help at night.

There was nil of significance relevant to the date under consideration to indicate significant problems with forgetfulness, memory loss, fatigue or otherwise such as to impact on the criteria to the extent to enable higher points to be scored.

As indicated in the General Practitioner Capita Report, 26/9/2017, the Appellant has had a difficult time health wise. Appellant had significant surgery in March 2011. He had further surgery on 23 November 2016 and was in ICU. He was last seen by a Health Professional on 3 January 2017 as noted in that Capita Report.

The Tribunal has taken all the evidence into account and prefers to rely on the clinical findings/specialist's reports and find that they enable a reliable assessment to be made as to functional ability. The Tribunal concurs with Decision Maker's assessment, save one point added in respect of activity 3, as we believe same to be in keeping with the weight of medical evidence.

Given the Appellant's overall medical condition including his hernia it is accepted that he may have some problems bending and various aids are appropriate. These included, for example, perching stool, shower seat, shoe horn, sock aid, rails in the bathroom, raised toilet seat, pads, dosette box which are all considered reasonable and would enable Appellant to perform the activities of Daily Living independently. The Tribunal can understand that he would have some restriction in interacting due to having a colostomy bag and it is accepted that 9b is appropriate. It is not accepted that any descriptor attracting higher points is appropriate as the Tribunal is of the view that Appellant is not as functionally restricted as claimed or that he satisfies the criteria in relation to the higher scoring descriptors.'

*The error of law*

29. As was noted in the statement of reasons, the appellant's representative had prepared a written submission and provided additional medical evidence to the appeal tribunal. In the written submission, the representative made reference to specific activities from Part 2 of Schedule 1 to the 2016 Regulations. There is no discrete reference to activity 4. Nonetheless, the appeal tribunal, in line with its inquisitorial role, decided to adduce evidence from the appellant about activity 4. As the extract from the record of proceedings set out above demonstrates, the questioning centred on the washing and bathing facilities which the appellant used on a daily basis i.e. his shower adapted with a seat and subsequently with a rail. The appeal tribunal was aware that the appellant had a separate bath because that is mentioned in the report of the assessment undertaken by the health care professional. Having commenced the process of adducing evidence relevant to activity 4, the appeal tribunal was mandated, by the principles set out in *SP*, to consider the use of both a shower and a bath. To repeat, it is clear that the primary focus was on the shower rather than the bath. Further, the appeal tribunal was obliged, again by the principles in *SP*, to consider, as Judge Rowley put it in paragraph 21 – 'a claimant's functional abilities ... in relation to whether they need assistance to be able to get in or out of an unadapted bath or shower' and in paragraph 28 'I accordingly conclude that a tribunal should measure a claimant who has an adapted bath or shower against a hypothetical test of an unadapted one.' The appeal tribunal's focus on the adapted shower alone, and failure to consider functional ability to get in or out of an unadapted bath or shower, renders its decision as being in error of law. The error is a material one as had the appeal tribunal considered the potential application of descriptor (e) of activity 4 in the affirmative, then that would have resulted in the award of one further point, which, when added to the points already awarded, would have taken the appellant's score to the threshold for entitlement to the daily living component at the enhanced rate.

30. I am of the view that the appeal tribunal was unaware of the decision in *SP*. That is not a criticism, however. A plethora of decisions issue from the offices of the Social Security Commissioners in Northern Ireland and the Administrative Appeals Chamber in London. It can be difficult to keep up with everything. The LQPM who sat in this case is very experienced and I am certain, that had she been aware of the decision in *SP*, she would have applied the relevant principles in keeping with her usual diligent approach.

*The other grounds of appeal*

31. Having found, for the reasons set out above, that the decision of the appeal tribunal is in error of law, I do not need to consider the other grounds of appeal. I do not wish, however, to do any disservice to the time and effort spent by Mr Hawkins in formulating those grounds or Ms Patterson in responding to them.

**Disposal**

32. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
- (i) the decision under appeal is a decision of the Department, dated 1 November 2017, as revised on 12 December 2017 and was changed, in which a decision maker decided that the appellant was entitled to the standard rate of daily living component from 8 December 2017 to 8 October 2021 but was not entitled to the mobility component of PIP from and including 16 August 2017. At the oral hearing before me, Ms Patterson confirmed that the end date of the period of award was extended to 28 January 2022 and that the appellant made a further successful claim to PIP from and including 29 January 2022;
  - (ii) the appellant will wish to consider what was said at paragraph 34 of *DP-v-Department for Communities (PIP)* ([2020] NICom 1) concerning the powers available to the appeal tribunal and the appellant's options in relation to those powers;
  - (iii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and
  - (iv) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

17 August 2022