

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/2574/2018

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made at Swansea on 18 May 2018) involved the making of an error of law, it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted panel.

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

Directions for the Rehearing:

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. In doing so, the tribunal must not take account of circumstances that were not obtaining at the date of the original decision of Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: *R (DLA) 2&3/01*.

Reasons for Decision

1. On 29 March 2016 the claimant applied for a Personal Independence Payment (PIP). He had previously been in receipt of a disability living allowance (DLA) comprising the lowest rate of the care component only, but had to claim PIP as a result of the process by which that benefit is replacing DLA. On 5 August 2016 the Secretary of State decided that there was no entitlement to PIP and that decision remained unaltered after a mandatory reconsideration. The claimant then appealed to the First-tier Tribunal (the tribunal) but his appeal was dismissed. However, on 9 April 2018 I set aside the tribunal's decision and remitted. The appeal was then considered by a differently constituted tribunal at a rehearing of 18 May 2018. That tribunal also dismissed the appeal, deciding that the claimant was entitled to seven points under the activities and descriptors concerned with the daily living component of PIP and no points under the activities and descriptors relating to the mobility component of PIP. That meant there was no entitlement. The claimant, aided by his representative (the same one who had represented him at the hearing of 18 May 2018) asked for permission to appeal to the Upper Tribunal. On 20 November 2018 I granted permission. I have subsequently received a written submission from each party. What follows is an explanation as to why I have decided that the tribunal erred in law such that its decision has to be set aside and why I have decided, once again, to remit for a further rehearing.

2. The claimant suffers from peripheral neuropathy. His evidence to the tribunal was to the effect that, as a result of that condition, his hands are numb and stiff particularly in the early part of any given day although the condition eases as the day goes on. At least that is how the tribunal interpreted his evidence. He also explained that such would impact adversely upon his ability to perform certain tasks in the early

part of the morning. But he said he had developed a coping strategy which would normally involve his using an electric fan heater or a hair dryer for five to ten minutes in order to “free up the movement in his hands”. But if the need arose for him to use the toilet urgently upon rising, he would modify that procedure by sitting on the toilet seat, turning on the hot water tap attached to the sink next to the toilet (so it seems the numbness and stiffness permits that), placing his hands in the sink and allowing the hot water to run over his hands. That too, it seems, eases the numbness (see paragraph 10 of tribunal’s statement of reasons of 10 August 2018).

3. As already noted, the tribunal awarded the claimant seven daily living points. Five of those (relating to difficulties preparing food, managing therapy and dressing and undressing) were attributable to the difficulties with the use of his hands. But no points were awarded under any of the descriptors linked to activity five (Managing toilet needs or incontinence). That was so despite the claimant asserting that he had difficulties due to the numbness when attempting to wipe his bottom after defecating. He had also indicated that he would, at least sometimes, get faecal matter on his hands when attempting to wipe himself, presumably because the numbness meant he would perform the task in a clumsy manner. This is what the tribunal had to say about why it was not awarding points in consequence of such difficulties:

“20. The appellant described to us at the hearing how he warms and manipulates his hands on waking by using a heater/hair dryer or hot tap water. Once done, he told us has sufficient feeling and movement to use the toilet before making breakfast or taking medication. We find it unlikely that for more than 50% of the time he is unable to wipe himself clean following use of the toilet in the morning. On his own evidence this type of activity gets easier throughout the day so using the toilet later in the day is unlikely to pose these difficulties at all. His representative submitted at the hearing that he was often unable to wipe himself leaving faecal matter on his hands requiring hand washing following toilet use. We find it unlikely that with adequate use of toilet paper or wipes the appellant would be unable to perform this task to an acceptable standard even in the mornings when his neuropathy is at its worst. It is recommended that everyone washes their hands after using a toilet in any event so the need to do this would not be unreasonable or unusual”.

4. It is argued on behalf of the claimant, in a nutshell, that the tribunal failed to consider with respect to activity 5, whether or not the claimant’s use of the fan heater, the hair dryer or the hot water tap in the sink, amounted to the use of an aid or appliance as that term is defined at regulation 2 of the Social Security (Personal Independence Payment) Regulations 2013. Further, it is contended that the tribunal did not make sufficiently specific findings regarding the claimant’s evidence he would get faecal matter on his hands when wiping and did not ask itself whether his doing so meant that, for that reason, he was unable to perform the activity to an acceptable standard as that term is used at regulation 4(2A) (b) of the same Regulations. It is also asserted that the tribunal was required to consider the possible use of the above items as aids for itself, despite the point not having been put on behalf of the claimant by his experienced representative.

5. The Secretary of State, through her representative, opposes the appeal but says the if the tribunal’s decision is set aside there should a further remittal. The Secretary of State argues that even if the items were being used as aids the tribunal was not required to address the point in the absence of a specific assertion to that effect being made before it. Here reliance is placed upon what was said by the Court

of Appeal in *Hickey v SSWP* [2018] EWCA Civ 851). It is also said that even if the claimant does get faecal matter on his hands at least at times when wiping, his ability to wash his hands after doing so means he is able to manage his toilet needs to an acceptable standard.

6. I have found this to be a marginal case. In my judgment (and notwithstanding what seems to be something of a protest in the claimant's grounds) the tribunal was entitled to conclude, on the material before it, that the impact of the peripheral neuropathy would lessen as the day progressed. But it did seem to accept there was a need, immediately or shortly after the claimant would rise in the morning, for him to use one of the above items for a short period of time (five to ten minutes) in order to "free up the movement" in his hands. It did award two points in relation to problems preparing food because it thought he would need to use aids but it was quite specific as to the sort of aids that it had in mind and it is clear it did not have in mind a fan heater, hair dryer or tap. It also awarded two points because it thought the claimant would need to use aids when dressing and undressing. It was less specific here as to the sorts of aids it thought might be used but it does not seem it was thinking about those items here either. So, although it would almost certainly have awarded the same points in relation to those activities anyway, it reached no view as to whether the claimant was using any of those items as an aid at all or in the context of the management of his toilet needs. It seems to me that wiping oneself immediately after defecating does constitute an aspect of the overall function of managing toilet needs and no one involved in this appeal has suggested otherwise. The tribunal said, without making a completely clear finding on the point, that it thought it "unlikely" that the claimant would not be able to perform the task of wiping his bottom to an acceptable standard through the utilisation of sufficient toilet paper or wipes but it did not explain why, in view of the difficulties it seemed to accept he had with the use of his hands in the early part of the morning, it was so concluding. Perhaps it thought if he could turn a tap on (and of course he would have to do that before benefitting from the hot water) he had sufficient in terms of grip and dexterity anyway so that he would be able to wipe himself clean. But it did not say that. Further, it did not make it clear whether it was finding he could perform the task to an acceptable standard without having used at least one of the above items first. If it thought he could only so perform the task after using one of those items and if it thought doing so amounted to using an aid then it might have awarded 2 points under daily living descriptor 5b. That would then have led to the claimant establishing entitlement to the standard rate of the daily living component of PIP.

7. Of course, none of the above items are produced specifically to assist with respect to the managing of toilet needs. But as was explained in *CW v SSWP (PIP)* [2016] UKUT 197 (AAC) an aid does not have to be specifically designed, made and sold for the purpose of overcoming a limitation or function. Whatever the purpose for which the item was designed or sold, the question is whether or not it is being used as an aid. So, in principle, such items might be aids. Whether they are being used as such will depend on whether they are needed to assist in respect of a function involved in the activity that is impaired. In this case, the Secretary of State's experienced representative, whilst not expressly conceding the point, does not argue that such items cannot, in principle, serve as aids.

8. It is right to say that the Court of Appeal, in *Hickey*, pointed out at paragraph 52 of its judgement that there was no obligation on a tribunal to, as it put it, “ask every possible question on every descriptor, regardless of the particular matters put in issue by the claimant”. It added that a tribunal could not be expected to “go into every issue and sub-issue, regardless of the points actually raised by the claimant, on the off chance that there might one day be material”. In this case, the claimant’s representative has, with frankness, acknowledged that he did not put the particular point that the items were being used as aids to the tribunal when representing him before it. But, on my reading, the Court of Appeal was not saying in *Hickey* that there was no scope for the tribunal to pursue matters not specifically raised before it. Indeed, it recognised at paragraph 51 of its judgement that “The experience and make up of the FTTs who deal with these appeals make them uniquely suited to ask the necessary questions and reach the appropriate conclusions” whilst also observing that there are legal and practical limits to a tribunal’s obligation to do so. In this case the tribunal heard evidence as to the claimant’s relevant difficulties with respect to his hands and as to the coping mechanisms, involving the items referred to above, which he had developed. Indeed, it referred to them in its statement of reasons. I appreciate that there will certainly be cases where because a matter is not specifically raised before a tribunal, that tribunal is not obliged, as matter of law, to deal with it. That might be especially so in circumstances where a point is not taken when it could have been, by an experienced representative. But in this case, there was evidence regarding the use of items to reduce or extinguish particular difficulties with respect to toileting. In a sense (though the tribunal did not specifically consider it and the claimant’s representative did not specifically argue it) the question of whether the items were being used as aids was a relatively obvious point to consider. In those circumstances, and whilst not disagreeing the Court of Appeal in *Hickey* to any extent whatsoever, I have concluded that, on balance, given the nature of the evidence before it, the tribunal was required to consider whether the above the items were being used as aids and if so, whether that did or did not lead to an award of points under daily descriptor 5b. So, in not considering that point, the tribunal erred in a manner which was material in the sense it might (I do not say would) have reached a different outcome had it done so.

9. As to what seems to have been an alternative conclusion reached by the tribunal to the effect that if the only problem for the claimant was getting faeces on the hands rather than wiping himself clean, such would be remedied by the washing of the hands, it is not now necessary for me to reach a firm view. But ordinarily it seems to me one would expect to be able to accomplish such a task without a difficulty of that nature arising. If such a problem does arise at least with regularity there might conceivably be health concerns. It will probably come down to a question of fact and degree but I would have thought in appropriate circumstances it will be open to a tribunal, having made appropriate findings, to conclude that that sort of difficulty either of itself or in conjunction with other related problems can justify a finding that the management of toilet needs is not being accomplished to an acceptable standard.

10. I am not now required to deal with further errors the tribunal might have made. Any such errors (assuming there were any) will be subsumed by the rehearing which will now follow. There will be a rehearing because I have decided to remit. As to that I

am, aware that this is the second remittal and that it is some considerable time since the Secretary of State made her decision as to entitlement to PIP. But the Secretary of State's representative has urged me to remit and the claimant's representative has not disagreed. I am not told of any further claim for PIP so, if I were to seek to remake the decision myself without further evidence and without the range of expertise possessed by the First-tier Tribunal, I would not simply be adjudicating on a closed period.

11. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

MR Hemingway
Judge of the Upper Tribunal

Dated: 11 June 2019