IN THE UPPER TRIBUNAL **Case No.** CPIP/381/2019
ADMINISTRATIVE APPEALS CHAMBER

Before **T H Church, Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal (which it made at Wakefield on 15 October 2018 under reference SC246/17/04176) involved the making of an error of law, it is set aside and the case is remitted to the First-tier Tribunal for rehearing before 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 First-tier Tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
B. The First-tier Tribunal hearing the remitted appeal shall not involve the tribunal judge who was involved in the hearing of the appeal on 15 October 2017.
C. In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: *R(DLA)* 2 & 3/01.
D. If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction C above).
E. The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.

REASONS FOR DECISION

Background

1. This is an appeal by the claimant against a decision of the panel of the First-tier Tribunal which heard her appeal at Wakefield on 15 October 2017 (the **"Tribunal"**) in relation to the Secretary of State's decision that she was not entitled to Personal Independence Payment (**"PIP"**) from and including 10 August 2017.
2. The claimant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal but his application was refused. She then exercised her right to apply to the Upper Tribunal for permission to appeal.

The permission stage

3. The claimant's application came before me. I granted permission to appeal to the Upper Tribunal. In my grant of appeal, which was addressed to the claimant, I said in relation to the Tribunal's treatment of daily living activity 2:

> "4. The Tribunal accepted that you have "some difficulty swallowing food and tablets" (paragraph 11 of the statement of reasons) due to throat ulcers and indigestion which make it "difficult and painful" for you to eat (paragraph 38 of the statement of reasons). However, it decided that the extent of these difficulties was insufficient for you to require prompting to take nutrition or to mean that you were not taking nutrition to an acceptable standard (paragraph 38 of the statement of reasons), seemingly on the basis that, while you had experienced some unplanned weight loss, this hadn't been until after the date of the decision under appeal, when it found that these problems worsened.
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> 5. You had said in your application form for the benefit that you "cannot eat normally because it is too painful to swallow", you have to "cut down what I eat and take more food in liquid form" and have lost your appetite, requiring encouragement from your husband to eat (see page 23 of the appeal bundle). This evidence doesn't appear to have been challenged and the Tribunal did not say either in its decision notice or in its statement of reasons that it didn't accept this evidence.
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> 6. In its brief explanation of its reasons for deciding as it did in relation to your ability to take nutrition the Tribunal said that you could "improve the problem" by adapting the food that you eat, taking those foods which are easier to swallow. This raises the question "what kind of nutrition does the claimant have to be able to take to be found to score no points under daily living descriptor 2?". The Tribunal did not make any findings of fact in relation to your evidence that you take "more food in liquid form" and it is unclear whether, when it said that you could adapt the food you consumed, it was thinking of food in liquid form.
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> 7. The words "take nutrition" are defined in Part 1 of Schedule 1 to The Social Security (Personal Independence Payment) Regulations 2013 (the **"PIP Regulations"**) to mean:
>
> > "(a) cut food into pieces, convey food and drink to one's mouth and chew and swallow food or drink; or
> >
> > (b) take nutrition by using a therapeutic source"
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> 8. While neither "food" nor "drink" is itself defined, the use of both terms gives rise to the possibility that an ability to take liquids ("drink") but not solids ("food") might be insufficient to establish an ability to take nutrition.
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> 9. If the Tribunal did take the approach that an ability to consume food in liquid form was capable of satisfying daily living descriptor 2(a) it may have misunderstood the proper legal test, which would amount to an error of law.
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> 10. I find that it is also arguable with a reasonable prospect of success that the Tribunal erred in failing to find sufficient facts to justify its conclusion that you were able to take nutrition to an appropriate standard, or in failing adequately to explain its findings and its decision-making in relation to this activity."

4. I acknowledged that even if the Tribunal did err in any of the ways I had suggested it might have done any such error may not have been material because even if the Tribunal hadn't made such an error the outcome of the appeal would have been the

same, given that the most likely points to be awarded under daily living activity 2 would be 2 points for an aid under descriptor 2(b)(i) or 4 points for prompting under descriptor 2(d). This would have been insufficient for the claimant to qualify for the daily living component of Personal Independence Payment. However, the claimant's representative questioned whether the Tribunal had given sufficient consideration to the requirements set out in Regulation 4 of the PIP Regulations when it decided whether the claimant should score points in relation to the other activities contemplated by the PIP descriptors. In this connection I said in my grant of permission:

> "The Tribunal does not refer explicitly to Regulation 4 in its statement of reasons, although it does allude to it in paragraph 38 where it uses the term "to an acceptable standard". I find that it is arguable with a reasonable prospect of success that the Tribunal erred either in failing to have due regard to the requirements of Regulation 4, and therefore applying the wrong test when it considered the applicability of the descriptors, or it failed to explain its reasons adequately. Since these considerations apply to multiple descriptors if such an error was made it may well have been material."

5. I made directions inviting the parties to make submissions in relation to the appeal and to indicate whether they wished to have an oral hearing.

Secretary of State's submissions

6. R. Naeem, on behalf of the Secretary of State, provided helpful and clear written submissions in support of the appeal on the basis that the Tribunal failed to make adequate findings of fact to support its decision, failed to provide adequate reasons for its decision, and failed to give due consideration to the requirements set out in Regulation 4.

The claimant's position

7. The claimant's representative made no further representations in response to the Secretary of State's submissions.

Why there was no oral hearing of this appeal

8. Neither party requested an oral hearing of this appeal. Given the agreement between the parties I could identify no compelling reason to hold one and I decided that the interests of justice didn't require one. I decided that it was proportionate and appropriate to determine this appeal on the papers alone.

My decision

9. When deciding whether to grant permission to appeal the test I had to apply was whether it was arguable with a realistic prospect of success that the Tribunal erred in law in a way which was material. The test I must now apply is whether the Tribunal did indeed make a material error of law.

Daily Living Activity 2

10. Turning again to daily living activity 2, the Tribunal gave the following reasons for its decision not to award any points in relation to this activity:

> "38. In relation to taking nutrition, we accepted that [the claimant's] throat ulcers and indigestion made it difficult and painful for her to eat, but not to the extent that she needed prompting or that she was not taking nutrition to an acceptable standard. She could improve the problem by adapting the food she eats to those foods which are easier to swallow. While she has lost weight recently, when assessed she was slightly overweight; the weight loss came some months after the date of decision."

11. There is a lot to unpack in this brief paragraph. The first point that needs to be addressed is the finding that, while the claimant's throat ulcers and indigestion made it "difficult and painful" for her to eat the extent of that difficulty and pain was insufficient to necessitate prompting.
12. While the PIP Regulations don't say that a claimant will only be non-scoring if he or she can perform all the activities contemplated by the descriptors set out in Schedule 1 to the PIP Regulations without pain or difficulty, the Tribunal's acceptance that performing this activity was "difficult and painful" put it under a duty to consider the nature and extent of that difficulty and pain and to consider whether the claimant could truly be said to be capable of performing the activity unaided.
13. Pain is notoriously difficult to measure. There is no objective clinical pain test. But that probably doesn't really matter in the context of assessing entitlement to PIP given the way the PIP Regulations approach things. The scheme of the PIP Regulations approaches disability in a practical and claimant-centred way. It isn't concerned with diagnoses but rather with the impact that a claimant's health condition has on the individual claimant's ability to do things. The claimant's subjective account of their experience of pain and discomfort is one factor to be taken into account. The tribunal is obliged to consider such evidence as there is (exercising its inquisitorial function to seek further evidence if appropriate), to evaluate that evidence in the light of all the other evidence, and to make findings of fact accordingly. Having done so it must explain its decision with adequate clarity.
14. The claimant's case is that at the applicable time her throat ulcers made swallowing "very uncomfortable" with the consequence that she couldn't eat "normally" because it was too painful to swallow. She says this led to her consuming more of her food in liquid form and to a loss of appetite which in turn meant that she required encouragement to eat from her husband.
15. The Tribunal wasn't obliged to accept the claimant's evidence on this, but given the claimant's evidence it was obliged to explain what it made of that evidence and, if it rejected it, to make that clear and to explain why. The Tribunal didn't make any specific finding of fact as to whether the claimant actually received prompting from her husband as she had claimed, but it decided that prompting wasn't necessary, referring to the claimant appearing "slightly overweight" when assessed.
16. Whether or not the Tribunal thought that the claimant received the prompting she claimed, in order for its reasons to meet the standard of adequacy the Tribunal was obliged to explain why prompting was not required. The fact that the Tribunal accepted that the claimant's appetite was "poor" at the date of the decision under appeal (see paragraph 11 of the Tribunal's statement of reasons) and that she suffered from anxiety and depression (paragraphs 9 and 16-20 of the Tribunal's statement of reasons) made this requirement to explain why it decided that prompting was not required all the greater.

17. The reasons it gave (that the claimant's unplanned weight loss had occurred after the period in question) are inadequate. This is because on the claimant's uncontradicted evidence she was receiving regular prompting to eat from her husband during the period in question. Unless the Tribunal rejected that evidence its reasoning doesn't stand up: the fact that the claimant didn't lose weight when she was receiving regular prompting doesn't establish that she didn't require prompting. It might just as well show that the prompting given was effective in achieving the desired result of the claimant eating when prompted to do so.
18. The second point that needs addressing is whether the Tribunal was entitled to conclude that the claimant could take nutrition "to an acceptable standard" notwithstanding the difficulty and pain involved. I will deal with this below when I consider whether the Tribunal properly considered the requirements of Regulation 4(2A).
19. The third point raised by paragraph 38 of the Tribunal's statement of reasons is its assertion that the claimant "could improve the problem by adapting the food she eats to those foods which are easier to swallow". What did the Tribunal mean by this? It isn't entirely clear, but it is most likely that it meant either consuming food in liquid form, as the claimant had claimed to do, or perhaps eating food that was not liquid but was otherwise soft, such as mashed potato.
20. This doesn't sit well with the wording of paragraph (a) of the definition of "take nutrition", i.e. "cut food into pieces, convey food and drink to one's mouth and chew and swallow food or drink". While the evidence didn't suggest that the claimant had any difficulty with using cutlery to cut up food, with using her upper limbs to convey the food to her mouth, or with chewing, the series of activities assumes that for the purposes of paragraph (a) the claimant is expected to be able to eat solid food which requires cutting and chewing and has not been further processed with a view to making it easier to swallow (as such food would not require cutting or chewing). The Tribunal was wrong to say that the claimant could perform the activity unaided by adapting her diet because what the Tribunal appears to contemplate either doesn't amount to taking nutrition (because the food doesn't require cutting or chewing) or, if it does, it isn't unaided (because an aid such as a blender or masher would need to be employed to achieve the "improvement" contemplated. In any event the claimant's evidence was that she did take some of her nutrition in liquid form and the Tribunal should have exercised its inquisitorial powers to ask how often she had to liquidise, blend or otherwise process her food in a way which made it easier to swallow, and it should have made findings of fact as to how often this was required.
21. Paragraph (b) of the definition of "take nutrition" doesn't involve the same activities of cutting up, conveying chewing and swallowing, as it contemplates the use instead of a therapeutic source (i.e. a feeding tube), but there was no evidence that the claimant used a therapeutic source and neither was there any suggestion that use of one might be appropriate.

Regulation 4

22. The claimant's representative submitted that the Tribunal failed properly to apply Regulation 4 of the PIP Regulations, which set out the proper approach to assessing a claimant's ability to carry out activities. Regulation 4 provides:

"Assessment of ability to carry out activities

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.

….

(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."

23. The Tribunal does not refer explicitly to Regulation 4 in its statement of reasons, although it does arguably allude to it in paragraph 38 where it uses the term "to an acceptable standard". It is not necessarily an error of law for the Tribunal not to refer expressly to Regulation 4 in its statement of reasons but it must be apparent from the decision notice and the statement of reasons, when read together as a whole, that the Tribunal had that regulation in mind when it made its decision about which of the PIP descriptors applied to the claimant.

24. The fact that the Tribunal uses the words "to an acceptable standard" does indicate that the Tribunal may have been aware of Regulation 4(2A), but the Tribunal's reasoning doesn't demonstrate with any clarity that it considered all the requirements of Regulation 4 in relation to each of the activities in issue in the appeal. Indeed, the reasons it gives for not awarding points to the claimant don't appear to reflect that Regulation 4 has been considered in any depth. For example, when dealing with the claimant's walking the Tribunal accepted that the claimant becomes breathless when walking due to her COPD and walks at a slightly slow pace covering a distance of 200 metres in a 7 minute period, but there is no discussion of whether this could be done safely, to an acceptable standard, repeatedly or within a reasonable time period. Given the definition of "reasonable time period" it was incumbent on the Tribunal to explain why it found that the claimant could cover 200

metres within a reasonable time period when it accepted that it would would take her as long as 7 minutes to cover that distance.

25. The Tribunal's findings in relation to the claimant's ability to take nutrition also raise the issue of whether the claimant is able to perform the activities contemplated by daily living activity 2 "to an acceptable standard". Even though the Tribunal refers to that standard in paragraph 38 of its statement of reasons it hasn't explained how it applied it.
26. While the terms used in the other limbs of Regulation 4(2A) are defined, "to an acceptable standard" is not. So, what does it mean? In the absence of definition it must bear its everyday meaning, but given the general approach of the PIP scheme, that everyday meaning cannot be restricted to an objective assessment by a third party of how a claimant performs the activity. It must also take into account how the claimant experiences the activity him or herself.
27. The Tribunal found that the claimant to experience pain and discomfort when eating, and it accepted that the claimant experienced a loss of appetite which the claimant attributed to the pain and difficulty she experiences when eating. These factors were relevant factors to consider when deciding whether the claimant could perform the activity to an acceptable standard. The Tribunal was therefore under an obligation to explain why it concluded that these problems weren't sufficient to mean that the standard to which the claimant took nutrition was not acceptable. It failed to do so.

Conclusions

28. For the reasons given above I find that the Tribunal erred in its decision making in relation to activity 2 in that:
    a. it made insufficient findings of fact to support its decision that the claimant didn't require prompting to take nutrition;
    b. it misunderstood the proper meaning of "take nutrition" and therefore its secondary reasons for deciding that the claimant could take nutrition unaided (by "adapting the food she eats to those foods which are easier to swallow") were erroneous;
    c. it failed to consider the requirements of Regulation 4(2A) of the PIP Regulations in sufficient depth; and
    d. the reasons it gave for its decision are inadequate in that they don't allow the reader to understand fully enough how it evaluated the evidence, why it evaluated the evidence in the way it did or why it came to the conclusions it did based on the evidence before it.
29. I am also satisfied that the Tribunal failed to consider sufficiently the requirements of Regulation 4(2A) of the PIP Regulations when assessing the claimant's ability to perform the other daily living and mobility activities and it failed adequately to explain its decision-making.
30. I am satisfied that the errors made by the Tribunal were material. In other words, had the Tribunal not made the errors it made the outcome might have been different.
31. I therefore allow the appeal and set aside the decision under appeal. Because further facts need to be found I remit the case to be re-heard by the First-tier Tribunal.
32. At the rehearing the First-tier Tribunal should follow the directions I have given. The rehearing won't be limited to the grounds on which I have set aside the First-tier

Tribunal's decision of 15 October 2018. The First-tier Tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it won't be limited to the evidence and submissions before the First-tier Tribunal at the previous hearing. It will decide the case on the basis of all the evidence before it, including any written or oral evidence it may receive.

33. Nothing in this decision of the Upper Tribunal should be taken as amounting to any view as to what the ultimate outcome of the remitted appeal should be. All of that will now be for the First-tier Tribunal's good judgment.
34. This appeal to the Upper Tribunal is allowed on the basis and to the extent explained above.

Signed

Thomas Church
Judge of the Upper Tribunal

Dated **02 September 2019**