DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The Secretary of State's appeal to the Upper Tribunal is disallowed. The decision of the Stoke on Trent First-tier Tribunal dated 13 September 2016 did not involve any error on a point of law and therefore stands.

REASONS FOR DECISION

1. The Secretary of State appeals against the decision of the First-tier Tribunal with the permission of Upper Tribunal Judge Wright, granted on 13 February 2017. The tribunal had allowed the claimant's appeal against the decision of 12 May 2016 and awarded the standard rate of the daily living component of personal independence payment (PIP) and the standard rate of the mobility component for the period from 15 June 2016 to 14 June 2018. It gave him nine points on daily living activities, one over the necessary level, including two points on activity 5 (managing toilet needs or incontinence) for needing to use an aid or appliance to be able to manage toilet needs or incontinence. The only element of the decision challenged in the Secretary of State's appeal is that award of two points under activity 5.

2. The tribunal's statement of reasons included the following under findings of fact:

> "9. [The claimant] suffers from IBS which is aggravated by his anxiety. He has symptoms of diarrhoea every day, and this is made worse when he has to leave the house. He is prescribed loperamide to take as and when required, but he told us that he was taking it every day because of his symptoms. He would typically need to take between 1 and 3 tablets. He also takes co-codamol for the pain experienced as part of this condition."

The statement also included the following under reasons for decision, after noting that the tribunal found the claimant credible in his evidence to it:

> "21. [The claimant] suffers from IBS. His doctor confirms that his IBS is related to his anxiety and panic attacks. [The claimant] told his doctor about his chronic diarrhoea, and indeed has been prescribed loperamide to treat this condition. His doctor has also confirmed, in a letter at pages 109 and 110 of the bundle, that [the claimant] has reported bowel incontinence when his symptoms are severe. [The claimant] told the HCP that he would wear dark clothing in case he had an accident. He told the Tribunal that he would have accidents a couple of times a week where he would need to change his underclothes because of soiling. He had brought medication, a toilet roll and a change of underwear with him to the Tribunal. We felt that he would be assisted if he wore incontinence pads. Such an aid would help him to manage his incontinence. He therefore meets the criteria for an award of 2 points for this activity."

In the record of proceedings (page 140) the claimant is recorded as saying that he had accidents ("I mean bits will leak – not totally soil self. That has happened") a couple of times a week and that he had to change his underclothes a couple of times a week

3. The Secretary of State's submission dated 17 June 2017 on the appeal included the following:

> "2. With regard to the arguments identified by [Judge Wright] in the reasons for giving the Secretary of State permission to appeal (paragraph 2 of the direction) I would first submit that the word 'manage' in the words 'manage incontinence' mean 'to cope with the difficulties of'. From the definition in Part 1 of Schedule 1 to the [Social Security (Personal Independence Payment) Regulations 2013] 'incontinence' means 'involuntary evacuation of the bowel [or] bladder'. Furthermore in paragraph 20 of CPIP/2152/2015 Judge Green's decision held that:
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> > 'If there was only 'negligible' leakage, that might not be sufficient to amount to 'involuntary evacuation'.'
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> Accordingly it is my submission the words 'manage incontinence' should be interpreted as meaning 'to cope with the difficulties of an involuntary evacuation of the bowel [or] bladder provide the evacuation is more substantial than negligible leakage'.
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> 3. In the light of the above I would submit that the word 'evacuation' for the purposes of PIP does not just apply to the complete evacuation of the bowel or bladder and so it is my submission that uncontrollable escapes of faeces or urine may be considered as incontinence if they are more substantial than negligible leakage.
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> 4. It is also my submission that the need of an aid or appliance in order to manage incontinence must be reasonably required. This is in accordance with Upper Tribunal decision CPIP/1534/2015. I would, therefore agree that it would be sensible for someone, who is unaware that they are soiling themselves, to use an incontinence pad. In the case where someone has the sensation that they need to use the toilet then an incontinence pad may be worn for security and confidence just in case they are unable to reach a toilet in time due to the physical condition of incontinence. In both these situations I would submit that the pad would only be an aid for the purposes of PIP when it absorbs leakage which is more than negligible. I would further submit that it is pertinent to ascertain the frequency of such leakages in order to establish whether they occur on over 50% of the days in the required period. In this event descriptor 5b would apply in accordance with regulation 7 of the PIP Regulations.
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> 5. In the present case there was evidence before the Tribunal that the claimant has accidents a couple of times a week and that 'bits will leak' (page 140). In light of CPIP/2152/2015 it is my submission that the Tribunal should have made findings of fact with regard to the leakage so as to establish whether it was substantial enough to constitute incontinence. In this event incontinence pads would be reasonably required and so the Tribunal should have gone on to consider the frequency of the leakage."

Paragraph 6 went on to say that findings about frequency should also have been made about when

the claimant was out of doors.

4. Thus, the errors of law put forward by the Secretary of State boil down to a failure to make sufficient findings of fact to determine whether the leakage amounted to incontinence as defined (in which case the use of incontinence pads would be reasonably required) and a failure to make findings as to the frequency of leakages reaching that level, so as to apply the rule in regulation 7 of the PIP Regulations.

5. To start with the second point, that in my view is based on a misunderstanding of the effect of regulation 7, as is shown by the recent decision of the three-judge panel of the Upper Tribunal in *RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 105 (AAC). Those appeals were concerned with the effect of epilepsy on activities like preparing food, managing therapy or monitoring a health condition and washing and bathing, as well as the mobility activities. In paragraph 55 the judges, having noted that their analysis showed that regulation 7 played no part in the construction of regulation 4(2A) and (4) [on "safely" etc], continued:

> "Indeed Mr Komorowski [counsel for the Secretary of State] did not rely on regulation 7 in response to these appeals. He correctly accepted that if, for the majority of days, a claimant is unable to carry out an activity safely or requires supervision to do so, then the relevant descriptor applies. On a correct analysis, as we have determined, that may be so even though the harmful event or the event which triggers the risk actually occurs on less than 50 % of the days."

That principle reflects what would have been my understanding of regulation 7. In my judgment the same principle applies in the context of the present case. The test is whether on the majority of days in the period to be looked at the claimant reasonably required the use of an aid or appliance (in this case incontinence pads) on a precautionary basis in order, in the Secretary of State's words, to cope with the difficulties of involuntary evacuations of the bowel occurring a couple of times a week. The test is not whether those evacuations occur on more than 50% of the days in the period or whether the pads would actually absorb leakage on more than 50% of those days. Regulation 7 refers to whether a descriptor is satisfied on over 50% of the days in the period. Descriptor 5b can be satisfied in its terms by a reasonable need to use an aid or appliance on a precautionary basis on many more days than those on which incontinence actually occurs.

6. On that basis, although the tribunal did not expressly refer to regulation 7 or to the 50% test, I cannot see that it adopted any approach that is inconsistent with the principles set out in the previous paragraph. It made sufficient findings of fact about the frequency of accidents from which it could reasonably conclude that there was a need for the use of incontinence pads on a precautionary basis for the majority of the time. There could clearly have been a fuller explanation and a more explicit identification of each step in the reasoning. However, I am satisfied that those steps, and in particular the use of the pads on a precautionary basis to help manage the claimant's problems, were necessarily implied in the way in which the tribunal expressed itself. I conclude that there was no error of law either in adopting a wrong principle of law or in failing to make adequate

findings of fact or give adequate reasons.

7. That leaves the question of whether the tribunal made sufficient findings of fact (and gave an adequate explanation) to determine whether the claimant's "accidents" amounted to incontinence within the meaning of activity 5. In relation that, I am content to adopt the approach in paragraphs 2 and 3 of the Secretary of State's submission of 17 May 2017. Once again, the tribunal did not expressly refer to anything in the PIP Regulations that might throw light on the meaning of incontinence or to any test in terms of evacuation of the bowels that is more substantial than negligible leakage. It appeared just to assume that what it described in the statement of reasons would amount to incontinence. I do not think it can be said that any degree of soiling that requires a claimant to change underwear necessarily by that description goes beyond negligible leakage. However, when one looks by way of amplification of paragraph 21 of the tribunal's statement of reasons (as I consider legitimate because the tribunal accepted the credibility of the claimant's evidence on 13 September 2013) at what the claimant is recorded on page 140 as having said, in my judgment that indicates that what the tribunal was accepting as happening in the "accidents" was capable of being classified as something more substantial than negligible leakage. The tribunal's conclusion on activity 5 did not show an adoption of any wrong principle of law in this respect. I therefore consider that, taking the statement of reasons with the record of proceedings, there were sufficient findings of fact. Once again, there could clearly have been a fuller explanation and spelling out of the reasoning. However, I am satisfied on balance that there was an adequate explanation, the test being adequacy, not perfection. Certainly, having rejected the Secretary of State's contentions on the other point in the appeal and bearing in mind the limited focus of the Secretary of State's challenge to the decision of 13 September 2016, I would have been very reluctant to set aside the tribunal's decision on that ground alone. I can see nothing else in the decision that involves an error of law.

8. Accordingly, the Secretary of State's appeal must be dismissed.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 14 June 2017