

IN THE UPPER TRIBUNAL

Appeal No: CPIP/2723/2016

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the Secretary of State.

The decision of the First-tier Tribunal sitting at Stoke-on-Trent on 3 June 2016 under reference SC049/16/00130 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

- (1) The new hearing will be at an oral hearing.
- (2) If either party has any further evidence that they wish to put before the tribunal which is relevant to the decision of 19 October 2015, this should be sent to the First-tier Tribunal's office in Birmingham within one month of this decision being notified to the parties.
- (3) The First-tier Tribunal is directed to follow the law as set out below.

Appearances: Mr Tim Buley counsel represented the appellant
Secretary of State for Work and Pensions.

Ms Dair and Miss Santoro represented the
respondent claimant.

REASONS FOR DECISION

Introduction

1. The key focus on this appeal is on activity 1 – “preparing food” - in Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (“the PIP Regs”). Putting matters very broadly at this stage, the issue on the appeal is to what extent, if any, preparing the “right” or “dietary appropriate” food falls to be taken into account under activity 1.

Relevant factual background

2. The claimant in this appeal was born in June 1999 and so was aged 16 at the time of the Secretary of State’s decision under appeal to the First-tier Tribunal. His main medical condition is that he has type 1 diabetes and is insulin dependent. He had previously been in receipt of the lower rate of the mobility component and the highest rate of the care component of Disability Living Allowance. On being moved across to the Personal Independence Payment (“PIP”), the Secretary of State decided that he did not score any points for either the daily living or mobility components of PIP and so was not entitled to PIP with effect from 18 November 2015. It was that decision which was under appeal to the First-tier Tribunal. It was argued in that appeal that due to his diabetes the claimant needed “help, prompting and keeping an eye on all the time to keep him safe”.
3. The First-tier Tribunal in its decision of 3 June 2016 (“the tribunal”) allowed the appeal and found that the claimant was entitled to the enhanced rate of the daily living component of PIP for two years from 18 November 2015 to 17 November 2017. It did so on the basis that the

claimant needed "supervision or assistance to either prepare or cook a simple meal" (thus scoring 4 points under descriptor 1(e) in Part of 2 of Schedule 1 to the PIP Regs) and needed "supervision, prompting or assistance to be able to manage therapy that takes no more than 14 hours a week" (scoring 8 points under descriptor 3(f) in Part 2 of Schedule 1 to the PIP Regs). It confirmed that he was not entitled to the mobility component of PIP. There is no challenge to the mobility component aspect of its decision and so I say no more about that component.

4. Before turning to the tribunal's reasons for its decision, and to put that reasoning (or lack thereof) in some context, it is necessary to consider some of the evidence that was before the tribunal. I refer only to the evidence which is most relevant to the two daily living descriptors the tribunal awarded.
5. In the section of the PIP claim pack setting out what the claimant's health conditions or disabilities were, all that was recorded was "diabetes". The next page of the claim pack then recorded the medication and treatments the claimant had for his diabetes. These included: novo rapid insulin, "ACCU-CHEK" blood monitor, aviva testing strips, and glucose 40% oral gel. Under the "Preparing Food" section of the claim pack it was said that the claimant did not need to use an aid or appliance to prepare or cook a simple meal but he did need help from another person to do so. This was explained as follows.

"Food has to be specially prepared for [the claimant] due to diabetes. Mum has to count carbs in the food and weigh the food to be able to know how much carbs in each portion. When his blood sugar is low he gets dizzy and disorientated and his presence in the kitchen can be dangerous for him. When [he] is hungry he would eat junk food, so he needs prompting to eat the right food. He has no signs before hypos, he would get dizzy, sweaty and disorientated when his blood sugar is low."

(It was also said, in relation to activity 2 (taking nutrition), that the claimant needed prompting and supervision to eat the "right food" as otherwise he would eat junk food.)

6. When it came to the section of the claim pack addressed to “Managing treatments” (that is, activity 3), it was said that the claimant needed an aid or appliance to monitor his health conditions **and** help from another person to monitor his health conditions or manage home treatments. The explanation given on the claim pack for these answers was:

“[The claimant] needs prompting and encouraging to test his blood sugar. Mum has to remind him each time to test it. Sometimes mum has to physically test his blood sugar when he feels dizzy and has to test his blood sugar every 15 minutes in case of a hypo. After a hypo he would feel tired and out of energy.”

7. Following this claim pack being submitted, the claimant was seen by a health professional (HP) on behalf of the Secretary of State. The HP noted that the primary health condition was Diabetes Type 1. The HP recorded, inter alia, the following in her report:

“History of conditions

His blood sugars are not stable but he is able to check his blood sugars regularly independently. He states his blood sugar goes low in the night time and his mother monitors this. She has been informed this is not necessary but she prefers to do this. Sometimes his blood sugars will go up in the morning. He has hypoglycaemic attacks (hypo’s – drop in blood sugar) maybe once weekly and this can be sometimes three times daily. During August his blood sugars were very uneven, his blood sugars were taken every 15 minutes throughout the day....further medical evidence states he is going through his teenage years and the turbulence means he is not fully adhering to his regime in terms of testing and doesn’t always tell his mother. He has a cannula fitted onto his abdomen but he has problems with this.....

Current mediation and treatment

He uses an insulin pump which is constant and he carries cannulas. He also carries a pen in case this is required. He monitors his blood sugars 6-8 times daily and this is monitored throughout the night also. The Claimant is compliant and has no side effects.

Social and occupational history

....He has not been employed but attends sixth form college and will be studying biology/chemistry/maths and computer and want’s (sic) to go into medicine. Social and leisure activities – He plays football, he also plays video games which he does sitting down. He also goes out with his friends.....

Functional history....

Variability

He does get variability in his days and when his blood sugar is high he needs to test this more. He drinks plenty of water and needs to rest.

Sometimes he will get double vision and gets dizzy not wanting to do anything. He takes sugar substances at this time. If his blood sugar is high he needs to urinate more to flush this out. He has good and bad days but is able to manage his condition daily...

Preparing food

He normally has two pieces of toast with cheese for his breakfast and will drink water. Whilst at college he will eat sandwiches of his mother will make his lunch. His mother will cook his dinner as she normally has to count his carbohydrates. When he returns from school he will eat junk food if not watched over. He is able to make chips or will put something into the oven/microwave.

Taking nutrition

He reports that he does not have any difficulties with eating and drinking.

Managing therapy or monitoring a health condition

He reports that he is able to take his medication appropriately as prescribed or as directed on packaging without difficulty. He is always able to request and collect prescriptions from the chemist. He is able to recognise changes in his condition, and notifies his GP accordingly.....

Other relevant functional history

He normally goes to bed at 11pm. He normally sleeps well but his mother doesn't and checks him throughout the night. He normally gets up at 7am to go to college and then his mother takes him in the car....."

The HP assessed the claimant as not meeting any of the scoring descriptors under either activity 1 or activity 3, as did the Secretary of State in his decision.

8. The claimant's mother then submitted a good deal of further evidence relating to his diabetes. This included a record of his blood sugar level and a letter from one of his treating nurses which said that his diabetes management was still extremely challenging and both the claimant and his mother struggled with this. The claimant's mother also submitted a letter in which she said that when his blood sugar was low he could not be trusted to carry out any activity in the kitchen due to shaking and dizziness and he needed supervision in the kitchen because he had no sign before hypos. It was asserted on this basis that he ought to have scored 4 points for "preparing food".

9. This letter also said that the claimant always needed prompting and encouraging to take his blood sugar and although he could sometimes do his blood sugar, his mother had to do so in case of low or high blood sugar due to his inability to do so himself due to dizziness, disorientation or fatigue. The letter continued that the claimant's mother had to take his blood sugar every 15 minutes and she had to wake up several times during the night to check his blood sugar. It was asserted that on this basis he ought to have scored 8 points for "managing therapy" as "he needs supervision, prompting or assistance to be able to manage therapy that takes no more than 14 hours a week".

10. In a subsequent letter the claimant's mother argued under a heading "Preparing food" that in order to stay healthy the claimant needed "to eat healthy food and carbs should be counted on his meal to match the amount of inulin to the amount of carbohydrate eaten" It was said that to cook a simple meal for him his mother had to weight the ingredients and divide it into portions in order to know how many carbohydrates were in each portion. It was said he could only heat the portions of food in a microwave and so he should score 2 points under this activity. (The claimed need to be supervised in the kitchen apparently having fallen away, at least at this stage.)

11. In relation to supervision, prompting or assistance to be able to manage therapy, this letter relied heavily on data that had been downloaded from the claimant's ACCU-CHEK blood sugar monitor over the period 14 January 2016 to 10 April 2016. This raw data was set out but was also, it would seem, summarised in a pie chart. This chart showed that the claimant had had "hypos" on 3.4% (or 24) of the readings; had been within range on 25.7% (or 179) of the readings; had been above average on 42.8% of (or 298) of the readings and had been below average on 28% (or 195) of the readings. Based on this data the letter argued as follows. On the 24 times the claimant had had hypos, the claimant's life would have been at risk if no help had been given to him. He would get dizzy, disorientated and drift into unconsciousness during a hypo and

would need help to get glucose gel into his mouth to counteract it. When the readings were below average he would have run the risk of having another hypo if not treated. Likewise when the blood sugar was above average. In summary the letter argued “74.3% of his blood sugar [readings] needed attention to keep him safe and out of danger”, and therefore he met descriptor 3(f). Quite what the help or treatment was outside of the actual hypos, and who provided that help, was not set out in the letter.

12. The above summarises the relevant written evidence before the tribunal. There was also, however, the oral evidence of the claimant and his mother to the tribunal, to which I will return later.
13. In its reasons for its decision the tribunal said, and only said, the following of relevance to the issues before me (for ease of reading I have removed the paragraph numbering used in the statement of reasons – the reasoning refers to the claimant’s mother as the “Appellant” and he as her son).

“Facts found by the Tribunal

The Appellant’s son, now aged 16..., suffers from type 1 diabetes....
Further, on the Claim Form, the Appellant indicated her son’s difficulties with: [and the activities under which it was said the claimant needed help in the claim form, though not the help it was said was needed, are then set out]/
Although, in her detailed Appeal letter....she focussed on: preparing food; taking nutrition and mobility.
Furthermore, the Appellant’s son was prescribed novo rapid insulin, glucose gel, and has an insulin pump....
The Appellant’s son lives with his parent and attends college.

Reasons

We therefore considered those Daily Living Activities and reasoned as follows.

Activity 1 – Preparing Food

The Appellant’s son doesn’t measure the food correctly and would eat the wrong food without guidance (page 178). Plainly, he needed supervision or assistance to prepare/cook a simple meal.....

Activity 3 – Managing therapy or monitoring a health condition

The Appellant's son has an intensive medication/treatment regime [and reference is made here to the treating nurse's letter and evidence given by the claimant's mother in the record of proceedings (where a little confusingly given the nomenclature used in the statement she is referred to as the appellant's mother)]. Plainly, the Appellant's son needs supervision, prompting or assistance to be able to manage therapy – that takes more than 14 hours per week, given the accu-checks [and reference is her made to the detailed ACCU-CHEK data print out] and the insulin pump [reference is here made to evidence recorded in the record of proceedings], as well as the Appellant's genuine concern for night-time care of her so, as evidenced by the specialist nurse [i.e. what I have called the treating nurse]."

14. It is convenient to now set out my reading of the evidence recorded in the (handwritten) record of proceedings insofar as it relates to the tribunals' reasoning set out above.
15. The reference to page 178 in the reasoning relating to preparing food refers to internal page 9 of the record of proceedings and can only in my view be to the passage headed "Preparing food". This refers to the passage in the claim pack set out in paragraph 5 above and says:

"'Mum cooks'. 'She specially prepares it'. 'Ready-made meals if mum not there'. App [which despite what I have said and the use elsewhere in the record of App's mother" seems to refer to the claimant's mother] 'Doesn't know the measurements'. 'Would eat junk food – bad for blood sugars'. 'Crisps/chocolate/sweets.'"

I simply observe at this juncture that there is nothing in these passages, or the tribunal's reasoning, which shows it sought to explore with the claimant *why* he could not cook or work out the measurements for himself, or *why* he needed guidance to avoid eating the wrong food (though on any analysis this last point would seem to relate to activity 2 – taking nutrition - and not preparing food).

16. Turning then to what was recorded as having been said at the hearing relevant to "managing therapy", the passages relied on in the reasoning were as follows. Of the claimant's "intensive medication/treatment regime" the passage relied on from the record of proceedings reads:

"Managing treatment?
'quite intensive'.

Appellant's mother - Checks every 30 minutes. At night mother checks – 7 nights per week. More unstable at weekends. Life threatening condition. Kidney/heart – organs – complications. Feet problems. Neuropathy. Coma/death."

The reference in the reasoning to the oral evidence given about the insulin pump appeared to be to the following:

"Dr
Insulin pump since June 2015. Put on pump. Diabetes was up and down. Pump to stabilise sugar levels. Has done that to some extent. Hypos – post (?) college. Uses glucose tabs and gluco-gel. Injections if unconscious. Sometimes can't physically take glucose tablets. Has special provision at college. At football, sometimes takes off the pump – sugars usually go quite high. Happens more at weekends. Due to break in routine."

And the oral evidence showing the claimant's mother's "genuine concern for night-time care of her son" takes one to the following passages in the record of proceedings:

"Mums checks during the night...At night Test blood sugars. If high, I make corrections. Ensure canula is in. Mother tests blood sugars at 3am and 5am. Appellant's mother check it twice. On retreat appellant had to set up and check himself. When blood sugars low – weak and shaky. Difficult to walk. 2-3 times a week in a good week. On bad week, 2 days in duration. Visit medical room [at school] 1 or 2 times a week. Sixth form room most of the times. Appellant – goes to bed at 11pm. Mum checks 12.30/1am and 3am and 5am. Appellant's mother – I check it. And correct it, if necessary. I wake him sometimes to help him."

17. Taking stock at this stage, the following observations may be made. First, the record is not entirely clear as to who out of the claimant or his mother was giving what evidence. However it seems tolerably clear that when he was "on retreat" the claimant had to manage his treatment on his own and did so likewise for most of the time when at school/college, and that the main area when his mother was checking his blood sugars, and giving him corrective treatment if necessary, was during the night. Second, it is not apparent from the record of proceedings that the tribunal queried why the claimant's mother needed to check his blood

sugars at night given the HP's evidence (see paragraph 7 above) that the mother had been told this was not necessary. Nor is it clear from the record of proceedings that the tribunal sought to enquire into why during the daytime the claimant needed supervision prompting or assistance to manage his treatment or medication outside of when he had an actual hypo. For example, he had on his own evidence been able to manage this "on retreat" (at Alton Castle) and seems to have told the tribunal he was able to check his blood sugars on his own during the day (both at home and when at college). Moreover, the claimant told the tribunal only that it was *sometimes* that he couldn't take the glucose tablets, and no enquiry seems to have been made by the tribunal of how often that occurred.

18. The Secretary of State sought and was granted permission to appeal by the First-tier Tribunal against the tribunal's decision. His grounds for seeking permission to appeal were in summary:

(a) that for activity 1 "preparing food" the measuring of food or avoiding eating the wrong food due to diabetes is not part of the statutory test. The statutory test is not designed to assess culinary skills but is concerned with assessing the impact of any impairment on a person's ability to perform the tasks required to prepare and cook a simple meal. What is being assessed was the claimant's ability to open packaging, peel and chop, serve food on a plate and use a microwave oven or cooker hob to cook or heat food. In addition, the tribunal had failed to explain why the claimant was not able to prepare a simple cooked meal unaided or unsupervised; and

(b) that for activity 3 "managing therapy" the tribunal had failed to make any findings on the number of days and length of time involved or why the claimant was unable to manage his own medication and treatments.

19. The First-tier Tribunal said that the Secretary of State was seeking permission to appeal “on the issue of the Tribunal’s interpretation of descriptor (sic) 1”, and said “It is at least arguable that the tribunal erred in the issues it took into account in awarding descriptor 1”. This of course leaves out of account the arguments the Secretary of State was making about activity 3, but as the First-tier Tribunal did not expressly limit its grant of permission to appeal to arguments on activity 1 the arguments on activity 3 can be made on this appeal. This was made clear by Upper Tribunal Judge Rowley when directing an oral hearing of the appeal to the Upper Tribunal.

Core relevant law

20. PIP was introduced under Part 4 of the Welfare Reform Act 2012. Section 78 of that Act deals with the daily living component. It provides, so far as here relevant, that:

“78.-(1) A person is entitled to the daily living component at the standard rate if (a) the person’s ability to carry out daily living activities is limited by the person’s physical or mental condition....

(2) A person is entitled to the daily living component at the enhanced rate if (a) the person’s ability to carry out daily living activities is severely limited by the person’s physical or mental condition....”.

The underlining is mine and is to emphasise that the focus of the test under the Act is on an ability to carry out an activity. Section 80 of the same Act then provides that whether a person’s ability to carry out activities is limited by his physical or mental condition is to be determined in accordance with regulations and on the basis of an assessment of the person. Further, the limitation on the ability to carry out the activity must be as a result of the person’s physical or mental condition, and in this context the balance of authority seems to be in favour of the latter meaning an adverse mental health or physical health condition: see *SSWP –v- IV* (PIP) [2016] UKUT 420 (AAC) and paragraph 16 of *KP –v- SSWP* (PIP) [2017] UKUT 0030 (AAC), though the contrast argument suggested in paragraph 47 of *SSWP –v- LB* (PIP) [2016] UKUT 0530 (AAC) has yet to be addressed head-on.

21. The relevant regulations are the Social Security (Personal Independence Payment) Regulations 2013 (the "PIP Regs"). The most relevant parts of those regulations are set out below.
22. Part 2 of the Pip Regs deals with the "Personal Independence Assessment". It provides by regulations 3 and 4 as follows, insofar as is relevant on this appeal:

"3.—(1) For the purposes of section 78(4) of the Act and these Regulations, daily living activities are the activities set out in column 1 of the table in Part 2 of Schedule 1."

"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.

(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."

23. Schedule 1 to the PIP Regs then sets out, in Part 2 of that schedule, the daily living activities and the points scores for the descriptors under those activities. Prior to this, however, Part 1 of Schedule 1 provides definitions for terms used in Part 2 (and Part 3, which deals with the mobility activities). Parts 1 and 2 of Schedule 1 to the PIP Regs provide relevantly, and respectively, as follows:

"assistance" means physical intervention by another person and does not include speech

"cook" means heat food at or above waist height

"prepare", in the context of food, means make food ready for eating or cooking

"prompting" means reminding, encouraging, or explaining by another person

"simple meal" means a cooked one-course meal for one using fresh ingredients

“supervision” means the continuous presence of another person for the purpose of ensuring [the claimant’s] safety

DAILY LIVING ACTIVITIES		
<i>Column 1</i> <i>Activity</i>	<i>Column 2</i> <i>Descriptors</i>	<i>Column 3</i> <i>Points</i>
1. Preparing food.	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8”

24. For reasons which will become apparent, it is not necessary for me to set out in full the terms of activity 3 and its descriptors as they appear in Part 2 of the above Schedule. It suffices for me to record that activity 3 is concerned with “Managing therapy or monitoring a health condition” and descriptor 3(f) awards 8 points if a claimant:

“Needs supervision, prompting or assistance to be able to manage therapy that takes more than 14 hours a week.”

Discussion and conclusions

Activity 3 – Managing therapy

25. I will take this ground of appeal first because I can deal with it much more shortly than that concerned with activity 1.
26. The correct construction of activity 3, and more particularly the distinction, if any, between managing/monitoring medication and managing therapy, has already been the subject of one Upper Tribunal decision in *SSWP –v- LB* (PIP) [2016] UKUT 0530 (AAC). That decision is being appealed by the Secretary of State to the Court of Appeal. In addition, a three-judge panel of the Upper Tribunal has been convened – in cases CPIP/1159/2016 and CPIP/1882/2015 – to

address the same issue. In the circumstances I consider it would be idle, and potentially unhelpful, for me to enter into that debate on this appeal. It may, however, be necessary for the rehearing of this appeal to be delayed until either the Court of Appeal or the three-judge panel has decided one of the cases before them.

27. I am satisfied, however, that, whichever is the correct reading of activity 3 and descriptor 3(f), the tribunal's fact-finding and reasoning on why descriptor 3(f) was met was patently inadequate. It may have been "plain" to the tribunal why descriptor 3(f) was met, but its reasoning does not provide an adequate explanation for why that was so. I have foreshadowed some of the criticisms of the reasoning above.
28. One example concerns the reasons why the tribunal concluded the claimant needed supervision, prompting or assistance to be able to manage his therapy. All of these forms of 'help' have to be needed from another person. As I have said above, the particular focus of the tribunal appears to have been on the help given by the mother to the claimant during the night. However, in this context nowhere does the tribunal grapple with, or answer, the plainly relevant and contrary evidence in the HP's report that the claimant's mother had been informed monitoring his blood sugars at night was not necessary. If the basis of the tribunal's 3(f) points award involved the monitoring of the claimant's blood sugars which the mother did at night, the reasoning and fact-finding in my judgment had to explain why that help was needed notwithstanding the information the mother had been given that it was not necessary. The reasoning, however, is silent on this important area of contested evidence. The source of the information the mother had been given is not explored even though the identification of that source would plainly be relevant to the weight to be attached to that information. For example, if the information had come from a nurse or physician treating the claimant's diabetes it would be likely to be worthy of considerable weight.

29. If, however, the night time help was disregarded by the tribunal because it was not necessary (as to which it would have needed to give reasons), or only formed part of the help found by the tribunal to qualify under descriptor 3(f), the tribunal's reasoning fails to explain what was the qualifying day time supervision, prompting or assistance. Such an explanation would particularly have been required in this case given the evidence seemingly showing that the claimant could manage taking his blood sugars on his own when at college and when on the retreat. Again, the detailed analysis of the evidence was simply not provided by the tribunal. And because of this what time was needed each week for the supervision, prompting or assistance (see *MF v SSWP* [2015] UKUT 554 (AAC)) does not begin to be properly identified in the reasons.
30. Neither party at the hearing before me sought to defend adequacy of the tribunal's reasons as to why it had awarded the claimant descriptor 3(f). Mr Buley for the Secretary of State sought to argue, albeit perhaps somewhat faintly, that on the evidence no award of more than one point was merited under activity 3 whichever of the competing constructions of that activity set out in *SSWP –v- LB* was correct. However he rightly recognised that an entirely different construction of activity 3 might result from the appeal against that decision to the Court of Appeal (or the three-judge panel cases referred to above), and so did not demur from this appeal being remitted to be redecided by a new First-tier Tribunal on activity 3.

Activity 1 – Preparing food

31. Neither party at the hearing before me sought to defend the adequacy of the tribunal's reasoning on this activity either. In my judgment they were correct not to do so.
32. The award the tribunal made for descriptor 1(e) was dependent on the claimant needing supervision or assistance to either prepare or cook a simple meal. The first criticism of the tribunal's sparse reasoning is that it does not identify whether it was with the preparation or the

cooking of the simple meal (or both) that the claimant needed supervision or assistance. That then leads on to the more serious deficit in the reasoning, and that on which those acting for the claimant before me put up no real resistance, namely *why* the claimant was not able to measure food correctly or why he would eat the wrong food.

33. The criticism of the reasoning at this stage is not dependent on resolving whether preparing or cooking the “right” food falls within activity 1. The point that can here be made is that even if activity 1 does encompass preparing or cooking food that is appropriate for a claimant’s dietary needs, the reasoning fails to explain why the claimant was not able to measure the food correctly. To use the statutory language of section 78 of the Welfare Reform Act 2012, the reasoning leaves entirely opaque what it was in the claimant’s physical or mental condition that limited his ability to “prepare food” (assuming for present purposes that this can involve preparing the ‘correct’ food and this includes measuring the correct proportions of the same) such that he needed to be supervised or assisted by another person in order to be able to measure the food. It is not obvious from the evidence why the claimant’s diabetes would have affected his ability to measure food, nor is any other physical or mental (health) condition obviously in play.
34. A further criticism of the reasoning is that a difficulty in eating (the exact nature of the difficulty is immaterial at this stage) does not fall within activity 1 but instead is covered, if the difficulty is covered at all, by activity 2 – taking nutrition: see *MM and BJ –v- SSWP* (PIP) [2016] UKUT 0490 (AAC); [2017] AACR 17. Being kind to the tribunal, however, I will assume that it was using the word “eat” in its reasoning loosely to cover preparing the ‘wrong’ type of food which it would then be ‘bad’ for the claimant to eat in terms of his diabetes. Assuming for the moment, however, that these consideration may be relevant to activity 1, the fundamental problem with the tribunal’s reasoning is that it fails to explain why the claimant would prepare and eat the wrong food without guidance, and more particularly what is was in his physical or mental health conditions that would cause him to do so.

35. The above basic deficits in the tribunal's reasoning renders its decision erroneous in point of law on activity 1 as well as activity 3. The Secretary of State sought argue here, with more force than he had on activity 3, that on the evidence there was no basis for any points being awarded under activity 1 given the lack of any evidence of limitations caused by the claimant's diabetes in respect of his physical and mental abilities to prepare and cook a simple meal. I consider there is very considerable force in that submission on the evidence before me in respect of the diabetes affecting the claimant's cognitive faculties so as to render him unable to measure ingredients or use the 'correct' ingredients. As Mr Buley put it for the Secretary of State, it is insufficient for the purposes of activity 1 that a claimant is unable to prepare and cook a simple meal because of a lack of experience or training or even the inclination to cook, and there was a distinct lack of evidence showing an inability on the claimant's part to learn how to prepare or cook a simple meal (and even less evidence of a learning difficulty caused by any mental or physical health condition).

36. However, it seems to me that there was some *other* evidence (unexplored by the tribunal, at least in its reasoning) that the diabetes could cause the claimant to get dizzy and disorientated and this might have affected his ability to prepare or cook a simple meal. (See the claimed need for help when "Preparing Food" set out in the claim pack as quoted in paragraph 5 above and the contents of the claimant's mother's letter as referred to in paragraph 8 above). Whether that dizziness and disorientation would have been with sufficient frequency to satisfy any of the descriptors under activity 1 may be doubtful, but it needs to be properly determined. It is on this basis that activity 1, too, needs to be remitted to be redecided by another First-tier Tribunal, and in the end Mr Buley did not argue against this result either.

37. Given the poor evidential basis for the claimant's mental or physical condition in fact limiting his ability to measure food and prepare and cook the 'right' food for his diabetes, I am somewhat reluctant to rule

on the issue of whether preparing the “right” food for a claimant’s dietary needs falls to be taken into account under activity 1. However this was the basis on which permission to appeal was given, it has been argued before me (if not extensively), and if the claimant is able to show that at the relevant time his health conditions meant he was unable to measure food or prepare the right food for his diet then the new First-tier Tribunal needs to be directed on what may properly be taken into account under activity 1. (It may also be relevant to whether the tribunal also erred in law by misdirecting itself as to the law by including measuring food correctly and eating (in the sense of preparing to eat) the wrong food as reasons for the award of descriptor 1(e) under activity 1. However, as the tribunal’s reasoning is so sparse on this issue I am not sure whether it can safely be said that it did misdirect itself as to law in this way.)

38. Perhaps the nearest Upper Tribunal authority on this issue is the decision of Upper Tribunal Judge Levenson in *ZI –v- SSWP* [2016] UKUT 572 (AAC). That case addressed the different issue of whether the “simple meal” spoken of in the majority of the descriptors under activity 1 had to be one that respected the claimant’s “cultural cuisine” and whether, therefore, the claimant would “be able to prepare all elements of a culturally appropriate meal without assistance in particular in the preparation of chapattis”. In rejecting the need for anything culturally appropriate in the statutory simple meal Judge Levenson said the following.

“12. The conditions of entitlement to DLA were very different from those for entitlement to PIP and decisions on the law relating to DLA cannot necessarily be applied in PIP cases. In relation to cooking, one of the bases for entitlement to lowest rate care component of DLA was that a person “cannot prepare a cooked main meal for himself if he has the ingredients” (section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992). “Cooked main meal was” not defined in the Act or in the relevant regulations. The attempt by the Commissioner to define it in R (DLA) 2/95 was never without difficulty and explanations by judges at any level should not be treated as though they were words in a statute. I agree with Judge Mitchell [in *AI –v- SSWP* (DLA) [2015] UKUT 0176 (AAC)] in doubting that much of what was said in that case can survive the decision of the House of Lords in *Moyna* [2003] UKHL 44, R (DLA) 7/03 (upholding my

decision sitting as a Social Security Commissioner in that case).

13. I agree with paragraph 3 of Judge Mitchell's decision in which he said that "The nature of a cooked main meal must, in material respects, be the same for all claimants. Otherwise different claimants would face different disability thresholds. That cannot have been Parliament's intention."

14. Likewise, in relation to PIP, it cannot have been the intention that people from different cultural or religious or ethnic communities with precisely the same disabilities in relation to cooking would have different levels of entitlement to benefit because of their community affiliation."

39. In another context, where the issue was the extent to which it was unsafe for the claimant to cook in her kitchen due to her being accompanied by her young, hyperactive son, the Secretary of State citing *ZI* in support argued before Upper Tribunal Judge Gray in *SC – v- SSWP (PIP)* [2017] UKUT 0317 (AAC) that "it matters not what the personal conditions of a claimant are or involve; the test should be a standard benchmark of functional ability and broadly the same whoever is being assessed". Judge Gray agreed with this submission. She said, at paragraphs [13]-[15] :

".....[*ZI*] establishes the principle that the test is as to a person's physical and mental capacity to cook, whether or not they actually do so.

The fact that someone does not cook may be due to preference or habitual family arrangements, or it may be indicative of real problems in the task. If somebody says that they do not cook because it would not be safe for them to do so that assertion must be considered in the light of the evidence as to the extent of their physical or mental health problems, and that argument is put forward here. However it is also said that the appellant cannot cook because she needs to do something else, (look after her son) and that is not relevant in a calibration of any difficulties that she might have if she were to cook.

Any difficulties in cooking because of the presence of a small child must be ignored because the test is not concerned with the practicalities of preparing and cooking food, but with the capability of so doing, and, to be relevant, any difficulties must arise out of a physical or mental condition."

40. I agree with the conclusions reached in *ZI* and *SC*. However as the issue before me is different (i.e. preparing the “right” food and where the inability to do so might be said to arise from the claimant’s physical or mental condition), I consider I need to express my reasoning in my own terms. Nothing I say below runs counter to the analysis in either *ZI* or *SC*.
41. The starting point as set out above and as I developed in *MM and BJ* is that the adjudicatory task mandated by section 78 of the Welfare Reform Act 2012 is to establish whether a claimant’s ability to carry out a daily living activity is limited by their physical or mental condition. Two considerations are therefore of prime consideration. I will take them in reverse order.
42. The first is to establish what the claimant’s physical or mental (health) condition(s) is (or are). In this case on the evidence there was only one condition, namely the claimant’s type 1 diabetes. That ‘condition’ would, however, carry with it all manifestations of the diabetes the claimant might rationally on the evidence be found to have (e.g. dizziness).
43. The second is to identify the activity the claimant is limited in his ability to carry out due to his diabetes (and its effects). The language of “activity” and “carry out” puts the focus on the physical and mental processes needed to be able to carry out the activity or be limited in so doing.
44. The activity in issue here is “Preparing food”. What then is involved in that activity? The interpretation section found in Part 1 of Schedule 1 to the PIP Regs does not provide a definition of the phrase “Preparing food”. The closest to it that is defined is the word “prepare”, which “in the context of food, means make food ready for cooking or eating”. That may provide a definition of “prepare” that works for the purposes of the descriptors under activity 1, but if used to define “Preparing food” in activity 1 it would leave out of account cooking altogether. This would

leave parts of many of the descriptors with nothing to bite on or falling outside activity 1 altogether, neither of which can be correct given that the ability to cook is plainly intended to be part of the assessment of the activity 1 ability.

45. On this basis it seems to that the analysis of the content of activity 1 needs, as did the analysis for activity 2 in the *MM and BJ* decision referred to above, to identify the meaning and scope of the activity from the definitions of the words and phrases used in the descriptors associated with that activity. The task is less easy to do than in *MM and BJ* given the tightness of the definition of “take nutrition” for activity 2, with its focus on the actions needed to eat and drink, and the greater breadth of that which activity 1 seeks to capture. It is also not helped by the various different definitions of relevant words and phrases (as set out in paragraph 23 above) not sitting entirely easily together.
46. For example, if “prepare” means in the context of food “make food ready for cooking or eating” then descriptor 1(e) would seem to translate in the context of “preparing a simple meal” to needing supervision or assistance to be able to “make a cooked one-course meal for one using fresh ingredients ready for cooking or eating”, which might be thought to leave the cooking to be done earlier and by someone else. The answer to this might be either: (a) that the definition of “prepare” is only in the context of food (which appears only in descriptor 1(f)) and is not relevant to prepare a simple meal; or (b) that as points may be awarded if the claimant cannot do one of either preparing or cooking a simple meal, the more easy task of being able to make [an already] cooked one-course meal for one ready for eating is less likely to disadvantage claimants.
47. However, notwithstanding the problems the statutory definitions may cause, rather than solve, it seems to me that broadly speaking the tasks or mental and physical processes involved in the activity of “preparing

food” cover the following: making food ready for eating or cooking using fresh ingredients, and heating at or above waist height a one-course meal for one using fresh ingredients. It is the carrying out of those tasks or processes which has to be done – per regulation 4(2A) of the PIP Regs – inter alia, safely and to an acceptable standard. In other words, it is the task of cooking in the sense of heating food at or above waist height that needs to be done safely and to an acceptable standard. That does not, it seems to me, put any focus on the dietary content of that which is being cooked, beyond the need for the use of fresh ingredients. Likewise, it is the physical and mental processes needed to be able to make a one-course meal for one using fresh ingredients ready for cooking (or eating) which need to be done safely and to an acceptable standard. That will involve assessing the tasks needed to be able to prepare a simple meal for cooking. Those tasks I can readily see will include opening packaging, lifting and carrying, washing food, and peeling, chopping and cutting up the (fresh) foodstuffs. However beyond these tasks associated with making a simple meal using fresh ingredients, I do not see where the dietary content of that which is being prepared or cooked falls to be taken into account.

48. The statutory language of “a simple meal” and “a cooked one-course meal for one”, as opposed to “a cooked one-course meal for the claimant” or “a suitable meal”, as well as that statutory language only referring to the *content* of that which is being prepared or cooked in terms of “fresh ingredients”, in my judgment points against particular dietary requirements (other than fresh ingredients) falling within the scope of that which falls to be considered under Activity 1 “Preparing food”.
49. The House of Lords in *Moyna –v- SSWP* [2003] UKHL 44; [2003] 1 WLR 1929; *R(DLA) 7/03*, held, at paragraph [17], that the “cooked main meal” test in section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992 was a “notional test, a thought experiment, to calibrate the severity of disability”. The “notional meal”

provided the foundation for Upper Tribunal Judge Mitchell ruling out cultural or religious dietary requirements as being relevant to the cooked main meal test in the care component of disability living allowance in *AI*, a step which was carried across to activity 1 in Part 2 of Schedule 1 to the PIP Regs in *ZI*. For my purposes, however, the relevance of *Moyna* sounds in the language of PIP relating to "Preparing food" highlighted in paragraph 48 above. That language too in my judgment is couched in terms of a 'notional simple meal' test and is not therefore a test which admits of the particular dietary requirements of individual claimants.

Overall conclusion

50. For the reasons set out above, the tribunal's decision of 3 June 2016 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber) at a hearing.
51. The Secretary of State's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether the claimant's appeal will succeed on the **facts** before the new First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law as set out above and once it has properly considered all the relevant evidence.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

Dated 25th August 2017