

AM v SECRETARY OF STATE FOR WORK AND PENSIONS
[2017] UKUT 7 (AAC)
UPPER TRIBUNAL CASE NO: CPIP/2983/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 17 May 2016 at Hull under reference SC007/16/00441) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

- 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. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 0417 (AAC).
- C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on her claim that was made on 28 September 2015 and refused on 30 December 2015.
- D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: R(DLA) 2 and 3/01.

REASONS FOR DECISION

A. History and background

1. The claimant was in receipt of an award of disability living allowance when the Secretary of State invited her to make a claim for a personal independence payment. She did so, with the help of the CAB whose adviser completed the claim form for her. She was then interviewed and examined by a health professional. The decision-maker accepted the advice of the professional that the claimant scored 6 points for the daily living component and no points for the mobility component. The First-tier Tribunal dismissed her appeal, but I gave her permission to appeal to the Upper Tribunal, with comments on the four grounds put forward by her representative.

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B. Ground 1: adjourning to obtain the disability living allowance papers

2. The ground of appeal to the Upper Tribunal was that the First-tier Tribunal had failed to exercise its discretion to obtain the documents relating to the claimant's award of disability living allowance.

3. In my grant of permission, I said:

The first ground argues that the tribunal should have asked for the disability living allowance papers relating to your award of that allowance. I can find no reason why the tribunal should have done that. You did not relate your appeal back to your disability living allowance entitlement. The personal independence payment criteria are very different. You had completed the questionnaire in some detail, provided a lengthy letter of appeal and subsequent statement of the descriptors in issue, and had produced some medical evidence. In addition, the health professional had recorded your interview and findings on clinical examination. There was plenty of evidence that addressed the specific criteria that the tribunal had to apply.

4. In response to the appeal, the Secretary of State's representative had told me that the claimant's disability living allowance papers have been destroyed. In those circumstances, there is no merit in this point.

5. In reply, the claimant's representative has written at some length. What he says may be of some relevance in other cases and to the Secretary of State's practice, but this is not an appropriate case in which to add to the Upper Tribunal's jurisprudence on the issue. I would only say that I do not know what the Secretary of State's policy is on retaining disability living allowance papers once there has been a claim for a personal independence payment. If they are routinely destroyed after a period, this will affect the need for tribunals to consider adjourning to obtain them.

C. Ground 2: Activity 1 – preparing food

6. This is set out in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI No 377):

- | | |
|--|---|
| 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 |

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f. Cannot prepare and cook food.

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7. In her claim, the claimant indicated that she did not use an aid or appliance when preparing food, but did need help from another person. She wrote that she lacked motivation and was forgetful. In her appeal, she wrote that she needed supervision and assistance in order to cook. She said she could not chop vegetables and was forgetful, having burnt things.

8. The health professional gave the opinion that the claimant needed a perching stool to alleviate her pain, although her medication for pain was low. Physical examination showed normal grip in fist and fingers. Informal observation showed no cognitive impairment. The decision-maker accepted the advice, so the claimant scored 2 points for this activity.

9. The tribunal confirmed the score of 2 points for descriptor 1b on the ground that the claimant needed to use a perching stool in order to cope with her leg pain. It found that she had no problems with her hands or with cognition, and that she could, and did, prepare big simple meals and then froze it in portions for use later. The ground of appeal was that the tribunal failed to find whether the claimant could manage this 50% of the time.

10. In my grant of permission, I said:

The second ground concerns the fact that you only cooked in batches. You attributed your limitation with cooking to pain, motivation and forgetfulness. The tribunal's reasoning appears to be based on your cognitive abilities and the possibility that a perching stool would alleviate your pain. It does not mention depression. I note that descriptor 1d refers to 'prompting to be able to prepare or cook a simple meal' and not 'prompting to prepare or cook a simple meal'. The same points arising in respect of taking nutrition. I would be grateful if the Secretary of State's representative would address the significance of the wording of the descriptors for both activities with reference, of course, to the relevant definitions.

The tribunal's reasoning

11. In response to the appeal, the Secretary of State's representative has noted that the tribunal did not deal with any effect of the claimant's depression on her ability to cook, although it did refer to that condition elsewhere in its decision. The representative conceded that this was a mistake on the tribunal's part, because depression and the need for prompting were mentioned in her claim. However, the representative has argued that the points for prompting are the same as for the descriptor that the tribunal applied, so the mistake was not material to the outcome on this issue.

12. In reply, the claimant's representative has argued that if the tribunal had applied regulation 4, the claimant might have satisfied descriptor 1e, which carries 4 points.

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13. I have decided that the tribunal made an error of law in dealing with this Activity. Its findings appear to repeat the health professional's reasoning. The problem is that the tribunal did not say what it meant by 'cognition'. Did it intend to include forgetfulness? Did the health professional intended that? How could she have assessed forgetfulness through informal observation? The difference between descriptor 1b or 1c and 1e is 2 points, which would have been enough for the claimant to qualify for the daily living component at the standard rate. The tribunal did make the error accepted by the Secretary of State and, in the circumstances, it was material in that it might have affected the outcome.

The 'to be able to' issue

14. This is the question I raised in the grant of permission. The Secretary of State's representative has argued that the use of this phrase is not significant. He notes that the phrase is not always used, as it does not appear in descriptor 1e, which he attributes to inconsistent drafting. The claimant's representative has not commented on this issue in respect of Activity 1, although he has relied on the presence of the words in Activity 2, which is the subject of Ground 4.

15. Having considered the matter again, my view is that the use of the phrase relates back to the basic conditions of entitlement in sections 78 and 79 of the Welfare Reform Act 2012 and to the enabling provisions in section 80. For the basic conditions of entitlement, it is sufficient to refer to section 78, which deals with the daily living component. It provides that a person is entitled to a personal independence payment if their '*ability* to carry out daily living activities is limited' by their physical or mental condition (section 78(1)(a) and (2)(a)). That language occurs again in section 80, which contains the enabling provisions for the Activities. The best explanation I can find for the use of the phrase in the descriptors is that it picks up the word 'ability' in the basic conditions of entitlement and in the enabling provisions.

16. The Secretary of State's representative is right about inconsistencies in the drafting. It is sufficient to point out that paragraph 1 of Schedule 1 contains a definition of 'engage socially', an expression that is not used anywhere in the legislation. The absence of the phrase in descriptor 1e is adequately accounted for as another inconsistency.

D. Ground 3: Activity 9 – engaging with other people face to face

17. This is set out in Schedule 1 to the Regulations:

- | | |
|--|---|
| a. Can engage with other people unaided. | 0 |
| b. Needs prompting to be able to engage with other people. | 2 |
| c. Needs social support to be able to engage with other people. | 4 |
| d. Cannot engage with other people due to such engagement causing either – | 8 |

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- (i) overwhelming psychological distress to the claimant; or
- (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.

Paragraph 1 of Schedule 1 contains this definition, which is generally accepted as applying to Activity 9:

‘engage socially’ means –

- (a) interact with others in a contextually and socially appropriate manner;
- (b) understand body language; and
- (c) establish relationships

18. In her claim, the claimant indicated that she needed help to mix with other people and that she found this difficult because of severe anxiety or distress. She wrote that she avoided mixing as she got anxious and felt dizzy and sick. In her appeal, she said that her difficulty was with crowds. She told the health professional that crowds made her nauseous. The professional’s opinion was that the claimant could engage with others unaided. She wrote that the evidence and observations did not support any difficulties. The decision-maker accepted the advice.

19. The First-tier Tribunal found that the claimant ‘may not like to be in large groups however she is able to engage with people in smaller social groups and so can score no points under this activity.’ The ground of appeal was that the tribunal misdirected itself by limiting its consideration to small groups.

20. In my grant of permission, I said:

The third ground concerns engaging with others. The tribunal said that although you might have difficulties with large groups, you could engage in smaller groups. Your representative is correct that the descriptors do not refer to engagement in small groups, but they do not refer to large groups either. The test is whether you can engage with people face to face. You are able to do that. Does the fact that in particular circumstances you would have a problem alter that?

21. In response to the appeal, the Secretary of State’s representative has argued that the starting point is to consider what is meant by ‘other people’. It is not limited to people you already know, as is made clear by the reference to ‘establish relationships’ in the definition of ‘engage socially’, which has been interpreted to apply to this Activity. He interprets this as referring to a reciprocal exchange rather than a friendship or partnership. From this, he reasons that the Activity is essentially concerned with engagement one-to-one or in small groups.

22. In reply, the claimant’s representative has simply said that the fact that the claimant cannot engage in certain circumstances is sufficient to satisfy the Activity and the tribunal did not consider regulation 4.

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23. I have decided that the tribunal did not make an error of law in dealing with this Activity. It applies to 'engaging with other people *face to face*'. That governs every descriptor under this Activity. Engaging face to face is by definition only possible on a one-to-one basis or within a small group. That is the function being tested by the Activity. It is not possible to engage with a large crowd face to face, although it is possible to engage with people within that crowd or in small numbers.

24. The fact that a claimant has difficulties engaging with individuals or small numbers when in a crowd is a circumstance in which they may experience difficulties. But it is no more relevant to the function tested by the activity than any other circumstance, such as noise, loudspeaker announcements or any nearby activity that may distract attention from the other person.

25. As I read the claimant's evidence, her difficulty arises from being present among a crowd of people. This affects her generally whether or not she is trying to engage with someone. It is merely a circumstance in which a difficulty arises rather than a problem with the function of engaging face to face itself.

E. Ground 4: Activity 2 - taking nutrition

26. This is set out in Schedule 1 to the Regulations:

- | | |
|---|----|
| a. Can take nutrition unaided | 0 |
| b. Needs – | 2 |
| (i) to use an aid or appliance to be able to take nutrition; or | |
| (ii) supervision to be able to take nutrition; or | |
| (iii) assistance to be able to cut up food | |
| c. Needs a therapeutic source to be able to take nutrition. | 2 |
| d. Needs prompting to be able to take nutrition. | 4 |
| e. Needs assistance to be able to manage a therapeutic source to take nutrition. | 6 |
| f. Cannot convey food and drink to their mouth and needs another person to do so. | 10 |

In particular, this ground concerns descriptor 2d. The relevant definitions are set out in paragraph 1 of Schedule 1:

'prompting' means reminding, encouraging or explaining by another person.

'taking nutrition' means-

- (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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27. The claimant has diabetes that is controlled by diet. In her claim, the claimant indicated that she needed help to eat and drink. She wrote that she lacked appetite to eat most days and tended to drink coffee and eat biscuits. She needed to be prompted or encouraged to eat every day. In her appeal, she wrote that she did not know whether this was a result of her depression. The health professional's opinion was that the claimant could take nutrition unaided. The decision-maker accepted that opinion.

28. The First-tier Tribunal found that she could and did eat. She had cereal for breakfast and ate a small amount of food when her daughter came home from school. The ground of appeal was that 'the tribunal erred in law in failing to make findings of fact on the issue of whether she needed help with her diet to control diabetes and whether Descriptor 2d applied'.

29. In my grant of permission, I said:

The fourth ground concerns your diabetes. You said you had no appetite (pages 9 and 21)) and that you did not eat the right food (page 89), but the health professional recorded you as saying that you ate a main meal at night (page 57). This is the principal ground on which I have given permission. I have already mentioned the precise wording of the descriptors. Given the definition of 'take nutrition', I have asked myself how the need for prompting or supervision to ensure you eat correctly for your diabetes might fit in. Would eating the wrong foods not be 'nutrition'? I note that Judge Mark in *SA v Secretary of State for Work and Pensions* [2015] UKUT 512 (AAC) treated lack of appetite and motivation as within this activity. Is that right, given the definition of 'take nutrition'?

30. In response to the appeal, the Secretary of State's representative has referred to the recent decision of Upper Tribunal Judge Wright in *MM and BJ v Secretary of State for Work and Pensions* [2016] UKUT 0490 (AAC), in which he decided:

1. ... in its statutory context the activity in issue is concerned with the *act* of eating (or drinking) and not with the nutritious quality of what is being eaten (or drunk).

31. In reply, the claimant's representative has argued that the type of food is irrelevant. Relying on the words 'to be able to', he argued that the test is not concerned with the nature and quality of the food. The words show that the test is limited to encouraging the claimant to overcome their inability to make a decision to eat. The person will then eat whatever they wish. In the claimant's case, it will be the diet prescribed for her diabetes. The cases have focused on the word 'nutrition' and the argument has been that this included encouraging someone to eat properly. The descriptor covers anyone who lacks the motivation to eat and Judge Mark was right to include this within the descriptor.

32. The argument now put by the claimant's representative differs from the one he used in his ground of appeal. That ground must fail following Judge Wright's

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decision. The argument now put might succeed if the evidence showed that the claimant needed prompting (as defined) in order to eat. It does not show that. What it shows is that the claimant is able to perform the physical functions involved in eating on her own initiative. She takes breakfast and then is prepared to eat to keep her daughter company later in the day. The evidence does not indicate that her daughter's presence plays any part in her ability to eat breakfast. Even when she eats later with her daughter, the evidence does not show that her daughter prompts her in any way within the definition.

33. There will be a rehearing of this case, so it is possible that the evidence given then will put a new perspective on the claimant's difficulties with this Activity.

**Signed on original
on 06 January 2017**

**Edward Jacobs
Upper Tribunal Judge**