

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/3104/2017

Before: A. Rowley, Judge of the Upper Tribunal

Decision: I allow the appeal. As the decision of the First-tier Tribunal (made on 4 August 2017 at Cardiff under reference SC188/17/01539) 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.

REASONS FOR DECISION

1. The parties agree that the First-tier Tribunal erred in law, that its decision should be set aside, and that I should refer the case for re-determination by a differently constituted First-tier Tribunal. Although the parties have agreed to a decision without reasons, nevertheless I feel that it is appropriate for me to give brief reasons for my decision.
2. The issue on the appeal is whether the tribunal erred in law in its consideration of daily living descriptor 5b which is contained in Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. A claimant who meets the criteria of the descriptor scores two points. As the tribunal had awarded six points to the claimant under other daily living activities, any error in its consideration of descriptor 5b would constitute a material error.
3. Under descriptor 5b a claimant scores two points if he or she:
“Needs to use an aid or appliance to be able to manage toilet needs or incontinence.”
4. Under the definitions in part 1 of Schedule 1 “manage incontinence” means “manage involuntary evacuation of the bowel or bladder, including use a collecting device or self-catheterisation, and clean oneself afterwards”.
5. The following principles have been established in Upper Tribunal cases:
 - (a) Incontinence pads fall within the definition of “an aid or appliance” (*BS v SSWP (PIP)* [2016] UKUT 456 (AAC)).
 - (b) “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.” (*SSWP v NH (PIP)* [2017] UKUT 258 (AAC)).
 - (c) The “need” must be a reasonable need. Thus, the descriptor may be satisfied even if an aid or appliance is not actually used, so long as it is reasonably needed (*MB v SSWP (PIP)* [2016] UKUT 250 (AAC)).

(d) It is sufficient if a person satisfies a descriptor at some point during a 24 hour period, for a period which is more than trifling and which has some degree of impact on him or her (*TR v SSWP (PIP)* [2015] UKUT 626 (AAC); [2016] AACR 23).

6. In this case the findings of the tribunal included:

“The Tribunal accepted that the [claimant] had some problem with bed wetting at night but find that it did not occur during the day as the [claimant] advised that she did not wear pads. The Tribunal preferred the evidence of Dr Slater on page 107 who advised that she had been told that the [claimant] had ‘nocturnal bed wetting and urge incontinence’. This does not demonstrate that the [claimant] would have needed an aid to manage her toileting needs for the majority of the time.”

7. The claimant’s written case was that she wore incontinence pads during the day and night, although she appears to have told the tribunal that she did not wear pads. It is not wholly clear to the reader whether the tribunal found that the claimant did not wear incontinence pads at all, or whether she did not wear them during the day but did at night. The lack of clarity, in itself, is arguably an error of law.

8. Be that as it may, for the following reasons I find that the tribunal erred in law in its consideration of the claimant’s night-time needs¹. If the tribunal found that the claimant *did* wear incontinence pads at night (which, on any view, constitutes some point of a 24 hour period), it erred in failing to explain why that meant that she did not satisfy daily living descriptor 5b.

9. If, on the other hand, the tribunal found that the claimant did *not* wear incontinence pads at night, it failed to consider a further relevant matter in the light of its clear finding that she wet the bed at night (with an unspecified frequency). Drawing together the principles set out above, daily living descriptor 5b will be satisfied if a claimant has a reasonable need to use incontinence pads (even on a precautionary basis) at night for the majority of the time, even if they are not in fact used by the claimant. It was incumbent on the tribunal to explore and make findings on this issue. Its failure to do so amounted to an error of law.

10. For these reasons, the tribunal’s decision must be set aside. The parties submit that I should remit the matter to a new First-tier Tribunal for a rehearing. I have carefully considered whether I should do so, or whether I should remake the decision, particularly as the appeal is now in respect of a closed period, a new claim for PIP having been made on 21 August 2017. In the exercise of the wide discretion given to me by section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, on balance, I have decided that it is appropriate for me to remit the matter for a rehearing, not least because it seems to me that, in addition to the errors referred to above, the tribunal may well also have erred in law in the light of *YM v SSWP (PIP)* [2018] UKUT 16 (AAC), a decision of Upper Tribunal Judge Ward which was issued after the parties had made their submissions to me. I have taken the view that, given the parties have already agreed that the tribunal had erred in law and that I should remit the matter for rehearing, it would

¹ For the purposes of this decision it is not necessary for me to consider further the tribunal’s findings in relation to her urge incontinence.

be disproportionate and would cause undue delay if I were to direct further submissions on the effect of *YM* in this case. Nevertheless, at first blush, it seems to me that the tribunal may well have erred in failing to explain why it was not making an award of PIP when that was potentially inconsistent with the claimant's previous award of DLA. Any such error may have materially affected the tribunal's decision on the mobility component. I am not in a position to make such further findings of fact on that issue which would enable me to remake the decision.

11. As I have decided to remit the matter for a rehearing, it is not necessary for me to consider any other errors of law the tribunal may have made. Any that may have been made will be subsumed by the rehearing.

Directions in relation to the rehearing

12. I give the following directions in relation to the rehearing. They may be added to by a District Tribunal Judge.
13. The new tribunal should not involve any judge or other member who has previously been a member of a tribunal involved in this appeal. It 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. Whilst the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to those, but must consider *all* aspects of the case entirely afresh.
14. The new tribunal must not take account of circumstances that were not obtaining at the time of the decision: 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.
15. It will be noted from my grant of permission to appeal that I had some potential unease about the claimant's presentation at the hearing, and in particular the learning difficulties which her representative, almost in passing, referred to in her written submissions². I wondered whether those difficulties could have impacted upon the evidence that the claimant gave to the tribunal. This was potentially important, as the tribunal had apparently asked the claimant's sister (who, it seems, had been 'correcting' the claimant's evidence) to leave the hearing, and it had then gone on to find that the claimant had been dishonest when giving her evidence. Whilst it has not been necessary for me to consider whether any error of law arose from those circumstances, nevertheless I simply observe at this stage that if the claimant's representative has any further evidence to adduce as to the claimant's learning and/or communication difficulties, it should be sent to the new tribunal (together with any further evidence which the claimant wishes to rely on) within one month of the date of the letter sending out this decision. The new tribunal may then, if it sees fit, consider the extent of any difficulties it considers the claimant may have and whether any allowances should be made for them in its conduct of the rehearing.
16. The District Tribunal Judge who gives directions for the rehearing may wish to consider whether to direct the Secretary of State to provide any evidence which underpinned the claimant's previous DLA award which is not yet on the First-tier

² For funding reasons, the claimant's representative was not able to attend the hearing.

Tribunal's file. In any case, the new tribunal should be mindful of what Upper Tribunal Judge Ward said in *YM*, referred to in paragraph 10 above.

17. For the sake of completeness, I should add that the fact that this appeal has succeeded on a point of law says nothing one way or the other about whether the claimant's appeal will succeed on the facts before the new tribunal.

A Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 12 March 2018