IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER **Case No *UA-2023-001449-PIP***
[2024] UKUT 211 (AAC)

Appellant: **JT**
Respondent: **SSWP**

DECISION OF THE UPPER TRIBUNAL

E FITZPATRICK

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal: First-tier Tribunal (Social Security and Child Support)
Tribunal Case No: SC 337/23/00267
Tribunal Venue: Newcastle upon Tyne
Decision date: 19.5.23

Decision date: 16th July 2024
Decided on consideration of the papers
Representation:
Appellant: S Isaac, RBL (with assistance from CPAG Upper Tribunal Project)
Respondent: R Jagger (DWP Decision-Making and Appeals)

RULE 14 Order Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings.

IN THE UPPER TRIBUNAL **Upper Tribunal Case No. *UA-2023-001449-PIP***
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 211 (AAC)**

Before: Ms E Fitzpatrick, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (SC 337/23/00267) of 19.5.2023 involved the making of an error on a point of law.

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I **set aside** the Tribunal's decision and **remit the appeal for re-hearing** before the First-tier Tribunal. Directions for the re-hearing are at the end of the reasons for the decision.

REASONS FOR DECISION

Background

1. In brief, the appellant made a claim for PIP on 15/09/2022. A PIP2 questionnaire was received on 15/11/2022. The appellant attended a telephone assessment with a health professional on 10/01/2023. On 20/01/2023 a decision maker decided that he scored 4 points for the daily living activities and 0 points for the mobility activities and as such was not entitled to an award of PIP. Mr T requested a mandatory reconsideration and on 20/02/2023 a decision maker looked at the decision again but decided not to change it. The appellant lodged an appeal with HMCTS on 03/03/2023. The First-tier Tribunal heard the appeal on 19/05/2023. The FTT confirmed the decision of the Secretary of State, although it awarded 6 points for the daily living activities and 4 points for the mobility activities, this was still insufficient for an award of PIP. The appellant now appeals to the Upper Tribunal.

Proceedings before the Upper Tribunal

2. The appellant's grounds of appeal as set out by his representative are twofold. Firstly, it is argued in relation to Activity 9, Engaging with other people face to face, insufficient findings were made by the FTT as to who needed to give the prompting accepted as needed. Secondly, it was submitted there was inadequate consideration of risk by the FTT when considering Activity 5, Managing toilet needs or incontinence, which was also inconsistent with the

FTT's findings on the same issue in the context of Activity 4 Washing and bathing.

3. I granted permission to appeal on 20th November 2023. The respondent has forwarded a submission supporting the appeal on the second ground referred to above. I have decided this case on the papers as I consider I have sufficient information to do so fairly, bearing in mind the overriding objective. I also note this is an appeal supported by the respondent, albeit solely on the second ground of appeal. I have provided full reasons as I consider it is merited in this case and it may be helpful in assisting Tribunals with the application of regulation 4 (2A) of the Social Security (PIP) Regulations 2013 in particular (a) safely and how this is relevant to the consideration of regulation 7 of the 2013 Regulations, in particular what is now commonly referred to as the "50% rule" in regulation 7(1)(a).

Discussion – error of law

4. The appellant told the Health Professional that he suffers with muscle spasms and pain in his legs. There is also a GP factual report (page 91 of the FTT bundle) which indicates the appellant suffers with tingling/ stabbing pain and a feeling of weakness in all limbs. In addition, the appellant's representative advised the appellant's leg goes dead on the toilet, so a grab rail was due to be installed on the left-hand side of the toilet (addition E, page 4).The FTT refers in paragraph 12 of its written reasons to the fact the appellant no longer drives a car alone, subsequent to an incident in October 2022, when his foot went into spasm causing him to crash into the car in front.

5. The First-tier Tribunal has provided comprehensive written reasons, however, when considering daily living activity 5, it found that the claimant's leg "does give way occasionally and a rail will definitely assist on these occasions" (para 18) but the FTT then goes on to conclude the request for this aid "does not meet the legal test of being *required for the majority of the time*" and awards no points for activity 5.

6. This reasoning is problematic in several respects. Firstly, as the appellant's representative pointed out, it appears inherently inconsistent with the FTT's findings in the preceding paragraph where, in the context of the consideration of Activity 4 (Washing and bathing), the FTT found the Appellant "had no control over when this (muscle spasm) would exacerbate itself to the extent it made the activity (washing and bathing)....unsafe." The FTT took the view an aid *was* required in order for the appellant to carry out this activity safely and awarded 2

points. The FTT reached a different conclusion in respect of Activity 5. While it is noted this is a different activity requiring some different functional ability, it is not clear why, given the FTT appear to have accepted the uncontrolled nature of the muscle spasm(s), a different conclusion was reached in relation to Activity 5. Specifically, in my view, insufficient findings of fact were made by the FTT in its consideration of this issue to support this conclusion. Without findings of fact about, inter alia, whether the appellant had sufficient warning to grab the rail in the event of the fall, it is not sufficient for the FTT to reason as the leg does not give way most of the time, he does not need to use an aid (in this instance a rail), most of the time. In this regard the FTT was in error of law.

7. I am also in agreement with both the appellant's representative and the respondent that the FTT was in error in its (lack of) consideration of Regulation 4(2A) (a) safely. The First-tier Tribunal has focussed its reasoning in respect of activity 5 on the fact that the appellant's leg gives way "occasionally" but not the majority of the time. While the FTT accepts by it's finding the appellant's leg gives way occasionally and he has no control over when this would exacerbate itself to the extent washing and bathing became unsafe, there is no explicit consideration in the FTT's reasons of the issue of whether Activity 5 could be performed *safely as* per Regulation 4(2A) (a). This is not referred to in the FTT's written reasons in respect of Activity 5. Although the First-tier Tribunal appear to have had some regard, in general terms, to the likelihood of harm occurring, it is not clear that it has considered the *consequences* that might occur if the appellant's leg gave way. As such the First-Tier Tribunal has not applied the correct legal test when considering if the appellant requires the use of an aid, such as a grab rail, to carry out the activity in accordance with the "safely" requirement in regulation 4(2A). On this basis the FTT is in error of law. Given the appellant scored 6 points for the activities of daily living, both errors of law identified above are material as they may have impacted on the appellant qualifying for an award of the daily living component of PIP.

8. Given my reasons above I am not required to consider the appellant's first ground of appeal. I indicated in my grant of permission it was my view this ground had less merit than the second ground advanced. This remains my view.

The relationship between Regulation 4(2A) and Regulation 7

9. FTT 's are busy and have much to consider. It may therefore be helpful to provide a brief recap of how Tribunals should approach the consideration of regulation 4(2A) and regulation 7. *RJ, GMcL and CS v Secretary of State for*

*Work and Pensions (PIP) [2017] UKUT 105 (AAC), r*eported as [2017] AACR 32, provides some helpful guidance about how this should be done;

55. "**A*s is clear from our analysis, regulation 7 has no part to play in the construction of regulation 4(2A) and (4)****. Indeed Mr Komorowski 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, th****at may be so even though the harmful event or the event which triggers the risk actually occurs on less than 50 per cent o****f the days.*

Safety and supervision: overall conclusion

*56. In conclusion, the meaning of "safely" in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring, and the severity of the consequences are relevant**. The same approach applies to the assessment of a need for supervision."*

10. In line with the above if, for the majority of days, an appellant was unable to carry out an activity safely then the relevant descriptor would apply. A point scoring descriptor may apply even though the harmful event or the event which triggered the risk occurred on less than 50% of the days. What is important is whether there is a real possibility of harm occurring that cannot be ignored.

11. In this case the FTT has failed to explicitly state in its written reasons whether regulation 4(2A)(a) safely had been considered in the context of Activity 5. It also failed to make sufficient findings of fact on which to base its conclusions. Finally, it either failed to consider regulation 4(2A) (a) in the context of this activity, or if it did so, by focussing on the *occasional* nature of the muscle spasms, it conflated the consideration of regulations 4 and 7 with the result that the incorrect test was applied in relation to regulation 4(2A)(a) safely and, axiomatically, priority was incorrectly accorded to regulation 7 (the 50% rule).

This is not consistent with the guidance given in *RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP) [2017] UKUT 105 (AAC)* and is in error of law.

12. I find that the First-tier Tribunal erred in law as set out above. There is no need to rule on the remaining ground (the appellant has not requested that the Upper Tribunal does so). The First-tier Tribunal's decision is set aside.

13. The appellant did not object to the Secretary of State's invitation to the Upper Tribunal to remit his case to the First-tier Tribunal for re-hearing and given further findings of fact are required, it is appropriate to remit the case back to the FTT. As a matter of law, the next tribunal cannot, in its reasoning, take into account the findings of fact or conclusions of the tribunal whose decision I have set aside. The undetermined grounds of appeal are just that – undetermined.

14. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view, on whether the appellant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

Directions for the re-determination of the appellant's appeal

I direct as follows:

15. The appeal against the Secretary of State's decision of 20th January 2023 is remitted to the First-tier Tribunal for re-determination.

16. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.

17. If the appellant wishes the First-tier Tribunal to hold an oral hearing before his remitted appeal is determined he must make a written request to the First-tier Tribunal to be received by that Tribunal within one month of the date on which this decision is issued.

18. If the appellant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.

19. Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.

20. The parties are reminded that the law prevents the First-tier Tribunal from taking into account circumstances not applying at the date of decision (section 12(8) of the Social Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if it says something relevant about the circumstances at 20th January 2023.

(Signed on the Original)

E Fitzpatrick
Judge of the Upper Tribunal
Authorised for issue 16/7/24