

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CPIP/3126/2016

**Before:** M R Hemingway: Judge of the Upper Tribunal

**Decision:** As the decision of the First-tier Tribunal (made on 15 April 2016 at Nuneaton under reference SC222/16/00015) involved the making of an error 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. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 1 September 2015 and refused on 3 November 2015.

**REASONS FOR DECISION**

**What this appeal is about**

1. This appeal raises some issues concerning the way in which claimants with alcohol dependency are to be assessed for possible entitlement to a personal independence payment (PIP).

**The background circumstances**

2. The claimant, who was born on 19 November 1970, has health problems which, when claiming PIP, he listed as epilepsy, severe back pain, severe leg cramps, muscular wastage and loss of weight. He did not, at that stage, mention any difficulties linked to his consumption of alcohol but in a letter of 14 March 2016 his GP described him as being "chronically disabled due to a history of persistent alcoholism". He was previously in receipt of the lower rate of the mobility component and the middle rate of the care component of disability living allowance (DLA). However, as a consequence of the process by which DLA is being replaced by PIP for most claimants, it became necessary for him to claim PIP. He did so. On 6 November 2015, seemingly in reliance upon the content of the report of a health professional who had seen the claimant on 21 October 2015 and had then prepared a report at that date, the Secretary of State decided that payment of DLA would cease on 1 December 2015 and that there was no entitlement to PIP from and including 1 September 2015. Indeed, the Secretary of State took the view that the claimant did not score any points at all under any of the activities and descriptors relevant to either the daily living component or the mobility component of PIP. Since an application for mandatory reconsideration did not result in any alteration to the terms of the decision, the claimant decided to appeal to the First-tier Tribunal ("the tribunal")

### **Some legislative provisions in brief**

3. Personal independence payments were introduced by the Welfare Reform Act 2012. They consist of two components: the daily living component and the mobility component (section 77(2)). The daily living component is governed by section 78:

#### **“Daily living component**

- 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; and ...
- (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; and ...”

4. The mobility component is governed by section 79:

#### **“Mobility component**

- 79.** - (1) A person is entitled to the mobility component at the standard rate if –
- (a) ...
  - (b) the person’s ability to carry out mobility activities is limited by the person’s physical or mental condition; ...
- (2) A person is entitled to the mobility component at the enhanced rate if –
- (a) ...
  - (b) the person’s ability to carry out mobility activities is severely limited by the person’s physical or mental condition; ...”

5. The daily living and the mobility activities are prescribed by Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. Part 2 of the Schedule contains the activities and descriptors relevant to daily living and Part 3 contains those relevant to mobility. It is not, however, necessary for the purposes of this decision to set them out.

### **The appeal to the First-tier Tribunal**

6. The appellant had asked for an oral hearing of his appeal so the tribunal held one. He attended. It is noted in the record of proceedings that he had attempted to bring a bottle of vodka into the Hearing Centre but had been prevented from doing so by security staff. It is recorded that he told the F-tT that, around the date of the decision under appeal, he would have been drinking half a bottle of vodka and five cans (presumably of beer, lager or cider) each day. He said he would drink “first thing in morning”. He explained in response to questions put to him that he had developed epilepsy first of all and that “alcoholism came

later”. He told the tribunal he would have fits and that the last one had occurred some six or seven weeks prior to the date of the hearing. He also provided the tribunal with some information regarding the way in which he felt his various other health problems impacted upon him.

7. The tribunal dismissed the appeal. Its decision was slightly more generous than had been the Secretary of State’s (from the claimant’s perspective) in that it awarded him 2 points under daily living descriptor 6b because it thought he would need an aid or appliance to be able to dress or undress. But that, of course, did not get near the 8 point threshold for even the standard rate of the daily living component. The tribunal, upon request, went on to issue its statement of reasons for decision (statement of reasons). Under the heading “The facts” it said it was concluding that the claimant was able to perform, unaided and unassisted in any way, the various tasks referred to in the PIP activities and descriptors other than dressing which it found as noted above, he could do with an aid. It mentioned alcohol only once and in that regard it said this:

“ 25. Whilst the Tribunal accept that the Appellant is alcohol dependent, the tribunal find that alcohol is not having an impact upon the Appellant’s functioning’s for the reasons set out below.”

8. The tribunal then gave, but only with reference to the various other health problems the claimant had claimed to suffer from, an explanation as to why it was finding that none of the activities and descriptors other than daily living descriptor 6b had application. So, the “reasons set out below”, whilst carefully expressed, did not explain, despite the promise that they would, why it was thought the claimant’s alcohol dependency and his propensity to consume it was not impacting upon his functioning. One of its key findings, though, was that he had not had a day time epileptic fit for over 12 months and that his epilepsy was adequately controlled with medication such that it was not posing a risk to him.

### **The proceedings before the Upper Tribunal**

9. Having been refused permission to appeal by a district tribunal judge of the First-tier Tribunal, the claimant renewed his application with the Upper Tribunal. His grounds were to the effect that the tribunal had “refused to listen to evidence” about certain pending hospital appointments. He also suggested that weight should not have been accorded to the health professional’s report.

10. I granted permission but not for the reasons the claimant was seeking it. Essentially, I thought the tribunal might have erred, having concluded that the claimant was dependent upon alcohol, in failing to make a clear finding as to whether it regarded alcohol dependency as being a “physical or mental condition” (although I thought it might have been implicit from what it said that it did); in failing to consider whether any intoxication in consequence upon the alcohol dependency led to an inability, without prompting, assistance or supervision, to perform relevant tasks during a day or a part of a day; in failing to consider whether intoxication might lead to an inability to perform relevant tasks safely, to an acceptable standard, repeatedly and within a reasonable time period (see regulation 4(2A) and 4(4) of the Social Security (Personal Independence Payment) Regulations 2013) (the PIP Regulations) and, to put it more fundamentally, in failing to make sufficient findings regarding the impact of the alcohol dependency at all. I directed submissions from the parties.

11. Mr R J Whitaker, now acting on behalf of the Secretary of State, has supplied a helpful submission of 31 January 2017. Broadly speaking, he accepts that the tribunal erred in the ways I thought it might have done. He accepts that the tribunal ought to have, and did not, make findings with respect to the severity of alcohol addiction, the likely frequency and extent of intoxication within each particular day and any impact such might have upon the PIP activities. Accordingly, he invites me to set aside the tribunal's decision and to remit for a complete rehearing. Having made his position clear as to that, though, he then goes on to refer to the decision of the Upper Tribunal in *TR v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 626 (AAC) in which it was said that for a descriptor to apply on a given day then the ability to perform a relevant task or function must have some tangible impact upon a claimant's activity and function during a day but not more than that (see paragraph 32). Applying that general approach to the particular position of an alcoholic and referring to what was said from paragraphs 33 to 37 of *TR*, he argues that a person who might become intoxicated towards the end of the day but can otherwise function, might not meet the requirements of a specific descriptor if the task relevant to that descriptor only has to be completed once a day or only at certain times of the day. The specific example he gives is a person who might be able to prepare and cook food "through the various mealtimes of the day" but is then unable to do so, due to intoxication, for perhaps the last hour or so prior to retiring to bed. Such a person, he says, would not score points under daily living activity 1.

12. The claimant, by way of reply to Mr Whitaker's submission, said that his painkilling medication does not take effect quickly and asserts that he was not previously aware of the fact that he could, if wished, make a fresh claim for PIP. That latter comment was simply made in response to Mr Whitaker's observation that there was no departmental record of a further claim having been made. Perhaps the claimant, now having been put right, has by now made a fresh claim but I do not know if he has or not.

### **My consideration of the issues**

13. There have been a number of important decisions concerning the approach to be taken to persons suffering from chronic alcoholism and other forms of addiction in the context of disability living allowance and employment and support allowance. I have in mind, in particular, *R(DLA) 6/06*; *JG v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 37 (AAC) and *SD v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 100 (AAC).

14. In *R(DLA) 6/06*, a decision made in the context of DLA by a Tribunal of Social Security Commissioners it was decided, amongst other things, that whilst the transient and immediate effects consequent upon a person choosing to consume too much alcohol ought not to be taken into account in determining entitlement. That is because a person exercising such a choice could reasonably be expected to avoid any need for attention or supervision by controlling alcohol consumption. But, alcohol dependency is a medical condition and a person who cannot realistically stop consuming alcohol to excess because of a medical condition could reasonably be said to be suffering from a disability and to require attention, supervision or other help contemplated by legislation relating to that particular benefit. It is worth noting that the Tribunal of Commissioners had received expert evidence, which it accepted, concerning the nature of alcohol dependence. In its summary of that evidence it said:

“ 18. Alcohol dependence is a discrete illness, well recognised by the medical professions and manuals of diagnostic criteria. Alcohol dependence falls within the category of Substance Dependence in the current Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM IV). The illness is diagnosed on the basis of a constellation of markers, as follows:

‘A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period

- (1) tolerance, as defined by either of the following:
  - (a) a need for markedly increased amounts of the substance to achieve intoxication or desire effect
  - (b) markedly diminished effect with continued use of the same amount of the substance
- (2) withdrawal, as manifested by either of the following:
  - (a) the characteristic withdrawal syndrome for the substance ...
  - (b) the same (or a closely related) substance is taken to relieve or avoid withdrawal symptoms
- (3) the substance is often taken in larger amounts or over a longer period than was intended
- (4) there is a persistent desire or unsuccessful efforts to cut down or control substance use
- (5) a great deal of time is spent in activities necessary to obtain the substance (eg visiting multiple doctors or driving long distances), use the substance (eg chain-smoking), or recover from its effects
- (6) important social, occupational, or recreational activities are given up or reduced because of substance use
- (7) the substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance (eg current cocaine use despite recognition of cocaine-induced depression, or continued drinking despite recognition that an ulcer was made worse by alcohol consumption).’

The definition of Dependence Syndrome in the current equivalent World Health Organisation manual (ICD10) largely corresponds.”

15. It went on to say:

“ 33. Rather than a clear cut distinction between dependence and choice, in our judgment it is more helpful to think in terms of the degree of self-control that is realistically attainable in the light of all of the circumstances, including the claimant’s history and steps that are available to him to address his dependence. A person who cannot realistically stop drinking to excess because of a medical condition and cannot function properly as a result can reasonably be said both to be suffering from disablement and to require any attention, supervision or other help contemplated by the legislation that is necessary as a consequence of his drinking. We can see no reason why the effects of being intoxicated should not be taken into account in determining his entitlement to the care component of DLA ...”

16. In *JG* it was decided, amongst other things, that the summary of the expert evidence in *R(DLA) 6/06* should be adopted by decisions makers and tribunals in employment and support allowance (ESA) cases as representing the current mainstream medical view. Mr Whitaker does not suggest that any approach different to that ought to be taken in the context of PIP. I am sure he is right not to do so. So, it follows that alcohol dependency, if accepted or if established by the evidence, will amount to a “physical or mental condition”, specifically a mental one, as the phrase is used at sections 78 and 79 of the Welfare Reform Act 2012. Difficulties caused by alcohol dependency, therefore, may be relevant to the question of whether or not points are to be scored under the daily living and mobility activities and descriptors though it seems to me, in general terms, that it is more likely that the daily living descriptors will have relevance.

17. The tribunal, as already noted, did find that the claimant was dependent upon alcohol and did, I accept, implicitly decide that such dependency amounted to a “mental condition”. So, that opened the gateway to potential entitlement because the initial threshold test was met.

18. The tribunal did, though, then go wrong in effectively overlooking any possible consequences of the alcohol dependency and any intoxication when assessing whether or not any of the descriptors were satisfied. Mr Whitaker accepts that it was guilty of that significant omission. Its failure to do so clearly did amount to an error of law and, indeed one which, had it not been made might (I do not say would) have led to a different result. So, the tribunal’s decision does have to be set aside.

19. There is then the question of whether I should remit or re-make the decision myself. The Secretary of State has invited me to remit. I suspect that the claimant would like me to re-make the decision myself albeit that he has not actually said so. I appreciate he has been waiting a long time for this decision. However, the absence of factual findings concerning such as the severity of the addiction, the frequency and degree of intoxication within each day and the impact upon the ability to perform the PIP functions safely, to an acceptable standard, repeatedly and within a reasonable time period (see Regulations 4(2A) and 4(4) of the PIP Regulations) does mean that further fact finding to a substantial degree is needed. I suppose I could hold a hearing and hear evidence from the claimant myself but neither party has asked for a hearing before the Upper Tribunal and it seems to me that if there is to be such a hearing for fact finding purposes that ought properly to be before the tribunal which is an expert fact finding body and which will have available to it a range of expertise through the composition of its panel. So I have concluded that remittal to a new tribunal is the appropriate course.

### **Some matters for the new tribunal**

20. The new tribunal will not be limited to the grounds upon which I have set aside the tribunal’s decision. It will consider all aspects of the case, both fact and law, entirely afresh. Neither will it be limited to considering only the evidence which was before the previous tribunal. It will decide the case on the basis of all the evidence before it and which may include additional documentation as well as oral evidence. As to that, given the need for further fact finding, the claimant would be well advised to attend the oral hearing as he did the previous one.

21. Of course, it does not follow that merely because a claimant is dependent upon alcohol and therefore has a “mental condition”, that that claimant will be unable to perform any of the various tasks or functions relevant to PIP. As was mentioned in R(DLA) 6/06, for example, there is the concept of the “functioning alcoholic”, who might be dependent yet still hold down a job. Such a person might not meet the point scoring requirements under PIP even for a part of any day. Matters will vary from one individual to another and careful fact-finding on the part of the new tribunal will be necessary. Also, as Mr Whitaker correctly points out, whilst alcohol dependence is relevant to PIP every much as it is to DLA, the actual criteria for satisfaction of an award are much different.

22. There is then Mr Whitaker’s additional point regarding *TR*, which he makes in the context of guidance which might be given to the new tribunal upon remittal. As I understand it, he is not challenging the correctness of the general approach taken in *TR* but is arguing that the approach has to be refined, in the manner he suggests, in certain substance abuse cases.

23. In *TR* I said:

“ 32. ... it seems to me that for a descriptor to apply on a given day then the inability to perform the task or function must be of some significance, that is to say something which is more than trifling or, put another way, something which has some tangible impact upon a claimant’s activity and functioning during a day but not more than that ...”

24. I would accept that, to use Mr Whitaker’s example, an alcoholic claimant who only becomes significantly intoxicated at the very end of a day will have had, by that time, an opportunity to perform many of the PIP functions and will, in all probability have actually done so. So, to stay with the example of preparing and cooking food, such a claimant might have prepared and cooked as many meals as he reasonably required at appropriate and reasonable stages of the day. In such circumstances, an inability to prepare and cook food during the closing moments of a day in circumstances where, in any event, that claimant would not wish to or need to do so would not lead to the scoring of points. The position might be different though with respect to such as toileting and undressing, which it might reasonably be thought would be performed at the very end of a claimant’s active day but it would, I suppose, take an unusual degree of inebriation to render an otherwise healthy person incapable of attending to those sorts of tasks for himself purely on account of that inebriation. So, in appropriate cases, findings may have to be made as to whether the effects of intoxication cause such significant impairment as to render the claimant incapable of fulfilling any relevant tasks or functions at all (and if not the process may stop there); when if there is such impairment it would typically take hold during a day; which functions would be impaired; which activities and descriptors would be in issue; and whether any limited period of incapability through intoxication would properly lead to a conclusion that that incapacity is capable of having a tangible impact upon the claimant’s activity and function during a day.

25. I appreciate that fact finding of the nature indicated above is difficult. I do not wish to make things any more difficult for busy tribunals than they already are. But a number of such cases might be relatively straightforward either because it is obvious an alcohol dependent claimant is nevertheless functioning in the manner referred to above or because it is obvious that intoxication takes hold and has an impact of significance at an early stage in any given day. Where the matter is not clear cut a tribunal will simply have to do its best, take a broad view of the evidence where appropriate and rely upon its expertise.

**Conclusion**

26. The appeal to the Upper Tribunal is allowed. The decision of the tribunal made on 15 April 2016 is set aside. The appeal against the decision of the Secretary of State made on 3 November 2015 will have to be re-heard by a new tribunal.

**(Signed on the original)**

M R Hemingway  
**Judge of the Upper Tribunal**

**Dated:** 24 July 2017