IN THE UPPER TRIBUNAL **Case No.** CPIP/1988/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made on 28 March 2017 at Liverpool under reference SC068/16/02862) 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 FOR THE REHEARING:

A. The tribunal must (by way of an oral hearing) 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 417 (AAC).

REASONS FOR DECISION

1. Both the claimant (through her representative) and the Secretary of State (through hers) have expressed the view that the decision of the First-tier Tribunal (the tribunal) involved the making of an error of law. The Secretary of State's representative has asked me to set aside the tribunal's decision and to remit for a rehearing. The claimant's representative has asked me to remit or re-make the decision myself on the basis that the claimant should score points under daily living descriptors 3d and 7d (which would give a total of 12 points under the daily living component) and under mobility descriptor 1d (which would yield 10 points under the mobility component). The level of agreement that there is between the parties makes it unnecessary for me to say very much about the history of the case or to analyse the whole of the evidence or arguments in detail. I need only deal with the reasons why I am setting aside the tribunal's decision and why I have decided to remit rather than to re-make the decision myself.

2. The claimant was accepted by the tribunal as being profoundly deaf (see paragraph 11 of the statement of reasons for decision). She uses British Sign Language and, it appears, has some ability to lipread. She wears cochlear implants. She 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). But as with many claimants, as part of the process by which that benefit is being replaced by personal independence payments (PIP) it became necessary for her to make a claim for PIP. She did so but on 13 May 2016 the Secretary of State decided (as confirmed in a letter of 17 May 2016) that her entitlement to DLA would end on 14 June 2016 and that there was no entitlement to PIP. A request for a mandatory reconsideration did not lead to any alteration to the terms of that decision so the claimant, aided by her representative at Citizens Advice Liverpool, appealed to the tribunal. But the tribunal decided not to award any points under daily living activity 3 or mobility activity 1 and it only awarded 2 points in relation to daily living activity 7 on the basis that the claimant

needed to use an aid or appliance to be able to speak or hear (daily living descriptor 7b). So it dismissed the appeal.

3. The grounds of appeal to the Upper Tribunal took a range of points not all of which I have found it necessary to deal with. But in particular, it was contended with respect to activity 3 that it had wrongly concluded that assistance provided to the claimant by her mother when she was undertaking what had been described as "focused listening practice exercises" could not be regarded as assistance with therapy. It had been argued that those exercises helped the claimant to improve her ability to hear effectively with her cochlear implants. Further, it was contended that the tribunal had erred in wrongly taking into account an ability to lipread with respect to the descriptors linked to activity 7, its being said that the Secretary of State's own position (on the basis of a concession made in a previous case to which I shall refer below) was that such should not be taken into account because it was an unreliable way of understanding verbal information. I granted permission to appeal and have subsequently received two sets of helpful written submissions from each representative. It was necessary for me to receive more than the usual one submission from each side because I felt there was a need to clarify with the Secretary of State, given what had been said in her first submission, whether her position as stated when the above concession had been made, had changed. But I now know that it has not.

4. As to activity 3, the tribunal had said that the exercises could not be regarded as therapy because what was being done did not constitute medical treatment of a disease or curative treatment. It likened it to encouragement to exercise or encouragement to give up smoking. It clearly had in mind what had been said by the Upper Tribunal in *AH v SSWP (PIP)* [2016] UKUT 0276 (AAC). In *AH* the Upper Tribunal, as part of its reasoning, relied upon a dictionary definition of the word "therapy" as "the medical treatment of disease; curative medical or psychiatric treatment".

5. The Secretary of State's representative is in agreement with the claimant's representative and points out that the exercises had been carried out on the recommendation of an audiologist, that it was said such exercises had to be undertaken regularly and that they were intended to train the brain to effectively make use of the implants. She suggests that all of this constitutes a very different scenario to that of a person simply offering encouragement to give up smoking. She also refers to a slightly different and perhaps wider dictionary definition of "therapy as "treatment intended to heal or relieve a disorder". I agree that the evidence about the exercises was capable of suggesting that it was of a substantively different nature to the mere encouragement to give up a "bad habit" like smoking or to take up a good one such as, for example, tending an allotment or cross country running. So, I agree that the tribunal erred in failing to adequately explain why it did not regard the exercises as constituting therapy.

6. It is worth my saying a little more about therapy despite this not having been the main focus of the submissions provided. The claimant's argument, I think, is that her mother was providing assistance to be able to manage therapy. If that is right then it raises the possibility of points being scored under daily living descriptor 3c or 3d. Schedule 1 to The Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations) contain a definition of "assistance" and an explanation of what is meant by "therapy" though that is not actually a definition of the general meaning of the word. But what it says, in a nutshell, is that the therapy must be something which is undertaken at home having been prescribed or recommended by an appropriate health professional as specified. There was also a definition

of the term "managing medication or therapy" which was present until 16 March 2017 when that was replaced by separate definitions of the terms "manage medication" and "manage therapy". Since this appeal is concerned with an appealable decision made on 13 May 2016 regard must be had to the legislation in the form in which it was at that date though I cannot see that the position on the facts of this case would be materially different anyway even if the current version was to be applied.

7. Both the current and past versions require that a failure to undertake the therapy will be likely to result in a deterioration in the claimant's health. I have asked myself whether, whatever benefit the claimant might gain from the exercises, it could properly be said that absent them, her health would be likely to deteriorate. In *RH v SSWP (PIP)* [2015] UKUT 281 (AAC), though it is fair to say this was not the main focus of the decision, the Upper Tribunal accepted that the use of a TENS machine to relieve pain was capable of amounting to therapy despite the lack of any therapeutic effect upon the condition causing the pain. So, in that context a wide meaning was given to the term health. It seems to me that, whilst the current situation is not the same, it would be appropriate to regard the exercises as amounting to therapy so long as the evidence was capable of showing that they helped facilitate the claimant's ability to hear which was impaired by her deafness, such that without the benefit derived from them, that ability to hear would be reduced by more than a minimal degree. I would stress, I do not regard myself as finally deciding issues concerning the way in which the word health is to be interpreted in this context. I have not had proper argument on the point. But the Secretary of State could have raised the issue in the context of this appeal and has not done so. Perhaps the matter will be revisited by the Upper Tribunal in due course but for the purposes of this appeal, the tribunal conducting the rehearing (and there will have to be one for reasons I will explain below) should proceed on the above basis unless the Secretary of State attempts to and then succeeds in attempting to persuade it that it should take a different course.

8. But the above is insufficient to actually enable a conclusion to be reached now as to the possible applicability of the relevant descriptors. There may be issues of fact as to whether, for example, the claimant really does need assistance (or perhaps supervision or prompting) from her mother or any other person in order to be able to manage the therapy as opposed to being able to do it herself, and there may be factual issues as to whether, even if those matters are to be resolved in the claimant's favour, it is something which takes more than 3.5 but no more than 7 hours per week bearing in mind that her representative seeks points under 3d not 3c. But as I say, I am satisfied that the tribunal erred. But that of itself would not be sufficient to demonstrate material error on the part of the tribunal since even if the claimant was to be accepted as scoring points under activity 3d as that would only, absent the scoring of any other additional daily living points, give her an overall score of 6.

9. Moving on to activity 7, in *EG v Secretary of State for Work and Pensions* [2007] UKUT 101 (AAC), the Upper Tribunal had not felt itself able to conclude, despite a concession from the Secretary of State's Counsel, that lipreading should be disregarded as a matter of law. The Secretary of State had submitted in that case that lipreading was not considered an acceptable way to interpret verbal communication especially in light of the content of regulation 4(2A) of the 2013 PIP Regulations. The Secretary of State had, indeed, taken a similar stance before the same Judge of the Upper Tribunal in a later case, that of *CC v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 429 (AAC). The PIP Assessment Guide of 2 November 2017 (which contains guidance to health professionals conducting PIP assessments) contains the statement that "lipreading is not considered an

acceptable way to interpret verbal information". That is not binding on tribunals but it is further evidence of the clear view of the Secretary of State.

10. In *SB v Secretary of State for Work and Pensions* [2018] UKUT 122 (AAC) a different Judge of the Upper Tribunal dealing with the same issues concerning lipreading expressed the view that "it is pointless to disagree with a Secretary of State who wishes to implement legislation in a way that is perhaps more generous to claimants than the legislation strictly allows". Given the clear and consistent way in which the Secretary of State has set out and now for the purposes of this appeal clarified her position, I would agree with and follow that pragmatic approach. This tribunal clearly did take what it found to be the claimant's limited ability to lipread into account in reaching its findings concerning activity 7. I therefore accept the Secretary of State's representative's position in this appeal that the tribunal erred in law in doing so. So, when I put that alongside the error it made with respect to activity 3, that means its decision must be set aside. There is then no purpose in my asking myself whether the tribunal might have made other errors of law. Whether it did or did not will not now impact upon the outcome. As to lipreading I would direct the tribunal conducting the rehearing to take the approach which the Secretary of State says should be taken. For clarity, that means that the tribunal rehearing the appeal should not take into account any ability it might find the claimant to have with respect to lipreading when looking at activity 7.

11. It seems to me, speaking more generally but without wishing to actually bind tribunals, that so long as the Secretary of State continues to take the approach she does then tribunals should themselves ought to adopt and follow that same approach. Such will lead to consistency and desirable predictability. But of course, if the Secretary of State does change her mind which she would be entitled to do, it may be that the question of whether lipreading ought to be taken into account might have to be the subject of specific argument and perhaps, in due course, a binding decision of the Upper Tribunal. But that is not necessary now.

12. I should explain why I have decided remittal is the appropriate course of action. As will be apparent from what I have already said with respect to activity 3, it does seem to me that further findings of fact will be required. That is also likely to be the case with respect to mobility activity 1 as well as daily living activity 7. I do not consider the evidence before me to be anything like so clear cut as to enable me to safely reach my own findings and conclusions on the documentation before me.

13. This appeal is allowed then on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **6 June 2018**