

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CPIP/703/2018

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

**Decision:** As the decision of the First-tier Tribunal (which it made on 4 October 2017 at Southend-on-Sea under reference SC241/17/00149) involved the making of an error of law it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted panel.

This decision is made under section 12 of the Tribunals, Courts and Enforcement Act 2007.

**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).
- C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 31 October 2016 and refused on 14 December 2016.
- 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**

**Introduction**

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (the tribunal) which it made on and after a hearing of 4 October 2017. I have decided, for reasons set out below, to allow the appeal; to set aside the tribunal's decision; and to remit for a rehearing.

**The issues raised by the appeal**

2. The appeal is concerned with the claimant's eligibility for a personal independence payment (PIP) and more specifically to any entitlement he may have to points under the descriptors linked to mobility activity 1 (Planning and following journeys). I have found it necessary, in deciding this appeal, to consider whether the mere passive presence of another person, if such is enough to avoid a claimant experiencing overwhelming psychological distress when that claimant is attempting to follow the route of a journey, is sufficient to

enable such a claimant to score points under mobility descriptors 1d or 1f or whether the other person is required to take an active role. I have also had to consider what approach tribunals should take when there is evidence to suggest a claimant is capable of undertaking some but not all familiar journeys; and what a tribunal has to address by way of explanation in circumstances where it is deciding mobility descriptor 1b applies but that neither 1d nor 1f do.

### The law

3. PIP was introduced by the Welfare Reform Act 2012. There are two components being the daily living component and the mobility component. Section 80 provides that a person's ability to carry out mobility activities is to be determined in accordance with regulations. Regulations made under section 80(3) provide that the ability to carry out mobility activities is to be decided on the basis of an assessment. The various activities to be assessed for the purposes of possible entitlement to PIP are set out in the Social Security (Personal Independence Payment) Regulations 2013. Regulation 3(2) provides that mobility activities are those set out in column 1 of a Table appearing at Part 3 of Schedule 1 to the Regulations. Each activity has a number of descriptors linked to it and points are awarded, as specified, in respect of each descriptor. Entitlement to the standard rate is established once 8 points are scored and entitlement to the enhanced rate is established once 12 points are scored. Mobility activity 1 and its associated descriptors are concerned with a claimant's ability to plan and follow the route of a journey. The activity and its associated descriptors have been designed to assess the barriers claimants may face in consequence of mental, cognitive or sensory difficulties. They are in this form:

Activity	Descriptors	Points
1. Planning and following journeys.	2. (a) Can plan and follow the route of a journey unaided and	0
	(b) Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4
	(c) Cannot plan the route of a journey.	8
	(d) Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	(e) Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10
	(f) Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12

## **The background**

4. The claimant was born on 8 March 1971. He does not have any physical health problems but a health professional who conducted a face-to-face assessment on 29 November 2016 recorded that he had been diagnosed with paranoid schizophrenia more than 25 years ago. She wrote that that mental health condition caused thought disorder, paranoid and delusional thinking, low mood, lack of motivation and high levels of anxiety. She noted that he had been under the care of a consultant psychiatrist for a lengthy period but that, some five years ago, he had been discharged into the care of his GP because his presentation was by that time very stable. Nevertheless, he continued to be prescribed a high dose of antipsychotic medication alongside a moderate to high dose of a mood stabilizer.

5. The claimant had previously been the recipient of an award of disability living allowance (DLA) comprising the middle rate of the care component and the lower rate of the mobility component. However, in consequence of DLA being replaced by PIP it became necessary for him to make a claim for PIP which, on 31 October 2016, he did. Thereafter, and after the face-to-face assessment referred to above, a decision-maker acting on behalf of the Secretary of State decided, on 14 December 2016, that DLA would end on 17 January 2017 and that there was no entitlement to PIP from 31 October 2016. Since an application to have that decision altered by way of mandatory reconsideration was unsuccessful, the claimant appealed to the tribunal.

## **The proceedings before the tribunal and its decision**

6. The claimant's position when applying for PIP and when appealing to the tribunal was that he would usually need encouragement to venture out-of-doors at all; that he could sometimes accomplish certain specific short, local, familiar journeys alone but not others; and that he would never go to somewhere unfamiliar without another person being present. He had a particular friend, whom I shall simply call C, who would normally provide that presence. He described C's role in that context as being a provider of "moral support". The claimant said that he required such support from C, or possibly on occasions from a different person to C, because of his anxiety and paranoia. He also told the tribunal of another coping mechanism he had which would involve his venturing out-of-doors, as I understand it when travelling on the familiar journeys he said he could manage on his own, wearing headphones and looking down at the ground.

7. The tribunal heard oral evidence from both the claimant and from C. It did, in fact, allow his appeal, concluding that he was entitled to the standard rate of the daily living component of PIP only, from 18 January 2017 to 17 January 2022. It awarded 10 daily living points and it may be worth noting that 4 of those points were scored because of its view that he needed social support to be able to engage with other people in consequence of his mental health difficulties (daily living descriptor 9c). But as to mobility, it decided that he scored only 4 points under mobility descriptor 1b (Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant) but no more points than that.

8. Having dismissed the appeal, the tribunal went on to produce its statement of reasons for decision (statement of reasons). It is clear from that, that it accepted that the claimant suffered from paranoid schizophrenia and that he has a personality disorder. It accepted he did experience paranoid thoughts, low mood, lack of motivation and anxiety and that there was a history of his having been detained under mental health legislation on six occasions, albeit not in recent years. It noted the fact of the previous award of DLA but then did no more than point out that the legislative tests for DLA and for PIP differ. Pausing there, it may be worth noting that, in all probability, the claimant had been given the lower rate of the mobility component of DLA on the basis of his being so severely disabled mentally, that disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty of walking out-of-doors without guidance or supervision most of the time.

9. The tribunal carried out a careful analysis of the oral and documentary evidence concerning the claimant's health difficulties and the way in which such would or might impact upon his ability to journey out-of-doors. It noted his evidence that he could sometimes achieve a journey to the doctor or to his chemist alone "because he was used to it and it was close by" albeit that, even then, when he was "low" he would need someone to go with him. It noted that he had said at the face-to-face assessment that his paranoia and anxiety "affected his ability to leave the house". It noted that in his written grounds of appeal he had said that he "usually needed prompting to undertake a familiar journey but could not undertake an unfamiliar journey unless he had the 'moral support' of someone with him", and that a letter from his GP had suggested that he did not go out on his own "in unfamiliar areas and was reliant on other people to take him out". It noted the health professional's view that the difficulties he claimed to have in going outside were consistent with his diagnosis and that "he needed prompting to undertake any journey". Pausing there, and in looking at the report produced by the health professional after the face-to-face assessment, having said his claimed difficulties were consistent with his diagnosis, she had added "it would be reasonable to suggest that he would need prompting to reliably and repeatedly make any journey without overwhelming distress, for the majority of the time". It might be thought, I suppose, that the reference to the seeming inability to "make any journey without overwhelming distress", absent prompting, was indicative of a view being taken by the health professional that he would be unable, without another, to follow the route of a journey. But I am not sure that is how the tribunal interpreted what was said. Anyway, it concluded its evaluation of mobility activity 1 in this way:

" 19. ... the tribunal noted that [the claimant] described the support that he received from his friend on journeys as 'moral support'. The tribunal also noted that [the claimant] wore headphones and listened to music when his friend was with him outdoors. The tribunal concluded that [the claimant] felt reassured by his friend being present but that his friend was not taking any active role in guiding, supervising or calming him during the journey. The tribunal accepted that (the claimant) needed encouragement in order to go out. The tribunal decided that this fell within the scope of 'prompting' as defined in the regulations i.e. reminding, encouragement or explaining. The tribunal therefore confirmed the award of 4 points made by the Secretary of State under mobility descriptor 1b."

10. That meant the 8 point threshold for the standard rate of the mobility component was not reached. So, although the appeal had been allowed the claimant had not succeeded to the extent that he thought he should have done. He asked for permission to appeal to the Upper Tribunal.

## The proceedings before the Upper Tribunal

11. Permission to appeal was refused by a District Tribunal Judge of the First-tier Tribunal but I granted permission because I was concerned about the way the tribunal, notwithstanding its generally most careful and thorough approach, had dealt with the possible applicability of the descriptors linked to mobility activity 1. In granting permission and making directions I raised the issue of whether any person present when the claimant was seeking to follow the route of a journey had to take an active role, as the tribunal had seemed to think, before points could be scored. I also invited views as to what approach ought to be taken with respect to the possible applicability of mobility descriptor 1f in circumstances where there appeared to be an ability to undertake some familiar journeys but not others.

12. I have received two submissions, both of which are most helpful, from two different representatives for the Secretary of State. In the first submission it was indicated that the claimant's appeal was supported and it was argued that the tribunal had erred, having accepted that the claimant required prompting to undertake any journey (effectively to get out of the house), through failing then to ask itself whether he would also require prompting in order to avoid overwhelming psychological distress when attempting to follow the route of a familiar or an unfamiliar journey. As to the need to do that the Secretary of State's representative referred to certain of what had been decided by the Upper Tribunal in *MH v SSWP (PIP)* [2016] UKUT 531 (AAC). It was also argued that the tribunal's factual findings had been inadequate in a number of ways but, in particular, with respect to what it was that C or another person might actually do for the claimant when he was attempting to follow the route of a journey and what the "moral support" might constitute. In the Secretary of State's second submission, which had been prompted by questions I had raised in further directions, it was clarified that the Secretary of State accepted that the passive presence of another could be sufficient to lead to the scoring of points under mobility descriptor 1d or 1f so long as it could be established, on the facts, that such passive presence was sufficient of itself to reduce the degree of psychological distress to below the threshold of its being overwhelming or to prevent it arising. As to the situation of a claimant with only a limited ability to make familiar journeys, it was pointed out that mobility descriptor 1f referred to "a familiar journey" rather than "any familiar journey" such that, it was argued, a claimant could score points under that descriptor by showing that, typically, s/he would need accompaniment by another person on a majority of days when undertaking familiar journeys even if such accompaniment would not always be necessary.

13. The claimant provided a reply to the Secretary of State's first submission which was essentially factual, addressing the difficulties he said he would have when venturing outside. What he had to say at that stage did not appear to me to differ significantly from what he had said in his appeal to the tribunal. By the time the Secretary of State had produced her second submission the claimant had obtained representation from Coventry Law Centre. However, the Law Centre, understandably, did not offer any further comments upon the issues raised by the appeal and simply indicated that the claimant would be content with setting aside and remittal.

## My reasoning

14. First of all, it is worth saying something about what it was that the tribunal was deciding concerning mobility and what it was that was left or appears to have been left undecided.

15. The tribunal obviously did accept that the claimant had difficulties of some significance when trying to go out of his house and then when going on journeys in consequence of his mental health problems. It clearly did accept, given its award of points under mobility descriptor 1b, that he does need prompting to be able to leave his home and that that prompting avoids him experiencing overwhelming psychological distress at that stage. Had it not accepted that it would not have awarded the 4 mobility points that it did. It did not, however, make a clear finding to the effect that the degree of psychological distress suffered would then remain below an overwhelming level once the claimant had actually left his home and was engaged upon following the route of a journey. It may have thought that the claimant could follow the route of a journey absent another person without that level of distress arising (even though prompting had been needed to prevent it arising at the getting out of the home stage) and that might be why it did not award points under mobility descriptors 1d or 1f. Alternatively, and I think this may be the more likely, it might have thought that overwhelming psychological distress would be experienced when following the route of a journey absent another person, that it was prevented from arising by the mere presence of another person (in practical terms usually C), but that points would nevertheless not be scored under 1d or 1f because the person (probably C) would not be playing an active role in, as it put it, “guiding, supervising or calming”. Clearly, it thought that such an active role was required to trigger the scoring of points.

16. I am satisfied that the tribunal did err in law in a way that was material in the sense that, had it not so erred, the outcome on the appeal might have been different.

17. As to that, as indicated, the tribunal clearly thought the claimant would, typically, suffer overwhelming psychological distress when contemplating a journey out-of-doors and that, in consequence, prompting was required to enable him to get outside. In *MH*, cited above, this is what a 3-Judge Panel of the Upper Tribunal had to say about the relationship between mobility descriptor 1b and mobility descriptors 1d and 1f:

“ 43. When raising in Mr H’s case the question of the relationship between descriptor 1e and descriptor 1f, Judge Rowland queried whether the Secretary of State’s concession of law in *HL* had been rightly accepted, which appeared at first sight to be related. The point, which was only of indirect relevance to the question of the relationship between descriptor 1e and descriptor 1f, but is of more direct relevance in the cases of Ms C and Mrs D and which has been adopted by the Secretary of State in those cases, was that if the overwhelming psychological distress could be avoided by the prompting - i.e. ‘reminding, encouraging or explaining by another person’ - that gives rise to the scoring of 4 points under descriptor 1b, it is arguable that it is wrong to have regard to such distress when considering descriptors 1d and 1f. However, this argument could only hold good if prompting given during the course of the journey to avoid overwhelming psychological distress is to be taken into account only under descriptor 1b - hence the Chamber President’s question in the cases of Ms C and Mrs D - and so it depends partly on the scope of descriptor 1b.

44. Read in isolation, we consider that the natural meaning of descriptor 1b is that it applies both to prompting that encourages a claimant to embark on a journey - *i.e.*, prompting given before the journey commences - and prompting that encourages a claimant to continue to follow the route of a journey - *i.e.*, prompting during the course of a journey. Reading descriptors 1d and 1f in isolation, we consider

that the Secretary of State was right to concede to *HL* that overwhelming psychological distress can have the effect that a person is unable to follow the route of a journey because he or she may be or become unable to navigate or, we would add, to make progress. A person who is accompanied may be encouraged to overcome the distress whereas a person who is unaccompanied may not. Thus descriptors 1d and 1f might be satisfied by a person liable to suffer from overwhelming psychological distress when out walking. There is therefore a potential overlap between descriptor 1b on one hand and descriptors 1d and 1f on the other hand.

45. If the structure of the scheme were such that an overlap was impossible, we would accept Ms Scolding's argument that the effects of overwhelming psychological distress are to be considered only under descriptor 1b and not also under descriptor 1d or 1f. However, it is clear from regulation 7(1)(b) and (c) that the table in Part 3 of Schedule 1 to the 2013 Regulations is structured so that a claimant may satisfy more than one descriptor and therefore there is no reason why there should not be an overlap. Consequently, all three descriptors can and should be given their natural meaning even though that means they do overlap.

46. This does not render descriptor 1b otiose. If regulation 7(1)(b) has the practical effect that descriptor 1b is only important where the claimant requires prompting to avoid overwhelming psychological distress before being able to embark on a journey, that is by no means extraordinary given that only 4 points are scored under that descriptor so that it cannot by itself give entitlement to even the standard rate of the mobility component. We note that this approach to the descriptors appears to be consistent with paragraphs 6.14 and, more significantly, 6.16 (which refers to 'someone who requires prompting to leave the house in order to follow a journey') of the consultation response."

18. In my recent experience some tribunals have, very occasionally, seemed to misunderstand that passage a little. That has led to some tribunals sometimes thinking that (perhaps through simply reading the opening to paragraph 44 in isolation and slightly misconstruing it) what was being decided was that a person who required prompting to get out of the house and who then also required prompting to actually enable him/her to follow the route of a journey would, nevertheless, only score 4 points under mobility descriptor 1b. But that is not right and that is not what was being said in *MH*. The correct position is that if a claimant requires the prompting to prevent the onset of overwhelming psychological distress or to reduce it to a level less than overwhelming in order to enable him/her to get out of the house but is then able to follow the route of a journey absent another person, only 4 points under 1b will be scored. However, if the need for prompting to avoid overwhelming psychological distress continues whilst the claimant is following the route of a journey and is needed to enable the claimant to follow the route of a journey, then 10 points may be scored under 1d or 12 points may be scored under 1f. So, where a tribunal decides that mobility descriptor 1b applies such that 4 points are scored, it will normally have to go on to ask itself whether that same prompting is required to enable the claimant to follow the route of a journey. If it is not then ordinarily, the tribunal will have to offer something by way of an explanation as to that. That is because, on the face of it, it might seem surprising (though I accept it is certainly possible) that a claimant who would, absent prompting, experience overwhelming psychological distress at the time of contemplating going out-of-doors would not, absent that prompting or absent another person, experience overwhelming psychological distress when travelling on a journey. Here, the tribunal did not explore that aspect as it was in my judgment, in the circumstances of this case, obliged to do. Indeed, unless I misunderstand the Secretary of State's first submission, that is what she herself acknowledges.

19. There is then the question of whether or not the other person as referred to in mobility descriptors 1d and 1f is required to be active (and of course if that person was prompting that would amount to being active) for points to be scored. The tribunal clearly thought there was such a requirement although it did not explain why it believed that to be the case. Prompting,

which is referred to in mobility descriptor 1b but not in any other descriptor linked to that activity, is defined within Schedule 1, Part 1 of the Social Security (Personal Independence Payment) Regulations 2013 as “reminding, encouraging or explaining by another person”. The term supervision, which is not used in mobility activity 1 but appears in other activities/descriptors, is defined as “the continuous presence of another person for the purpose of ensuring C’s safety” (here C is used as an abbreviation for the word claimant). The definition for assistance, again not appearing in mobility activity 1 but appearing in other activities/descriptors, is “physical intervention by another person and does not include speech”. Perhaps, although it did not expressly say so, the tribunal thought that the other person referred to in daily living descriptors 1d and 1f would have to be providing supervision, assistance or prompting as defined for points to be scored despite its using different terminology, though if that was its line of thinking it would probably have had to say more, at the very least, as to why it thought supervision, as defined, was not being provided. But neither of those descriptors, on a literal reading, require anything more than presence. What is being posited is what the claimant could or could not achieve simply “without another person, an assistance dog or an orientation aid”. Clearly it is the “without another person” wording which is relevant here. The literal wording does not require any form of prompting, assistance, supervision or other type of active involvement with the claimant. So, I agree with the Secretary of State’s representative that so long as it can be demonstrated that the passive presence of another person is sufficient, on the facts, to avoid overwhelming psychological distress being experienced by a claimant when attempting to follow the route of a journey, then points may be scored under the two relevant descriptors. The tribunal was in error in thinking and deciding otherwise. That error was potentially material because, although its findings were not wholly clear, it might have been concluding that the passive presence of C or some other person did indeed prevent overwhelming psychological distress arising in circumstances where it would otherwise have arisen but that such, without an active presence, simply did not count.

20. Finally, there is the issue concerning the approach to be taken in circumstances where a claimant is able to undertake at least some but not all familiar journeys. As the Secretary of State’s representative points out, mobility descriptors 1d and 1f refer to “a familiar journey” and “an unfamiliar journey” rather than using the term “any journey” which is used in mobility descriptors 1b and 1e (my underlining). The Secretary of State says, in effect, that that difference in wording means that a person who can make some but not other familiar journeys or who can sometimes but not always make familiar journeys is not excluded from the ability to score under mobility descriptors 1d or 1f merely through that limited ability. Rather, matters are simply to be assessed in the normal way as provided for in regulation 7 of the Social Security (Personal Independence Payment) Regulations 2013 with respect to the frequency aspect. That is to say, if the evidence shows that a person is unable to follow the route of a familiar or an unfamiliar journey on over 50% of the days of the “required period” (that is the period in respect of which matters are to be assessed) then points will be scored with respect to one or other of those descriptors (see regulation 7(1)(a)). That is the Secretary of State’s position. I agree that, in applying regulation 7, there has to be an assessment as to whether a claimant is or is not able to accomplish the relevant task (here following the route of a familiar journey or an unfamiliar one) on over 50% of the days in the relevant assessment period. I agree with most of the Secretary of State’s representative’s reasoning which underpins that. I agree with the result because clearly the occasional ability to undertake a familiar or unfamiliar journey will not impact upon the regulation 7 assessment or calculation. I think, though this is not explicitly stated, that the Secretary of State’s representative is

suggesting, in making the distinction between the term “a journey” and the term “any journey” that an occasional ability to undertake any journey for the purposes of mobility descriptors 1b and 1e will prevent points being scored under those descriptors, notwithstanding the regulation 7 formula, because an occasional ability would mean it could not be said that a claimant would be unable to undertake any journey. Whilst it does not matter for the purposes of this appeal, if that is the Secretary of State’s representative’s position then I would have to disagree. It seems to me that the term “any journey” was simply selected to make it clear that, with respect to the descriptors where that term is used, no distinction was being drawn between a familiar journey and an unfamiliar one. But as I say, it does not matter here.

21. Turning then to the situation of a claimant who is able to make some specific familiar journeys most days but is unable to make other familiar journeys most days (which may be the situation obtaining here) then it has to be borne in mind that the necessary investigation and analysis concentrates upon the nature of the claimant’s disability. The focus is, in general terms, upon the impact of the mental health condition in following a familiar (or indeed an unfamiliar) route. The test is general in nature so that it does not contemplate consideration of particular or specific journeys. So, a broad assessment of the ability to undertake familiar journeys is what is required. Viewed from that perspective an ability to manage, without another, a very limited number of specific journeys as is the position of this claimant according to his evidence, will not preclude him establishing entitlement to points under 1f. Although the Secretary of State’s representative said nothing about this particular discrete aspect in the first submission and only a little about it in the second submission it was, on my reading of the second submission, her position that that was the correct analysis. I conclude that it is.

### **Disposal of the appeal**

22. The tribunal did not consider matters with respect to mobility activity 1 in the way it should have done as identified above. Accordingly, it did err in law and its decision has to be set aside.

23. I have concluded that the appropriate course of action is remittal. That is because there are further facts to be found, in particular, with respect to the impact of the claimant’s mental health difficulties upon his ability to follow the route of familiar and unfamiliar journeys. There are also further facts to be found, in particular, as to the role played by C or any other person who might accompany the claimant on journeys, whether such a role is indeed entirely passive and, if it is, whether it nevertheless has the effect of avoiding psychological distress. But the rehearing will not be limited to just those sorts of issues. It will be a complete rehearing. The tribunal will consider all aspects of the case, both fact and law, entirely afresh.

24. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)  
M R Hemingway  
**Judge of the Upper Tribunal**  
**12 October 2018**