IN THE UPPER TRIBUNAL **Appeal No. UA-2021-000241-PIP**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

CW

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Hemingway

Decision date: 23 October 2022
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 1 March 2021 under number **SC236/19/01718** was made in error of law. That being so, and pursuant to Section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I **set that decision aside** and **remit** the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing (which may be a remote hearing).**

2. **The First-tier Tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to its discretion under section 12(8)(a) of the Social Security Act 1998, any other issues which may merit consideration.**

3. **In undertaking that task, the First-tier Tribunal must not take account of circumstances that were not obtaining at the date of the decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: *R(DLA) 2 and 3/01.***

4. **The First-tier Tribunal which considers the case shall not include any of the panel members who did so on 1 March 2021.**

5. **These Directions may be supplemented, amended or replaced by later directions made by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

REASONS FOR DECISION

1. This is the claimant's appeal to the Upper Tribunal (brought with my permission given on 13 December 2021) from a decision of the First-tier Tribunal (F-tT), which it made following a hearing of 1 March 2021, to the effect that the claimant is not entitled to a personal independence payment (PIP). The appeal is supported by the Secretary of State and both parties are agreed that I should set aside the F-tT's decision and remit for a complete rehearing. In those circumstances it would normally be necessary for me to say only very little. However, in this case, I have found it necessary to address certain of the F-tT's reasoning as it relates to how it interpreted the definition of "take nutrition" as contained within Part 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2103 ("the 2013 Regulations"). I do so below.

2. By way of very brief background, the claimant applied for PIP on 18 July 2019. On 10 September 2019 he attended a consultation with a health professional for the purposes of an assessment as to possible entitlement. It was noted in a report subsequently produced by that health professional that, on a date in 2014, he had received what was described as a "*crush injury*" to his left hand and it was indicated that "*he struggles with grip*" in consequence. He has had surgery as a result of the injury which has included the amputation of his middle finger. It was also noted that the claimant suffers from asthma. In addition to those physical difficulties identified in the report he has subsequently asserted that he has mental health problems.

3. On 19 September 2019 a decision-maker acting on behalf of the Secretary of State decided that the claimant was entitled to 5 points under the activities and descriptors relevant to the daily living component of PIP and no points under the activities and descriptors relevant to the mobility component of PIP. Since he did not reach the necessary 8-point threshold to establish entitlement with respect to either component, PIP was refused. The claimant sought a mandatory reconsideration, but the terms of the decision were unaltered, so he appealed to the F-tT.

4. The F-tT held an oral hearing of the appeal. The claimant attended that hearing and was represented by Mr P Spriggs of Sunderland City Council's Welfare Rights Service. The F-tT not only dismissed the appeal but reduced the amount of points the claimant was entitled to under the daily living activities and descriptors from 5 to 2. It subsequently set out its reasoning in a statement of reasons for decision (statement of reasons) of 24 May 2021. Given the level of agreement between the parties I have not found it necessary to set out what it had to say about all aspects of the appeal but I would observe, at this stage in my decision, that it did not refer to the fact that it had reduced the points awarded by the Secretary of State, it did not indicate that it had sought to place the claimant and/or his representative on notice that it might do so,

and it did not explain why it thought that it should reduce points previously awarded by the Secretary of State in circumstances where no-one had invited it to do so. Having said that though, any error of law which the F-tT might have made in this regard would not, of itself and taken in isolation, have been material.

5. In addition to reducing the 5 points previously awarded to 2, the F-tT also decided that the claimant was not entitled to any points under the descriptors linked to activity 4 (Washing and bathing) or activity 6 (Dressing and undressing). Since the claimant did not assert entitlement to any points under the activities concerned with the mobility component of PIP, that led the F-tT to dismiss the appeal.

6. The Secretary of State, through her representative in these proceedings before the Upper Tribunal, accepts that the F-tT has erred in law on the grounds of fairness given that it had reduced points without giving warning of its intention to do so and without affording an opportunity to meet the concerns which ultimately led it to make that reduction. The Secretary of State's representative also asserts that the F-tT has erred either through failing to adequately consider the evidence or through failing to adequately reason out its conclusions with respect to its decision not to award any points under daily living activity 4 and daily living activity 6. Finally, the Secretary of State agrees with the representative for the claimant that the F-tT has erred, with respect to its consideration of Activity 2 (Taking nutrition) through applying the wrong legal test.

7. I accept that the F-tT erred in law through reducing the 5 points which had been awarded by the Secretary of State's decision-maker through a combination of points given under daily living activity 1 (Preparing food), daily living activity 2 (Taking nutrition) and daily living activity 3 (Managing therapy or monitoring a health condition), because it went about doing so in a way which was unfair. There is nothing in the material before me to suggest that the F-tT, at any stage prior to or during the course of the hearing of the appeal, sent out any form of signal either to the claimant or the claimant's representative so as to indicate that reducing any points previously awarded was within its contemplation. It is well established that (perhaps absent something exceptional) fairness demands such a signal be sent and an opportunity to meet any concerns should be given. Such has been stated by the Upper Tribunal on a number of occasions but I have in mind, in particular, what was said in *BTC v Secretary of State for Work and Pensions* [2015] UKUT 0155 (AAC) and *EG v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 0275 (AAC). Since the Secretary of State for Work and Pensions accepts this ground to be made out, and since the error is an obvious one anyway, I shall say no more about it other than to point out that it becomes an error with materiality if other errors demonstrate that an F-tT which had taken the correct approach to all of the issues before it might have awarded sufficient points to lead to entitlement to PIP.

8. I also accept the Secretary of State's concession, freely and clearly made through her representative, that the F-tT erred through failing to properly consider the evidence and through failing to adequately set out its reasoning with respect to the descriptors linked to daily living activity 4 and daily living activity 6.

9. The above is sufficient to justify the setting aside of the F-tT's decision. That is because had the F-tT not fallen into error in the various ways which I have already accepted it did, it might have awarded sufficient points to establish entitlement to the daily living component of PIP. So, strictly speaking, I need not say any more. But I

think it appropriate to do so in this case given the content of the ground of appeal which asserts that the F-tT applied the wrong test when considering the possible applicability of descriptors linked to daily living activity 2.

10. The relevant activity and descriptors are as set out below:

Activity	Descriptors	Points
2. Taking nutrition	a. Can take nutrition unaided.	0
	b. Needs - (i) to use an aid or appliance to be able to take nutrition; or (ii) supervision to be able to take nutrition; or (iii) assistance to be able to cut up food.	2
	c. Needs a therapeutic source to be able to take nutrition	2
	d. Needs prompting to take nutrition	4
	e. Needs assistance to be able to manage a therapeutic source to take nutrition.	6
	f. Cannot convey food and drink to their mouth and needs another person to do so.	10

11. As the F-tT pointed out, Part 1 of Schedule 1 to the 2013 Regulations defines "*take nutrition*". And this is the definition:

> "Take nutrition" means –
>
> (a) Cut food into pieces, convey food and drink to ones' mouth and chew and swallow food and drink, or
>
> (b) Take nutrition by using a therapeutic source".

12. The F-tT took the view that a claimant seeking to demonstrate an inability to take nutrition other than by using an aid or appliance for the purposes of establishing entitlement to two points under daily living descriptor 2(b)(i), would have to be able to demonstrate an inability to perform all of the cumulative tasks included within the above definition. Thus, in order to satisfy the requirements of that descriptor a claimant would have to show an inability to cut food into pieces without an aid or appliance, and an inability to convey food and drink to the mouth without an aid or

appliance, and an inability to chew without an aid or appliance, and an inability to swallow without an aid or an appliance. This is how the F-tT reasoned that out:

> "31. The Tribunal considered the taking nutrition point. The Tribunal decided the Secretary of State had applied the wrong legal test.
>
> 32. Taking nutrition is legally defined. A therapeutic source is not relevant to this appeal.
>
> 33. The definition of taking nutrition is cut food into pieces, convey food and drink to ones mouth and chew and swallow food and drink.
>
> 34. [The claimant] may need fat-handled cutlery for his left hand. However, that will only be relevant in relation to cutting food into pieces. It does not affect his ability to convey food and drink to his mouth or to chew and swallow food and drink.
>
> 35. The definition is a very tightly defined one.
>
> 36. The Tribunal concluded the way it is written means all the elements of that definition have to be satisfied to meet the legal requirements.
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> 37. The Tribunal concluded the definition is a complete test. The use of a comma after "into pieces" is a breathing point rather than a grammatical reflection of a separate independent element.
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> 38. The use of a semi-colon in the case of *JM v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0296 (AAC), 27 separated paragraph a of the definition from paragraphs b and c. It meant paragraph a was a separate head of the definition.
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> 39. That is not the case in the taking nutrition definition.
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> 40. A purposive approach has also been taken in that case – *GW v the Secretary of State for Work and Pensions [2015]* UKUT 572 (AAC).
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> 41. It was pointed out it may be very difficult for the definition to be satisfied. However, as has been made clear in Parliamentary reports and the recent Upper Tribunal decision – *TW v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 25 (AAC) the legislative purpose was to restrict entitlement to PIP compared to DLA. It was intended to significantly reduce the number of people who qualify for the benefit and to provide significant cost savings. Consequently, that therefore means a tight definition is justified on the purpose of intention behind the legislation.
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> 42. The Tribunal has to apply the definition as introduced by Parliament.
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> 43. The Tribunal decided the clear and unambiguous interpretation is it is a single test requiring all the elements to be satisfied. Therefore fat-handled cutlery for cutting up food is not going to be enough. It will not affect the ability to convey food and drink nor will it affect the ability to chew and swallow food and drink.
>
> 44. The Tribunal has to apply the legislation as produced by Parliament. It is not the function of the Tribunal, or indeed any court, to rewrite the legislation to accord with what that tribunal thinks it should be rather than what it is. Further, it would not be appropriate for a court or tribunal to suggest legislation should be re-worded in a

> fundamentally different way because that is a policy decision solely within the jurisdiction of Parliament which is comprised of democratically elected and accountable representatives. It is a political, policy decision to phrase the definition in the way it was.
>
> 45. Consequently, [the claimant] has no problems conveying food to his mouth. He has no problems conveying drink to his mouth. He has no problems swallowing or chewing food and drink. Consequently, the taking nutrition descriptor is not satisfied. The need for adapted cutlery is not enough".

11. The representative for the claimant in seeking to challenge the decision of the F-tT expressed what I would interpret as a degree of bewilderment with respect to the above reasoning, observing that "*points have always been given for needing modified cutlery to reliably take nutrition*", that "*needing an aid to cut up food has pretty much been established as a given when it comes to scoring points*" and that the interpretation of the relevant definition adopted by the F-tT appeared to run contrary to what was referred to as "*The PIP Healthcare Professional's Guide*". He went on to suggest "*we need clarity on this for future cases*". The representative for the Secretary of State asserted that it was the F-tT which had applied the wrong test rather than the Secretary of State's decision-maker.

12. The reference made by the claimant's representative to the PIP Healthcare Professionals Guide is a reference to published guidance issued by the Department for Work and Pensions in order to assist health professionals when carrying out their assessment functions. As the claimant's representative points out, part of that guidance reads as follows:

> "Descriptor B (2 points): Needs:
>
> (i) to use an aid or appliance to be able to take nutrition; or
>
> (ii) supervision to be able to take nutrition; or
>
> (iii) assistance to be able to cut up food".
>
> Applies to claimant's who need to use specially adapted cutlery; …"

13. Of course, the Upper Tribunal and F-tTs must apply the law rather than what is stated in guidance. But the guidance does emanate from a government department and does seem to suggest that an inability to cut up food unaided will be sufficient to enable a claimant to score points under daily living descriptor 2b(i). That might be thought to be at odds with the belief expressed in the F-tT's statement of reasons to the effect that the intention of Parliament was to require all elements contained within the above definition to be satisfied before points could be scored.

14. I have looked for decisions of the Upper Tribunal concerning the way in which the definition of *"take nutrition*" ought to be interpreted and in particular for decisions which consider whether all of the elements contained within that definition have to be satisfied. There is, from what I can tell, nothing in any decision of the Upper Tribunal which definitively decides that point, but I note

that I did, in *CB v SSWP (PIP)* [2022] UKUT 100 (AAC) suggest in non-binding observations contained within that decision, that they do not. I also note that, in that case, the Secretary of State's representative (as here) had taken the view that they do not. According to my decision in *CB*, the Secretary of State's representative had contended in writing "*it is, however, my submission that if any claimant cannot carry out any of the relevant actions prescribed in the statutory definition of taking nutrition, it can be said they cannot take nutrition*". The absence of a decision of the Upper Tribunal specifically deciding the point might be attributable to the fact that, there is, in truth, little to commend the interpretation the F-tT applied in this particular case such that it is obvious not all of the elements have to be met. But, nevertheless, the matter has been raised and perhaps, if it is an ongoing issue, at least within one region where F-tT cases are heard, I ought now to address it head-on.

15. I have decided, in truth without any real difficulty, that the F-tT did err in law through misinterpreting the relevant definition and through wrongly concluding that all of the elements of the above definition must be met before points may be scored under daily living descriptor 2(b)(i). In other words, putting things into context for the purposes of this case, if the claimant needs to use an aid or appliance (such as cutlery with special qualities) in order to cut food into pieces then he meets the requirements of the above descriptor and scores two points for doing so, irrespective of his ability or otherwise to convey food and drink to his mouth, to chew food, and to swallow food and drink. There are a number of reasons why I have reached that conclusion and I set them out below.

16. I have considered whether the case law cited by the F-tT offers support for its interpretation. As to the case of *JM*, cited above, the Upper Tribunal was primarily concerned with daily activity 5 and the definition of "*Managing continence*". What was decided in that case does not directly inform upon the way the definition of "*take nutrition*" is to be understood and the Upper Tribunal was not, in any sense, purporting to lay down any general rule of interpretation as to such definitions based upon which type of punctuation had been used. As to *TW*, also cited above, the Upper Tribunal was concerned with technical arguments resulting from the transfer of claimants from disability living allowance to PIP and whether the relevant transitional provisions were discriminatory to the extent that they fell foul of Article 14 of the European Convention on Human Rights (ECHR). The highly technical reasoning deployed by the Upper Tribunal, by which it navigated its route to a conclusion that Article 14 had not been breached was very far removed from the more mundane question of how the particular definition at issue in this case is to be interpreted. Put simply, what was said in *TW* had nothing to do with that. In any event, even if *TW* was, as is suggested by the F-tT, somehow informative as to a general approach which ought to be taken to the interpretation of legislation concerned with PIP, it would not seem to me to displace the obvious starting point that regard is to be had, first of all, to the plain meaning of the words used in the definition. Those words do not read as if a cumulative test involving a need to meet all of the elements is intended. As to *GW*, I suspect that the F-tT has slightly incorrectly cited that decision and that it intended to refer to *GW v Secretary of State for Work and Pensions* [2015]

UKUT 570 (AAC). The F-tT indicated that a purposive approach had been taken by the Upper Tribunal in that case. That is true but it does not seem to offer any support for the interpretation of the definition of "*take nutrition*" which the F-tT adopted. In *GW* the Upper Tribunal was concerned with the definition of "*toilet needs*" as found in Part 1 of Schedule 1 to the 2013 Regulations. That definition, like the definition of "*Take nutrition*" had a number of elements. The definition is "*getting on and off an unadapted toilet; evacuating the bladder and bowels; and cleaning oneself afterwards*". The F-tT in that case had concluded that all of those elements had to be satisfied before entitlement to points under the relevant activity could be triggered. But the Upper Tribunal did not think very much of the F-tT's interpretation and said this about it:

> "15. I do not agree with this analysis. The word "and" may be used in legislation both disjunctively and conjunctively. It must be interpreted within its own particular context. I adopt a purposive approach to the construction of the definition of "toilet needs". Only a moments reflection would lead one to see that if all three parts of the definition must be satisfied very few people would meet the criteria of descriptors 5(b), (c) or (d). Bearing in mind the level of points scored for those descriptors that would be surprising indeed. I am of the view that the word "and" must be given a disjunctive effect in this context".

17. So, whilst the F-tT is correct in saying that the Upper Tribunal adopted a purposive approach, a result of it doing so was to decide that a claimant could score points if unable to perform one of the three tasks included in the relevant definition. Really, that supports the opposite conclusion to that which the F-tT arrived at with respect to the definition of "*take nutrition*". Realistically, there is nothing in *GM* which supports the view the F-tT took in the case before me.

18. As I have touched on above, none of what the F-tT had to say, in my view, indicated that any different approach ought to be taken to the question of interpretation than one based on a straightforward reading of the words used. It seems to me that, once that simple and obvious approach is taken, it becomes clear that the definition has a number of components being the cutting of food, the conveying of it and drink to the mouth, the chewing (other than drink of course) and then the swallowing. Each one of them is an essential component of the overall task of taking nutrition. It is obvious, therefore, that if, for example, there is an inability to cut food into pieces, there is an inability to take nutrition. Thus, it would make no sense to say that there must be an inability to do all of the components set out in the definition. Further, an inability to cut food into pieces, convey food to the mouth, and then chew and swallow, would suggest a highly unusual and very extensive level of disability. It would be odd, therefore, if such was required simply to enable a claimant to score a mere 2 points under daily living descriptor 2b(i). Further still, a claimant who can take nutrition unaided satisfies daily living descriptor 2a and scores no points, a person who has to use an aid or appliance to be able to take nutrition scores 2 points under daily living descriptor 2b(i). If the definition adopted by the F-tT were to be correct it would mean a person unable to take nutrition through an inability to perform one of the components included in the definition would score no points despite not coming within the

group of persons to whom daily living descriptor 2a applies. Thus, the interpretation would produce illogical consequences.

19. I have spent quite a lot of time on this. Some might say it is so obvious that an inability to perform one of the relevant elements of the definition without an aid or appliance leads to the scoring of 2 points under the relevant activity, that I should not have bothered. But it would be unfortunate if the interpretation taken by the F-tT in this case were to take hold and that claimants were to lose out as a result. So, I thought it right to clarify the position.

20. I set aside the F-tT's decision in consequence of the various errors of law identified above. The appeal will have to be reheard entirely afresh by an entirely differently constituted F-tT. That F-tT should apply the approach I have set out with respect to daily living descriptor 2(1)(b) and the interpretation of "take nutrition".

21. This appeal, to the Upper Tribunal then is allowed on the basis ant to the extent above.

MR Hemingway
Judge of the Upper Tribunal
Authorised for issue on 24 October 2022