



**IN THE UPPER TRIBUNAL
PIP
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-001268-
[2024] UKUT 185 (AAC)**

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

Between:

M.S.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 25 June 2024
Decided on consideration of the papers

Representation:

Appellant: In person
Respondent: Mrs Helen Hawley, Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 21 February 2023 under number SC007/22/01185 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and re-make the decision originally under appeal as follows:

The Appellant's appeal (SC007/22/01185) to the First-tier Tribunal is allowed.

The Respondent's decision of 6 July 2022 is revised.

The Appellant is entitled to an award of the daily living component of PIP at the standard rate for an indefinite period from 8 February 2022 (daily living descriptors 5f (8 points) and 9b (2 points) apply).

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds.

What is in issue on this appeal to the Upper Tribunal

2. The issue (in outline) on this appeal is the Appellant's entitlement to Personal Independence Payment (PIP) with effect from 8 February 2022.

The Upper Tribunal's decision in summary and what happens next

3. I allow the Appellant's appeal to the Upper Tribunal, which is supported by the Secretary of State. The decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision.
4. I can re-decide the underlying appeal that was before the First-tier Tribunal. There is therefore no need for the appeal to go back to be reheard by a new and different First-tier Tribunal. Accordingly, I substitute my decision for that of the First-tier Tribunal dated 21 February 2023.
5. My decision, in summary, is that the Appellant is entitled to the standard rate of the PIP daily living component for an indefinite period from 8 February 2022.

The background to this appeal to the Upper Tribunal

6. The Appellant, who is now aged 64, and has the misfortune to suffer from Multiple Sclerosis (MS). The effects of his MS are helpfully summarised in the following way in the submission on the Upper Tribunal appeal by the Secretary of State's representative:

4.4 The claimant's main health condition is Multiple Sclerosis (MS), which is remitting and relapsing in nature, and he has had the condition for a number of years. When lodging his appeal with HMCTS [pp.2-6] the claimant asserted that he should have been awarded 8 points for daily living descriptor 5f – Needs assistance to be able to manage incontinence of both bladder and bowel.

4.5 The claimant went on to explain that MRI scans show lesions and scarring in his central nervous system in both his brain and spinal cord, and described suffering from various symptoms of his MS, which come and go in a remitting and relapsing cycle. However, the nerve damage has become permanent with regards to his bladder and bowel incontinence some years ago. He is not taking any medication for his MS due to its side effects. He is under the care of a Consultant Urologist and a Specialist Continence Practitioner and has Botox injections to help with his bladder incontinence [pp. 8-9, Addition A p.1 and Addition C p.2], which he states has had limited success.

4.6 The claimant is employed as a service support representative travelling in a works van to garages to make sure jet washers and other garage equipment is in working order.

4.7 The claimant has no control over when he will urinate or defecate, and he has no sensation of needing the toilet; his urine incontinence is

more frequent, and he can change his pads numerous times a day. However, the pads do not always prevent leakage of the claimant's bladder and or bowel incontinence.

4.8 Besides using pads, the claimant uses a bucket in his works van to defecate in whilst working, as he cannot get to a toilet in time, or a toilet might not be available to him, wet wipes to clean himself and his van; he also takes spare clothing with him to change into following a leakage episode.

4.9 The claimant in his written submissions [Addition B p.1 and Addition D pp.1-7] reiterates and expands upon the history and difficulties he experiences in managing his MS and his double incontinence. He contends that attending to his toilet needs takes more than twice as long as a person without his disability.

The decisions by the Secretary of State and the First-tier Tribunal

7. However, the DWP's decision-maker awarded the Appellant just two points for PIP daily living descriptor 5b ("needs to use an aid or appliance to be able to manage toilet needs or incontinence"). Accordingly the Appellant's PIP claim was refused. That disallowance decision was also upheld following a mandatory reconsideration.
8. The First-tier Tribunal (FTT) subsequently confirmed the outcome of the DWP disallowance decision on the Appellant's claim for PIP, scoring him at an aggregate of four points for daily living activities 5b (2 points) and 9b (2 points). It therefore likewise made no award of either component. The Appellant (Mr S) took issue with the FTT's decision to refuse his claim to the daily living component, especially in relation to activity 5 (managing toilet needs or incontinence).

The Upper Tribunal's grant of permission to appeal

9. I gave the Appellant permission to appeal following an oral hearing in Leeds on 21 February 2024. In doing so I made the following observations:
 7. Mr S's grounds of appeal for his application to the Upper Tribunal for permission to appeal against the First-tier Tribunal's decision were set out in his Form UT1 and associated correspondence, as supplemented by his oral arguments at the permission hearing. As noted, he was mainly concerned with the Tribunal's decision to refuse to make any award of the PIP daily living component.
 8. As I explained at the oral hearing, and as Judge West had explained in earlier directions for the oral hearing, a disagreement over the facts is not sufficient to give permission to appeal. On that basis at least the grounds of appeal as set out on Form UT1 did not appear at first sight to be very promising.
 9. However, I still consider it is arguable that the Tribunal erred in law. It is arguable that the Tribunal did not make sufficient findings of fact about the steps needed and the time taken to manage Mr S's admitted condition of double incontinence. Alternatively, the Tribunal may not have given adequate reasons for its decision.

10. In particular, it is questionable whether the Tribunal found sufficient facts or gave adequate reasons as regards the regulation 4(2A) criteria of “acceptable standard” and “reasonable time” in para 13 of the statement of reasons (SoR).
11. As regards an acceptable standard, the Tribunal’s explanation seems to be focussed exclusively on what is or is not covered by the term “cleaning oneself afterwards”. It does not in terms appear to address whether Mr S can attain an acceptable standard in doing so, given the practical circumstances and difficulties he so vividly describes.
12. As regards reasonable time, there is no finding beyond that Mr S can manage his cleaning in a reasonable time period. But as Mr S argued at the oral permission hearing, the issue is not what he can do with his arms and hands but rather what he has to do by way of cleaning afterwards when compared with what a person without such a disability has to do, having been to the toilet (and as such the Tribunal may have lost sight of the respective time differential involved). I have to say Mr S seems to me to be at an extreme end of the spectrum of having difficulties with daily living activity 5. Given the likely time involved in cleaning up, especially when on the road at work, I am struggling to see how it could not take him at least as twice as long as a person without his disability. On that basis it is at least arguable that he should qualify for 8 points under descriptor 5f.
13. In this context it may be the decision of Upper Tribunal Judge Gray in the decision *GP v SSWP (PIP)* [2016] UKUT 444 (AAC) is relevant, at least by analogy. That was an appeal to the Upper Tribunal by the Secretary of State. The claimant in that case suffered from severe OCD. The First-tier Tribunal awarded him a total of 12 daily living points. This included 8 points for descriptor 4g, namely that the claimant could not (applying regulation 4(2A)) wash or bathe at all within the terms of the legislation (because he took so long). According to Judge Gray (at paragraph 12):

“The factual findings of the FTT set out in the statement of reasons were that the time that the appellant took to wash and bathe was more than twice the time somebody without the disorder would take, and that entitled him to eight points under activity 4g, the maximum for the activity.”
14. The Secretary of State’s appeal in *GP v SSWP (PIP)* was dismissed on another point. However, there is nothing in Judge Gray’s decision to suggest that she considered there was anything amiss with the FTT’s conclusion on the facts about daily living activity 4g.
15. All in all, I am satisfied there is sufficient uncertainty here about the Tribunal’s approach to regulation 4(2A) to justify giving permission to appeal.

The proceedings before the Upper Tribunal

10. Mrs Helen Hawley, who is the Secretary of State’s representative in these appeal proceedings, supports the Appellant’s appeal to the Upper Tribunal in her detailed and helpful submission.

11. In summary, the Secretary of State's primary submission is as follows:
- 4.3 It is my submission that the FtT has erred in law in both its fact finding and duty to provide adequate reasons for their decision. The conclusion from the FtT on how they assessed the claimant's functional abilities appears limited in their reasoning. It seems that what the FtT has provided at paragraphs 12-14 in relation to daily living activity 5 – Managing toilet needs or incontinence, appears to be no more than a rehearsal of evidence and a conclusion without an adequate explanation.
12. Mrs Hawley adds that in reaching its conclusions the FTT "appear to have simply assumed that the claimant would be able to clean himself after an evacuation of the bladder or bowel (or both) within a reasonable time period without adequately explaining how they reached that conclusion given the claimant's very detailed and extensive written evidence on he how managed his double incontinence on a daily basis" (paragraph 4.12). Thus "there appears to be a distinct lack of reference to the extensive and detailed evidence provided by the claimant concerning his significant difficulties with and the time taken to manage the effects of his double incontinence when determining which point scoring descriptor applied in the claimant's circumstances within daily living activity 5" (paragraph 4.15).
13. Mrs Hawley therefore submits that the FTT erred in law and so its decision should be set aside. She accepts that the facts and circumstances of the case are sufficiently recorded to enable the Upper Tribunal to make the decision that the FTT should have made, namely that the Appellant satisfies the criteria to be awarded 8 points for daily living descriptor 5f (needs assistance to be able to manage incontinence of both bladder and bowel).

The Upper Tribunal remakes the original decision under appeal

14. I therefore conclude that the First-tier Tribunal erred in law for the reasons summarised above. I accordingly allow the Appellant's appeal to the Upper Tribunal. I also set aside the First-tier Tribunal's decision.
15. I re-make the FTT's decision in the following terms:
- The Appellant's appeal (SC007/22/01185) to the First-tier Tribunal is allowed.*
- The Respondent's decision of 6 July 2022 is revised.*
- The Appellant is entitled to an award of the daily living component of PIP at the standard rate for an indefinite period from 8 February 2022 (daily living descriptors 5f (8 points) and 9b (2 points) apply).*

16. I formally find that the First-tier Tribunal's decision involves an error of law on the grounds as outlined above.
17. Obviously, as a result of this Upper Tribunal decision, there will now be some arrears of the PIP daily living component due to be paid to the Appellant.

The Appellant's later PIP claim

18. Mrs Hawley helpfully adds the following further information (at paragraph 4.19 of her submission):

the claimant made a further unsuccessful claim to PIP on 24/07/2023. If the UT Judge is minded to accept my submission and set aside the FtT's decision made on 21/02/2023 and gives the decision that the FtT should have given, the Secretary of State is prepared to take the UT Judge's decision being the "decision of the FtT" for the purposes of regulation 11(2)(c) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, with the result that regulation 11 will extend to the disallowing decision made on the second claim to PIP made by the claimant on 24/07/2023.

19. Regulation 11(2) of the 2013 Regulations provides as follows:

(2) Where—

(a) the Secretary of State makes a decision under section 8 or 10 of the 1998 Act or such a decision is revised under section 9(1) of the 1998 Act ("decision A");

(b) the claimant appeals against decision A;

(c) after the appeal has been made, but before it results in a decision by the First-tier Tribunal, the Secretary of State makes another decision ("decision B") which—

(i) supersedes decision A; or

(ii) decides a further claim by the claimant;

(d) after the making of decision B, the First-tier Tribunal makes a decision on the appeal ("decision C"); and

(e) the Secretary of State would have made decision B differently if, at the time, the Secretary of State had been aware of decision C,

the Secretary of State may revise decision B.

20. This accordingly enables the Secretary of State to give ongoing effect to the present substituted decision by revising the adverse decision on the Appellant's subsequent claim.

Conclusion

21. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The decision is re-made as above (section 12(2)(b)(ii)). My decision is also as set out above.

**Nicholas Wikeley
Judge of the Upper Tribunal**

Approved for issue on 25 June 2024