IN THE UPPER TRIBUNAL **Appeal No. UA-2024-000699-PIP**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 338 (AAC)**

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

Between: LB Appellant

and

The Secretary of State for Work and Pensions Respondent

Before: Upper Tribunal Judge Perez

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

Representation:
Appellant: Clive Giles, Citizens Advice, Teignbridge
Respondent: Helen Hawley, Department for Work and Pensions, Decision Making and Appeals

DECISION

1. Mr LB's appeal is allowed.

2. The First-tier Tribunal decision dated 5 January 2024 (heard under reference 1685017640365684) is set aside so far as relating to the mobility component of the personal independence payment. That part of the case is remitted to the Social Entitlement Chamber of the First-tier Tribunal, to be reheard in accordance with the directions at paragraph 22 of this decision.

REASONS FOR DECISION

Introduction

3. The claimant, Mr LB, appeals to the Upper Tribunal with my permission dated 14 August 2024. That permission was given on the papers.

Factual and procedural background

Secretary of State's decisions

4. The claimant made a claim for both components of the personal independence payment. The claimant was assessed by a health care professional for the Secretary of State. The Secretary of State's decision maker accepted that the claimant has: anxiety and depressive disorders – mixed, carpal tunnel severe left hand, Type 2 diabetes, migraines, osteoarthritis, restless leg syndrome, non-fatty liver and oesophageal duodenitis and psoriasis.

5. On 28 February 2023, the Secretary of State's decision maker made a decision awarding two daily living points for needing an aid or appliance for preparing food; two points for taking nutrition: needing an aid or appliance, or supervision from another person to be able to eat and drink, or needing assistance from another person to be able to cut up food; and two points for needing an aid or appliance to wash or bathe. The total of six daily living points was not enough for an award and no daily living award was made by that decision. In the same decision, the Secretary of State's decision maker gave zero mobility points, and so made no mobility award either.

6. On 14 April 2023, the Secretary of State's decision maker made a decision on mandatory reconsideration. The decision gave an additional two points for needing an aid or appliance to manage toilet needs or incontinence. This took the daily living total to eight points. So the decision made an award of the daily living component at the standard rate. The period of the award was from 9 November 2022 to 20 February 2025. The decision maintained the zero mobility points originally awarded, and so confirmed that no mobility component was awarded from 9 November 2022.

Appeal to the First-tier Tribunal

7. The claimant appealed to the First-tier Tribunal. His grounds of appeal to the First-tier Tribunal were that: "My mobility is severely restricted and I am unable to walk more than fifty yards before I have to stop. No account was taken of this in the reconsideration. In addition, no account has been taken of my mental health problems which affect my daily living and mobility". Although those grounds mentioned daily living, the claimant's representative at the First-tier Tribunal hearing said the claimant was not challenging the standard rate daily living award, and that only the mobility component was in issue.

8. The First-tier Tribunal said—

> "11. By way of background the Appellant confirmed that he was in receipt of Carer's Allowance for his wife who has a number of health conditions. He said that he experienced widespread osteoarthritis for which he took pain relief, and diabetes type 2 for which he injected insulin twice a day. He had experienced a number of hypos last year for which he had little warning. He said that he may get sweaty or silly. When this happened, he would eat something sweet.
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> 12. He had undergone decompression for carpal tunnel syndrome in his left wrist some years ago and in his right wrist last year. He took amitriptyline at

night to help with his restless leg syndrome. He had undergone light therapy for his psoriasis which had found to be of beneficial effect.

13. He had experienced low mood for some years which had been exacerbated by the death of his father. He had been prescribed sertraline. He had been referred for talking therapy. He thought that he was on a waiting list but had not followed this up.

14. Notwithstanding the impact of his own medical conditions, he was able to drive an unadapted manual car. He was able to get in and out of the vehicle without assistance, operate the brakes, clutch accelerator, steering wheel, seat belts etc. safely. He considered himself to be a safe and competent driver.

15. He had not applied for a blue badge as his wife had one because of her own mobility issues. Owing to his diabetes he had a restricted period driving licence which is reviewed every 3 years. He initially said that he was restricted to driving for an hour a day but upon being questioned further about this he said that this is what had been recommended by his GP. There was no formal restriction on his licence to this effect. He did not like driving in the afternoon because of his diabetes. He was able to drive to familiar places alone but generally referred to be accompanied. He would struggle to get to somewhere unfamiliar owing to anxiety. He was however able to follow Satnav directions. He had not had a hypo whilst driving.

16. In or about July 2022 he and his wife had moved from […] to […] because their landlord was selling the property they rented. They had then moved to […] where they presently reside. They had never previously resided in [that place].

17. Asked how he had managed to orientate himself when out and about in […], which was an unfamiliar place to him he said that he was able to follow his wife's directions as she was more familiar with the area. He was also able to program and follow the Satnav. Asked if he had ever gotten lost, he made reference an in incident about 6 months ago when visiting friends in […]. He had become lost during a diversion and had found the Satnav unhelpful.

18. Asked whether he could use public transport he said that occasionally he would get the bus into town. He again said that when out and abut he preferred to have someone with him for reassurance. He used a self-purchased walking stick to assist his balance.

19. Asked about his ability to mobilise on flat level ground he said that his ability to mobilise was limited by pain in his hips and legs and that his legs felt like they were giving out occasionally. He said that he was always in a degree of pain but that this would become an issue after he had walked about 20 yards. He said that it may take him about 5 minutes to cover this distance after which he would need to rest of a few minutes. When it was put to him that this appeared to be a somewhat unrealistic timescale and was inconsistent with our limited observations of him entering the hearing room he said that he was not very good at judging distances and times.

20. When it was observed that the HCP had recorded that he could walk 2 aisles of the supermarket using the trolley for support he said he would shop weekly with his wife and that they would have a break in the supermarket café.

They may be in the supermarket for up to 30 minutes depending on how long he had to stand at the checkout.

21. In making our decision we considered the impact of the Appellant's conditions upon their ability to undertake the mobility activities safely, to an acceptable standard, repeatedly and within a reasonable timescale for at least 50 per cent of the days down to the date of decision.

Mobility Activity 1 - Going Out

In his PIP2 the Appellant had said in terms that he was able to drive locally and use Satnav but that if he had to go anywhere unfamiliar, he would need to be accompanied because of his mental health issues and that for virtually all journeys he would have somebody with him.

The HCP recorded as follows: -

> "He drives a car and does not get lost, he denies panic attacks, he does not like crowds and leaves home to attend appointments in addition to weekly shop needed. He drove to assessment centre today, he previously left home two days ago to visit […]'s niece as having a baby. No reports of needing to abandon a journey. Can follow a map and directions on satnav, he had counselling about 10 years ago but no therapy to manage anxiety."

As is noted above the Appellant had moved home several times in the recent past and had settled in […] which was an unfamiliar place. The evidence was that he had been able to orientate himself without significant difficulty. He was able to use public transport. We found no reliable evidence to the effect that owing to cognitive issues he would be unable to plan the route of an unfamiliar journey.

It is recorded both in the PA4 and in the Patient Summary that the Appellant is his wife's full time carer. We found that the fact of him being accompanied on his journeys was born of habit rather than of necessity and that whilst his preference may have been to be accompanied there was no reliable evidence of overwhelming psychological distress which would prevent him from following the route of a familiar or unfamiliar journey without another person. No points were awarded.

Mobility Activity 2 – Moving Around

In his PIP2 the Appellant stated that his ability to mobilise was limited to 50m and that he used a walking stick and a shopping trolley when mobilising. He estimated his speed as being about a third of the speed as an able bodied person.

There was no medical evidence to support this level of limitation.

The HCP records that he was observed to walk 30m slowly with aids The walking aids he used were self-purchased and were not recommended by a medical professional. Again, it is recorded by the HCP that he had had no specialist or physiotherapy referrals in connection with his mobility issues and that he had said could walk 2 aisles of the supermarket before having to stop.

> We found his oral evidence as to his ability to mobilise to be unreliable, unrealistic, and inconsistent with our, albeit limited observations. Having claimed in his PIP2 and notice of appeal that he would have to stop after 50 yards he told us that he would have to stop after walking 20 yards and that it would take him 5 minutes to do so before going on to accept that he was not very good at estimating times and distances.
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> Asked whether he could use public transport he said that occasionally he would get the bus into town. This seemed to us to be inconsistent with someone whose ability to mobilise was as limited as claimed.
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> Looking at the evidence before us in the round we found it more likely than not that on most the days the Appellant would be able to mobilise for between 50 and 200m to the required standard. No points were awarded with reference to mobility activity 12(c) [sic].
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> The duration of the daily living award was not challenged in the written submissions or at the hearing.".

9. The First-tier Tribunal accepted that the claimant satisfied the same daily living descriptors as the Secretary of State had found satisfied on mandatory reconsideration. So the First-tier Tribunal awarded eight daily living points and confirmed the standard rate daily living award for the period 9 November 2022 to 20 February 2025. The First-tier Tribunal disagreed with the zero points awarded for mobility and gave four points for mobility descriptor 2b: Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided. Those four points were insufficient, however, for an award of the mobility component.

10. The First-tier Tribunal refused permission to appeal to the Upper Tribunal.

Grounds of appeal to the Upper Tribunal

11. The claimant applied to the Upper Tribunal for permission to appeal to the Upper Tribunal in respect of the mobility component part of the First-tier Tribunal's decision.

Permission to appeal to the Upper Tribunal

12. On 14 August 2024, I gave permission to appeal to the Upper Tribunal in relation to the mobility component, for arguable errors of law in relation to mobility activity 2. I said in granting permission that I needed to make no comment on whether the First-tier Tribunal arguably erred in law in relation to mobility activity 1, but that, if the Secretary of State opposed the appeal, the Upper Tribunal would need her submissions as to mobility activity 1 too. The Secretary of State did not oppose the appeal, and has not needed to make a submission as to mobility activity 1.

Submissions

13. The parties have both agreed: to my finding that there were the errors of law set out at paragraphs 16 to 19 of this decision, to the mobility component part of the First-tier Tribunal's decision being set aside for the reasons in those paragraphs, and to the Upper Tribunal referring the mobility component part of the case for redetermination entirely afresh by the First-tier Tribunal.

Law

14. At the relevant time, regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/377) provided—

> "**4.**—(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.
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> (2) C's ability to carry out an activity is to be assessed –
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> (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
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> (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.
>
> (2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—
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> (a) safely;
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> (b) to an acceptable standard;
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> (c) repeatedly; and
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> (d) within a reasonable time period.
>
> (3) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.
>
> (4) In this regulation—
>
> (a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
>
> (b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and
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> (c) "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity".

15. In PS v SSWP [2016] UKUT 326 (AAC) (CPIP/665/2016), Upper Tribunal Judge Markus QC held—

> "9. On the main issue, Mr Whitaker (who has made the written submissions of behalf of the Secretary of State) says that it is a matter for the tribunal whether pain is significant enough to mean that a person cannot mobilise to an

acceptable standard. Mr Whitaker says that the Appellant did not explicitly state that he could not walk to an acceptable standard. His evidence was that his pain increased as he walked and that after a short distance the pain stopped him. Mr Whitaker says that this meant that the pain was not significant enough to prevent him walking up to that point, and so it was at that point at which the pain meant that walking was to an unacceptable standard. He asks, rhetorically, "Why would the claimant continue to walk through significant pain when he didn't have to?"

10. I do not agree with these submissions. The Appellant's case had consistently been that his ability to walk was limited as to distance and speed, and that he suffered pain throughout. Thus, in his claim form he said at page 37 "I walk slowly with a slight limp, I have pain at the base of my spine, shoulder (leftside) and neck which increases as I walk and envelops my whole torso. My right leg often gives way – very few steps and my right arm has started to shake a lot with spasms, my right arm sometimes flails around when my right leg gives way as I try to stay balanced". His pain management doctor had written (page 45) that the Appellant "felt that his pain was present continuously and walking was aggravating his symptoms…He could that his walking was very impaired due to the back pain and could only walk for less than 10 minutes". In his request for mandatory reconsideration the Appellant described constant pain and then said "I would rather push through the pain and stay as active and independent as I can, for as long as I can. I dread the thought of being in a wheel-chair or living in some sort of supported accommodation." He said "I think it is fair to say that I cannot walk fifty yards as I struggle at every step". The note of his oral evidence at the hearing was "I am in constant pain …the further I go the worse it gets….I think I could walk about 30 sec to 2 minute – not very long – it is the pain that would stop me."

11. What the Appellant was saying in his written and oral evidence was that he suffered pain when he walked, that he would walk slowly for a short distance despite the pain but that it would get worse until the pain would stop him. It could not properly be assumed that, because the Appellant managed to keep going for a certain distance, any pain he experienced while he was walking was not relevant. If a claimant cannot carry out an activity at all, regulation 4(2A) does not come into play. Where a person is able to carry out an activity, pain is clearly a potentially relevant factor to the question whether he or she can do so to an acceptable standard.

12. Although not legally binding, the approach set out in PIP Assessment Guide (2016), which provides guidance for health professionals in assessing claimants, reinforces my conclusion:

> "3.2.5 The fact that an individual can complete an activity is not sufficient evidence of ability. HPs may find it helpful to consider:
> …
> • Impact – what the effects of reaching the outcome has on the individual and, where relevant, others; and whether the individual can repeat the activity within a reasonable period of time and to the same standard (this clearly includes consideration of symptoms such as pain, discomfort, breathlessness, fatigue and anxiety)."

13. This was also the approach taken by Upper Tribunal Judge Parker in CPIP/2377/2015 where she said of regulation 4(2A) and 4(4):

> "6. … Matters such as pain, and its severity, and the frequency and nature, including extent, of any rests required by a claimant, are relevant to the question of whether a claimant can complete a mobility activity descriptor 'to an acceptable standard'…
>
> 7. Whether a claimant can stand and then move to a particular distance 'to an acceptable standard', inevitably links with two of the further relevant matters under regulation 4(2A): 'repeatedly' and 'within a reasonable time period'. As these terms are statutorily defined, unlike the phrase 'to an acceptable standard', then if a claimant fails to satisfy that statutory test in either respect, it is unnecessary to give consideration to 'an acceptable standard'; however, it might still technically be possible for a claimant, who is unable to show that he cannot carry out an activity repeatedly or within a reasonable time period, yet notwithstanding to establish that he is unable to do so 'to an acceptable standard'. Such instances must be rare but may exist; for example a claimant who forces himself to walk quickly and repeatedly, through stoicism, despite a very high level of difficulty caused by matters such as pain, breathlessness, nausea or cramp."

14. The Appellant here was asserting that his was such a case. He had not succeeded in showing that he could not walk over 50 metres repeatedly or within a reasonable time period, but he said that he did so in considerable pain. The answer to Mr Whitaker's rhetorical question is found in the Appellant's request for mandatory reconsideration from which I have cited above: that he would rather push through the pain in order to stay as active and independent as possible. In addition, in his claim form he said that he experienced other difficulties while walking – his arm going into spasm or flailing, and his leg giving way – which could also be relevant to whether he could walk the distance to an acceptable standard.

15. The tribunal was wrong not to consider what the impact of pain was on the Appellant's ability to mobilise the distance found to an acceptable standard. The tribunal was not relieved of the requirement to consider the application of regulation 4(2A) simply because it, or any element of it, had not been mentioned in terms by the Appellant. The provision was put in issue by the evidence.

16. There is no need for me to determine the other matters raised in my grant of permission. In any event, on reflection I agree with Mr Whitaker's submissions that whether the Appellant could walk the distance repeatedly did not arise on the evidence. Nor was there anything in the evidence to suggest that the Appellant's condition was variable such that regulation 7 might apply. On the contrary, the Appellant's case was that his condition was "pretty much the same from day to day" (page 105).

17. On the basis of the error of law which I have found, I allow the appeal and set aside the tribunal's decision. Further findings of fact are required and so I have decided to remit this appeal to a different tribunal in accordance with the directions which are set out above.".

Analysis

Errors of law

16. The First-tier Tribunal erred in law in relation to mobility activity 2, as follows.

17. First, the First-tier Tribunal made no findings as to how long the supermarket aisles in question were, or as to how long it took the claimant to walk along them. The First-tier Tribunal needed to make findings on both in order to make a finding as to whether the walking was able to be done within a reasonable time period (within the definition in regulation 4(4)(c)).

18. Second, the First-tier Tribunal made no findings as to—

(a) whether the claimant would then reasonably need to repeat the two aisles of the supermarket;

(b) whether, if he did reasonably need to repeat the two aisles, how many times he would reasonably need to repeat them (regulation 4(4)(b));

(c) whether he was able to repeat walking those two aisles before having to stop; and

(d) whether, even if he had been able to complete the two aisles within a reasonable time period on the first time of completing them, he was able to complete them within a reasonable time period (and safely)—

(i) on the first repetition of that journey (if a repetition was reasonably required); and

(ii) on each subsequent repetition that was reasonably required.

19. Third, the First-tier Tribunal made no finding as to the level of pain the claimant is in while walking. The First-tier Tribunal needed to make such a finding in order to be satisfied that the walking was – even if able to be done safely, repeatedly and within a reasonable time period – able to be done to an acceptable standard (PS v SSWP [2016] UKUT 326 (AAC), CPIP/665/2016). This applied even to the first round of walking two supermarket aisles. Walking despite pain is not to an acceptable standard.

Disposal

20. Both parties agreed to remittal of the mobility component. I consider remittal appropriate for findings of fact to be made afresh in relation to both mobility activity 1 and mobility activity 2.

Conclusion

21. It is for all of the above reasons that I allow the appeal so far as relating to the mobility component part of the First-tier Tribunal's decision and so set aside that part of the decision, and that I remit the mobility component part of the case to a freshly-constituted panel of the First-tier Tribunal, for redetermination entirely afresh

CASE MANAGEMENT DIRECTIONS

22. I therefore direct as follows—

(1) The mobility component part of the case is to be redetermined entirely afresh by the First-tier Tribunal.

(2) The First-tier Tribunal panel which rehears the mobility component part of the case must contain no-one who was on the panel which decided the case on 5 January 2024.

Rachel Perez
Judge of the Upper Tribunal
25 October 2024