

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CPIP/2301/2015

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (made on 7 January 2015 at Chatham under reference SC13/14/00282) involved the making of an error of law it is set aside under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is remitted to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS

- A The new tribunal must 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 In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 25 July 2013 and refused on 16 July 2014.
- C In doing so, the tribunal must not take account of circumstances that were not obtaining at the 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 Secretary of State's appeal to the Upper Tribunal in respect of a decision of the First-tier Tribunal (F-tT) made on 7 January 2015. The F-tT had decided to allow the appellant's appeal against a decision of 16 July 2014 that he was not entitled to a personal independence payment and had concluded he was entitled to the daily living component at the enhanced rate from 25 July 2013 to 24 July 2016.

Background

2. Personal independence payments were introduced by the Welfare Reform Act 2012. They consist of two components being the daily living component and the mobility component. Both are available at a standard and enhanced rate. Entitlement is established by the scoring of points under specified activities and descriptors. A score of 8 points leads to entitlement at the standard rate and a score of 12 points leads to entitlement at the enhanced rate. A number of terms used in the legislation are specifically defined.

3. The claimant, who was born on 24 October 1973, has schizophrenia. He also suffers from back pain though that is, it seems fair to say, less of a problem to him. He was diagnosed with schizophrenia in 1998 and has subsequently been treated by a psychiatrist and assisted by a community psychiatric nurse and a mental health social worker. He has been residing in

“supported accommodation” (which combines the provision of accommodation with the provision of support services) since July 2013. There is a history of his having been “sectioned” (detained under mental health legislation) as a result of his mental health difficulties on a number of occasions. He has been receiving injections of depakote and clopixol on a weekly basis as a consequence of his mental health difficulties.

4. The claimant had been assisted by his social worker in applying for a personal independence payment. It appears that he was helped in completing the standard form PIP2 in which he set out an account of his difficulties. On 19 June 2014 he attended a “face to face consultation” with a health care professional who went on to produce a written report of that date. According to that report he had sufficient difficulties to enable him to score 7 points under the activities and descriptors relevant to entitlement to the daily living component of personal independence payment but no points in relation to the mobility component. The 7 points related to the activities of managing therapy or monitoring a health condition, engaging with other people face to face and making budgeting decisions.

5. On 16 July 2014 the respondent went on to decide that the claimant was entitled to those 7 points but no more. That meant he was not entitled to a personal independence payment at all. After unsuccessfully pursuing the mandatory reconsideration procedure the claimant decided to appeal to the F-tT.

The appeal to the First-tier Tribunal and its decision

6. The F-tT held an oral hearing of the claimant’s appeal. He attended, accompanied by his social worker, and both of them provided oral evidence. The F-tT decided to allow the appeal concluding that the claimant scored 12 points with respect to the daily living component, albeit, that he scored no points with respect to the mobility component. Of those 12 points, the F-tT had decided that he was entitled to 4 points under the descriptors linked to the activity of communicating verbally; 2 points under the descriptors linked to the activity of reading and understanding signs, symbols and words; 4 points under the descriptors linked to the activity of engaging with other people face to face; and 2 points under the descriptors linked to the activity of making budgeting decisions. Specifically, with respect to reading and understanding signs, symbols and words, the F-tT decided that the claimant needed prompting to be able to read or understand complex written information. With respect to the activity of communicating verbally, it decided that he needed communication support to be able to express or understand complex verbal information (my underlining). The F-tT issued a decision notice to this effect and, thereafter, produced its statement of reasons for decision (“statement of reasons”). It is apparent from the latter document that the F-tT also considered the appellant to be entitled to one further point on the basis that he needed “prompting or assistance” in managing therapy or monitoring a health condition but that it had not made a formal award as to that because the awarding of one further point would not impact upon the outcome.

The proceedings before the Upper Tribunal

7. The Secretary of State applied for permission to appeal to the Upper Tribunal and this was granted by a judge of the First-tier Tribunal in the Social Entitlement Chamber. It was contended by the Secretary of State, in the grounds of appeal, that the F-tT had erred in failing to have regard to the definitions of “complex verbal information” and “complex written

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information” as contained in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013, when deciding that the claimant had been entitled to 4 points in relation to the activity of communicating verbally and 2 points in relation to the activity of reading and understanding signs, symbols and words. It was also contended that as the claimant had been already awarded 4 points under descriptor 9(c), a descriptor linked to the activity of engaging with other people face to face, on the basis that he would need social support to be able to engage with other people, his difficulties regarding “general social skills and social activities” had already been catered for such that they should not be considered again in respect of activity 7 (communicating verbally) which, it was said, tested the actual ability to express oneself and understand a conversation.

8. I issued directions providing for further submissions and invited the parties, in addition to addressing the various other matters raised, to comment upon whether anxiety caused by mental health difficulties could be a relevant factor when considering whether points may be scored under the descriptors linked to activity 7.

9. The claimant decided not to offer any comments upon the matters raised. Mr R J Whitaker, on behalf of The Secretary of State, prepared a helpful submission concerning the interaction between activity 7 and activity 9. He did, in fact, express the view that mental health difficulties and functional loss associated with such difficulties could lead to the satisfaction of the descriptors under activity 7. In this context he made reference to the Government’s response to the consultation on the Personal Independence Payment assessment criteria and regulations of 13 December 2012 and quoted from it as follows:

“ 5. 86. Some respondents raised concerns that the activity does not take into account mental and cognitive impairments. As with elsewhere in the assessment, we do not consider the type of impairment that an individual has but the impact it has on the activity. Whether mental or cognitive impairment prevents an individual from being able to convey information – and in particular to understand information conveyed to them – they can potentially score in this activity.”

10. He says, therefore, that the intention was that mental health impairment should be considered in respect of activity 7 and that, if such impairment leads to functional loss associated with anxiety, that could potentially lead to the scoring of points under the relevant descriptors. So, he acknowledges, it is not the case that “communicating verbally” simply relates to difficulties caused by factors such as damaged parts of the throat, vocal cords or mouth which allows a person to produce sounds or damage to the sensory system which allows them to hear sounds or to the brain itself which may effect sensory processing or understanding. Nevertheless, continues Mr Whitaker, the tasks covered by activity 7 and those by activity 9 are different. Unless those differences are delineated there is a risk that they could be conflated into one activity. Almost always, when a person is seeking to communicate verbally with someone, they are doing so whilst also engaging with them face to face. However, activity 7 is designed to measure the specific ability to vocalise and understand information whereas activity 9 is measuring the specific ability to be able to function in a social environment. Mr Whitaker, once again, refers to the Government’s consultation response referred to above with respect to the purpose of the activities. He quotes as follows:

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“Activity 7:

- 5.76 This activity was designed to establish an individual’s ability to be able to convey and understand verbal communication ...

Activity 9:

- 5.94 This activity was included to allow an assessment of the barriers that some individuals can face to the mental and cognitive elements of engaging with other people, such as not being able to understand body language, tone or social cues.”

11. In this case, continues Mr Whitaker, there was no persuasive evidence to suggest that the appellant did have communication difficulties consequent upon social anxiety. It was apparent that he was able to communicate, for example, with his parents, his brother and, in a more formal setting, the health care professional who had examined him and the F-tT which had heard his evidence.

12. Neither party asked for an oral hearing before the Upper Tribunal.

My reasoning

13. The first thing I have to consider is whether to hold an oral hearing. However, as noted, there has been no request for one. I have attached weight to the lack of any such request. Having reminded myself of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I have concluded that I can justly decide the appeal without an oral hearing, the issues in dispute being clear from the documentation before me. I have decided not to hold one.

14. The relevant activities and descriptors which have been raised by this appeal to the Upper Tribunal are as follows:

Activity	Descriptors	Points
7. Communicating verbally.	a Can express and understand verbal information unaided.	0
	b Needs to use an aid or appliance to be able to speak or hear.	2
	c Needs communication support to be able to express or understand complex verbal information.	4
	d Needs communication support to be able to express or understand basic verbal information.	8
	e Cannot express or understand verbal information at all even with communication support.	12

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8. Reading and understanding signs, symbols and words.	a	Can read and understand basic and complex written information either unaided or using spectacles or contact lenses.	0
	b	Needs to use an aid or appliance, other than spectacles or contact lenses, to be able to read or understand either basic or complex written information.	2
	c	Needs prompting to be able to read or understand complex written information.	2
	d	Needs prompting to be able to read or understand the basic written information.	4
	e	Cannot read or understand signs, symbols or words at all.	8
9. Engaging with other people face to face.	a	Can engage with other people unaided.	0
	b	Needs prompting to be able to engage with other people.	2
	c	Needs social support to be able to engage with other people.	4
	d	Cannot engage with other people due to such engagement causing either – (i) overwhelming psychological distress to the claimant; or (ii) the claimant will exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	8

15. As to the definitions, the following is contained within Part 1 of Schedule 1 to the 2013 Regulations:

“ ‘Complex verbal information’ means information in C’s native language conveyed verbally in either more than one sentence or one complicated sentence:

‘Complex written information’ means more than one sentence of written or standard sized text in C’s native language.”

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16. The F-tT, as indicated, decided that, amongst others, descriptors 7c and 8c were met. The Secretary of State's primary concern is that no regard was had to the definitions set out above, by the F-tT, when it so decided.

17. The F-tT, in its statement of reasons, set out its findings and then explained its reasons for deciding which descriptors were met. It found, amongst other things, that the claimant had help in managing his bills and his post, that he was not socially active, that he would spend time with his brother, that they would visit the cinema once a week, that otherwise he would stay indoors watching television or reading, that he preferred to spend time with his family, that his social worker was concerned that he would not socialise outside the family, that he had a "pay as you go" mobile telephone, that he needed help with budgeting, that he needed help to manage his bank account, that he needed help to fill in forms, that he needed help in understanding and responding to correspondence and that his brother would help him manage his money.

18. In the section of its statement of reasons headed "Reasons" the F-tT noted that the healthcare professional who had examined the claimant had identified that he had difficulties in relating to others and in budgeting and that he was prone to anxiety when under stress. It noted his social worker's evidence to it that he did not always understand the extent of his own difficulties. It then went on to say this:

" 17. They both [that is a reference to the claimant and his social worker] agreed that [the appellant] had significant problems in dealing with letters and forms. In practice, he simply did not know what to do with either, and needed help every time he received a letter or had to complete a form. He described the PIP claim form as 'weird', and said that he could not understand jargon. The form had been completed only with help from [the social worker]. He also said that, although he might struggle through the first page of a letter, he would then give up, which held the danger of him missing important information, particularly in relation to his benefit payments.

18. In respect of his financial affairs, it was clear that he was not able to manage independently at all. His brother organised his weekly money for him, and his parents helped him to organise his weekly budget. [The appellant] said that he had to pay rent of £5 per week, and that he paid this most of the time. He had been unable to set up a bank account and to arrange for bills to be paid by standing order without help. [The social worker] said that he did really struggle with such practical activities."

And then:

" 20. The other significant matter the tribunal had to take into account was the impact on [the appellant] of him not managing his correspondence, his financial affairs, and struggling to relate to and understand people. He said that he became anxious and stressed; [the social worker] agreed with this, but went on to say that the probable impact of such stress was that [the appellant] would relapse. He had a very difficult history. He had spent significant periods of time in hospital following his diagnosis, including most of the four year period which preceded his move to supported housing in July 2013. The reason why he has spent so long in hospital at that time was because attempts to move him into supported housing had not been successful. The ultimate aim now, [the social worker] said, was to move him into independent living. She had helped him to apply for PIP in July 2013, when he had only recently been discharged from hospital, and was even less well equipped to manage without support.

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She was very clear that, even in January 2015, [the appellant] was no way near achieving independent living. He still required a great deal of additional support.

21. On balance, the tribunal concluded that the medical assessor and the decision maker had significantly underestimated [the appellant's] needs, and had little difficulty in determining that he was able to express and understand complex verbal information only with help from a person trained/experienced in helping people to communicate (7c-4 points); that he needed prompting from another person to read or understand complex written information (8c-2 points); that he was able to engage with other people only with support from a person trained/experienced in helping people to engage in social situations (9c-4 points); and that he needed prompting/assistance from others to enable him to make complex budgeting decisions (10b-2points). The tribunal did not include in its decision reference to descriptor 3b, although it was accepted that he did need prompting/assistance in managing his medication, which would have given him an additional point, but this was not necessary to the award because he achieved 12 points anyway, and therefore met the criteria for an enhanced daily living award."

19. The F-tT did not, in the paragraphs I have quoted, nor elsewhere in its statement of reasons, refer to the definitions of "complex verbal information" or "complex written information" which have been set out above. As was contended in the Secretary of State's grounds of appeal, it is apparent that those definitions do not, as it is put in the grounds of appeal, set "a high bar of reading ability" or "a high bar of verbal ability". Indeed, it might be said that the definitions mean that "complex" for the purposes of activity 7 and activity 8 does not really mean complex at all in the way that the word is normally understood. That, perhaps, seems rather odd but, nevertheless, the definitions are clear, specific and have to be applied by decision makers including tribunals. The F-tT did not show, in its statement of reasons for decision, that it had regard to those specific definitions. Indeed, its failure to refer to them suggest that it might, in fact, have been unaware of them. Whether that is right or not, given the terms of those definitions it was incumbent upon the F-tT to show an awareness of them and to show that they had been applied. It seems to me that, in fact, in explaining how it reached its decision in the paragraphs I have set out above, the F-tT sought to apply an ordinary dictionary definition of the term "complex". As such, I am satisfied, despite what is otherwise a most careful decision, that it did err in law. The error is material because had the F-tT not considered descriptor 7c and descriptor 8c to be satisfied this would have meant, even allowing for the one point in relation to managing therapy or monitoring a health condition, the claimant would have reached only 7 points. That would not have been sufficient to have established entitlement.

20. In light of the above, therefore, I have decided to allow the Secretary of State's appeal to the Upper Tribunal and to set aside the F-tT's decision.

21. I shall, though, although it is not now essential to this decision, say something about the relationship between activity 7 and activity 9. In fact, I find myself in agreement with the careful submissions of Mr Whitaker which I have summarised above. I accept that anxiety caused by mental health difficulties can potentially lead to the scoring of points under activity 7 such that the activity and its associated descriptors are not simply concerned with physical or sensory impairments to communication. I also accept though, as highlighted in the government response, that there is a distinction to be drawn between the sorts of tasks the two different activities, and the associated descriptors, are seeking to test. In this context there is a difference between communication and engagement. If a claimant has difficulty in speaking as a result of anxiety, or perhaps some other mental health problem, it must be asked what it is

that causes that difficulty. Is it a fear of social engagement? Or is it something simply connected to the activity of communicating verbally? It could, of course, be both but, equally, it could be one or the other. So, it seems to me an anxious claimant who, for example, is not able to communicate with strangers or persons who are not well known to him or is not able to do so when in the company of a large number of people but is able to verbally express himself or herself and understand communication with a person with whom they are familiar and comfortable would, in all probability, score points under activity 9 but not under activity 7. That is because, in such a case, it is likely to be the engagement with others which is triggering the difficulty. So, such a claimant would not be able to score points under both activity 9 and activity 7 as a consequence of an anxiety problem impacting upon the ability to engage with other people. However, if a claimant was so anxious that not only was he impaired with respect to engaging with others but was also impaired with respect to the function of communicating verbally, perhaps a most unlikely eventuality, he might score under both activities.

What happens next?

22. I have set the F-tT's decision aside. I have, in consequence, gone on to consider whether I should now remake the decision myself or whether I should remit to a differently constituted F-tT. I have chosen the latter course of action. That is because, my having set the decision aside, it does seem to me that there are further facts to be found and that that task is best undertaken by the F-tT as an expert fact-finding body which will have, in consequence of the make-up of its panel, a range of relevant experience and expertise.

23. There will, therefore, have to be a fresh hearing before a new F-tT. The new F-tT will not be bound by the findings and conclusions of the first F-tT. It will reach its own findings and conclusions on the basis of all of the evidence before it including any further written or oral evidence it may receive. The consequence of my having set the F-tT's decision aside means that the new F-tT's starting point, though not necessarily its end point of course, will be the decision of 16 July 2014 to the effect that the claimant is entitled to 7 points in relation to the daily living component and no points in relation to the mobility component. As to activities 7 and 8, the F-tT should apply the appropriate definitions concerning complex verbal information and complex written information. It should bear in mind what I have had to say regarding the relationship between activities 9 and 7 and the particular matters which the descriptors seek to test. Looking at things practically, it does seem unlikely that the F-tT will have to concern itself very much with the possibility of entitlement to the mobility component, no relevant difficulties in this context having been claimed, but it should not shut its mind to it unless such is authoritatively and expressly conceded. I appreciate that the claimant may not necessarily welcome having to attend another hearing though it does appear that he was able to provide the first F-tT with oral evidence when accompanied by his social worker. Perhaps she or a colleague may be able to accompany him again. Certainly, it does seem to me that the claimant's presence at the reconvened hearing before the new F-tT is likely to be helpful to all concerned.

Conclusion

24. The Secretary of State's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal of 7 January 2015 is set aside. The case is remitted so that a new and

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entirely differently constituted First-tier Tribunal shall consider the claimant's appeal against the decision of the Secretary of State of 16 July 2014.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated:

5 January 2016