ZI v SSWP (PIP)
[2016] UKUT 572 (AAC)

CPIP/1532/2015

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by the claimant does not succeed**. In accordance with the provisions of the Tribunals, Courts and Enforcement Act 2007 I confirm the decision of the Social Entitlement Chamber of the First-tier Tribunal sitting in Nottingham and made on 6th November 2014 (reference SC045/14/00833). This is to the effect that the claimant is entitled to the daily living component and to the mobility component of Personal Independence Payment ("PIP"), both at the standard rate, from 26th June 2013 to 24th November 2016.

General

2. The grounds of appeal at this stage, and the basis on which a judge of the First-tier Tribunal gave the claimant permission to appeal, are limited to one aspect of entitlement to the daily living component of PIP and it is not necessary for me to consider or comment on other aspects of entitlement. Entitlement to PIP is based on an assessment of a person's needs in accordance with specified criteria and the allocation of points in connection with difficulties with certain activities. A claimant who has scored at least 8 points in respect of the daily living component is entitled to be paid at the standard rate of that component. A claimant who has scored at least 8 points in respect of the mobility component is entitled to be paid at the standard rate of that component. A claimant who has scored at least 12 points in respect of the daily living component is entitled to be paid at the enhanced rate of that component. A claimant who has scored at least 12 points in respect of the mobility component is entitled to be paid at the enhanced rate of that component. In the present case the First-tier Tribunal found that the claimant scored 11 points in relation to the daily living component and was therefore entitled to the standard rate but not to the enhanced rate. The score of 11 points included 2 points in respect of needing "to use an aid or appliance to be able to either prepare or cook a simple meal". The issue before me is whether the First-tier Tribunal was in error of law in deciding that the claimant did not score a higher number of points in respect of preparing food. Had the First-tier Tribunal awarded a higher number of points the claimant would instead have been entitled to the enhanced rate of the daily living component.

3. PIP has been replacing disability living allowance (DLA) for most relevant claimants. The details of the assessment are provided for in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2011. In respect of daily living several activity areas are set out in Part 2 of the Schedule and for each activity area several descriptors are set out, each with a corresponding score. What counts is the highest scoring descriptor in each activity area that applies to a particular claimant (regulation 7). A descriptor is applies if it is satisfied (either together or in combination with other descriptors in defined circumstances) for over 50% of the relevant days. Regulation 4(2A) provides that a claimant is only to be treated as able to carry out an activity if he can do so safely (defined as being in a manner unlikely to cause harm either to the claimant or another person), to an acceptable standard, repeatedly (defined to mean as often as the activity is reasonably requited to be completed) and within a reasonable time period (defined as meaning no more than twice as long as the maximum period that a person without the relevant limitations would normally take).

4. For the activity of "preparing food" (which is activity 1) the descriptors are as follows:

a. Can prepare and cook a simple meal unaided.	0
b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
d. Needs prompting to be able to either prepare or cook a simple meal.	2
e. Needs supervision or assistance to be able to either prepare or cook a simple meal.	4
f. Cannot prepare and cook food.	8

"Simple meal" is defined in paragraph 1 of Part 1 of the Schedule as "a cooked one-course meal for one using fresh ingredients". "Cook" is defined as "heat food at or above waist height". "Prepare" is defined in the context of food as "make food ready for cooking or eating". "Meal" and "food" are undefined.

Background and Procedure

5. The claimant is a man who was born on 2nd December 1956. He was a provincial taxi driver for about 15 years until he had heart attacks in April and August 2013. He

subsequently had a quadruple bypass and had stents inserted. He has diabetes leading to loss of sensation in his right toes and reduced sensation in his other foot and has difficulties with chronic back problems, urinary problems, breathing (although he is not asthmatic) and anxiety following an assault when he was a taxi driver.

6. He claimed PIP on 26th June 2013 and on 17th January 2014 the Secretary of State awarded mobility component at the standard rate (8 points scored) from 26th June 2013 to 24th November 2016 but refused to award daily living component (4 points scored). On 27th May 2014 the claimant appealed to the First-tier Tribunal against the decision of the Secretary of State. The First-tier Tribunal considered the matter on 6th November 2014 and allowed the appeal to the extent of making the award that I have confirmed in paragraph 1 above. On 1st April 2015 a judge of the First-tier Tribunal gave the claimant permission to appeal to the Upper Tribunal against that decision of the First-tier Tribunal on the limited issue of whether the kind of meal to be considered had to be one that respected the claimant's "cultural cuisine" and whether the claimant would "be able to prepare all elements of a culturally appropriate meal without assistance in particular in the preparation of chapattis". Final submissions from the parties were not received until 18th September 2015. The Secretary of State opposes the appeal and supports the decision of the First-tier Tribunal. Neither party has requested an oral hearing of the appeal.

The First-tier Tribunal

7. The activity of preparing food was considered at some length by the First-tier Tribunal (paragraphs 9 to 17 of its statement of reasons). I set out below the relevant extracts:

> 9. … The submission from [the claimant]'s representative sought 4 points for 1(e) on the basis that he needed assistance to cook a simple meal …
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> 10. In [the] claim pack [the claimant] had not identified preparing food as an issue for him. He commented to the HCP that "he does not cook as he has never been in the habit". However, he made it clear at the hearing that he knew how to cook as he had done so when he was single and had taught his wife how to cook.
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> 11. … the tribunal agreed that the provision of a perching stool in the kitchen would assist [the claimant] when preparing and cooking a simple meal. The stool would be an aid … as it would improve his impaired physical function namely standing to prepare food. The tribunal found that the length of time he would need to sit on such a stool would not cause substantial problems because of his back.

12. In his representatives submission it was suggested that [the claimant]'s cultural cuisine was not considered in relation to this activity: "This food cannot be cooked on the hob and left. It requires constant attention and [the claimant] would require assistance from his wife to safely complete this descriptor. Without assistance [the claimant] could not complete this task safely, to an acceptable standard and within a reasonable time scale". The tribunal did not accept this argument for a number of reasons.

13. Simple meal is defined as "a cooked one course meal for one using fresh ingredients". This test makes no reference to the need to consider cultural cuisine when applying this descriptor. The tribunal referred to the need to apply the descriptors in the context of an acceptable standard and within a reasonable time. Again this makes no reference to whether an acceptable standard should include the cultural heritage of the appellant.

14. However, the tribunal found that even if they were obliged to take this into consideration they were still obliged to look at a simple meal and could not take into account complex cooking processes in reaching their decision. In addition the tribunal used the expertise of its members and their cultural heritage to conclude that not all meals that [the claimant] might regard as culturally suitable would in fact require the degree of attention he put forward. Indeed to an extent he agreed that mainly chicken or vegetable based meals would require less time and involvement to cook. However, he said that he would not want to eat those all the time.

15. The tribunal had to take into account the 50% rule and found that even if other meals did take longer to cook (which they did not necessarily accept) eating other than those easier to cook meals would not be required over 50% of the time. Equally eating a slightly narrower range of meals meant that he was still able to prepare and cook meals to an acceptable standard.

16. The argument was also that [the claimant]'s wife would need to provide assistance to ensure he completed the task safely. "Assistance" means physical intervention by another person by another person and the tribunal could not see the need for assistance in this activity. [The claimant] had no upper limb problems and could prepare his meals sitting down.

17. His argument at the hearing was that the cooking processes involved frequent stirring for some time which he would have difficulty doing and it was at this point that he would need assistance. The tribunal had found above that this would not necessarily be the case with a simple meal which could be prepared and cooked in a reasonable time. They found once he had a perching stool to relieve some of the difficulties in weight bearing while he cooked, with this aid alone he was more than capable of preparing and cooking his

> meal culturally appropriate or otherwise. Furthermore, he would be stable using such a stool and the activity could therefore be carried out safely.

8. I am bound to say that I find paragraphs 14 and 15 puzzling. The First-tier Tribunal is not appointed for its "expertise" in cuisine (or, indeed, in cultural requirements). If it has particular knowledge this has to be put to the parties and if it is relevant to the reasoning it must explain in the statement of reasons what that specific knowledge is, perhaps how it has been come by, the response of the parties, and the specific findings of fact based on it. Paragraph 15 appears to be purely speculative and not stated to be related to particular evidence. The 50% rule applies to the satisfaction of a specific descriptor (or descriptors) not to the number of days on which a claimant might be required or wish to carry out particular actions. A person might never have to cook because somebody else does the cooking, but the PIP scheme still looks at the physical and mental capacity (although not the skill) to do so if required.

9. On the other hand, paragraph 17 could not really have been expressed more clearly and (because the Upper Tribunal can only interfere with findings of fact if they were made in error of law) really dooms this appeal to failure whatever approach is taken to terms in which permission to appeal was given. However, I consider that matter in deference to the submissions of the parties.

The Arguments

10. On behalf of the claimant it is argued that the First-tier Tribunal did not take account of the definition of the "cooked main meal" given by the Social Security Commissioner in R (DLA) 2/95. This "a labour intensive reasonable main meal freshly cooked and prepared on a daily basis on a traditional cooker for one person". It was argued that reasonable is what is reasonable for a member of the community (the type of community not specified) to which the claimant belongs but a cooked main meal is not a snack. It is then argued that the claimant's "cultural food consists of chappatis" (as though that were the only cultural specific food ever cooked for or by or eaten by him) and a description of the cooking process is given. It is argued that the claimant would have to stand and wait for one side to be done and then stand to cook the other side and that the exertion required (a chappati pan being particularly heavy) would cause breathlessness.

11. The Secretary of State argues that the regulations make no reference to having to take cultural cuisine into account and refers to the DLA decision made by Upper Tribunal Judge Mitchell in AI v Secretary of State [2015] UKUT 0176 (AAC), CDLA 3008/2014.

Conclusions

12. The conditions of entitlement to DLA were very different from those for entitlement to PIP and decisions on the law relating to DLA cannot necessarily be applied in PIP cases. In relation to cooking, one of the bases for entitlement to lowest rate care component of DLA was that a person "cannot prepare a cooked main meal for himself if he has the ingredients" (section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992). "Cooked main meal was" not defined in the Act or in the relevant regulations. The attempt by the Commissioner to define it in R (DLA) 2/95 was never without difficulty and explanations by judges at any level should not be treated as though they were words in a statute. I agree with Judge Mitchell in doubting that much of what was said in that case can survive the decision of the House of Lords in Moyna [2003] UKHL 44, R (DLA) 7/03 (upholding my decision sitting as a Social Security Commissioner in that case).

13. I agree with paragraph 3 of Judge Mitchell's decision in which he said that "The nature of a cooked main meal must, in material respects, be the same for all claimants. Otherwise different claimants would face different disability thresholds. That cannot have been Parliament's intention."

14. Likewise, in relation to PIP, it cannot have been the intention that people from different cultural or religious or ethnic communities with precisely the same disabilities in relation to cooking would have different levels of entitlement to benefit because of their community affiliation.

15. For the above reasons this appeal by the claimant does not succeed.

H. Levenson
Judge of the Upper Tribunal
23rd December 2015