

**THE UPPER TRIBUNAL**

**ADMINISTRATIVE APPEALS CHAMBER**

**DECISION OF THE UPPER TRIBUNAL JUDGE**

**The Secretary of State's appeal is allowed.**

**The decision of the Stirling First-tier Tribunal of 27 July 2015 is set aside.**

**That decision is remade as follows:**

**The claimant is awarded 6 points for descriptor 2(e) and 4 points for descriptor 5(d) of part 2 of schedule 1 to the Personal Independence Payment Regulations 2013.**

**She is entitled to the standard rate of the daily living component of personal independence payment from 22 October 2014 to 21 October 2016.**

**REASONS FOR DECISION**

1. This is an appeal by the Secretary of State, brought with the permission of District Tribunal Judge Susan Boyd, against the decision of the Stirling First-tier Tribunal of 27 July 2015.
2. The claimant is a thirty three year old woman. As the tribunal succinctly state in paragraph 2 of their findings of fact on document 86 she "suffers from malabsorption requiring therapeutic parenteral nutrition" i.e. nutrition provided other than by the alimentary tract.
3. On 22 October 2014 the claimant applied by telephone for personal independence payment. She then submitted an application form dated 18 November 2014. On 15 January 2015 she had a face-to-face consultation with a Health Care Professional, a nurse.
4. On receipt of the report of that consultation, a decision maker, on 20 January 2015, awarded the claimant 2 points for descriptor 2(c), "needs a therapeutic source to be able to take nutrition", of the daily living activities and no other points for any of those activities. She also made no award for mobility activities. Accordingly the claimant's application for personal independence payment was refused.
5. The claimant sought a mandatory reconsideration of the decision maker's decision. That resulted in no change to that decision.
6. The claimant appealed. The tribunal increased her award for Activity 2 to one for descriptor 2(e), "needs assistance to be able to manage a therapeutic source to take nutrition", granting her 6 points. They also awarded her 8 points for descriptor 3(f) "needs supervision, prompting or assistance to be able to manage therapy that takes more than fourteen hours a week." The tribunal thus awarded the claimant a total of 14 points for daily living activities. Their decision was to award her an enhanced award for daily living activities for two years from 22 October 2014, her date of claim. The tribunal confirmed the decision maker's decision to award the claimant zero points for mobility activities.

7. The tribunal's findings of fact which are especially relevant read as follows on documents 86 – 87:

- “3. The origins of the Appellant's difficulties follow on from complications which arose from a gall bladder operation some years ago. This led to the Appellant being unable to absorb nutrition via her stomach by normal means. Various treatments were attempted to resolve difficulties including follow-up surgery.
4. Due to malabsorption the Appellant lost considerable weight and became frail. Her weight reduced to some 7 stones.
5. The Appellant has ordinarily worked throughout her adult life. By June 2014 she became too ill and frail to work.
6. In or about August 2014 the Appellant commenced Total Parenteral Nutrition treatment. In effect all of the Appellant's nutrition is taken in liquid form by blood vessel.
7. The Appellant required a period of inpatient care in hospital in order to be trained personally as to how to manage her necessary therapy.
8. The Total Parenteral Nutrition treatment requires an array of medical equipment together with expertise and skill to use the equipment. Aseptic technique is required to avoid infection.
9. The Appellant's treatment is specifically prescribed to be taken 5 nights out of 7 nights for at least 10 hours per night. The Appellant's Total Parenteral Nutrition treatment subsists for at least 50 hours per week.
10. The Appellant requires assistance throughout a significant proportion of the time that she is taking the necessary treatment. Due to the nature of the equipment required, including a drip stand, feeding pump and the necessary equipment to ensure aseptic preparation the only location that the Appellant can undertake the task is within her bedroom. This is where all of the necessary components of her treatment including additional fridge which has been provided in order to store the liquid nutrition. These are all standard necessary components of such treatment.
11. The Appellant's husband works. The Appellant has two young children of school age. The only reasonable timeframe within which the Appellant can manage and receive her necessary treatment is between 7.00 pm and 7.00 am.
12. As a consequence of the large quantities of liquid being taken by the Appellant throughout her course of the treatment she requires to visit the toilet frequently. She is unable to do this safely in the absence of assistance. For around the first 5 hours or thereby of her treatment the bag of liquid is too heavy for her to transport personally. The Appellant cannot be disconnected from the liquid feeding bag. She relies upon the assistance of her husband. Once the bag is lighter the Appellant is able to carry the bag herself but this is throughout night time hours. The Appellant is woken due to the need to go to the toilet regularly. She is prescribed a sleeping tablet at night. She is in a tired state. She reasonably requires the assistance and intervention of her husband to navigate to the toilet and back so as to avoid any difficulty arising with her treatment.

13. The Appellant's husband requires to assist the Appellant for around 3 hours each night she is receiving her Total Parenteral Nutrition treatment. The Appellant's husband assists the Appellant for approximately 15 hours each week."
8. The tribunal's reasons read as follows on documents 87 - 88:

**“REASONS FOR DECISION**

- “1. The Tribunal had the benefit of taking clear oral evidence from the Appellant. The Tribunal found the Appellant both credible and reliable. The Appellant is a very positive person who has faced her health challenges without complaint whilst simultaneously fulfilling the role of a proactive caring parent to two young children.
2. On the basis of the evidence the Tribunal had no doubt that the management of the Appellant's health condition requires the assistance of another person, namely her husband. Reference is made to the Tribunal's Findings of Fact which are referred to for their terms.
3. There is no dispute about the fact that the Appellant's taking of nutrition is by a therapeutic source. The Respondent does not dispute this. Given the Tribunal's finding that she requires assistance from another person to manage this therapeutic source, the Tribunal awarded 6 points in terms of activity 2E of the daily living activities.
4. The Tribunal concluded that the nature of the Appellant's Total Parenteral Nutrition treatment is therapy for the purposes of activity 3 of the daily living activities. The nutrition by blood vessel is prescribed medically and in the absence of the taking of such therapy the Appellant will become very ill. As the Tribunal found that the Appellant requires assistance from another person, namely her husband, to manage this therapy and that this assistance is for more than 14 hours a week, the Tribunal awarded the Appellant 8 points in terms of activity 3F of the daily living activities.
5. The Tribunal considered all other daily living activities and found none to apply. The Tribunal did not find any mobility activities applicable.
6. For the foregoing reasons the Tribunal found the Appellant entitled to the daily living component of the Personal Independence Payment at the enhanced rate. The Appellant attracted 24 points under the daily living activities.
7. The Tribunal made the award for a period of 2 years from the Application date of 22 October 2014. There is no likelihood in the near future of there being a material variation to the nature of the Appellant's treatment. There is scope in the longer term future for a variation to occur. This may include the times of treatment and the ability to become more mobile with more modern equipment. The Appellant will also become more adept and experienced.”

9. It is apparent from the tribunal's findings of fact and reasons that they treated the assistance the claimant received from her husband almost every night in connection with her therapeutic parenteral nutrition as qualifying her both for an award for descriptor 2(e) and one for descriptor 3(f).

10. The Secretary of State in his grounds of appeal in paragraph 3 of document 100 concedes the correctness of the tribunal's award of descriptor 2(e). In doing so the Secretary of State's submission writer correctly refers to the definition of "therapeutic source" in part 1 of schedule 1 to the Personal Independence Payment Regulations 2013 as including "parenteral .... tube feeding, using a rate limiting device such as .... feed pump". I entirely agree with that concession.

11. However in paragraphs 4 - 5 of document 100 the Secretary of State's submission writer goes on to submit that the tribunal's decision in respect of descriptor 3(f) is erroneous in law on the ground that the claimant's nutrition from a "therapeutic source" could not also count as "therapy" for the purposes of Activity 3.

12. In my opinion, the correct approach in dealing with the issue of whether assistance required by a claimant can or cannot count for the purposes of more than one of the descriptors of part 2 of schedule 1 to the Personal Independence Payment Regulations 2013 is well expressed by Upper Tribunal Judge Williams in paragraph 28 of *J.T. v Secretary of State for Work and Pensions* [2015] UKUT 0554 (AAC). That paragraphs reads as follows:

"28. The first point in dealing with this issue is that there is no rule in the PIP legislation that states that because the facts of a particular individual's problems fall to be assessed as creating limits within one descriptor they cannot also be assessed as creating limits within another descriptor. And it does not follow from the structure of Schedule 1 that because a set of facts gives rise to a recognised limit for, say, the need of an aid or appliance to manage medication then that excludes any consideration of the use of that aid or appliance for any other descriptor. To take a broader example, the fact that someone has a particular physical limitation for which assistance is needed for one described activity does not prevent the same limitation being relevant to any other descriptor. The contrary is clearly the case. For example, where the problem is limited ability to use upper limbs. that will be potentially relevant to several descriptors. That is an approach accepted by Judge Hemingway in *PE v Secretary of State for Work and Pensions* [2015] UKUT 0309 (AAC) about an argued overlap between two other descriptors. In that case Judge Hemingway found that the matter of overlap was not decided by any argument about "double counting" but because the specific descriptors in issue did not permit it (paragraph [30]). So it does not follow that because MF has a need that can be assessed within descriptor 3 it falls to be so assessed but should not, if relevant, also be assessed for descriptor 5. Both should be considered on all the evidence. I therefore turn to that descriptor."

13. To summarise the position established by Upper Tribunal Judges Williams and Hemingway in the passage from *JT* cited in paragraph 12 above, there is no rule of law precluding "double counting" between the descriptors of part 2 of schedule 1. The question of whether assistance can count under one or more of those descriptors depends on the construction of the precise statutory language used in such of them as are potentially relevant in any given case.

14. Applying the approach laid out in paragraphs 12 – 13 above, I turn to the statutory text of descriptor 2(c) and of descriptor 3(f) of daily living activities. The former refers to a claimant needing “assistance to be able to manage a therapeutic source to take nutrition”. It is not in dispute that the tribunal did not err in law in holding that the claimant satisfied that statutory provision. The latter descriptor refers to a claimant needing “supervision, prompting or assistance to be able to manage therapy that takes more than fourteen hours a week”. In my opinion, the claimant on the facts found by the tribunal could have been said to “need such assistance”, particularly when the definition of what it means to “manage medication or therapy” in paragraph 1 of schedule 1 is taken into account. But that would only have merited an award for descriptor 3(f) had the highly specific provisions of descriptor 2(c) not appeared in part 2 of schedule 1. I consider that those precise provisions have the effect of taking the relevant assistance entirely out of the scope of Activity 3 “managing therapy” where it otherwise would have been and placing it within the scope of Activity 2 “taking nutrition”. That is the effect of a maxim of statutory construction expressed in Latin as *lex specialis derogat legi generali*. The principle which that maxim expresses has been well expressed in English and clearly explained by Lord Kerr in paragraph 62 of *Moohan v Lord Advocate* [2015] S.C. (UKSC) 1 at p.18 as follows:

“Where two provisions are capable of governing the same situation, a law dealing with a specific subject matter overrides a law which only governs general matters.”

Applying that principle to the facts of this case means that the specific provisions of descriptor 2(e) apply but not additionally the general provisions of descriptor 3(f).

15. Accordingly the tribunal erred in law in awarding points both for descriptor 2(e) and descriptor 3(f). For the reasons expressed in paragraph 14 above they should not have awarded points for the latter descriptor. I exercise my discretion in favour of the Secretary of State and set the tribunal’s decision aside on the basis of that error of law.

16. My decision expressed in paragraph 15 means that I do not require to decide on the correctness of the submission made on behalf of the Secretary of State in paragraph 6 of document 101 expressing a second ground of appeal. Had I required to deal with that submission I would have rejected it on the ground that the tribunal’s finding of fact 13 was within their province as the judges of fact to make. It was not irrational nor did it lack a foundation in the evidence before the tribunal.

17. So far as the disposal of this appeal is concerned, I consider it expedient to remake the tribunal’s decision on the basis of their findings of fact under section 12(2)(b)(ii) and (4)(a) of the Tribunals Courts and Enforcement Act 2007. I hold, applying the approach laid out in paragraphs 12 – 13 above, that the tribunal’s finding of fact 12 justifies an award for descriptor 5(d) of the Daily Living Activities (“needs assistance to be able to manage toilet needs”) in addition to the award made for descriptor 2(e). I do not consider such an award is precluded by the maxim of statutory construction on which I rely in paragraph 14 above as descriptor 5(d) is a specific provision and not a general one like descriptor 3(f). Thus, under my decision given in substitution for that of the tribunal, the claimant receives a total of 10 points for daily living activities. Accordingly she is entitled to an award of the standard rate of Personal Independence Payment for daily living activities. That award will run for two years from her date of claim for the reasons which were appropriately given by the tribunal in paragraph 7 of their reasons for decision.

18. The appeal by the Secretary of State succeeds to a degree. The claimant receives the award of Personal Independence Payment for daily living activities specified in my decision rather than the one she received under the tribunal's decision.

(Signed)  
A J GAMBLE  
Judge of the Upper Tribunal  
Date: 9 February 2016