IN THE UPPER TRIBUNAL **Case No.** CPIP/3760/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Liverpool on 7 July 2016 under reference SC068/16/02301 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out below.

DIRECTIONS

(1) The new tribunal must conduct a complete rehearing (an oral hearing) 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. While the tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to these but must consider all aspects of the case, both fact and law, entirely afresh.

(2) These directions may be amended or supplemented by further directions made by a district tribunal judge of the First-tier Tribunal in the social entitlement chamber.

REASONS FOR DECISION

1. The claimant suffers from health problems which include depression, anxiety, bulimia and irritable bowel syndrome. She also says that she displays features of attention deficit hyperactivity disorder, autistic spectrum disorder and obsessive compulsive disorder.

2. On 30 March 2016 the Secretary of State decided to refuse the claimant's application for a personal independence payment ("PIP"). At that time the Secretary of State considered that she was not, in fact, entitled to any points. However, following a mandatory reconsideration it was subsequently decided that she was entitled to 6 points in relation to the daily living component but no points in relation to mobility. The 6 points awarded were under daily living descriptor 2d and daily living descriptor 9b. Those 6 points were, of course, not sufficient to ground entitlement to even the standard rate of the daily living component. Dissatisfied with the outcome she appealed to the First-tier Tribunal (the "tribunal").

3. The appellant attended the appeal hearing and gave oral evidence. The tribunal concluded that she was entitled to the 6 points previously awarded but no more. In its statement of reasons for decision ("statement of reasons") it noted, amongst other things, that she had part-time employment with the Department for Work and Pensions three days each week though it certainly did not treat the fact that she was able to hold down part-time employment as being determinative of her appeal.

4. The appellant had claimed to the tribunal, amongst other things, that she experienced difficulty with the activity of dressing and undressing. Specifically, she had claimed a need for prompting to dress (though she said she could do so when she had to such that she was able to

dress for work). She had also indicated that when she took her son to school she would put a coat on over her night clothes rather than dressing properly. She had claimed a further difficulty which was to the effect that she found it difficult to select suitable clothing as a result of her "body issues" which she linked to her bulimia and how she felt about her body in consequence of her suffering from that condition.

5. The tribunal explained why it was not awarding points under the activity of dressing and undressing in this way:

> "**Dressing and undressing**. [The appellant] is able, physically, to get dressed and undressed unaided. Her issue with dressing is selecting appropriate clothing. She feels that due to her eating disorder and depression she takes longer than most to choose clothes she feels happy to wear. This is not the test. Her difficulties in choosing clothes, whilst accepted, is not so serious that she is unable to leave the house or ever change clothes. She is able to make a decision eventually. No points were awarded."

6. The tribunal dismissed the appeal and the appellant, by this stage having secured representation from the Vauxhall Community Law and Information Centre, applied for permission to appeal. There were only two grounds both of which related to the tribunal's treatment of activity 6. It was contended that the tribunal had erred in failing to address the motivation aspect at all and in failing to consider the relevance of the criteria set out at regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 ("the Regulations") when considering the claimed difficulties in selecting items of clothing. I granted permission on both grounds.

7. Ms J Blatchford, now acting on behalf of the Secretary of State, has indicated that the appeal is opposed. She says that the evidence before the tribunal indicated that the claimant was, in fact, getting dressed more than 50% of days because not only, on her own account, would she go to work but she would also go out to visit her family and to take her child to leisure activities. (Presumably there is an assumption underlying that point that the claimant would not go to see her family or take her son to leisure activities without getting dressed in a way one would normally apply the term). Ms Blatchford also argued that the evidence was to the effect that the claimant was taking time when she did dress only to consider whether her clothing looked good rather than whether a particular item was appropriate to wear. Only the latter should count and the tribunal had been correct in saying, in effect, that the selection of clothing on the basis of appearances was not part of the test for daily living activity 6.

8. Mr D Taylor, of the Vauxhall Community Law and Information Centre, pointed out that, with respect to the first ground, remittal would enable a new tribunal to make findings as to whether the claimant does dress when going out to visit family or on leisure activities. He also said (though I am do not think Ms Blatchford was arguing to the contrary) that putting a coat on overnight clothes could not amount to dressing. As to the second ground he submitted, in effect, that what the tribunal had itself stated was indicative of an acceptance that it does take the claimant "a considerable time to dress". He stressed that the claimant's position was that the reason she took so long was directly linked to her suffering from health conditions. He also pointed out, and although this is not relevant to the decision I have to make it is useful to know by way of background, that she has now been awarded (presumably as a result of a new claim) the enhanced rate of the daily living component of PIP from 17 October 2016 to 2 February 2019 and that she has, in the context of this new claim, been found to satisfy daily living descriptor 6c.

9. The tribunal did appear to accept that the claimant would or might take longer to dress than would a person who did not have her health difficulties (see paragraph 14 of the statement of reasons under the heading "What the appeal was about" and paragraph 9 under the heading "Reasons for Decision"). In particular, its observation that with respect to selecting clothes to wear "she is able to make a decision eventually" does seem to point to its having accepted that there was a degree of difficulty of some significance. It did seem to contemplate (without making a clear finding on the point) a link that to her eating disorder and depression. It is possible, though it did not say this, that it also had in mind her assertion that she displayed features of obsessive compulsive disorder. I would stress, though, that I cannot see any evidence that a diagnosis of that condition has been made.

10. The claimant would have scored 2 points had it been found that she satisfied daily living descriptor 6c. That descriptor has two limbs one of which relates to a need for "prompting or assistance to be able to select appropriate clothing". Her ability to address and undress had to be assessed in light of regulation 4(2A) of the Regulations which says that in order to be found capable of carrying out an activity a claimant must be able to perform it "within a reasonable time period" which is then defined in regulation 4(4) as 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.

11. It does seem to me that the tribunal, having seemingly accepted a degree of difficulty with respect to the time it would take the claimant to dress, failed to make findings as to the cause of the difficulty and (in the event of its finding that a health condition was the cause) as to how long it would take her to dress and, in particular, whether she was not able to do so within a "reasonable time period" as defined within regulation 4(4). That was an issue squarely raised by what the claimant had asserted. Without making a finding as to that the tribunal was not in an informed position to decide whether or not descriptor 6(c)(ii) applied.

12. I do note and I have considered what Ms Blatchford had to say about all of the above. However, I do not accept that the tribunal's finding that the claimant would regularly dress for work or even for other purposes means that it can be taken to have found that she does so within a reasonable time period. The two do not necessarily follow. Further, whilst I agree that points would not be scored by a claimant who simply chooses to take time to select appropriate clothing, possibly trying on different items first and considering by way of comparison how they might look, I do not agree with the general proposition that the selection of clothing on the basis of appearance can never be relevant to the test for daily living activity 6. Rather, it seems to me that the way to look at it is this. Going back to basics, section 78 of the Welfare Reform Act 2012 says as follows:

> "**Daily living component**
>
> **78. -** (1) A person is entitled to the daily living component at the standard rate if –
>
> (a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and
>
> (b) …

(2) A person is entitled to the daily living component at the enhanced rate if –

(a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; and

(b) …."

13. There are equivalent provisions for the mobility component but that component is not in issue in this appeal to the Upper Tribunal. The point is that the difficulties experienced by a claimant, in order to allow that claimant to score points, must be a consequence of a physical or mental condition. Viewed from that perspective, what is important is not whether the claimant is hesitating over her clothing selections on the basis of appearance but, rather, assuming that she is, whether her hesitation or indecision is a consequence of a health condition.

14. In light of the above I do conclude that the tribunal erred in law. Its error was material because had it asked itself the correct questions with respect to daily living descriptor 6c and regulation 4(2A) and 4(4) it might (I do not say would) have concluded that there was entitlement to two additional points. Had it done that it would have gone on to award the standard rate of the daily living component of PIP.

15. Given the view I have reached it is not now necessary for me to say anything further with respect to the prompting issue as it potentially applies to dressing. It might, though, be that what I had to say in *GG v SSWP (PIP)* [2016] UKUT 0194 (AAC) might be thought to have relevance. I have in mind, in particular, paragraph 7 of that decision. What I said there though will not of itself be determinative of the issue at all. There is a need for appropriate fact-finding before the reasoning I set out that that paragraph can be applied. I hope I will be forgiven for referring to my own decision. It has less to do with narcissism and more to do with the fact that I have not found any other authority on the point.

16. I have decided that the tribunal did make a material error of law and it follows, here, that I set its decision aside. I have also decided to remit. That is because neither party has urged me to go on to remake the decision myself, because there are further facts to be found and because the fact-finding exercise will best be undertaken by an expert fact-finding body which will have available to it, through the composition of its panel, a range of expertise.

17. This appeal, then, is allowed on the basis and to the extent explained above.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated: **24 April 2017**