

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Before Upper Tribunal Judge Sutherland Williams

Decision

1. **This appeal by the claimant succeeds.** Permission to appeal having been given by Upper Tribunal Judge Jacobs on 19 December 2016, and in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set aside the decision of the First-tier Tribunal sitting in Bolton on 28 July 2016 (under reference SC122/16/00351) and remit this matter to a differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the Directions given below.
2. Neither party has requested an oral hearing. I am satisfied that this matter can be dealt with on the papers before me. The submissions from the parties are clear and further oral submissions are unlikely to assist.
3. This appeal focuses on two of the activity 9 descriptors, set out in Part 2 of Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013 ('the Regulations'), namely: 9(b) (prompting) and 9(c) (social support) and how they apply to persons with restricted vision, particularly to those who are unable to engage socially because of difficulty interacting with others in a contextually socially appropriate manner due to impaired sight.
4. For the reasons set out herein, I have decided that tribunals should approach such cases in the same way as any other claimant with a physical or mental health condition when considering activity 9, having regard to how the claimant is able to engage with others face-to-face (on a one-to-one basis or within a small group); whether that engagement is to an acceptable standard in social situations; how the claimant interacts with others in a contextually and socially appropriate manner, and whether the claimant is able to understand body language and establish relationships. In so doing, the tribunal must make appropriate findings of fact about the nature and quality of that interaction with other people, and what level of prompting or support, if any, is required.

Background

5. This appeal concerns a claimant with severe proliferative diabetic retinopathy and significantly reduced visual acuity. In addition to type I diabetes, the claimant also has neuropathic pain in his feet and depression.

6. The claimant was previously in receipt of the lower rate of the mobility component and the lowest rate of the care component of disability living allowance. The claimant made a claim for personal independence payment (PIP) on 9 September 2015. Following a medical examination on 18 December 2015, the claimant was awarded two points for the daily living component and 10 points for the mobility component, placing him onto the standard rate of the mobility component of PIP from 10 February 2016 to 17 December 2019. Following mandatory reconsideration, the claimant lodged an appeal on 14 April 2016 against the decision that he did not qualify for the daily living component.

7. The tribunal at first-instance increased the claimant's score for daily living to 7 points, however this was insufficient to change the award. As a result, the appeal was refused.

8. The claimant's representative throughout has been the Royal National Institute of Blind People (RNIB). It initially sought leave to appeal on 12 October 2016. This was refused by a District Tribunal Judge.

9. That application was renewed to the Upper Tribunal. On 19 December 2016, Upper Tribunal Judge Jacobs gave permission to appeal in relation to grounds 6 and 7 of the representative's application. In short, those grounds concern activity 9 of the daily living component: 'engaging with other people face-to-face'.

The respective submissions

10. The submission on the claimant's behalf suggests, as it did at the tribunal below, that the claimant is unable to see who other people are or who he is speaking to; that he is unable to see body language, which presents an effective barrier when engaging with others; and that the claimant also has difficulty establishing relationships. On these points, the RNIB submit that the tribunal at first-instance erred in law by failing to make adequate findings of fact.

11. The Secretary of State, in answer to the above, concedes that the tribunal could have made further findings of fact. However, the Secretary of State suggests that even with further findings, the claimant would not have scored any points in relation to activity 9. In particular, the Secretary of State suggests that the claimant will go to the pub with a friend, which could be considered contradictory to claims of generally avoiding other people. The Secretary of State also points out that the claimant appeared chatty and made jokes at the health care professional's examination.

The law

12. Activity 9 provides as follows:

Activity 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	8

causing either
(i) overwhelming psychological distress to the claimant; or
(ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.

13. Paragraph 1 of Part 1 of Schedule 1 to the Regulations contains relevant definitions:

“aid or appliance” means:
(a) any device which improves, provides or replaces C’s impaired physical or mental function; and (b) includes a prosthesis

"assistance" means:
physical intervention by another person and does not include speech

“engage socially” means:
(a) interact with others in a contextually and socially appropriate manner;
(b) understand body language; and
(c) establish relationships

"prompting" means:
reminding, encouraging or explaining by another person

“social support” means:
Support from a person trained or experienced in assisting people to engage in social situations

“supervision” means:
the continuous presence of another person for the purpose of ensuring C’s safety

“unaided" means:
without- (a) the use of an aid or appliance; or (b) supervision prompting or assistance

14. Pursuant to the legislative scheme, the descriptors should also be read together with regs 4 and 7 of the Regulations. That means that a claimant can only be taken as satisfying a descriptor of an activity if he or she can carry out the activity safely, to an acceptable standard, repeatedly, within a reasonable period of time, on over 50% of days in the required period.

Case law and commentary

15. The following principles, drawn from previous decisions of the Upper Tribunal, have equal application to those with severe visual impairment:

i. Activity 9 can apply to persons with either mental health or physical health issues, or both. (See para 17 of *HB v Secretary of State for Work and Pensions* [2016] UKUT 160 (AAC)), where UT Judge Rowley concluded: ‘*There is, in my judgment, no limit to the type of impairment which limits a person’s ability to engage with other people face-to-face*’.) Sections 78(1) and

80 of the Welfare Reform Act 2012 confirm that approach. Severe visual impairment is a physical and sensory condition, the effects of which, depending on the case, may require activity 9 to be considered.

ii. **Engaging face-to-face means engaging on a one-to-one basis or within a small group** (para 23 *AM v Secretary of State for Work and Pensions* [2017] UKUT 7 (AAC)):

23. It applies to ‘engaging with other people face to face’. That governs every descriptor under this Activity. Engaging face to face is by definition only possible on a one-to-one basis or within a small group. That is the function being tested by the Activity. It is not possible to engage with a large crowd face to face, although it is possible to engage with people within that crowd or in small numbers.

I would add to this that this definition imports that the individual will be in the presence of or in close proximity to the other person or small group. Engaging on the telephone, where you cannot see the other person, whilst an effective means of communication, is not engaging face-to-face. While you can engage face-to-face without seeing the person to whom you are speaking, difficulties may arise in understanding non-verbal communication or social cues. This will be a matter for tribunals to consider when assessing what prompting or support, if any, is required by reference to the assessment criteria.

iii. **The ability to “engage socially” is relevant to activity 9:** Upper Tribunal Judge Mark in *Secretary of State v AM* [2015] UKUT 215 (AAC), stated that the factors set out in the surplus definition of ‘engage socially’ were relevant considerations:

“It would follow that in all cases in which Activity 9 is in issue decision makers should apply the definition of ‘engage socially’ in Schedule 1 and should consider a claimant’s ability to interact with others in a contextually and socially appropriate manner, the claimant’s ability to understand body language, and the claimant’s ability to establish relationships in a social context.”

This will apply to those with severe sight restriction, as it would to any other claimant with a physical or mental health impairment. For those who are visually impaired, detecting body language can be challenging, depending on the level of sight restriction. A tribunal will therefore need to consider whether a claimant can detect body language when face-to-face (implying at a close distance) and on a one-to-one basis or in a small group; or whether prompting (explaining) will be required most of the time.

iv. **Support required in social situations should be considered:** Upper Tribunal Judge Bano confirmed in *SF v The Secretary of State* [2016] UKUT 543 (AAC), that descriptor 9(c) applies to claimants who need ‘social support to be able to engage with other people’, and ‘social support’ is defined in paragraph 1 of Schedule 1 as ‘support from a person trained or experienced in assisting people to engage in social situations’. Descriptor 9(c) is therefore concerned with the support required by claimants in social situations and that

connection with ‘social situations’ has subsequently been accepted by the Secretary of State as having general application to all of Activity 9. (See *HB v SSWP (PIP)* [2016] UKUT 160 (AAC) and *AM v SSWP* [2017] (above)).

For these purposes I remind myself that ‘social support’ is an ‘*assessment of actual disability during the activity, not of the level of prior involvement required to get the person to the stage where they can engage alone*’ *EG v Secretary of State for Work and Pensions* [2017] UKUT 154 (AAC).

This may have application to those with visual impairment depending on the severity of the condition, what other health factors exist, and whether social support is reasonably required most of the time in order to be able to perform the activity.

v. **It is in engaging with people generally that the “social” element of engaging face to face becomes significant.** In *HB v SSWP (PIP)* [2016] (above) Upper Tribunal Judge Rowley endorsed the relevant passage from the “*PIP Assessment Guide: A DWP guidance document for providers carrying out assessments for Personal Independence Payment*”, which states:

“When considering whether claimants can engage with others, consideration should be given to whether they can engage with people generally, not just those people they know well.”

It follows that the test is not simply engaging with people known to the claimant (family and existing friends) or for whom the claimant needs to engage for a specific and limited purpose (health professionals or the tribunal). ‘*..there is no legal basis for limiting the assessment of her ability to engage with others face to face to such engagement as is reasonably necessary*’. Upper Tribunal Judge Gray, *PM v Secretary of State* [2017] UKUT 154 (AAC).

vi. **A tribunal should make findings of fact as to the nature or quality of the appellant’s interactions with other people** (Upper Tribunal Judge Markus QC in *HJ v SSWP (PIP)* [2016] UKUT 487 (AAC) at 17). I return to this fundamental below.

16. Drawing the above together, in an appropriate case, a tribunal at first-instance considering activity 9 and someone with severe visual impairment will approach matters in the same way as it would with any other claimant maintaining activity 9 has application. I see no proper reason to draw any distinction beyond the above observations. A tribunal therefore will broadly have regard to how the claimant is able to engage with others face-to-face on a one-to-one basis or within a small group; whether that engagement is to an acceptable standard in social situations; how the claimant interacts with others in a contextually and socially appropriate manner, and whether the claimant is able to understand body language and establish relationships. In so doing, the tribunal must make appropriate findings of fact about the nature and quality of that interaction with other people, and what level of support, if any, is required - to ascertain whether any of the descriptors in activity 9 have application.

The present appeal: reasons

17. In the instant appeal I am not satisfied that the tribunal has given proper consideration to whether the claimant can engage socially by reference to the above tests.

18. When considering a claimant with a visual impairment, the tribunal should look to ascertain the level of sight restriction by reference to the evidence available. In so doing, a tribunal will be able to address whether the claimant is able to identify facial expressions and more generally read body language or identify whether someone is talking to him or, for example, offering a handshake.

19. In the instant matter, the RNIB's original submission refers to visual acuity in the right eye being limited to counting fingers, but 6/60 in his left eye. 6/60 generally implies a person can see at 6 metres what someone with standard vision could see from 60 metres away. Appropriate findings of fact could have been made in this regard.

20. Further, there was evidence that the claimant was able to identify in the healthcare professional's room items such as a computer, telephone and the assessor's reading glasses from a distance of about 5 or 6 feet. At the tribunal he could identify a box of tissues a metre away. This may have added weight to the tribunal's conclusion, but without reference to it in the tribunal's statement, it is not possible to measure how that level of apparent recognition sits with some of the statements made both by the claimant and his representative, e.g. 'he cannot see adequately whether people are entering or leaving the conversation'.

21. The failure to make proper findings of fact on issues that are central to this appeal amounts to an error of law.

22. I am further concerned that the tribunal has taken a too simplistic approach in concluding that '*Mr V engaged well with us at the hearing, without prompting and without social support*'. That may be correct, and it is a legitimate observation to make, but as will be apparent from the analysis of the case law above, the fact that the claimant was able to engage well at a tribunal hearing (when accompanied by his sister and a representative from RNIB), does not in itself give a complete indication of how he might engage socially when not accompanied. Some further investigation was therefore required about how he would manage outside of the tribunal setting.

23. In addressing social engagement, the tribunal states as follows: '*Participating in a tribunal hearing is a more formal experience than engaging with other people informally or engaging in social situations – but it is not as daunting or demanding as being at a party*'. In my view this raises more questions than it answers. If anything, it appears to suggest that the claimant may have difficulty in some social situations. At the very least, I would have expected it to have been put to the claimant, along with the tribunal's view that '*we did not think that [the claimant] would have been any different if we had been chatting to him round a*

table in a café. The tribunal may have been correct in that assertion, but the claimant should have been given the opportunity to comment upon it, not least because it involves a degree of speculation.

24. The tribunal's reliance on the lack of social support and prompting given in the tribunal setting therefore also amounts to an error of law. It follows from the case law above that the tribunal should have focused more closely on how the claimant would cope outside of the tribunal environment. While the tribunal was entitled to place reliance upon its own observations, it does not properly balance or address the other evidence given. The record of proceedings suggests a substantial impairment and while the tribunal's observations reflect to a degree the claim form and in part what the claimant told them, it overlooks central aspects of what the claimant and his advisers advanced.

25. The Secretary of State accepts the tribunal could have made further findings of fact in relation to activity 9, as it has '*predominantly relied upon its own observations of the claimant's ability to engage with the panel members*'. While I accept that submission, I am not persuaded that the Secretary of State is correct that even with further findings of fact (which I am not in a position to make) the claimant would still have scored no points under activity 9. The Secretary of State's observation that the claimant's ability to visit a pub with a friend appears '*to be contradictory to claims of generally avoiding other people*' illustrates a too narrow approach. In this regard, I can do no better than repeat the view given by Judge Markus QC in *HJ v SSWP (PIP)* [2016] (above) where she held as follows:

17. The tribunal made no findings of fact as to the nature or quality of the Appellant's interactions with other people. As I have said, her case was that she did not engage with people when at the pubs. It is possible that she may have had little if any engagement with the bar staff in the pubs, for instance if she always had the same drinks....

18. Moreover, it is possible or even likely that many or even all of the individuals with whom the Appellant interacted were known to her. There is no indication in the regulations that the term "engage socially" is limited to engagement with people who a claimant knows. Indeed the use of the word "others" in the definition of "engage socially", which is unqualified, strongly suggests that it is not so limited. Moreover, the requirement to be able to establish relationships suggests that the activity is not limited to considering engagement with those known to a claimant.

19.

20. Although the tribunal also relied on the Appellant's appropriate interactions as observed by itself and the nurse (paragraph 10), neither of whom she knew, it is impossible to know whether the tribunal would have reached the same conclusion as to activity 9 if it had addressed the above matters correctly. In any event, paragraph 10 of the statement of reasons considered isolated and specific examples which, on their own, did not evidence an ability to engage with people generally including the ability to establish relationships, for the majority of the time (see regulation 7).

26. I do not need to go further. The tribunal has failed to properly address how the claimant would engage with others he does not know well or read body language in a social setting. In making inadequate findings of fact and in relying too heavily on how the claimant appeared at the hearing, the tribunal has fallen into error. While the tribunal has gone some way to address activity 9 and the disputed

descriptors therein, the difficulty I find is that the tribunal has failed to establish sufficiently the social engagement aspect of the test. The conclusions that the tribunal has drawn in relation to the two descriptors in dispute are too vague and susceptible to challenge for this decision to stand. It is for these reasons that I am remitting this matter back to a freshly constituted tribunal.

What happens next

27. This matter will now be returned to the First-tier Tribunal to begin again. Neither the claimant nor the representative should assume that because they have been successful at this stage, they will now be successful in the tribunal below. That will be a matter entirely for the new tribunal to consider.

28. The tribunal shall take into account the case law highlighted in this decision when considering its factual findings. Furthermore, the tribunal should make clear findings of fact in terms of the extent of the claimant's visual impairment to ascertain whether he is able to engage with others to an acceptable standard. This would include addressing the difficulties that the claimant may have with problems of social context, functioning in a social environment, and understanding social cues.

29. One of the central aspects of the claimant's grounds of appeal is whether or not he is able to read body language due to visual impairment or whether he would need prompting from another person to be able to engage with other people face-to-face as a result of his impairment. The tribunal should consider this aspect as one of the ingredients it has to consider when assessing activity 9. It must, as a whole, take into account the full range of barriers that the claimant may face, including any support he may require from another person.

30. In this regard, I should underline that the tribunal will be considering this claimant as an individual and not generic statements that may or may not apply to persons with visual impairment.

31. It is unnecessary to give a definition of what 'body language' as a concept actually is. The relevant regulations do not seek to define it and for the purposes of this appeal I am satisfied the tribunal will be able to approach the meaning of "the claimant's ability to understand body language" appropriately and without further guidance.

- 1. The claimant should note that the new tribunal will be looking at his health problems and how they affected him at the time that the decision under appeal was made, namely 19 February 2016, and not subsequent events.**
- 2. The new panel will make its own findings in relation to the descriptors in issue. They will consider all aspects of the case afresh, but they should note in particular the issues highlighted in this decision.**

AND I DIRECT:

1. The decision of the First-tier Tribunal sitting in Bolton made on 28 July 2016 under reference SC122/16/00351 is set aside.
2. The case will be an oral hearing listed before a differently constituted panel.
3. Within 28 days of the issue of this decision, the claimant shall send to the relevant HM Courts and Tribunals Service office any further submission, medical or other evidence upon which he or his representative seek to rely. If he cannot send that evidence within 4 weeks of the issue of this decision the claimant should contact that office to let it know that further evidence is expected.
4. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.

M. SUTHERLAND WILLIAMS
Judge of the Upper Tribunal

Signed on the original on 30 May 2017