IN THE UPPER TRIBUNAL **Appeal No.** CPIP/400/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Perez

Decision

1. The claimant's appeal is allowed.

2. The decision of the First-tier Tribunal dated 29 July 2016 (heard under reference SC316/16/00475) is set aside. By consent, I substitute my own decision that the clamant is entitled to the daily living component of the personal independence payment at the standard rate from 13 April 2016 to 12 April 2026 and to the mobility component at the enhanced rate for the same period as the daily living component, that is from 13 April 2016 to 12 April 2026.

3. The award I am making is made up as follows.

4. The claimant scores 11 daily living points—

1. Preparing food.	e. Needs […] assistance to […] prepare and cook a simple meal.	4 points
2. Taking nutrition.	b. Needs— (iii) assistance to be able to cut up food.	2 points
3. Managing therapy or monitoring a health condition.	b. Needs […]— (ii) […] assistance to be able to manage medication.	1 point
6. Dressing and undressing.	e. Needs assistance to be able to dress and undress his upper body (as well as needing assistance to be able to dress and undress his lower body – descriptor 6d).	4 points

5. The claimant scores 12 mobility points—

2. Moving around.	e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12 points

Background

6. The claimant has, among other things, diabetic polyneuropathy and type 2 diabetes.

7. The claimant was previously awarded disability living allowance. That award comprised the highest rate of the DLA care component and the higher rate of the DLA mobility component. The claimant was invited to claim personal independence payment ("PIP"), which he did. Following a face-to-face assessment by an assessor provided by Capita, the Secretary of State's decision maker decided on 13 March 2016 to give no daily living points and no mobility points, and so decided that the claimant was from and including 13 April 2016 not entitled to either component of PIP. That decision was reconsidered but not changed. The DLA award ended on 12 April 2016.

First-tier Tribunal

Daily living component

8. On the claimant's appeal to the First-tier Tribunal ("the tribunal"), the tribunal gave nine daily living points. At least eight points are needed to merit standard rate daily living component (regulation 5(3)(a)). And at least 12 points are needed to merit the enhanced rate (regulation 5(3)(b)). The tribunal found therefore that the claimant is entitled to the daily living component of PIP at the standard rate. The nine daily living points the tribunal gave were made up as follows. Four points for activity 1, "Preparing food" (descriptor 1e), two points for activity 2, "Taking nutrition" (descriptor 2b), one point for activity 3, "Managing therapy or monitoring a health condition" (descriptor 3b), and two points for activity 6, "Dressing and undressing" (lower body only, descriptor 6d).

9. The tribunal made the daily living award for a two-year fixed period: 13 April 2016 to 12 April 2018. This was, said the tribunal, "because in the opinion of the tribunal it is possible that [the claimant's] condition may change" (paragraph 21, page 144).

Mobility component

10. The tribunal appeared to find as a fact that the claimant "has a high risk of foot ulceration" (paragraph 20, page 144, line 16). In so finding, the tribunal appeared to accept as accurate Dr Jamil's letter at page 122 dated 7 June 2016 (duplicated at page 119). That letter suggested that the risk of foot ulceration was caused or increased by "walking distances". The claimant's evidence included that he had pain and cramps from walking. The tribunal found however that the claimant "can safely, to an acceptable standard, repeatedly and within a reasonable time period stand and then move more than 200 meters [sic] aided or unaided (activity 12 [sic] (a) = 0 points)" (paragraph 20, page 144).

Permission to appeal to the Upper Tribunal

11. In his permission to appeal application, the claimant sought to challenge the tribunal's decision not to award the mobility component. He also sought enhanced

rate daily living component instead of the standard rate the tribunal had awarded. This was, said the claimant, because he should have received eight points, not four, for preparing food. Those additional four points would have given him 13 daily living points in total. The claimant's representative also told the Upper Tribunal that the medical assessment done by Capita for the Secretary of State was done by assessor Alan Barham, who had been discredited by the television programme "Dispatches". I did not need to grant permission to appeal on this point because there were other arguable errors of law. I did, however, ask the Secretary of State to make clear her position as to the assessment and observations done by Alan Barham. I return to this below.

12. I gave the claimant permission to appeal to the Upper Tribunal (page 158). My grounds for granting permission were that (a) there were arguably insufficient findings and reasons for moving around, and (b) there was an arguable failure adequately to explain why the pain and numbness in the claimant's hands justified only a finding of needing assistance or supervision to prepare food rather than a finding that he is unable safely to prepare food.

Upper Tribunal appeal

13. The Secretary of State supported this Upper Tribunal appeal, originally to the extent only of remittal. That was however overtaken by considerations arising from the discrediting of assessor Alan Barham. The parties have since agreed that I should substitute my own decision.

Discredited assessor

14. I will deal in some detail with points arising from the discrediting of assessor Alan Barham. My comments may be of use in other cases where a report of his was before the First-tier Tribunal.

15. Alan Barham was discredited by the Channel 4 "Dispatches" programme, following undercover reporting. The criticism of Mr Barham, based on what he himself had reportedly said, included that he had finished an assessment before he walked through the door (see for example the extract at Annex 1 to this decision, taken from: https://www.channel4.com/press/news/great-benefits-row-channel-4-dispatches).

16. Capita reportedly said—

> "The comments and actions of [this contractor] clearly fall short of what we expect and are totally unacceptable. We are obviously appalled by and sincerely apologise for this individual's disrespectful comments and actions. [He] will no longer work for Capita.".

17. Mr Barham was cautioned by a disciplinary panel (see for example the extract at Annex 2 to this decision, taken from: https://www.theguardian.com/society/2017/sep/21/benefits-assessor-sanctioned-for-mocking-disabled-claimant).

18. I therefore asked the Secretary of State (a) whether she planned to send the claimant for a fresh report and (b) what approach a fresh First-tier Tribunal panel should take to Alan Barham's report if I remitted.

19. The Secretary of State submitted a new report dated 18 April 2017 (pages 169 to 175). She said it was paper-based and based on, among other things, the report completed by Mr Barham (submission 28/7/17, page 167). The Secretary of State submitted that, if I remitted, the next First-Tier Tribunal "should weigh the evidence in the normal manner" and that "Mr Barham's report should be weighed as with all the evidence before the tribunal" (paragraph 4, page 168). I said that was not good enough, because the criticisms of Mr Barham meant that his purported observations and purported examination could not be relied upon (page 206). I directed that, unless the Secretary of State was conceding the enhanced rate of both components (rendering further reports unnecessary), she must tell me whether she was going to send the claimant for a fresh examination and if not, why not.

20. The Secretary of State replied that further factual findings were needed and that the Upper Tribunal could not be confident as to what findings a First-tier Tribunal would make on remittal (submission 21/11/17, paragraph 2, page 221). She submitted that it was therefore not open to her to concede enhanced rate for both components. She also said she did not mean to suggest that the report (by which I think she meant Mr Barham's report) should be relied on without criticism or unquestioningly. She said she was willing to send the claimant for a new face-to-face assessment if the claimant agreed to that, but that otherwise such an assessment should be ordered by the First-tier Tribunal.

21. The claimant's representative submitted that both Alan Barham's report, and the paper-based one dated 18 April 2017 based on Mr Barham's purported observations and purported examination, should carry no weight (submission 19/12/17, page 224). She asked me to consider whether it was really necessary for a new examination to be arranged, given that there is already clear information available in the existing evidence, including from the claimant's own clinicians.

22. In response, I gave directions saying (pages 227 to 229)—

> "7. There is force in the claimant's reply. There is medical evidence before me that is not subject to the criticism that it is based on a purported observation and examination by a discredited assessor. That medical evidence happens to be from the claimant's own doctors, rather than from an HCP, but that is by the Secretary of State's own choice. He could have sent the claimant for a fresh consultation instead of taking the apparently lackadaisical approach of seeking a paper report based on Mr Barham's consultation.
>
> 8. Since the papers contain medical evidence that is not subject to the criticism to which the two HCP reports are subject, there is potentially adequate material on which findings could be made, especially when supplemented by the claimant's own assertions as to his limitations and needs. It also seems the parties' positions are not too far apart. Both agree that there is an error of law, and both seem to agree that Mr Barham's report can be given no weight (although the claimant goes further and understandably says it <u>should</u> be given no weight).
>
> 9. I am therefore requiring the parties to attempt to reach agreement on this appeal, and am staying the appeal to allow for that. There is a wealth of

> evidence for the Secretary of State to base a position on without necessarily insisting on remittal, as long as his representatives take the trouble to go through the evidence. If he considers he needs the GP notes and if they are not all in the papers, there is no reason he could not obtain those with the claimant's agreement. If the Secretary of State feels unable to agree a position based on the existing evidence, there is no reason he could not also send the claimant for a fresh HCP consultation during this stay, to facilitate discussions. I remind the Secretary of State that the Upper Tribunal does not need to "be confident what findings a First-tier Tribunal would make on remittal" in order for the Upper Tribunal to make its own findings, including findings by consent.".

Parties' joint submission to the Upper Tribunal

23. To their great credit, the parties have reached agreement. A significant amount of effort, cooperation and goodwill have been shown on both sides in doing so. Their joint submissions dated 13 March 2018[1], 3 September 2018[2] and 14 March 2019[3] record the agreed position. The claimant's position on activity 3 altered after the 14 March 2019 joint submission. But after further submissions, directions and discussion, the claimant returned to the position set out in the 14 March 2019 joint submission (claimant's submission 5/11/19, page 293).

Submissions as to error of law

24. The parties invite me to find that the First-tier Tribunal erred in law in relation to the mobility component. They say this is because the tribunal made insufficient findings and gave insufficient reasons for why the claimant could walk more than 200 metres to the standards in regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/377, as amended). The parties jointly submit that the claimant had consistently maintained that, due to his diabetic polyneuropathy, he was in pain and discomfort when walking any significant distance and that this limited him to walking 50 metres. They submit that the tribunal recognised recent evidence to support that claim, most notably Dr Jamil's letter dated 7 June 2016 at page 122 (duplicated on page 119), and the GP Consultation Information Sheet dated 2 March 2016 at pages 8 and 9. The parties submit that, despite recognising that recent evidence, the tribunal erred in law in giving no clear reasoning for not accepting the evidence supporting the claimant. The parties also submit that, although the tribunal referred in paragraph 20 of the statement of reasons to the regulation 4(2A) criteria, the tribunal gave no analysis of those criteria.

25. The claimant abandoned the assertion of error of law in relation to preparing food, and abandoned the request for additional points for that activity.

Submissions as to disposal of this Upper Tribunal appeal

26. The parties initially jointly invited me to "maintain" the First-tier Tribunal's daily living activity findings, and the nine points it gave: four points for preparing food, two

[1] Pages 230 to 233.
[2] Pages 247 to 249.
[3] Pages 257 to 259.

for taking nutrition, one for managing therapy or monitoring a health condition, and two for dressing and undressing (submission 13/3/18, pages 230 to 233). And the parties initially asked me to award eight mobility points, under mobility descriptor 2c (more than 20 metres, no more than 50), and so to award standard rate mobility component.

27. Since I was being asked to substitute my own findings, I asked for greater precision as to how exactly the parties agreed that each descriptor was met. This is important because any future supersession request will be measured against my findings of fact. And, on a claim for a different benefit, consideration might be given to the evidence or agreed findings underpinning my substituted decision.

28. After further discussion, submissions and directions, the parties have reached a new agreed position for both components.

Agreed position on daily living component

29. The parties now ask me to award an additional two daily living points for dressing and undressing. This is because they agree that the claimant's difficulties using his hands affect his ability to dress and undress his upper body, not just his lower body. They agree that I should award the 11 daily living points mentioned at paragraphs 42 to 50, 65, and 67 to 69 below. The parties ask me therefore to substitute my own decision awarding standard rate daily living component. They ask me to award it for 10 years from 13 April 2016 to 12 April 2026. This extends the daily living award by eight years in comparison with the two-year daily living award the tribunal made.

30. I am not quite doing what the parties requested in relation to daily living activity 3: "managing therapy or monitoring a health condition". But that does not change the outcome they requested. I explain further at paragraphs 55 to 65 below.

Agreed position on mobility component

31. The parties now ask me to award 12 moving around points, under mobility descriptor 2e (four more than the tribunal gave). The parties invite me therefore to award enhanced rate mobility component.

Upper Tribunal decision

Error of law

32. I find that the tribunal erred in law in relation to moving around, for the following reasons.

33. The tribunal appeared to find as a fact that the claimant "has a high risk of foot ulceration" (paragraph 20, statement of reasons, page 144). In so finding, the tribunal appeared to accept Dr Jamil's 7 June 2016 letter at page 122. I find however that the tribunal erred in law in failing to make clear whether it found that the risk was caused or increased by "walking distances" as also evidenced by that letter.

34. The tribunal also should have said whether it accepted or rejected the claimant's evidence of pain and cramps from walking. It was not clear, even by implication, that the tribunal rejected that evidence. If the tribunal did not reject that evidence, then the tribunal should have explained why its finding on moving around was justified despite that evidence.

35. Even if the claimant had not been advised not to walk, that did not remove the need to make findings as to (a) what caused or increased the risk of foot ulceration, (b) how far the claimant could walk before stopping (whether because of pain or for other reasons), and (c) whether that walking could be done safely, to an acceptable standard, repeatedly and within a reasonable time period. Those findings were particularly needed in view of Dr Jamil's 7 June 2016 letter (page 122). Not being advised not to walk even short distances does not necessarily mean that the claimant can safely walk over 200 metres on numb feet. It could in any event be said that Dr Jamil's statement that the ulcers occur particularly if the claimant walks distances did not need to be supplemented with express advice not to walk distances.

36. The tribunal appeared to rely on a concern of one of the claimant's consultants, Dr Gidden, that the claimant should "improve" "his sedentary lifestyle" (letter 26/2/15, page 106). That apparent reliance erred in law in assuming that exercise must necessarily be done by walking or otherwise using the legs, and that it must entail moving more than 200 metres at a time. In any event, Dr Gidden is a pathologist. If the tribunal was going to rely on her letter as evidence that walking over 200 metres repeatedly was safe, the tribunal needed to say why the view of a pathologist was relevant as compared with, for example, the view of Dr Jamil, or of the podiatrist (page 108) or of the diabetic foot clinicians (pages 109 and 110).

37. I accept also the parties' joint submission that, although the First-tier Tribunal referred in paragraph 20 of its statement of reasons to the regulation 4(2A) criteria, the tribunal erred in law in giving no analysis of those criteria.

38. It is for these reasons that I set aside the tribunal's decision dated 29 July 2016. I need make no finding as to whether the tribunal also erred in law as to preparing food because the claimant does not now dispute the four preparing food points awarded by the tribunal.

Upper Tribunal's substituted decision

39. I accept that the claimant has, among other things, diabetic polyneuropathy. And I accept the GP evidence that the claimant's feet are susceptible to getting ulcers due to the poor sensation in his feet (Dr Jamil's 7/6/16 letter, page 122).

40. I find as follows.

41. With the parties' agreement, I find that the descriptors mentioned below are (a) satisfied on all of the days in the required period mentioned in regulation 7 and defined in regulation 7(3), and (b) satisfied therefore on over 50% of the days of the required period (as required by regulation 7(1)).

Daily Living component

Activity 1: "Preparing food"

42. I award the claimant four points for preparing food, under descriptor 1e, because he needs assistance to prepare and cook a simple meal.

43. This is because I accept that the claimant has numbness in his hands and fingers and cannot distinguish between hot and cold temperatures with his hands and fingers as stated in his PIP2 form and confirmed by Dr Jamil (letter 7/6/16, page 122). The reason I accept the claimant's evidence on this is that it was internally consistent as the tribunal said (paragraph 13, page 142), it is confirmed by his doctor (page 122), and the parties are content for me to "maintain" the tribunal's findings. I accept that the claimant is therefore at risk of burns, as Dr Jamil said.

44. The parties agreed that I should find that the claimant requires assistance rather than merely supervision for this activity. Although supervision could deal with the aftermath of the claimant burning himself, it is unlikely to suffice to prevent a burning episode in the first place.

45. The parties also agreed that I should find that the assistance is needed for both the preparation and the cooking parts of this activity. Even preparation can include handling something hot, like pouring hot water from the kettle into a bowlful or panful of dried pasta ready to cook the pasta.

46. I find therefore that the claimant cannot, without assistance, prepare or cook food safely and to an acceptable standard. He needs assistance to prepare a simple meal safely and to an acceptable standard. And he needs assistance to cook a simple meal safely and to an acceptable standard.

Activity 2: "Taking nutrition"

47. I award the claimant two points for taking nutrition, under descriptor 2b(iii).

48. This is because I find, as the parties invite me to, that the claimant needs assistance to be able to cut up food. (This was the basis for the tribunal's award of points for this activity, page 143, which the parties asked me to "maintain".) I accept that the numbness in the claimant's hands makes it unsafe for him to cut up food as he is at risk of cutting his hands, as Dr Jamil confirmed (letter 7/6/16, page 122). This reflects the reasoning of the tribunal at paragraph 14 of the statement of reasons (pages 142 and 143). It also accords with what the claimant said in his form (page 25), where he mentioned only needing help to cut up food.

Activity 3: "Managing therapy or monitoring a health condition"

Assistance to be able to manage medication

49. I award the claimant one point under descriptor 3b(ii).

50. This is because it is common ground – and I find – that (a) the tablets in his dosette box are medication and (b) he needs help to get his tablets out of the dosette

box (page 27, PIP2). The reason he needs that help is that, due to the loss of feeling in his hands and fingers, he is unable to get the tablets out of the dosette box himself. I find therefore, as the parties invite me to, that he needs assistance to be able to manage the medication that is in his dosette box. This finding reflects, to a limited extent, those of the tribunal about activity 3 (statement of reasons, paragraph 15, page 143).

Assistance to be able to monitor a health condition

51. I am however departing from the tribunal's findings as to needing help to monitor blood sugar levels and as to needing help to check the claimant's feet for pre-ulcerative lesions.

52. Given the parties' initial request for me to "maintain" the tribunal's daily living findings, I invited further submissions on those two points (directions 17/7/18, page 234). As to the blood sugar levels, I pointed out that what the claimant had said on page 27 was—

> "I need help with the following monitouring [sic] my blood sugar levels medication as I am unable to get my tablets out of my dosette box" (my emphasis).

So he was saying he needed help with the blood sugar medication, not with monitoring the blood sugar levels themselves. The parties' joint reply did not address this point. As to whether help is needed to check his feet, and the nature of any such help, my questions on that too were not answered.

53. I do not however find that the claimant does not need assistance with checking his feet or with monitoring blood sugar levels. I simply make no finding that he does need such assistance, because the parties' submissions were silent on it and I do not have sufficient material for such a finding.

Assistance to be able to manage therapy

54. The tribunal also appeared to find that the claimant "needs help to apply his foot cream" (paragraph 15, page 143). With the parties' agreement, I am reproducing that finding. I accept the claimant's evidence that he needs that help due to the loss of feeling in his hands and fingers (page 27, PIP2). For the purposes of this appeal, however, that finding is redundant, for the following reasons.

55. The parties invited me to find that descriptor 3b(ii) is met "through the claimant needing assistance in order to manage medication" (page 248, paragraph 6, joint submission 3/9/18). That submission seemed based not only on needing help with the dosette box but also on needing help to apply the foot cream. I asked the parties what the effect of that finding should be (directions 17/12/18, page 250). I said it was potentially help with managing therapy, if the cream is not medicated. I suggested I could, in that case, find that the definition of "manage therapy" in Part 1 of Schedule 1 to the regulations is satisfied. That would be either because the foot cream is "therapy" and its application is "managing therapy", or because the application of the foot cream is itself "therapy" (that might render otiose "manage", but might sit better with the definition of "therapy" later in Part 1 of Schedule 1). I said I would not have

to decide which it is for the purposes of the present appeal. If I did find that the claimant needed help to be able to manage therapy, that would attract an additional daily living point, taking the total to 12, and so would result in an award of enhanced rate daily living component.

56. If however the foot cream were medication, help with applying it would be help to be able to manage medication. That would merit only one point under descriptor 3b(ii). But the claimant already satisfies that descriptor by virtue of my finding that he needs help with the dosette box. Finding that the foot cream is medication would therefore result in no additional point.

57. The parties replied that the foot cream is Flexitol Heel Balm which contains 25% urea. They said they were agreed that it is medication (joint submission 14/3/19, page 257). The claimant's representative then (apologetically) resiled from that. She submitted (page 264)—

> "[Flexitol Heel Balm] has no active ingredients such as a local anaesthetic. The ingredients are all natural and the balm is "a super-concentrated moisturiser and exfoliator" … the fact that Flexitol is produced by a pharmaceutical company is no indication that it should be a medication. Such companies produce a wide range of products, many of which are quite clearly not medication, such as shampoo or toothpaste" (submission 30/4/19, paragraphs 10 and 11).

The representative submitted therefore that (given that the other parts of the definition seemed uncontentious) the definition of "manage therapy" is satisfied.

58. I directed an oral hearing of whether Flexitol Heel Balm[4] is medication (resulting in standard rate daily living component) or whether the definition of "manage therapy" is satisfied (resulting in enhanced rate daily living component). I directed the Secretary of State to supply evidence and submissions in support of her contention that Flexitol Heel Balm is medication (directions 12/7/19, page 266).

59. The parties then jointly sought an extension of time, which was granted, to await a letter from the claimant's podiatrist as to whether there is a "therapeutic massage element" to the application of the Flexitol Heel Balm. The parties' position was that that would satisfy the "manage therapy" definition without my needing to decide whether the balm is medication (submission 5/8/19, page 283).

60. The podiatrist, Trevor DeHaro, Clinical Lead, Diabetic & High Risk Foot Service at Northamptonshire Healthcare NHS Foundation Trust[5], wrote on 28 August 2019 (page 287A)—

> "You have asked me to comment re the patient's use of Flexitol cream. I would just like to clarify that the cream mentioned is in fact a treatment for hyperkeratosis or dry thickened skin in order to soften and aid the hydration of

[4] By which I said I meant the product listed in the online British National Formulary as "Flexitol 25% Urea Heel Balm (Thornton & Ross Ltd)", as at 12 July 2019.
[5] Item 10, page 95, SofS additional bundle. I have added that letter to the Upper Tribunal main bundle as page 287A.

> the skin and improve the skin quality. It is not a treatment for painful peripheral neuropathy.
>
> On the two points you ask in question;
>
> 1) We would not advise a massage specifically and merely recommend patients to apply emollients or creams by rubbing it into the skin and clearly this is not in any way suggested as a form of massage.
>
> 2) The management of peripheral neuropathy is usually via medication although many patients will say that the act of rubbing their feet will help them to deal with the pains from peripheral neuropathy. However massage is not on the list of recognised treatments for peripheral neuropathy.".

61. The Secretary of State made a submission dated 4 October 2019, with 199 pages of evidence, on whether Flexitol Heel Balm is medication. The evidence included scientific literature, a DWP Technical Note, NHS Drug Tariff extracts, a letter dated 4 September 2019 from Dr Chris Jones, Manager, Medicines Borderline Section, Inspection Enforcement and Standards at the Medicines & Healthcare products Regulatory Agency (MHRA) and MHRA Guidance Note 8.

62. The claimant's representative submitted in response—

> "3. After careful consideration of the new paperwork provided by the Secretary of State, [the claimant's] position in respect of activity 3 has been revised.
>
> 4. [The claimant] instructs that he wishes to now formally agree to the original Joint Submission made on 14 March 2019. Namely that he agrees with the Secretary of State's position in respect of <u>all</u> activities set out in that document.
>
> 5. All of the points set out at paragraph 4 of the Joint Submission dated 14 March 2019 are now undisputed." (author's emphasis, submission 5/11/19, page 293).

63. The representative's submission did not expressly say that the claimant accepts that there is no therapeutic massage element to the application of the foot balm. But it seems the representative accepts that that is the effect of the podiatrist's 28 August 2019 letter. I too accept that that is the effect of that letter. I find, therefore, that there is no therapeutic massage element to the application of Flexitol Heel Balm in this claimant's case.

64. The 14 March 2019 joint submission with which the claimant now agrees invited me to find that Flexitol Heel Balm is a medication. I decline however to do that. I do not need to make such a finding to award the one point that help with the foot balm would merit under descriptor 3b(ii); I have already awarded one point under that descriptor for help with the dosette box. And I think it not right to make a finding on that potentially contentious issue merely because, faced with the volume of evidence the Secretary of State has supplied, this particular claimant has chosen to concede the point. My decision will, so far as I know, be the first time the Upper Tribunal has considered the classification of Flexitol Heel Balm. If the point is to be

decided, and therefore binding on the First-tier Tribunal, it should be decided after argument and evidence both for and against.

65. The furthest I will go therefore, in light of the claimant's concession, is that I do not make a finding that the definition of "manage therapy" is met in relation to Flexitol Heel Balm. But nor do I find that Flexitol Heel Balm is medication. It is unsatisfactory to fail to make a positive or negative finding on a point that could elevate the award to the enhanced rate. But the parties invite me not to find that the definition of "manage therapy" is met. Without the benefit of argument or evidence to the contrary, I have to accept that. It does not however mean I should go so far as to accept that Flexitol Heel Balm is medication. That will be for another Upper Tribunal appeal in another case.

66. I make no criticism, incidentally, of the claimant or his representative for choosing to concede the point. The claimant is (very ably) represented by Ms Sarah Hayle of the Northampton Community Law Service. Funding and resources are likely to have been an issue. Contesting 199 pages of evidence is not easily or cheaply done. It is also understandable that a claimant might not have the appetite to contest the point.

Activity 6: Dressing and undressing

67. I award the claimant four points for dressing and undressing under descriptor 6e, for the following reasons.

68. The First-tier Tribunal gave two points under 6d for a need for assistance to be able to dress or undress the claimant's lower body. I pointed out however[6] that it seemed the tribunal had in paragraph 17 accepted the claimant's "consistent" evidence that he has trouble not only with socks and shoes but also with zips and buttons. I invited submissions therefore on why help was needed only for the lower body. The parties now accept that "the problems faced by the claimant would be just as significant for their upper body as their lower body. As such we agree with changing the descriptor choice from 6d to 6e" (joint submission 3/9/18, paragraph 7, page 249).

69. I therefore accept that – due to loss of feeling in his hands, fingers and feet – the claimant has difficulty with, and so needs help with, putting on shoes and socks and doing up zips and buttons. (I also accept that putting on his socks properly is particularly important due to the risk of ulceration in his feet, although the need in relation to socks is made out even without that particular importance.) I therefore accept that the claimant needs assistance to be able to dress and undress his upper body. He also needs assistance to be able to dress and undress his lower body, for the same reasons. But the two points for that under 6d are replaced by the four upper body points under 6e, by virtue of regulation 7(1)(b).

[6] Directions 17/7/18, page 238, paragraph 27.

Mobility component

70. In their first and second joint submissions, dated 13 March 2018 and 3 September 2019, the parties asked me to award eight points for moving around, and so standard rate mobility, under mobility descriptor 2c: "Can stand and then move unaided more than 20 metres but no more than 50 metres"[7]. The parties ultimately agreed, however, that the claimant merited 12 points for moving around. This was because of PS v SSWP [2016] UKUT 0326 (AAC) (CPIP/665/2016), which decided that walking done with pain was not to an acceptable standard (submission 14/3/19). The parties asked me to award 12 points under descriptor 2e: "Can stand and then move more than 1 metre but no more than 20 metres". They submitted that—

> "The level of pain that arises soon after beginning walking is such that he could not walk 20 metres or more to an acceptable standard. The level of pain as presented by the claimant at p45 (in the claim form) and p125-6 (in the record of proceedings), is a credible presentation of his symptoms, and is consistent with the medical evidence of his condition. Furthermore, bearing in mind the other reliability criteria of regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013, the claimant may be at risk of harm with prolonged walking of any significant distance, due to the risk of ulceration, as mentioned by Dr Jamil (p122) and referred to consistently by the claimant (p95, p125-6). After walking such a distance the claimant reports that he may be deemed unable to walk for days afterwards (p70, p96, p126). Therefore the claimant cannot manage distances beyond 20 metres, safely, repeatedly, nor to an acceptable standard." (joint submission 14/3/19, paragraph 3, page 258).

71. I accept that submission, except that I find that the claimant is at risk of harm from prolonged walking, not that he may be at such risk. That there is a risk means that he may suffer harm (which I suspect is what the parties meant).

72. In his claim form the claimant said – and I find – that he "very rarely walk[s] anywhere as [he] suffer[s] constant pain and discomfort … cramp and a muscle wasting condition" (page 45). This was evidenced as still current as at 30 March 2016 (claimant's letter, page 95) and still current as at 7 June 2016 (Doctor Jamil's letter, page 122). I find with the parties' agreement that it was current at all relevant times for this appeal.

73. The claimant said in his letter dated 30 March 2016—

> "I suffer constant pain and discomfort due to diabetes and diabetic polyneuropathy. This can cause risk of injury to my feet, ulceration and foot infection without knowing due to no feeling in my feet and lower legs. I also suffer with cramp and a muscle wasting condition in my calf muscles which is caused by a nerve in my lower back. (See doctors letter enclosed)
>
> Last July this happened to me because I walked that bit too far and ended up with a [sic] ulcer under the skin of my foot which I didn't even know was there

[7] The agreed draft suggested in their joint 3/9/18 submission (page 249) did not in fact reflect that. It said "the claimant cannot walk a distance exceeding 20m". That discrepancy has however been overtaken by the parties' agreement that 12 points should be awarded under 2e.

> until I attended the foot clinic for my six week check-up. So now I couldn't walk on it for 3 months until it had fully healed otherwise if I did it would have caused a deep ulceration and infection which I have had many times over the years. Because of the problem I needed to attend the foot clinic on a regular basis so they could check it regularly and my wife had to redress the wound three times a week." (page 95, sixth and seventh paragraphs).

74. I accept that evidence. It was supported by Dr Jamil's evidence, which I accept, that the claimant's feet are susceptible to getting ulcers due to the poor sensation in his feet (letter 7/6/16, page 122).

75. In his 30 March 2016 letter, the claimant also corrected the report of assessor Alan Barham which at page 70 recorded that the claimant had said he "can walk to the local shop 300 metres away but has to stop". The claimant said—

> "I told him that I don't walk to the shops because of my condition, he said "but if you could, how long would it take if you did walk to the shops?" He then said to me, "about fifteen minutes?" I said yes it probably would but I never walk to the shops as I would be at high risk of ulceration and discomfort for the next two days or more" (pages 95 and 96).

76. And the claimant told the First-tier Tribunal—

> "I walk as little as possible – too much of a risk. I know to do this. I know I'll get pain but it's the risk of ulceration – it's the pain I've had – podiatry say to do as little walking as possible. Tried to increase walking last year and got ulcer" (record of proceedings, pages 125 and 126).

77. I accept that evidence. And I find that the claimant does not walk to the shops and that the reason for that is the risk of ulceration and of discomfort, as he said in his 30 March 2016 letter.

78. I considered whether the submission that the claimant cannot walk safely and repeatedly even 20 metres without pain, which I accept, means that he falls outside descriptor 2e and into 2f. Descriptor 2e says "Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided". It does not however require the claimant to be able to move 20 metres. A comparison with the descriptors on either side of 2e shows that the claimant cannot be given fewer points under 2d unless he can move <u>more</u> than 20 metres, which the parties agree he cannot do. And he cannot fall within 2f unless the pain is there for even the first metre of walking. The parties have not agreed that that is so. So the claimant does not fall within descriptor 2f, on what the parties have agreed. If he can stand and then move more than one metre, but no more than – say – two or 19 metres without pain (as to which I need make no finding), that brings him outside descriptor 2d and outside 2f. So he must fall within descriptor 2e.

79. I accept therefore that the 12 moving around points that I am awarding are merited under descriptor 2e, as the parties submit, and not under 2f. (I have not however had the benefit of argument on the distinction between 2e and 2f, because it was not in issue on this appeal.)

Period of award

80. I accept that 10 years is a reasonable initial period for the award of both components. There is nothing to suggest that the diabetic polyneuropathy will in this case resolve or improve before the expiry of 10 years. Although type 2 diabetes can in some cases improve with dietary changes, there is no fixed timescale for that, if it happens all. If, within the 10 years, the diabetic polyneuropathy improves enough to reduce materially the claimant's needs, that can be dealt with by a supersession, as can a material change for the worse.

Award

81. It is for these reasons that the claimant is entitled to an award of the daily living component at the standard rate from 13 April 2016 to 12 April 2026 and of the mobility component at the enhanced rate from 13 April 2016 to 12 April 2026.

Rachel Perez
Judge of the Upper Tribunal
28 February 2020

Annex 1

to Upper Tribunal decision

Extract from report of Channel 4 Dispatches programme, taken from:
https://www.channel4.com/press/news/great-benefits-row-channel-4-dispatches

"Capita assessor failure to maintain professional standards:

After he completed his training our undercover reporter was sent to Northampton to learn the ropes from experienced employees.

Alan is a Disability Assessor; his job is to work out whether disabled people will qualify for PIP. Alan was deemed, by his manager, to be well trained and a good assessor to learn from. He's keen to talk about the money he earned from Capita at the start of their contract in 2013.

Alan: The money? It was ridiculous. I was getting around 20 grand a month, most months.

They'd pay around £80 an assessment for the first 8 assessments, then they paid £160 an assessment for 8-14, then they paid £300 per assessment for 14-21.

Noel: So I imagine they're all banging them out very quickly then?

Alan: Oh yeah, we was flying through them, because of that money. That's 20 grand a month.

Alan tells Noel that sometimes he completes his assessments before even meeting the claimant:

Alan: So you'd think there's something significant as a leg missing would be 'oh my god there's the money; but when it gets to the nuts and bolts of it he does everything really don't he? I'd literally finished his assessment before I'd even walked through the door. I'd done it on Saturday. Cos the informal observations with only one leg…

Noel: Yeah, yeah

Alan: He's not going to claim that and then turn up with two legs

Dr Jed Boardman, "he represents both a failure of his own professional standards, but also,

a, sort of, problem in the system that is not somehow looking closely enough at the quality of that interview.

Alan talks to Noel about the use of informal observations, where the assessor watched the claimant but doesn't tell them that the observations are part of the assessment:

Noel: Do you catch many out with the informal obs then?

Alan: Most of its informal obs you catch them out on

Noel: Do you don't tell them you're doing an informal obs then?

Alan: No, no. If you tell them you're doing an informal observation they'll watch what they're doing.

Noel: Right

Alan: They're informal, that's why you don't have to say anything. They'll tell you everything that they want to tell you, is wrong, you can completely dismiss it more often than not. You'll get your whole assessment done with watching what they do.

The information held on Capita's computers is confidential and very sensitive. On Noel's second day he finds Alan photographing his computer screen.

Alan: Take pictures of your assessments as well

Noel: Take pictures of them, why?

Alan: Once they've attended, take a picture. Well, if you come to your payday and you haven't got all your assessment reports, how can you prove you've done them?

Barrister Simon Butler comments, "it's quite clear there has been a breach of the Data Protection Act, that there's been a clear breach of the patient's confidentiality because you're not entitled to take photographs of the patient's information and therefore as far as I'm concerned and from what I've seen that would be a serious breach of his professional standards"

Capita are clear that they want assessors who 'have an empathy with disabled people', Alan is clearly disrespectful about an overweight claimant:

Alan: Disability known as being fat

She asks for help to wipe her arse because she's too f**king fat to do it herself

Alan shares his views with his manager Jessica

Alan: Now this woman's so fat she can't wipe her own arse

Jessica: Well we've all been there Alan

Alan: No we haven't! How have you been there?

Jessica: I was just saying, you know, it could happen to anybody.

Alan: Yeah but I've got to give her an award for it

Jessica: Maybe if she did it, it would be like… exercise?

Noel then notices that the manager is removing a notice making claimants aware of their right to have the assessment recorded.

Capita response:

"The comments and actions of [this contractor] clearly fall short of what we expect and are totally unacceptable. We are obviously appalled by and sincerely apologise for this individual's disrespectful comments and actions. [He] will no longer work for Capita."…"

End of Annex 1

Annex 2

to Upper Tribunal decision

Extract from Guardian report of 21/9/17
taken from: https://www.theguardian.com/society/2017/sep/21/benefits-assessor-sanctioned-for-mocking-disabled-claimant

"Benefits assessor sanctioned for mocking disabled claimant

Alan Barham, who was dismissed by Capita after undercover footage emerged, given caution order by disciplinary panel

Patrick Butler Social policy editor

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A benefits assessor who was caught on film mocking disabled claimants of personal independence payments and suggesting they were liars has been found guilty of misconduct by a professional standards tribunal.

Alan Barham, a paramedic who carried out PIP assessments for Capita in Northampton, brought his profession into disrepute and undermined public confidence in the integrity of the PIP assessment process, a health and care professions disciplinary panel found.

It issued a five-year caution order, meaning any prospective employer will have access to details of the case on an online professional register for that period.

Barham was covertly filmed by a Channel 4 undercover journalist. Footage showed him boasting that he would largely complete assessment forms before meeting the claimant, and afterwards would often disregard the evidence they gave during their assessment.

He told the reporter he would "completely dismiss" claimants' explanations for why they needed disability benefit, and rely instead on his own "informal observations" to "catch them out".

The disciplinary panel said his comments about catching out claimants "portrayed him as

holding the view that many claimants were liars, which was totally at odds with an independent assessment process into whether a claim was valid or not".

Barham also mocked a disabled claimant, telling the undercover reporter that her disability was "being fat".

> "She asks for help to wipe her arse because she's too fucking fat to do it herself," he said.

The Health and Care Professions Council summoned Barham to the tribunal after several members of the public filed complaints about his conduct following the broadcast of the Channel 4 Dispatches programme in April 2016.

PIP assessments, which determine a claimant's eligibility for financial help, have proved controversial. Critics argue that the process is crude and inaccurate, and many assessors are not properly qualified. About 65% of appeals against a PIP assessment decision are successful.

Formerly known as disability living allowance, PIP is awarded to help people with the extra costs of living with a disability or chronic ill health. It is worth between £22 and £141.10 a week, depending on the severity of the condition.

In coming to a verdict of misconduct, the disciplinary panel said: "The impact of [Barham's] portrayal in the programme was that the public saw a disability assessor who lacked empathy and respect for the vulnerable claimants he was assessing, and who did not act in their best interests.

"In the panel's view, it is paramount that the public is able to trust the integrity of the PIP assessment process. Individual claimants as well as the general public need to have confidence that the disability assessors carry out the PIP assessments in a fair and sensitive manner, respecting the dignity of the claimants and having regard to the sensitive nature of the personal and medical information provided."

Barham told the panel that at the time he was filmed by Dispatches, he had become arrogant and big-headed. He had been lauded by Capita for the high percentage of excellent reports he produced and was well paid. He had allowed all this to "go to his head".

He joined Capita in 2014 after 11 years in the ambulance service as an emergency medical technician and paramedic. He was dismissed by Capita after the programme aired.

The panel said that although Barham's behaviour was not sufficient to warrant being struck off the professional register, and this was an isolated incident for which he had shown remorse, taking no action would have sent out the wrong message to the public.

Although the caution order will not prevent Barham from practising as a paramedic, the panel said it did not regard it as a lenient sanction, because it would negatively affect his employability and reputation."

End of Annex 2