



Neutral Citation Number: [2024] UKUT 244 (AAC)

Appeal No. UA-2024-000104-PIP

ADMINISTRATIVE APPEALS CHAMBER

IN THE UPPER TRIBUNAL

Between:

CF

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Stout

Decided on consideration of the papers

Representation:

Appellant: Jakub Mikulski (Free Representation Unit)

Respondent: L Ropel (DMA Leeds)

On appeal from:

Tribunal: First-Tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: SC323/22/01276

Digital Case No.: 1658273862299092

Tribunal Venue: Chelmsford (by telephone)

Decision Date: 5 June 2023

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal described in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.

SUMMARY OF DECISION

PERSONAL INDEPENDENCE PAYMENT – DAILY LIVING ACTIVITIES (42)

The Tribunal erred in law by failing to recognise that prescribed compression stockings constituted “therapy” within the meaning of Schedule 1 to The Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations). The Tribunal should have considered whether the appellant met any descriptor in activity 3 (managing therapy or monitoring a health condition) as a result of her difficulties in putting on and taking off the stockings.

As the compression stockings met the definition of “therapy”, difficulties with putting them on and taking them off could not also qualify the appellant for points under activity 6 (dressing and undressing). However, the Tribunal also failed to make adequate findings of fact to enable it to consider whether the appellant qualified for any points under activity 6 as a result of difficulties dressing or undressing with ‘normal’ clothes.

The Tribunal further erred in law in its consideration of activity 9 (engaging with other people face to face).

On the particular facts of this case, the Tribunal also erred in law in failing to consider of its own motion whether fairness required it to adjourn to a face-to-face hearing rather than proceeding by telephone.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
2. **The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 5 June 2023.**
3. **The appellant is reminded that the new First-tier Tribunal can only consider the appeal by reference to their health and other circumstances as they were at the date of the original decision by the Secretary of State under appeal (namely 6 May 2022).**
4. **If the appellant has any further written evidence to put before the First-tier Tribunal relating to that period, including any further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.**
5. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The appellant appeals against the First-tier Tribunal's decision of 5 June 2023 refusing the appellant's appeal against the decision of the Secretary of State of 6 May 2022 that the appellant was not entitled to Personal Independence Payment (PIP) from 29 December 2021 (the date of claim).
2. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 22 September 2023 and permission to appeal was refused by the First-tier Tribunal on 15 December 2023. The appellant filed the notice of appeal to the Upper Tribunal on 18 January 2024.

3. By a decision sent to the parties on 29 February 2024, I extended time for admission of the application and granted permission to appeal.
4. The Secretary of State then filed a response to the appeal, in which she indicated that she supported the appeal, albeit on slightly different grounds to those I had identified in the grant of permission. The appellant, represented by the Free Representation Unit, welcomes the Secretary of State's support of the appeal, but takes issue with certain aspects of the Secretary of State's response.
5. The principal legal issue on this appeal (Ground 1) is whether assistance that the appellant appears to require putting on prescription compression stockings should count only for the purposes of daily living activity 3 (as assistance required in 'managing therapy'); or whether it may also be taken into account in relation to daily living activity 6 (dressing and undressing). Ground 2 concerns activity 9 (engaging with other people face to face). Ground 3 concerns whether it was fair for the Tribunal to allow the hearing to proceed as a telephone hearing rather than adjourning to a face-to-face hearing.
6. The parties have each consented to a decision being made on the papers without an oral hearing (as permitted by Rule 34(1) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules)), and I am satisfied that it is appropriate in this case, and in accordance with the overriding objective in Rule 2, for this appeal to be determined on the papers without an oral hearing because, despite the minor disagreement between the parties, this is a straightforward case that does not require an oral hearing.

Background

7. The appellant suffers from Lymphoedema in both legs. This condition makes the appellant's legs feel heavy with swelling from their knees to ankles and tightness in their ankles. She wears compression stockings to aid in lymphatic drainage and reduce swelling in her legs. Additionally, the appellant has carpal tunnel syndrome in her left wrist with symptoms of weakness and pain. The appellant has also been diagnosed with stress, depression, and anxiety. She has symptoms of low mood, low confidence, and self-esteem.
8. On 29 December 2021, the appellant made a claim for PIP.
9. The Secretary of State awarded the appellant 4 points on daily living activity 1 (preparing food) and daily living activity 4 (washing and bathing) on the basis that she needed aids for those activities. The appellant sought mandatory reconsideration, upon which the Secretary of State confirmed the original decision. The appellant appealed. She requested a face-to-face hearing.

10. The appeal hearing was originally scheduled to take place face to face on 26 April 2023. The appellant telephoned the Tribunal that morning to say that her daughter had just been admitted to hospital and she was with her. She offered to deal with the appeal by telephone from her car. The Tribunal decided that would not be in the interests of justice and adjourned the hearing. The adjournment notice included the following:-

1. The appeal is adjourned for telephone hearing on the first available date with a time estimate of 1 hour.

(i) Do not relist on a Friday. The Appellant indicated that she would be willing to attend a face-to-face hearing at a venue convenient to her home if there is an available listing sooner than waiting for a listing by telephone.

11. As the Tribunal that made the decision under appeal subsequently noted in its decision, it is unclear why the Tribunal directed that the hearing should not take place on a Friday as that is in fact the only weekday on which the appellant does not work and was therefore probably the opposite of what was intended.

12. Without further reference to the appellant, the hearing was then listed by the Tribunal to take place by telephone. The appellant participated by telephone without objection at the time.

13. A bundle of documents before the Tribunal included the following written evidence from the appellant that is referred to by the parties' in their submissions as relevant to this appeal:-

Some days I struggle putting compression garments on and I need help and support from friends and family. I have good days and bad days. Most days I need help to put these on. I struggle getting them on my legs when I have a lot of pain and heaviness. Sometimes I get cramp and pins and needles in legs and feet. A family member helps with this by assisting with the garments. I struggle using my wrists. [page 33, FtT bundle].

...struggles to get compression tights on and needs help. Is encouraged and prompted to get dressed. Can take up to 20 minutes to fully get dressed [page 94, FtT bundle]

... every day I need help to put on my garments and I have to use rubber gloves to get them on [page 61, FtT bundle, appellant's statement]

14. Medical evidence before the Tribunal at pp 9-11 noted that the appellant is prescribed compression stocking and an Occupational Health Report (p 111 of the bundle) stated:-

... [the appellant] was diagnosed as having Lymphedema in August 2016. [She] told me that both [their] legs became more swollen and tight and it was hard to walk. [The appellant] attends a specialist clinic every 3-6 months with this condition and has to wear special surgical stockings to help control this.

15. The Tribunal's findings on the appeal are recorded in [23]-[28] of its decision as follows (*sic*):-

23. The Tribunal has not had the opportunity to see the Appellant, but has spent time asking her questions and listening to the answers. The report of the HCP is based upon a Face to Face assessment, though she disputes the findings and the recommendations.

24. The medical evidence gives information regarding the past history, and she has clearly had a problem with her legs. There are reports that the medication and the use of compression, or surgical, stockings has helped. She has been in a relationship, and had a child. She has moved to a flat of her own, albeit with only stairs to the second floor. She has continued in a full-time job, though has adjusted and slightly reduced her hours. She has help from her mother, though this relates to her having a child to look after- she says that she was managing until her daughter's birth. None of these things disqualify her from receiving PIP, but the Tribunal has to look at her ability to carry out the various activities at the time of decision. These are factors to consider.

25. The starting point is her PIP2 form, which indicates that the problems are with her legs and with standing. She accepts that she can cook; she suggests depression affects her ability to eat, but there is no sign of loss of weight. She suggests that she is reminded every day about her medication, but the evidence indicates it is effective and taken appropriately. The evidence did not support a need for reminding. Putting on stockings is not classed as therapy or medication. There is evidence about the effectiveness of lymph drainage, but this does not continue, and there is no evidence that this would require assistance. from another person.

26. She has good days and bad with regard to dressing, and sometimes needs to be encouraged. The evidence does not show this is for 50% of the time. She does have a problem meeting new people face to face, but can talk to people on the phone. Her job will entail talking to people, and while her medication has been increased it is still effective. While she says she needs support in making decisions, there is no reason why she cannot budget and know what money is coming in and out of her bank account

27. She suggests that she is too anxious to leave the house. There is no evidence of overwhelming psychological distress or anxiety. She goes to work 4 days a week, and visits her mother's house frequently. She has been advised to exercise, and is unable to stay in the same place for long. She can walk at least 200 metres.

28. It is for her, in her appeal, to show that the Respondent's decision was wrong. She has been unable to do so. The appeal is therefore dismissed.

Legal framework

16. The conditions for entitlement to PIP are set out in Part 4 of the Welfare Reform Act 2012 (WRA 2012) and The Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations). Under s 80 of the WRA 2012 and reg 4 of the PIP Regulations the First-tier Tribunal must be satisfied that the claimant has a mental or physical condition which limits their ability to carry out the activities in Schedule 1 to the Regulations. Each of the activities in Schedule 1 has a set of descriptors and a points score. Under regulations 5 and 6 of the 2013 Regulations, a claimant who scores 8-11 points on the daily living component or mobility component is entitled to PIP at the standard rate for that component; 12 or more points on a component entitles a claimant to an enhanced award on that component. In relation to each descriptor, the First-tier Tribunal needs to consider as required by regulation 4(2A) and (4) whether the claimant can carry out the activity safely, to an acceptable standard, repeatedly and within a reasonable time. By regulation 7, the claimant must normally satisfy the descriptor on over 50% of the days of the required period (as defined in that regulation).
17. Daily living activities 3 and 6 in Schedule 1 are of relevance to Ground 1 of this appeal. Daily living activity 3 is titled “Managing therapy or monitoring a health condition”. A claimant scores 1 point if they fulfil the following descriptor:
- b. Needs either –
 - (i) to use an aid or appliance to be able to manage medication; or
 - (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.
18. Or two points if they fulfil the following descriptor:
- c. Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week.
19. Daily living activity 6 is titled “Dressing and undressing”. A claimant scores two points if they fulfil one or more of the following descriptors:
- b. Needs to use an aid or appliance to be able to dress or undress.
 - c. Needs either -
 - (i) prompting to be able to dress, undress or determine appropriate circumstances for remaining clothed; or
 - (ii) prompting or assistance to be able to select appropriate clothing.
 - d. Needs assistance to be able to dress or undress their lower body.

20. Daily living activity 9, titled “Engaging with other people face to face”, is of relevance to Ground 2 of this appeal. A claimant scores two points if they fulfil the following descriptor:

b. Needs prompting to be able to engage with other people.

21. And four points if they fulfil the following descriptor:

c. Needs social support to be able to engage with other people.

22. “Aid or appliance” is defined in reg 2 of the PIP Regulations as follows:-

“aid or appliance”-

(a) means any device which improves, provides or replaces C’s impaired physical or mental function; and

(b) includes a prosthesis

23. Relevant definitions of some of the other terms referred to in those descriptors are in Part 1 to Schedule 1 to the Regulations as follows:-

“assistance” means physical intervention by another person and does not include speech;

“dress and undress” includes put on and take off socks and shoes;

“engage socially” means –

(a) interact with others in a contextually and socially appropriate manner;

(b) understand body language; and

(c) establish relationships;

“manage medication or therapy” means take medication or undertake therapy, where a failure to do so is likely to result in a deterioration in C’s health;

“medication” means medication to be taken at home which is prescribed or recommended by a registered –

(a) doctor;

(b) nurse; or

(c) pharmacist;

“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;

“therapy” means therapy to be undertaken at home which is prescribed or recommended by a—

(a) registered –

(i) doctor;

(ii) nurse; or

- (iii) pharmacist; or
- (b) health professional regulated by the Health Professions Council;

The grounds of appeal and the parties' submissions

24. The appellant's grounds of appeal were lengthy. I did not formally limit the grant of permission, but identified three grounds that I considered particularly arguable and which the parties have in the event been content to treat as the sole grounds of appeal.

Ground 1: assistance/aids required to put on compression stockings (activities 3 and 6)

25. When granting permission to appeal I observed as follows:-

... the First-tier Tribunal appears to have accepted the appellant's evidence that she needs special gloves and a device (i.e., probably, 'an aid') and/or assistance from her mother to put on stockings (see [20], [24] and [25] of the SoR), but has not awarded (or given any reasons for not awarding her) 2 points for daily living activity 6 (dressing and undressing) whether on the basis of 'needing an aid or appliance to be able to dress or undress' or 'needing assistance to be able to dress or undress their lower body'.

26. In responding to the appeal, and supporting it, the Secretary of State pointed to the evidence in the bundle indicating that the appellant's stockings are prescribed by her doctor/health professional and thus fall within the definition of "therapy" in Part 1 of Schedule 1 to the PIP Regulations and activity 3. The Secretary of State submits that the Tribunal erred in not considering, and in not making sufficient findings of fact to enable it to consider, whether the appellant should have been awarded points under activity 3. The Secretary of State submits that the appellant should not also be considered for points under activity 6 because this would amount to "double counting".
27. The appellant agrees with the Secretary of State that the compression stockings fall within the definition of "therapy" as they have been prescribed by the appellant's doctor/health professional and agrees that accordingly the appellant should have been awarded two points under activity 3. However, the appellant submits that this does not preclude the appellant also being awarded points under activity 6 which requires an assessment of the appellant's ability to dress her lower half including with "a hypothetical non-therapeutic stocking". The appellant adds that a person might reasonably choose to wear compression stockings even if not prescribed and that in those circumstances assessment of their ability to get them on and off would be relevant to activity 6 even though not to activity 3 as, if not prescribed, they would not fall within the definition of "therapy".
28. I broadly agree with the appellant and as this Tribunal on remission (and potentially other Tribunals in other cases) may need to deal with this issue, I provide some brief guidance on where the lines are to be drawn between activity 3 and activity 6 so far as compression stockings are concerned.

29. First, I agree with both parties in this case that compression stockings that have been prescribed by a registered doctor, nurse or pharmacist, or health professional regulated by the Health Professions Council will, by virtue of the definition in Part 1 of Schedule 1 to the Regulations, be “therapy” within the meaning of the Regulations. That was what Judge Perez concluded in relation to prescribed compression bandages in *PM v SSWP* [2018] UKUT 138 (AAC) (CPIP/383/2018). Whether something that is prescribed by a relevant professional is “medication” or “therapy” within the meaning of the regulations will need in each case to be determined by the Tribunal by reference to case law and by reference to the ordinary meaning of the words “medication” and “therapy” as those words are not otherwise defined in the Regulations. In this case, I am content that compression stockings can properly be described as “therapy”, as (with reference to the *Shorter Oxford English Dictionary* definitions), the normal meaning of medication relates to treatment with a “medicinal substance” or “drug”, whereas “therapy” refers to “treatment” more generally including by “systems of activities” and by action taken to “alleviate” as well as “cure” symptoms (see further *AS v SSWP* [2017] AACR 31 at [7] *per* Judge Bano for consideration of the meaning of “therapy”). It seems to me that the wearing of compression stockings to aid in lymphatic drainage and reduce swelling in that legs falls comfortably within the ordinary meaning of the word “therapy”.
30. The Tribunal in this case therefore erred in law in regarding the use of compression stockings as not being therapy or medication. The Tribunal needed to consider whether on the evidence the appellant satisfied descriptor “Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week” for the award of two points. In considering that descriptor, the Tribunal needed to be satisfied, having regard to the definition of “manage therapy” in Part 1 of Schedule 1, that a failure to manage the appellant’s compression stocking therapy would be “likely to result in a deterioration in C’s health”.
31. Secondly, I agree with the Secretary of State that if the compression stockings have been prescribed, so as to fall within the definition of “therapy” under the Regulations, then difficulties with putting them on would fall only to be considered under activity 3 and not also under activity 6. That is for two reasons:
- a. The activity of “dressing” for the purposes of activity 6 has to be considered by reference to the putting on of ‘normal’ clothing as is established by authorities such as Judge Jacobs’ decision in *PE v SSWP (PIP)* [2015] UKUT 309 (AAC), [2016] AAC 10. Prescription compression stockings could not in my judgment reasonably be classified as ‘normal’ clothing under that line of case law; and
 - b. Although there is in general no prohibition on the same difficulties giving rise to points in relation to multiple Schedule 1 activities, as a matter of legislative construction a provision which specifically provides for a particular situation may prevent a provision expressed in more general terms from applying to the same situation (see *AS v SSWP* [2017] AACR 31 *per* Judge Bano at [8]-[9]). I consider that principle of statutory construction would apply in this case so that, if an item of clothing falls

within the definition of “therapy” in the Regulations, any difficulty with it falls to be assessed by reference to the activity dealing with management of therapy rather than by reference to the more general activity of dressing/undressing.

32. Thirdly, however, I agree with the appellant that the fact that the appellant’s difficulties with putting on compression stockings fall to be considered under activity 3 does not mean that she cannot also be considered for points under activity 6. That is again for two reasons:
- a. The Tribunal needs to consider whether she would meet any of the activity 6 descriptors if she were putting on ordinary socks rather than compression stockings; and
 - b. It is not clear to me on the basis of the material I have that her only difficulty with getting dressed is the compression stockings. The Tribunal needs to make the necessary findings of fact in relation to this activity to enable it to consider whether the appellant should be awarded any points against this activity.
33. Fourthly, the hypothetical situation posited by the appellant of a person choosing to wear compression stockings even though they have not been prescribed by a person listed in Part 1 of Schedule 1 does not arise on this case and I express no view on it, save to say that compression stockings that have not been prescribed could not constitute “therapy” within the meaning of the Regulations. The Tribunal would therefore need to consider the case law on activity 6 and whether compression stockings that someone chooses to wear for a particular reason would fall to be regarded as ‘normal’ clothing for the purposes of that activity.

Ground 2: Engaging with other people face to face (activity 9)

34. When granting permission on this ground, I observed as follows:-

At [26] of the SoR the Tribunal has arguably misdirected itself in law when addressing daily living activity 9 (engaging with other people face to face) as it appears to have accepted that she has “a problem meeting new people face to face”, but found that she does not meet the criteria because she can talk to people on the phone or at her job. However, this activity is dealing with a person’s ability to meet and engage with others face to face in a social context. This means considering whether the individual can, to an acceptable standard, engage face to face in a social context with adults they do not know well, including whether they can (a) interact with others in a contextually and socially appropriate manner; (b) understand body language and (c) establish relationships. What the appellant could do on the phone or in work is not therefore relevant (or, at least, is not determinative). See *SF v SSWP (PIP)* [2016] UKUT 543 (AAC) at [6] and *HA v SSWP (PIP)* [2018] UKUT 56 (AAC) at [13]-[19]. If she needs ‘prompting’ for this activity, she would have scored 2 points or, if she needs ‘social support’ (as explained in *SSWP v MM* [2019] UKSC 34), she would have scored 4 points.

35. The Secretary of State supports the appeal on the basis that I outlined in the grant of permission, save that the Secretary of State argues that I went too far in suggesting that what the appellant could do on the phone or in work is 'not relevant' to the question of whether she meets the activity 9 descriptors. The Secretary of State supports that submission by reference to what is, so far as I can tell, an unreported, unpublished decision of Judge Rowland (*CPIP/1203/2016*). The appellant agrees with the Secretary of State. In [6] of that case, Judge Rowland stated as follows:-

I am also satisfied that the First-tier Tribunal did not err in law in its consideration of Activity 9. As has been noted before, the term "engage socially" is defined in Part 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) and is then not used anywhere in the Schedule but, even assuming that it defines "engage with other people" for the purpose of Activity 9, there is no need for the term "social" in the phrase "socially appropriate manner" to imply that, in considering whether any of the descriptors in Activity 9 is satisfied, regard should be had only to contact in a social, as opposed to a business or professional, context. The reasoning in *JC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 352 (AAC); [2015] AACR 6 at [24] to [35] applies to personal independence payment as much as to employment and support allowance. Accordingly, the reasoning of the First-tier Tribunal in paragraph 21 of its statement of reasons was quite adequate against the background of the evidence in the case.

36. I agree with the parties that the evidence the Tribunal had of the appellant's ability to engage on the phone and in work was not 'irrelevant' to the matters it had to consider in relation to activity 9. However, the difficulty in this case is that it appears from the decision that the Tribunal has misunderstood activity 9 because it identifies that the appellant does have a problem meeting new people face to face, i.e. a problem with one of the specific activities covered by activity 9, but then explains that it is not awarding her points because she does not have a difficulty with two activities (talking on the phone and engaging in a work context) that are not specifically covered by activity 9. There is therefore a clear error of law. The Tribunal appears simply to have misunderstood the nature of the test it had to apply.
37. What the Tribunal needed to do was to apply the guidance in *HA v SSWP (PIP)* [2018] UKUT 56 (AAC) at [13]-[19], which for convenience I set out here:-

13. It is now widely accepted that the definition of "engage socially" in Part 1 of Schedule 1 to the Social Security (Personal Independence Payments) Regulations 2013 applies to daily living activity 9, even though the expression does not actually appear within the terms of the activity or its descriptors. The expression is defined as meaning: "(a) interact with others in a contextually and socially appropriate manner; (b) understand body language; and (c) establish relationships". If a claimant is unable to satisfy these criteria, it follows that (s)he is unable to engage with other people "to an acceptable standard" (regulation 4(2A)(b)).

14. For completeness, Part 1 of Schedule 1 defines “prompting” as meaning “reminding, encouraging or explaining by another person”, and “psychological distress” as meaning “distress related to an enduring mental health condition or an intellectual or cognitive impairment”.

15. It is implicit from the tribunal’s conclusion - that the claimant needed prompting to engage with other people - that it considered that he was able to engage with other people without social support, without overwhelming psychological distress and without exhibiting behaviour which would result in a substantial risk of harm to the claimant or another person.

16. In my judgment it was incumbent on the tribunal to consider the claimant’s ability to satisfy the three components of the phrase “engage socially”, and to make adequate findings of fact as to the nature and quality of his interactions with other people (HJ v SSWP [2016] UKUT 0487 (AAC)). However, the tribunal simply CPIP/2034/2017 HA v SSWP (PIP) [2018] UKUT 56 (AAC) listed those with whom it said the claimant could engage, without investigating or making findings in relation to what actually happened during his interactions with them. In the light of the evidence as to (for example) his selective mutism, his inability to make eye contact and read facial expressions, his inability to understand body language and his tendency to bite himself or lash out during communication, it did not necessarily follow that – without more - the claimant was able to “engage socially” even with those people listed by the tribunal, for the purposes of daily living activity 9, at least on over 50% of days (regulation 7).

17. In any event, all of the “other people” in the tribunal’s examples were, as the tribunal stated, of the claimant’s age (16). They would not, therefore, generally be regarded as adults. Just as Upper Tribunal Judge Jacobs was of the view that a claimant’s inability to engage with men (albeit having an ability to engage with women) was of such a magnitude as to satisfy the descriptors (RC v Secretary of State for Work and Pensions [2017] UKUT 0352 (AAC)), equally, in my judgment, a claimant’s inability to engage with adults falls into the same category, irrespective of his or her ability to engage with children and young people. There was ample evidence before the tribunal to indicate that the claimant had considerable difficulties engaging with adults due to his anxiety. In my judgment the tribunal did not adequately explain why it considered that he would be able to engage with adults if he simply had another person “reminding, encouraging or explaining” and why it considered that the higher point-scoring descriptors of daily living activity 9 were not satisfied.

18. Further, the “other people” relied upon by the tribunal were all people known to the claimant. However, the term “engage socially” is not limited to such people. Rather, a tribunal must consider a claimant’s ability to engage with people generally, and not just those people they know well (HJ v SSWP [2016] UKUT 0487 (AAC)). The tribunal did not address whether the claimant’s ability to engage with those listed by it showed that he was able to engage with people generally, rather than just those whom he knew well. That, also, constituted an error of law.

19. Finally, the tribunal's reliance on the claimant's ability to use a phone to engage with others was misplaced, and amounted to a further error of law. The tribunal did not explain in what way it considered that the claimant could use a phone to engage with other people. In fact, the evidence was that he would send texts by phone. The description of the activity is "engaging with other people face to face" (my emphasis). I am quite unable to see how a claimant's ability to use a phone to send texts could possibly demonstrate an ability to engage with other people "face to face", not least because one of the requisite criteria of an ability to "engage socially" is an ability to understand body language.

38. The Tribunal needed to make the necessary findings of fact to enable it to decide whether the appellant needs assistance in engaging with other people face to face, to an acceptable standard, in a social context with adults she does not know well, including whether she can: (a) interact with others in a contextually and socially appropriate manner; (b) understand body language and (c) establish relationships.
39. If so, the Tribunal needed to consider whether that assistance amounts to "prompting" (qualifying her for two points) or "social support" (qualifying her for four points). In answering that question, the Tribunal needed to apply the guidance in *SSWP v MM* [2019] UKSC 34 about "social support". "Social support" is defined in Schedule 1 to the WRA 2012 as "*support from a person trained or experienced in assisting people to engage in social situations*". In *SSWP v MM* the Supreme Court held that "social support" does not mean only support from professionals, but can include support provided by experienced family members.
40. In considering those matters, if the Tribunal does not have sufficient evidence of the appellant's ability to engage in the social context dealt with by activity 9, it may be relevant for the Tribunal to consider the appellant's ability to engage in other contexts, including business/professional contexts and on the telephone, and the Tribunal may draw inferences from that evidence to help it consider daily living activity 9. However, if it does so it will need to explain what inferences it draws and why.

Ground 3: Proceeding with the hearing as a telephone hearing

41. In granting permission to appeal, I described this ground of appeal as follows:-

The appellant had requested an in-person hearing, but the appellant states she was never offered an in-person hearing and the hearing went ahead as a telephone hearing. The Tribunal notes at [23] that it has "not had the opportunity to see the appellant" but has nowhere in the reasons addressed whether or not it was fair, and in accordance with the overriding objective, to proceed with a telephone hearing in circumstances where the appellant wanted a face-to-face hearing and in person presentation may have had a bearing on the decision.

42. The Secretary of State again supports this ground of appeal on the basis that the Tribunal's approach to listing and continuing with the hearing by telephone was materially unfair in this case and/or that the Tribunal gave inadequate reasons for

why it considered it was in accordance with the overriding objective to proceed on that basis. The Secretary of State does, however, point out that it was in principle open to the Tribunal to proceed by way of a telephone hearing if it considered it was in the interests of justice to do so.

43. I agree with the Secretary of State. While the Secretary of State is correct to observe that a telephone hearing is, by rule 1(3) a form of oral hearing, so that the authorities on Tribunals continuing with decisions on the papers when fairness required an oral hearing (such as *JP v SSWP* [2011] UKUT 459 (AAC)) are not directly relevant, the Tribunal does always bear a continuing responsibility to ensure that a hearing is conducted fairly and in accordance with the overriding objective. In this case, the Tribunal notes in its decision that the appellant had requested an oral hearing, that an oral hearing was supposed to have been listed if possible, and also that it had not had the 'benefit' of seeing the appellant in person in a case where the appellant sought to dispute the content of a face-to-face assessment with the Healthcare Practitioner (HCP). Given those combined factors, it was in my judgment incumbent on the Tribunal in this case to consider of its own motion whether it was fair to continue with the hearing by telephone and, if it concluded that it was, to explain why it had reached that decision. As it is, I am not satisfied that the Tribunal even addressed its mind to the question of fairness, or to its power to adjourn of its own motion if need be to ensure that the hearing was fair. The observations of Lady Poole in *NB v Social Security Scotland* [2023] UT 35 at [23] about the need for Tribunals in appropriate cases to consider adjourning of their own motion for further evidence apply by analogy here. Given that the Tribunal's own remarks indicate the potential for a face-to-face hearing to have had an impact on its assessment of the evidence, I am satisfied that the Tribunal's error was a material one. If the Tribunal had properly considered the matter, it may have adjourned.

What happens next

44. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view, on whether the appellant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.
45. In doing so, the new Tribunal will have to focus on the appellant's circumstances as they were at the time of the decision on 6 May 2022. This is because the new Tribunal must have regard to the rule that a tribunal "shall not take into account any circumstances not obtaining at the time when the decision appealed against was made" (section 12(8)(b) of the Social Security Act 1998).

Conclusion

46. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal subject to the directions above.

**Judge Stout
Judge of the Upper Tribunal**

Authorised by the Judge for issue on 7 August 2024