

UPPER TRIBUNAL CASE NO: CPIP/3369/2015

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

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC053/15/00232, made on 17 August 2015 at Wolverhampton, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. The issue

1. The most important issue in this case is the interpretation and application of the definition of 'aid or appliance' in the Social Security (Personal Independence Payment) Regulations 2013 – the '2013 Regulations' from now on – and, in particular, whether the decision in *NA v Secretary of State for Work and Pensions* [2015] UKUT 0572 (AAC) was correct.

B. The claim

2. The claimant made a claim for a personal independence payment on 9 May 2014. She was at that time in receipt of an award of a disability living allowance consisting of the care component at the middle rate and the mobility component at the lower rate. The Secretary of State refused the claim on 6 November 2014. The Secretary of State also terminated the award of disability living allowance from and including 2 December 2014.

3. In the questionnaire that she submitted as part of the claim process, the claimant identified her problems as arising from: osteoarthritis in her lower back, knee replacement surgery, mental health issues, bowel incontinence, and high blood pressure. She identified difficulties with: managing treatments, washing and bathing, managing toilet needs, mixing with other people, going out, and moving around.

4. The claimant was interviewed and examined by a health professional. He reported that she needed to use an aid or appliance in connection both with washing and bathing and with managing toilet needs and incontinence, and that she could not follow the route of an unfamiliar journey without help.

5. The decision-maker at first accepted that report and made an award of a personal independence payment consisting of the mobility component at the standard rate. This was later revised to reduce the points scored for planning and

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following a journey, with the result that the claimant was no longer entitled to an award.

C. The appeal to the First-tier Tribunal

6. On appeal, the First-tier Tribunal restored the award of the mobility component, but confirmed the Secretary of State's refusal in respect of the daily living component. The claimant told the tribunal that she could not stand to get dressed and found it difficult to get jeans on and off. Her representative argued that her bed was a device for sitting down to help her with dressing.

7. In the course of its reasoning on dressing and undressing, the tribunal said:

It was advanced by the representative of the appellant that the appellant uses a bed as an aid to assist her to getting dressed. The Tribunal concluded that this was a somewhat novel submission. The Tribunal considered this and came to the conclusion that most people do dress by either sitting down on a chair or using a bed to put on lower garments such as socks. The question for the Tribunal was if this could be considered to be a recognised aid. The Tribunal considered what an aid was and came to the conclusion based upon the ordinary meaning that a bed or a chair whilst they may aid an individual could not be considered an aid for the purposes of dressing for the purpose of this benefit. The Tribunal was aware that an aid or appliance is defined as any device which improves, provides or replaces your impaired physical or mental function. Therefore, for that reason and based upon the appellant's oral evidence whereby she indicated that she can manage these functions albeit slowly the Tribunal awarded no points in respect of his descriptor.

I have tidied the grammar of that passage slightly.

8. The Regional Tribunal Judge gave the claimant permission to appeal to the Upper Tribunal, saying:

it is appropriate for the Upper Tribunal to consider whether a bed is an aid in relation to the activity of dressing.

He suggested that, as the facts were not in dispute, this might be an appropriate case in which the Upper Tribunal should re-make the decision if it allowed the appeal.

D. The legislation

9. Personal independence payments are governed by the Welfare Reform Act 2012 – the '2012 Act' from now on. Section 78 provides:

78 Daily living component

(1) A person is entitled to the daily living component at the standard rate if-

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- (a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; ...
- (2) A person is entitled to the daily living component at the enhanced rate if-
 - (a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; ...
- (4) In this Part 'daily living activities' means such activities as may be prescribed for the purposes of this section.

Section 80 provides for regulations:

80 Ability to carry out daily living activities or mobility activities

- (1) For the purposes of this Part, the following questions are to be determined in accordance with regulations-
 - (a) whether a person's ability to carry out daily living activities is limited by the person's physical or mental condition;
 - (b) whether a person's ability to carry out daily living activities is severely limited by the person's physical or mental condition;
10. The relevant Regulations are the 2013 Regulations. Regulation 2 contains definitions:

2 Interpretation

In these Regulations-

...

'aid or appliance'-

- (i) means any device which improves, provides or replaces C's impaired physical or mental function; and
- (ii) includes a prosthesis;

...

'C' means a person who has made a claim for or, as the case may be, is entitled to personal independence payment; ...

11. Regulation 4 of the 2013 Regulations is made under the authority of section 80:

4 Assessment of ability to carry out activities

- (1) For the purposes of ... section 78 ... of the Act, whether C has limited or severely limited ability to carry out daily living activities ..., as a result of C's physical or mental condition, is to be determined on the basis of an assessment.
- (2) C's ability to carry out an activity is to be assessed-

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- (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
- (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

12. Schedule 1 deals with the daily living activities and their descriptors. Paragraph 5 of Schedule 1 is relevant to this case:

<i>Activity</i>	<i>Descriptors</i>	<i>Points</i>
6. Dressing and undressing	a. Can dress and undress unaided.	0
	b. Needs to use an aid or appliance to be able to dress or undress.	2
	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.	2
	d. Needs assistance to be able to dress or undress their lower body.	2
	e. Needs assistance to be able to dress or undress their upper body.	4
	f. Cannot dress or undress at all.	8

Paragraph 1 of the Schedule defines 'dress and undress':

'dress and undress' includes put on and take off socks and shoes; ...

E. NA v Secretary of State for Work and Pensions [2015] UKUT 0572 (AAC)

13. In my case management directions on the appeal, I asked whether this decision was correctly decided.

The facts

14. The First-tier Tribunal found that the claimant had back pain and fatigue such that she needed to use a perching stool when cooking and a stool when bathing. It rejected her argument that she needed to sit down while dressing both her upper and lower body. The tribunal gave permission to appeal to the Upper Tribunal, asking whether the tribunal's findings were consistent.

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Judge Mark's reasoning

15. Judge Mark dealt with the argument that an aid or appliance should be specifically made for the purpose and so have a specialist function. He rejected that argument in these paragraphs:

10. There is no definition of 'device'. The representative of the Secretary of State has drawn attention to the definition in the 6th edition of the Concise Oxford English Dictionary, 1975, as a 'contrivance, invention, thing, adapted for a purpose or designed for a particular function'. She also points out that it could be argued that a bed or chair are things invented and made for particular purposes or functions, but that it would be 'unusual and outside of normal English language and usage to describe a 'bed' or a 'chair' as a 'device' or refer to it as '*an aid*' or '*an appliance*.' A perching stool or a bath or shower stool, she submits, are devices specifically for the purposes for which the claimant uses them, but that is not the purpose or function of a bed or chair, and they do not become devices and therefore aids because they are incidentally sat on, or used to rest one's foot on while dressing or undressing.

11. I am not clear why the definition in the 1975 Concise Oxford English Dictionary should be regarded as determinative with or without the qualification of what is usual or within normal English usage. The current Oxford English Dictionary includes various definitions of device, some of which are purely abstract. The expression must be construed here in the context of a person with an impaired physical or mental function which prevents them from undertaking certain activities without taking special measures to compensate for the impaired function. I note in this context that certain of the mobility descriptors refer to the need for an orientation aid. This is defined as a specialist aid designed to assist disabled people to follow a route safely. The reference to a specialist aid clearly indicates that in general aids do not have to be specialist aids such as perching stools and shower stools.

12. It is unnecessary for me to determine exactly which forms of compensation may count as a device for that purpose. However, I cannot see why it should matter, if he or she cannot stand to prepare the meal in the usual way, whether a claimant uses a perching stool, improvises with a bar stool, or prepares the meal sitting at a table, either in an ordinary chair or in a wheelchair. The question is not whether other people might choose to sit to do all or some of the work but whether the claimant is unable to do so without sitting or perching provided that the sitting or perching replaces the claimant's impaired physical ability to stand. So too, it should not matter whether the claimant is using in the shower a special shower stool or is improvising with a garden chair. Any other conclusion would mean that tribunals would have to investigate, whenever perching stools or shower stools were used because the claimant could not stand, whether the

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claimant really needed them or whether they could cope with some other object such as an ordinary stool or chair. I do not consider that that degree of precision is required, or was contemplated by Parliament, by the word 'device' in the definition of 'aid or appliance'.

13. Another example may be with taking medication. I do not see why a device for taking medication has to be a physical object that is constructed for that purpose. The alarm system on a mobile phone could be set to go off at regular intervals during the day to remind the claimant to take medication so long as that improves, provides or replaces their impaired mental function.

14. So too with dressing and undressing, the question is not whether other people might choose to use a chair or a bed to assist when dressing or undressing, but whether a claimant is unable to dress or undress without using them or some other qualifying aid or appliance. I therefore conclude that the claimant did score 2 points under descriptor 6(b) 'Needs to use an aid or appliance to be able to dress or undress' and therefore scored a total of 8 points in respect of daily living activities and was entitled to an award at the standard rate of the daily living component of PIP.

The argument for the Secretary of State

16. The Secretary of State's representative submits:

The reasoning of Judge Mark deals comprehensively with that argument and gives a well reasoned decision as to why such a restriction of what an aid can be should not be followed. The Secretary of State therefore agrees with Judge Mark when they state that a bed/chair (or anything else) can be an aid in circumstances where it wasn't built for that purpose, and this principle should bind all tribunals on this general point.

He also submits that the question posed by Judge Mark in paragraph 14 was the correct one.

17. Having accepted Judge Mark's analysis of the argument put to him, the Secretary of State's representative goes on to argue that the judge should have taken his analysis a stage further.

There must not just be a functional loss, but a functional loss in relation to the specific activity, or individual descriptor. A condition which leads to a functional loss in one activity may not do so in another. To assess whether there really is a functional loss at all one must consider the nature of what the descriptor is asking them to complete and the manner in which that activity can be completed. If the functional loss does not put them at a *disadvantage* in the particular context ... then it is not really a functional loss at all.

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Analysis

18. I accept the Secretary of State's submission, supporting Judge Mark's reasoning: an aid does not have to be specifically designed, made or sold for the purpose. This accords with practical experience that people do make use of items that are available in their homes rather than obtain or use specialist aids. Whatever the purpose for which the item was designed or sold, it is being used as an aid. The judge's interpretation is also supported by the contrasting wording of the definition of *orientation aid* in paragraph 1 of Schedule 1: this 'means a specialist aid designed to assist disabled people to follow a route safely'. This provided a clear model that could have been followed to achieve the same result for *aid or appliance*, but it was not. Finally, the judge's approach avoids the difficulty of classifying an item that may have been designed both for everyday use and to assist in overcoming a disability, such as a shoe horn. Although it is not legally relevant, I note that the *PIP Assessment Guide* issued by the Department for Work and Pensions on 25 July 2015 says:

3.2.19 ...

Aids and appliances may also include mainstream items used by people without an impairment, where because of their impairment the claimant is completely reliant on them to complete the activity.

19. I also accept the Secretary of State's argument that, in order to be relevant, an aid or appliance must relate in some way to the particular activity. I call this the *connection argument*. The difficulty is to define what that connection is. I now come to the arguments on that point.

F. The connection argument

The argument for the Secretary of State

20. The representative makes his point by way of a short example involving a person who uses a hearing aid. That would be an aid for the purposes of Activity 7 (communicating verbally), but irrelevant to Activity 8 (reading and understanding signs, symbols and words). By way of elaboration, the representative imagines two hypothetical new activities - playing the cello and playing the flute - and how they would apply to a man with a bad back that is uncomfortable or painful on prolonged standing. A cello can only be properly played sitting down, whereas it is possible to play the flute either standing up or sitting down. The man with the bad back has to sit down in order to play the cello, and would have to do so anyway as this is *the only way of performing the activity*, so there is no functional loss in the context of this activity. To put it differently, he is at no disadvantage to anyone else relative to this activity. Coming now to playing the flute, the man with the bad back has to play sitting down, but this is *an acceptable way of performing the activity*. To put it differently, he is at no disadvantage to anyone else relative to this activity. The representative then applies this reasoning to Activity 5 (managing toilet needs or

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continence). Most men, he says, urinate while standing, but it is possible to do so while seated. So the man who needs to sit down on account of his bad back does not need an aid or appliance for the purposes of Activity 5b, as he is at no disadvantage to others relative to this activity.

The argument for the claimant

21. The claimant's representative submits that the claimant needs to sit down in order to dress on account of her bad leg, in the same way that (as the tribunal found) she needs an aid for cooking and using the toilet. The issue, he argues, is not whether the claimant would be at a disadvantage by having to sit down, but whether she would be at a disadvantage if she could not do so. Would she be able to manage the activity safely, to a reasonable standard and as often as would be required without sitting down? The descriptor requires that the claimant '*needs* to use an aid'. The Secretary of State's argument would be stronger if the descriptor provided instead that the claimant '*uses* an aid'. Ultimately, the Secretary of State's argument would render *aid* otiose, as most activities could be managed using everyday strategies.

Analysis

22. For convenience, I refer just to aids and ignore appliances. This does not affect my analysis.

23. Broadly, I accept the Secretary of State's argument, although I reach my conclusion by a different route. In doing so, I have not found the language or concept of *disadvantage* helpful. It is not part of the legislative language and contains connotations of discrimination, which is more likely to confuse than to assist in interpreting and applying the personal independence payment legislation. It is preferable to analyse the actual language used.

24. The 2012 Act defines entitlement by reference to a claimant's limited ability to carry out daily living *activities*. The limitation must be caused by the claimant's physical or mental *condition*. The activities are set out in Schedule 1 to the 2013 Regulations. Every activity is divided into a series of descriptors each of which carries a number of points. The points scored provide the measure of the limitation on the claimant's ability to carry out the activity. They depend on the nature of any intervention that the claimant needs in order to carry out the activity. In the case of aids, the descriptors are always in the form: the claimant 'Needs to use an aid or appliance to be able to ...' What follows depends on the nature of the activity. *Aid or appliance* is defined by reference to whether it improves, provides or replaces the claimant's impaired *function*, which for convenience I describe as assisting in overcoming the consequences of a function being impaired. Putting all that together, an aid must help to overcome consequences of a function being impaired that is involved in carrying out an activity and is limited by the claimant's condition. To satisfy an *aid or appliance*

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descriptor, the claimant must need an aid to assist in respect of a function involved in the activity that is impaired.

25. The claimant's representative argues that the claimant needs to sit on account of her physical condition, and is using the bed as an aid to overcome her impaired ability to stand and balance. That, he argues, is all that the claimant has to prove to score the points. I do not accept that argument, because it fails to analyse the functions involved, in this case, in the activity of dressing and undressing.

26. All of the daily living activities involve a number of functions. It is likely that an aid will assist with some of those functions but not all of them. A hearing aid, for example, helps with hearing but not with speaking (Activity 7). It is possible that an aid may be entirely beneficial. A claimant who has difficult bending may find it helpful to use a long handled shoe horn. This is entirely beneficial in that it avoids the need to bend and involves no detriment. On the other hand, an aid may not be entirely beneficial. A hearing aid may pick up and amplify background noise. The aid is beneficial, but it is not without its problems.

27. I accept the Secretary of State's argument that there must be some connection between the aid and the activity or descriptor. This is always made clear by the language of the descriptors. The representative's example of a hearing aid is a good illustration. It is relevant to Activity 7b, which refers to needing to use an aid 'to be able to ... hear', because it assists with hearing, which is a function that is relevant to communicating verbally. But it is not relevant to Activity 8b, which refers to needing to use an aid 'to be able to read or understand ... written information', because it is not a function that is involved in reading or understanding signs, symbols and words, any more than it is involved in preparing food (Activity 1) or washing and bathing (Activity 4).

28. What degree of involvement or connection must the function have in relation to the activity? The hypothetical activities of playing the cello and the flute help the representative to make his argument. But they have, of course, been chosen because they provide clear examples to illustrate a point. It is more difficult to apply the Secretary of State's approach to some of the real legislation. In part, this difficulty arises from the nature of the activities. The personal independence payment activities differ from the employment and support allowance ones, at least those that apply to physical disabilities, in Schedule 2 to the Employment and Support Allowance Regulations 2008. The latter each centre around particular functions, such as the use of the hands or arms. In contrast, the personal independence payment activities each centre around an everyday activity that may involve a parcel of functions.

29. This case raises the issue of an aid in the context of an activity that can be performed in a variety of ways by using different functions, even by people with no limitation. So, although it is possible for someone with no limitation to dress entirely while standing, many nonetheless sit for part of the time as a matter of convenience.

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30. It is often possible, as the claimant's representative submits, to find strategies to avoid the need for an aid altogether. To take an example from dressing and undressing, a claimant could avoid any problems with sitting or standing by lying on the floor to dress and undress. I accept the representative's argument that that approach would render the references to an aid otiose, at least for some activities. I am sure that the Secretary of State's representative did not intend to go that far, but the example shows that it is not appropriate to require that the function in respect of which the claimant uses the aid be absolutely essential to carrying out the activity.

31. The claimant's entitlement depends on the extent to which they are limited in carrying out the everyday activities specified. That is what the legislation provides. It does not provide for entitlement if the claimant is only limited in carrying out the activity in a particular manner. This provides a focus for avoiding the extreme example I have just considered and for giving proper significance to the role that function plays in the definition of an 'aid or appliance'. The question is this: would this 'aid' usually or normally be used by someone without any limitation in carrying out this particular aspect of the activity? If it would, the 'aid' is not assisting to overcome the consequences of an impaired function that is involved in the activity and its descriptors. So, using an ordinary wooden spoon to stir hot food while it is cooking is using an 'aid' in the everyday sense of the word, but it would not assist in overcoming the consequences of any loss of function, because it would be used anyway. But if the spoon had a special handle for someone with poor grip, it would be an aid for the purposes of Activity 1 (preparing food). Gripping is a function involved in cooking and the use of a handle that improves grip makes the spoon an aid.

32. There is a difference between a person with has no limitation but who uses a spoon to stir hot food and one who uses a chair or a bed to sit during dressing. In the former case, it is not a matter of choice; no one stirs hot food with their fingers. In the latter case, it is a matter of choice or convenience, as it is possible for someone with full function to dress without sitting. They are, though, also similar in that they are both usual or normal ways of performing the activity. By employing them, the person is not demonstrating a limitation with the functions that are required for that aspect of the activity. Rather, the person is demonstrating a limitation with one manner of carrying out that aspect of the activity.

33. In summary, entitlement to a personal independence payment depends on the claimant having a condition that limits their ability to carry out particular activities. The need to use an aid is a measure of the extent of that limitation. Whether something is an aid depends on whether it assists in overcoming the consequences of a function being impaired in the carrying out of that activity. That function must be one that is required in order to carry out the particular aspect of an activity, not merely one of a range of functions that could be employed.

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The First-tier Tribunal did not make an error of law

34. The First-tier Tribunal did not express itself in quite the way I have done. It did, though, reject the argument that the claimant was using the bed as an aid and it did so by reference to what most people do when dressing. In essence, that is what I have decided. The tribunal directed itself correctly in law.

35. The tribunal also applied its approach correctly. The evidence was that the claimant sat in order to put on her jeans and take them off because of impaired balance. It is normal to carry out that aspect of dressing and undressing while standing, but it is just as normal to do so sitting down for convenience. Balance for that part of dressing and undressing is not required in order to carry out the activity in a normal manner. Needing to sit does not show an impaired function for carrying out the activity, but only for one manner of carrying out the activity. The tribunal was right, on the evidence, to find that the claimant did not score points for this Activity 6.

G. The mobility component

36. Just for completeness, the Secretary of State's representative submits that the tribunal went wrong in law by making an award in respect of Activity 1 in the mobility component. The claimant's representative concedes the point.

**Signed on original
on 20 April 2016**

**Edward Jacobs
Upper Tribunal Judge**