

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

As the decision of the First-tier Tribunal (made on 10 October 2016 at Stockport under reference SC944/16/00804) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 24 February 2016 and refused on 12 April 2016, from the effective date of 11 May 2016.
- D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

A. The claim for a personal independence payment

1. The claimant was receiving a disability living allowance consisting of the mobility component at the lower rate and the care component at the lowest rate, when the Secretary of State invited him to apply for a personal independence payment. He did so on 24 February 2016, but the Secretary of State refused the claim on 12 April 2016. The decision took effect on and from 11 May 2016; the award of disability living allowance terminated on the same date.

2. This appeal is concerned only with the daily living component Activity 1 (preparing food), so I will limit myself to that. In his customer questionnaire, the claimant ticked to indicate that he did not use an aid or appliance to prepare or cook a simple meal and did not need help from someone else to do so. He wrote: 'I rarely cook. I don't think about food. I tend to eat sandwiches or heat up a ready meal. I would need someone to remind me to eat properly. I don't feel motivated to cook or eat. I need prompting eg when my daughters ring to ask if I have eaten.'

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3. The health professional, a nurse, gave her opinion that the claimant needed prompting to be able to either prepare or cook a simple meal, descriptor 1d. She wrote: 'There are restrictions indicated in the questionnaire which are consistent with [the claimant] having the mental health conditions of anxiety and depression which he takes the appropriate medication for. He will experience symptoms of low mood and lack of motivation which will impact on his ability to undertake this activity. It is therefore medically reasonable to report that he would require prompting in order to prepare and cook a simple meal reliably, repeatedly, to an acceptable standard and in a timely manner.' The decision-maker accepted that opinion.

B. The appeal to the First-tier Tribunal

4. In his appeal to the First-tier Tribunal, the claimant wrote: 'I live off snacks unless a neighbour cooks for me. I would not be able to cook a meal even if I was prompted to do so.' In his written submission to the tribunal, the claimant's representative argued that he qualified for descriptor 1e. During the hearing, the claimant was asked about this Activity. He said that when he cooked, it was eggs and bacon. He did not do vegetables. He just could not be bothered. He didn't trust himself, as he had burnt a few pans and there were no smoke alarms.

5. The tribunal accepted the submission that descriptor 1e applied, with the effect that the claimant qualified for the daily living component at the standard rate. The tribunal included the mobility component at the standard rate in the award, but no issue arises on that component before me. The tribunal explained its decision on the daily living component:

[The claimant] suffers with anxiety and depression. It is accepted by the [Secretary of State] that these conditions cause low mood and lack of motivation. We found [the claimant] a straightforward and credible witness today. The difficulties he described with preparing and cooking a simple meal for one were consistent with what we would expect given what we know of his conditions and treatment. The Secretary of State has not provided a medical report or any other evidence which undermines [the claimant's] account of the difficulties he experiences preparing and cooking food. We accept that he requires supervision or assistance to either prepare or cook a simple meal *repeatedly, safely and to an acceptable standard* on over 50% of the days in the Required Period.

C. The appeal to the Upper Tribunal

6. The Secretary of State applied for permission to the Upper Tribunal, which I gave. I summarised the grounds of appeal: 'It seems that the First-tier Tribunal may not have had proper regard to the definitions of *supervision* and *assistance* in making its decision.' In order to understand those grounds, it is necessary to set out the relevant legislation.

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D. Daily living component - Activity 1

7. The descriptors for this Activity are set out in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013:

Activity	Descriptors	Points
1 Preparing food	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8

8. There are relevant definitions in regulation 2 and in Part 1 of Schedule 1.

Regulation 2

‘aid or appliance’-

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

(b) includes a prosthesis;

Part 1 of Schedule 1

‘assistance’ means physical intervention by another person and does not include speech;

‘cook’ means heat food at or above waist height;

‘prepare’ in the context of food, means make food ready for cooking or eating;

‘prompting’ means reminding or encouraging or explaining by another person;

‘supervision’ means the continuous presence of another person for the purpose of ensuring C's safety;

‘simple meal’ means a cooked one-course meal for one using fresh ingredients;

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'supervision' means the continuous presence of another person for the purpose of ensuring C's safety;

'unaided' means without-

- (a) the use of an aid or appliance; or
- (b) supervision, prompting or assistance.

9. Regulation 4 is also relevant:

4 Assessment of ability to carry out activities

(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or mobility 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—

- (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.

(2A) Where C's ability to carry out an activity assessed, C is to be assessed as satisfying a descriptor only if C can do so—

- (a) safely;
- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period.

(3) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(4) In this regulation—

- (a) 'safely' means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
- (b) 'repeatedly' means as often as the activity being assessed is reasonably required to be completed; and
- (c) 'reasonable time period' means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity.

E. Analysis

10. The representatives for both the claimant and the Secretary of State have presented detailed arguments on the meaning and application of this Activity and its related definitions. It is not necessary for me to deal with them for two

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reasons. First, the tribunal's reasons are inadequate to explain how it came to decide that descriptor 1e applied. Second, how that descriptor applies will require more precise investigation and fact-finding.

11. The tribunal found that the claimant was a straightforward and credible witness. It was entitled to do so. But that did not necessarily mean that the claimant satisfied descriptor 1e. The tribunal did not say whether the claimant required assistance or supervision. That might not matter if on the evidence it was clear that either or both, but it is not. There was evidence that the claimant had burnt pans, which would suggest supervision. But the claimant could and does use a microwave, which would prevent any risk. That leaves assistance, which means physical intervention but no speech. There was evidence that the claimant's daughters rang him to check whether he had eaten. That might amount to prompting, but that would not be assistance, as speech is excluded by the definition. There was also evidence that the claimant ate a proper meal if his neighbour cooked for him, but undertaking the whole process is not assistance within the definition. That refers to intervention, which is inappropriate to convey undertaking the whole process of preparation or cooking, let alone both.

12. The claimant's representative has cited what Judge Mesher said in *AI v Secretary of State for Work and Pensions* [2016] UKUT 322 (AAC) at [6]:

It may need to be decided in some future case whether assistance can cover the doing of an entire task of preparation or cooking instead of it being done by the claimant or whether the claimant has to retain some input into the task as the ordinary meaning of 'assistance' would suggest.

The ordinary meaning of 'assistance' is not in point, because the definition is an exhaustive one, being in the form 'assistance *means*', rather than one that extends the ordinary meaning, which would be in the form 'assistance *includes*'. The important word is 'intervention'. That word is not apposite to describe a situation in which another person undertakes an entire process, as there is nothing in which they would be intervening. If a couple set out on a journey in their car with the man driving, it would be intervention if his wife took over when he felt ill. But no one would say that she would be intervening if she had driven from the start because her husband did not feel able to do so.

13. As the claimant's representative has pointed out, the tribunal relied on regulation 4(2A); so did the health professional. But that does not avoid the difficulties that I have identified with applying descriptor 1e to the evidence before the tribunal. Regulation 4(2A) qualifies the application of each descriptor, but it does not override the definitions.

14. For those reasons, it is appropriate to set aside the tribunal's decision and direct a rehearing.

Signed on original
on 23 June 2017

Edward Jacobs
Upper Tribunal Judge