SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 3 September 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference LD/9173/18/02/D.

2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The appellant was born in September 2000. As a child, through his mother (the appointee), he had claimed and been awarded disability living allowance (DLA) from 24 June 2002, most recently at the low rate of the mobility component and the middle rate of the care component from 24 September 2016 to 11 September 2018. Around the commencement date of that award his mother's appointment to act on his behalf as a child ceased, as he had reached the age of 16. She was appointed again to act for him from September 2016 on the basis that he was incapable of managing his own affairs. As his award of DLA was due to terminate under legislative changes resulting from the Welfare Reform (NI) Order 2015, the appointee claimed personal independence payment (PIP) from the Department for Communities (the Department) from 12 April 2018 on the basis of the appellant's needs arising from bilateral hearing loss.

4. The appointee was asked to complete a PIP2 questionnaire to describe the effects of the appellant's disability and returned this to the Department on 11 May 2018 along with further evidence. She asked for evidence relating to his previous DLA claim to be considered. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received an audited report of the consultation on 20 July 2018. On 9 August 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 12 April 2018. The appointee requested a reconsideration of the decision, submitting further evidence. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appointee then requested a statement of reasons for the tribunal's decision and this was issued on 18 February 2020. The appointee applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination of the President of Appeal Tribunals, issued on 30 September 2020. On 13 October 2020 the appointee applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appointee, represented by Mr McGuinness of Advice North West, submits that the tribunal has erred in law by:

   (i) failing to apply the Preparing Food activity correctly;

   (ii) failing to apply the Washing and Bathing activity correctly;

   (iii) failing to apply the Communicating Verbally activity correctly;

   (iv) failing to apply the Planning and Following a Journey activity correctly;

   (v) failing to apply the Engaging with Other People activity correctly.

7. The Department was invited to make observations on the appellant's grounds. Mr Collins of Decision Making Services (DMS) responded on behalf of the Department. Mr Collins submitted that the tribunal had erred in law, but not materially, in the sense that it would not affect the outcome of the appeal.

The tribunal's decision

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the PIP2

questionnaire completed by the appellant, evidence from the previous DLA claim and a consultation report from the HCP. The appellant and the appointee attended the hearing and gave oral evidence, represented by Mr McGuiness of Advice North West, who provided a written submission. The tribunal also had sight of the appellant's medical records. An induction loop system in the hearing room was not working, but the appellant indicated a preference to proceed without it. He confirmed that he could hear the tribunal panel.

9. The appointee indicated that she did not allow the appellant to cook. However the tribunal reasoned that there was no reason why he could not monitor food to ensure that it was cooked. It found that he managed his own hearing aids and changed the batteries. When showering he took out his hearing aids, but stayed in the shower only a short time and left the bathroom door unlocked in case of emergency. He could not wear hats or clothing near his ears due to interference, but otherwise dressed without help. He indicated some need for lip reading and difficulties with higher pitched sounds. While noting that he might find it hard to mix with new people, the tribunal did not accept that he needed prompting to be able to engage with others. It noted that the appointee controlled the appellant's finances, but did not accept that he should have any difficulty with budgeting decisions. It noted that the appellant drove a car to his course at the Technical College alone. He said that he would always be accompanied if going further afield, in case of ambulance siren noises, etc. However, the tribunal did not accept this evidence.

10. The tribunal accepted that the appellant had a hearing disability, finding that he habitually wore bilateral hearing aids to be able to hear. It awarded 2 points for daily living activity 7 (Communicating verbally) and no points for mobility activities.

Relevant legislation

11. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.

12. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

13. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:

4.—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 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 taking account of relevant medical evidence.

(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.

(3) Where C's ability to carry out an activity is 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.

(4) 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.

5) In this regulation—

"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;

"repeatedly" means as often as the activity being assessed is reasonably required to be completed; and

"safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

Submissions

14. The appellant, represented by Mr McGuinness, expressly relied on the same grounds he had advanced in the application to the LQM. He placed particular reliance on the decision of a three judge panel of the

Great Britain Upper Tribunal (Lady Carmichael, Judge Knowles QC, Judge Markus QC) in *RJ, GMcL and CS v Secretary of State for Work and Pensions* [2017] UKUT 105, which had addressed the relevance of regulation 4(3) of the PIP Regulations in terms of safety.

15. Firstly, he submitted that the panel had failed to investigate the issue of danger when cooking and that it had not investigated the potential use of a flashing light smoke alarm to alert him to danger from smoke or fire.

16. Secondly, he submitted that the tribunal had failed to investigate whether showering for a short time was showering to an acceptable level and relied on the findings in *RJ, GMcL and CS v SSWP* that descriptor 4.c was satisfied in a similar case. He further submitted that the appellant should be assessed on what he would wish to do, not on the basis of limiting his own activities (citing *EG v Secretary of State for Work and Pensions* [2017] UKUT 101 and *CPIP/3528/2017*).

17. Thirdly, he submitted that the tribunal had not addressed the appellant's reliance on lip reading to aid communication (citing *P v Secretary of State for Work and Pensions* [2018] UKUT 376), arguing that 4.d was the appropriate descriptor.

18. Fourthly, he submitted that the tribunal had wrongly addressed the issue of risk when driving.

19. Finally, he submitted that the panel had not fully investigated activity 9, submitting that it did not fully consider the evidence relating to this activity, and placed unfair reliance on his ability to drive and his work placement.

20. Mr Collins did not accept that any error had been established in relation to four of the grounds advanced. However, he accepted that the issue of showering may well have revealed an error of law, but not one that was sufficient to affect the outcome of the appeal since it would lead to a maximum award of 2 further points for descriptor 4.c.

Assessment

21. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.

22. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

23. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or

that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

24. On the basis of the support of Mr Collins for the appellant's second ground, I accept that an arguable case has been established and I grant leave to appeal.

Daily living activity 1

25. Mr McGuinness' first submission for the appellant was addressed to activity 1 (Preparing food). He submitted that the appointee does not permit him to cook, as she feels it is too dangerous, and that the tribunal erred in law by failing to investigate why the appointee would be so concerned. He submitted that regulation 4 of the PIP Regulations was engaged and that the tribunal could not reasonably ignore the risk of harm, taking into account the likelihood of harm and the gravity of harm (following *RJ, GMcL and CS v SSWP*).

26. The appellant had told the tribunal that he "very rarely makes the dinner". The problem he identified was not knowing how to do it. The tribunal noted that the appellant had no physical restrictions which would impede his ability to prepare and cook a simple meal unaided. He had lived with hearing loss since birth, but had no other sensory impairments or cognitive or intellectual impairments. The tribunal could not identify any problem with monitoring food to ensure that it was cooked.

27. Mr McGuinness submits that the tribunal failed to investigate the issue of danger. The submission advanced seeks to place the onus on the tribunal to investigate the subjective fears of the appointee – the appellant's mother. However, the job of the tribunal in this context is not to investigate the subjective fears of a witness but to determine objective risk. In *RJ, GMcL and CJ v SSWP*, at paragraphs 26-28, the three judge panel described the analysis necessary in the context of preparing food as follows:

> 26. The definition of "safely" in regulation 4(4)(a) is expressly confined to that regulation. The Schedule does not define "safety" as used in the definition of "supervision". Nonetheless, there is a statutory link between the scoring of the daily living activities and the nature of assessment as required by regulation 4 which demands that the two terms are approached consistently, as follows. Entitlement to either component of PIP arises where a person's ability to carry out the daily living or mobility activities is limited or severely limited by their physical or mental condition (sections 78 and 79 of the Welfare Reform Act 2012). That is to be determined in accordance with the PIP Regulations (section 80). Whether ability is limited or severely limited depends on a claimant scoring the requisite number of points under Schedule 1 (regulation 5(3). The score is determined by adding the number of points awarded for the highest scoring descriptor which applies in relation to each activity, on over 50 per cent of the days (regulation 5(1) and (2) and regulation 7(1)).

Each descriptor requires an assessment of the claimant's ability to perform the activity in the manner described, and that is to be assessed according to regulation 4. It follows from this that regulation 4 applies to the assessment of each and every descriptor including, therefore, the need for supervision.

27. The way in which this works can be illustrated by considering daily living activity 1. Each of the descriptors addresses a person's ability to prepare and cook a simple meal. At one end of the spectrum is ability to do so unaided; at the other end is inability to do so even with support; and in-between is ability to do so with various degrees of support or limitation. The bottom line for each of these descriptors other than 1f (absolute inability) is that a claimant will not satisfy a descriptor unless they can prepare food, in the manner prescribed in the descriptor, assessed in accordance with regulation 4(2A). That is the position whether they are assessed as able to prepare food unaided or with any of the support or limitations listed in descriptors 1b–e. Thus a person cannot be assessed as needing supervision to prepare food unless, with supervision, they can prepare food safely, to an acceptable standard, repeatedly and within a reasonable time period and so, amongst other things, they must be able to prepare food in a manner unlikely to cause harm to C or another person in accordance with regulation 4(4). Inserting the definition of "supervision", the question to be asked is this: can the claimant, with the continuous presence of another person for the purpose of ensuring the claimant's safety, prepare food in a manner unlikely to cause harm to the claimant or another person? It would make no sense to approach the first part of that question (whether they need the continuous presence of another to ensure their safety) in a different manner to the second part (whether, with such a person, they are likely to cause harm to someone).

28. In addressing the meaning of safely more closely the three judge panel said, at paragraph 56:

56. In conclusion, the meaning of "safely" in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision.

29. The appellant did not identify any impediment to preparing and cooking a meal apart from inexperience. His mother did not identify any particular risk factor arising from his hearing disability. The tribunal was aware that

the appellant had no impediment in sight, smell, taste or touch - all of which, it seems to me, are more relevant senses in the context of preparing food and cooking than hearing. I consider that it is not obvious why a hearing disability would lead to a greater level of danger for the applicant in preparing and cooking a meal. I consider that it was not the tribunal's responsibility to trawl for evidence of a danger that was not objectively obvious.

30. Mr McGuinness has submitted that the appellant could not hear a smoke alarm and that the tribunal should have investigated the possible requirement to use of a flashing light smoke alarm. However, if the appellant was cooking and the food that he was cooking went on fire, he would both see and smell it. The only context where such an alarm might be helpful would be if the appellant had left the room, leaving food heating in his absence. However, if he did that, he would no longer be performing the action of "cooking" – which is defined in the PIP Regulations as heating food at or above waist height. Specifically, I consider that this definition, which is expressed in terms of the relative position of food to a claimant's body, implies that the claimant is required to be present during the act of cooking. Therefore, I reject this submission and find that there is no merit in this ground

Daily living activity 4

31. The second ground advanced by Mr McGuinness was that the tribunal had similarly failed to address risk when showering, in the context of activity 4 (Washing and bathing). In particular, he submitted that when showering he needed to remove his hearing aids. He submitted that the Upper Tribunal decision in *EG v SSWP* [2017] UKUT 101 – which addressed the needs of a similarly hearing impaired claimant - was supportive of an award of points under descriptor 4.c. Mr Collins accepted that this was the correct approach in law, but that it led to an award of 2 points only, which could not affect the outcome of the appeal. I agree with Mr McGuinness and Mr Collins that the tribunal has erred on this point and I will reserve the question of whether this was material to the outcome of the appeal until my conclusion.

Daily living activity 7

32. The third ground advanced by Mr McGuinness arises from the submission that the tribunal had not addressed the appellant's reliance on lip reading to aid communication (citing *P v Secretary of State for Work and Pensions* [2018] UKUT 376), arguing that 4.d was the appropriate descriptor. Relying on paragraph 17 of Upper Tribunal Judge Mitchell's decision, Mr Collins submitted that the failure to address the effectiveness or otherwise of lip-reading would only have been a material error if the tribunal had accepted that the claimant was unable to use hearing aids. An inability to use hearing aids would mean that lip reading was the main communication strategy. In the appellant's case,

however, he submitted that the evidence showed that he could – and did – regularly use hearing aids.

33. The evidence before the tribunal was to the effect that the appellant used hearing aids but had some difficulty discriminating speech sounds at higher frequencies and often also relied on lip reading. The tribunal relied upon the evidence of the HCP and its observations at hearing to the effect that his speech was clear and that he was able to understand the questions put to him, verifying this with him at the end of the hearing. The tribunal was satisfied that the appropriate descriptor was 7.b – namely that he needed to use an aid or appliance to be able to speak or hear.

34. The decision of Upper Tribunal Judge Mitchell in *P v SSWP* is authority for the proposition that a lip-reading by itself does not constitute a form of communication to an acceptable standard. However, the appellant does normally rely on lip-reading. He was seen to use hearing aids effectively at the tribunal hearing and gave evidence that he used them in daily life. While he indicated difficulties in some situations that caused him to rely on lip-reading in addition to hearing aids, this was clearly not the situation most of the time. I do not accept that there is merit in Mr McGuinness' submission on this ground.

Mobility activity 1

35. Mr McGuinness next submitted that the tribunal had erred by basing its findings on the appellant's ability to plan and follow journeys on the basis that he drives a car. He submitted that the panel erred by basing its assessment of the appellant's functional limitations solely on the fact that he could drive locally, without considering unfamiliar routes and by placing excess weight on this one aspect. He submitted that the appellant needed someone to accompany him on longer car journeys due to dangers arising from his inability to hear emergency vehicles approaching. He submitted that it was wrong of the tribunal to place weight on the fact that the appellant had not previously encountered any problems, as he had not been driving for long. He submitted that the tribunal had not correctly addressed risk when driving, having regard to *RJ, GMcL and CS v SSWP*.

36. The tribunal found that the appellant had no cognitive or mental health difficulties and summarised his evidence to the effect that going somewhere unfamiliar would cause anxiety as he wouldn't hear sounds around him. His evidence was that he could work out how to get somewhere, but that he would not be able to hear a police or ambulance siren when driving or approaching traffic when walking. It found his statement that he could not undertake unfamiliar journeys without another person unconvincing.

37. Reliance was placed on mobility activity 1.d by Mr McGuinness. The form of activity 1.d that applied in Northern Ireland changed between the

dates of claim (12 April 2018) and decision (9 August 2018) in this case. Specifically, mobility activity 1 was amended from 20 April 2017 by regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017. For the word "Cannot" in paragraphs (c), (d) and (f) were substituted the words "For reasons other than psychological distress, cannot".

38. However, in the decision of the High Court in England and Wales in *RF and others v Secretary of State for Work and Pensions* [2017] EWHC 3375, the equivalent amendment in the Great Britain version of the Regulations was declared *ultra vires*. The effect of the amendment in Northern Ireland was subsequently reversed from 15 June 2018 by regulations 2 and 3 of the Personal Independence Payment (Amendment) Regulations (NI) 2018, which substituted the original wording by regulation 2 and which revoked regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017 by regulation 3. Proceedings to determine the correct form of legislation to be applied in Northern Ireland in the interim period are currently ongoing before the Commissioner.

39. It can be seen that at the date of decision the form of mobility activity 1.d in the PIP regulations was as follows:

Activity	Descriptors	Points
1. Planning and following journeys.	…	
	d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10

whereas at the date of claim it was:

	d. For reasons other than psychological distress cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	…	

40. Therefore, one form of the legislation uses the words "For reasons other than psychological distress", which have the effect of narrowing entitlement in some cases. Nevertheless, I observe that, by the definition set out in Part 1 of Schedule 1, "psychological distress" means distress related to an enduring mental health condition or an intellectual or cognitive impairment.

41. It appears to me that the difference between the two versions of descriptor 1.d is not relevant in this particular case. This is because no reliance is placed on an enduring mental health condition or an intellectual or cognitive impairment, but rather on impaired hearing leading to anxiety. Therefore, in the present case, there is no practical difference in effect between the different versions of the legislation. For that reason, I consider that it is not necessary to await the determination of the Commissioner proceedings addressed to determining the relevant form of mobility activity 1 in the relevant period. Therefore, I can proceed to determine this aspect of the appeal.

42. Mr McGuinness placed weight on difficulties that the appellant might experience while driving. However, it should be recalled that – whereas evidence about ability to drive may be helpful in establishing whether a person may have the cognitive skills to plan and follow a journey - mobility activity 1 is not a test of a claimant's ability to drive. The issue in descriptor 1.d is whether the claimant can follow the route of an unfamiliar journey without another person, assistance dog or orientation aid. In general, ability to drive can be evidence of cognitive ability and is relevant to this activity, provided that it is done with comparable regularity.

43. The appellant had given evidence that when driving he might not hear the sound of an oncoming vehicle or the sound of a police siren and that he became anxious. His evidence was that he could manage daily trips "no bother" to places he knows well, but became unsure of himself and quite anxious if he had to go to unfamiliar places. He stated that he had never been in a situation where someone else had to alert him to an approaching emergency vehicle.

44. It is difficult to understand why, as submitted, there would be any material difference between familiar local journeys – which the appellant completed on his own without difficulty on a daily basis – and unfamiliar journeys. The sound of traffic when walking in the street or the sound of an emergency vehicle siren when driving on the road is exactly the same in familiar and unfamiliar settings. The consequence of encountering traffic or emergency vehicles is no different in either scenario. In terms of the safety of each situation, it appears to me that the position is identical. It may be that the appellant is more fearful on a longer journey – as he feels that the probability of encountering, say, an ambulance on a longer journey may be higher. However, there is no logical reason for differentiating between the risk of encountering emergency vehicles in the course of ten 5 mile journeys and one 50 mile journey.

45. Emergency vehicles also use flashing blue lights and bright livery in addition to sound. These are readily observed in rear and side mirrors and will alert a driver who may not immediately hear a siren due, for example, to listening to the car radio. Emergency vehicle lights are even more obvious when approaching from the opposite lane. When driving on a road, sight is plainly the most relevant faculty, although hearing

plays a part. In the hypothetical scenario set out by Mr McGuinness, I accept that the presence of a hearing disability would, logically, increase the element of danger. The question is by how much.

46. In *RJ, GMcL and CJ v SSWP*, the three-judge panel of the Upper Tribunal decided that when addressing whether a claimant can carry out a task 'safely', it was necessary to consider both the likelihood of the harm occurring and the severity of the consequences. It is obviously difficult for a tribunal to make such a judgement on a case-by-case basis. I take notice that the Road Traffic (NI) Order 1981 prevents people with certain disabilities from driving because of the risk to themselves and others. Conditions such as epilepsy can give rise to an unacceptable risk of severe harm occurring in the event of a seizure. Each case has to be considered on its own merits, but in principle it appears to me that a Driver and Vehicle Licence Agency (DVLA) assessment is a relevant benchmark for addressing safety in the context of driving. I am not aware of driving restrictions being placed on people with hearing disabilities by the DVLA, in the absence of other risk factors. It seems to me that evidence of a DVLA restriction may well assist a tribunal in assessing the ability of a claimant to plan and follow a journey safely. However, the absence of such a restriction is suggestive of a low level of risk in terms of likelihood of occurrence and severity of harm when driving.

47. Nevertheless, as indicated above, the mobility activity 1 test is not a test of driving. Many people without any physical or mental condition are unable to drive. I do consider that Mr McGuinness was entitled to introduce the issue of driving to the tribunal in order to illustrate limitations in the appellant's functional ability. In response, I consider that it was legitimate for the tribunal to ask whether the appellant had ever encountered an emergency vehicle, in order to assess how he dealt with the situation and whether any particular danger arose. In the circumstances that he had never encountered an emergency vehicle, it had to address the issue hypothetically. On all the evidence, I consider that it was entitled to take the view that the likelihood of harm occurring and likely severity of harm was not such that the appellant reasonably required to be accompanied when on a journey.

Daily living activity 9

48. Finally, Mr McGuinness submitted that the panel had not fully investigated daily living activity 9 (Engaging with other people face to face). He submitted that it did not fully consider the evidence relating to this activity, and placed unfair reliance on his ability to drive and his work placement. He submitted that the tribunal did not investigate how the appellant would feel when his hearing aids failed to be effective in noisy environments. The relevant activity provides:

9. Engaging with other
people face to face.

a. Can engage with other people unaided.	0
b. Needs prompting to be able to engage with other people.	2
c. Needs social support to be able to engage with other people.	4
d. Cannot engage with other people due to such engagement causing either –	8
(i) overwhelming psychological distress to the claimant, or	
(ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	

49. The representative's submission to the tribunal had made the case that the appellant only conversed with close friends and family and found interaction with people that he did not know well to be distressing.

50. The tribunal noted aspects of the appellant's engagement with other people in daily life. It accepted that the appellant would be more comfortable in the company of people who were familiar to him, because of his disability, but did not accept that this reached the threshold of requiring prompting to be able to engage with other people. It placed reliance on the report of the HCP which noted that he engaged appropriately in a friendly manner and had no treatment or specialist input, indicating an opinion that he was likely to be able to engage with other people to an acceptable standard. I consider that it is evident that the tribunal has addressed the submission advanced under this activity and has made a reasonable finding based on the evidence before it.

51. Mr McGuinness submits that the tribunal has failed to deal with the issue of engaging with others in a noisy environment where the appellant's hearing aids would fail him. It seems to me that this submission is mainly addressed to communication difficulties covered by activity 7 and partly to psychological factors inhibiting engagement. It also seem to me that it is based on a situation that is abnormal. Deputy Upper Tribunal Judge Sutherland-Williams in *DV v Secretary of State for Work and Pensions* [2017] UKUT 244 emphasised that the test was of the claimant's ability to interact generally one to one or in a small group and in social situations. I agree. I do not consider that the tribunal has erred by not basing its decision on such occasionally difficult situations. In general, activity 9

does not distinguish between engagement with familiar people and engagement with strangers. Any descriptor has to apply more than 50% of the time, by reason of regulation 7 of the PIP Regulations. I consider that the tribunal was correct to address the general situation of engagement with others most of the time, while discounting occasional situations which prove difficult.

Conclusions

52. I accept that the tribunal has erred in law on the basis conceded by Mr Collins. This would lead to an award of a further two points. This would give a prospective total of four points for daily living activities, which would not be sufficient to alter the outcome of the appeal. In the Commissioner's jurisdiction – with the exception of grounds of procedural fairness - where the grounds establish an error of law, that error must also be shown to be material to the outcome of the tribunal below (see *R(Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982). The error of law that has been established is not enough to have a material effect on the outcome of the appeal.

53. While I accept that the tribunal has erred in law in one aspect of its decision, I consider that it has not materially erred in law in giving the decision that it did. I consider that I should not set aside its decision for that reason. Therefore I disallow the appeal.

(signed): O Stockman

Commissioner

24 March 2021