Secretary of State for Work and Pensions v KS (PIP) [2018] UKUT 102 (AAC)
CPIP/3024/2017

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The Secretary of State's appeal to the Upper Tribunal is allowed, but without making any difference to the claimant's entitlement. The decision of the Stockport First-tier Tribunal dated 10 January 2017 involved an error on a point of law and is set aside (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)). The Upper Tribunal re-makes the decision on the claimant's appeal against the decision of the Secretary of State dated 10 July 2016 (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii)). That decision as re-made is that the claimant is entitled to the daily living component of personal independence payment at the enhanced rate and to the mobility component at the standard rate for the period from 10 August 2016 to 17 August 2020. That is the same decision on entitlement as given by the First-tier Tribunal, but, as explained below, is based on a different scoring of points under some activities.

REASONS FOR DECISION

1. The Secretary of State appeals against the decision of the First-tier Tribunal with the permission of a salaried First-tier Tribunal Judge, granted on 9 March 2017. Very unfortunately, especially as I understand that payment of the increased benefit awarded by the tribunal has been suspended, there was a long delay in the lodging of the notice of appeal with the Upper Tribunal because the Secretary of State was not notified of the grant of permission to appeal. Since the copy of the grant of permission included in the papers at page 123 has no date for issue to the parties written in, it appears most likely that the notification was not actually sent out until October 2017, so that the notice of appeal received on 24 October 2017 was lodged within time. In case it might turn that an extension of time is necessary to validate the notice, I grant that extension to 24 October 2017.

2. The claimant had been invited to make a claim for personal independence payment (PIP) as part of the conversion process from disability living allowance (DLA). She had been entitled to the higher rate of the mobility component and the middle rate of the care component of DLA. The first decision on her PIP claim on 10 July 2016 was that she was not entitled to PIP at all, scoring only 6 points for daily living activities and 4 points for mobility activities. Her entitlement to DLA was therefore terminated after 9 August 2016. After the claimant wrote asking for reconsideration and supplying some further information, the first decision was revised to one of entitlement to the standard rate of the daily living component for the period from 10 August 2016 to 17 August 2020. The points accepted were for the following descriptors: 1b (needs to use an aid or appliance to be able to either prepare or cook a simple meal – 2 points); 2c (needs a therapeutic source to be able to take nutrition – 2 points); 4b (needs an aid or appliance to be able to wash or bathe – 2 points); and 6b (needs to use an aid or appliance to be able to dress or undress – 2 points). The points for taking nutrition were the new ones.

3. The tribunal allowed the claimant's appeal against the decision of 10 July 2016 as revised and awarded the enhanced rate of the daily living component and the standard rate of the mobility component for the same period. The award of the standard rate of the mobility component has not

been challenged in the Secretary of State's appeal to the Upper Tribunal and I need say no more about that. In relation to the daily living component, the tribunal adopted the points identified in the previous paragraph, but in addition awarded 4 points for descriptor 3d (needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 hours but no more than 7 hours a week). Those points brought the total to the necessary 12 for the enhanced rate of the daily living component. The only elements of that award challenged by the Secretary of State are those to do with taking nutrition and managing therapy or monitoring a health condition, so I need not go into the other descriptors here.

4. What the tribunal said in paragraph 12 of its very thorough statement of reasons about those activities was as follows:

> "B) Nutrition: The PIP2 form stated that [the claimant] required a feeding line (Broviac line) to be fitted overnight. This was consistent with the letters from the Intestinal Failure Unit. Accordingly the Tribunal accepted that [the claimant] required a therapeutic source to be able to take nutrition such as to satisfy Reg 4(2A). The award of 2c confirmed. The Tribunal did not consider that [the claimant] would require assistance to manage the therapeutic source given the minimal mental health and musculoskeletal and cardiovascular issues (2e not applying). Given the minimal mental health, musculoskeletal and cardiovascular issues the Tribunal concluded that [the claimant] did not require supervision, assistance or prompting 2bii and iii and d not applying. [The claimant] had minimal musculoskeletal issues which would not necessitate the use of an aid or appliance, 2bi not applying.
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> C) Managing therapy: The PIP2 claim form stated that for 3 nights a week [the claimant] was fed intravenously by means of the broviac line, for a total of 12 hours. The use of the line for 3 nights a week was consistent with the letter from the Intestinal Failure Unit dated 24.02.16 (page 61). [The claimant's] further evidence was that she always needed help to set this up and to remove it taking one hour for each (i.e. a total of 2 hours for each of the 3 nights). Given the necessity for this to be performed in a completely sterile room and the importance of the accuracy of feeding and the sterile environment for the activity to be carried out in line the Reg 4(2A) especially in relation to safety, the Tribunal considered that [the claimant] would require assistance in order to manage therapy which takes more than 3.5 but no more than 7 hours per week. 3d awarded. In accordance with *RH v SSWP (PIP)* [2015] UKUT 281 (AAC) the Tribunal did not count the time during which [the claimant] was managing the therapy (receiving it during the night) as given the minimal mental health, musculoskeletal and cardiovascular issues the Tribunal did not consider that help during this period would be required in order to perform the activity in accordance with Reg 4(2A)."

Activity 3

5. In relation to activity 3 (managing therapy) the Secretary of State relies on the decision of Upper Tribunal Judge Gamble in CSPIP/386/2015 (from which several paragraphs were set out in the notice of appeal, although unfortunately a copy of the entire decision was not attached). There the judge held in paragraph 14 that as a matter of statutory interpretation the existence of the specific descriptor 2e (needs assistance to be able to manage a therapeutic source to take nutrition)

(the reference to 2c in that paragraph must be a mistyping) means that that assistance cannot be taken into account when applying the descriptors in activity 3. The general principle underlying that decision was approved and applied by Judge Bano in the decision *AS v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 104. Since that decision has now been reported as [2017] AACR 31, which means that it has the general agreement of the judges in the Administrative Appeals Chamber of the Upper Tribunal. I understand that the point about the interaction of descriptor 2e with activity 3 may be revisited by three-judge panel of the Upper Tribunal in two appeals where a hearing is pending. However, as I do not think it right to delay the present case to wait for the outcome of those appeals, I should follow and apply the specific ruling in CSPIP/386/2015. I do though note that Judge Gamble's ruling is limited to assistance to be able to manage a therapeutic source and that for these purposes "assistance" has the meaning of "physical intervention by another person and does not include speech" (paragraph 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations)). Thus I do not think that the decision in CSPIP/386/2015 excludes the consideration of supervision or prompting to be able to manage therapy under activity 3. The Secretary of State's submission is that the tribunal's award of 4 points for descriptor 3d was based on a finding of needing assistance with managing therapy in the form of the use of a therapeutic source (the Broviac line) and so was not allowed on the proper meaning of that descriptor.

6. Since I have concluded that I should follow and apply the ruling in CSPIP/386/2015, it follows that I accept that the tribunal of 10 January 2017 went wrong in law by awarding the claimant the 4 points for descriptor 3d. I am not at all clear why the tribunal in paragraph 12C found that the claimant needed assistance in relation to the using of the Broviac line and in paragraph 12B found that she did not. Possibly it thought that in relation to descriptor 2c only assistance during the course of taking the nutrition, rather than assistance in setting up and removing the line, was relevant. I see no reason why the assistance "to be able to" manage a therapeutic source to take nutrition should not include assistance in the setting up and taking down of the equipment in question and before or after the actual taking of nutrition, as I shall return to below. Thus, the tribunal's award under activity 3 was based on assistance specifically covered by descriptor 2e and so was not allowed.

Activity 2

7. In relation to activity 2 (taking nutrition) the Secretary of State submits that since the tribunal found, relying on the PIP2 form, that the claimant used the Broviac line for three nights a week, she did not need assistance for more than 50% of the days in any period in issue, so that the award of the 2 points for descriptor 2c was wrong in law. The 50% rule is contained in a complicated formula (that I shall not set out) in regulation 7(1) of the PIP Regulations. Its effect is that if, within each separate activity one or a combination of more than one descriptors are not satisfied for more than 50% of the days in a relevant period, no points can be scored on that descriptor. I note that that rule would on its face apply to activity 3 as well, but it is apparently the case that in relation to descriptors 3c to 3f, with their conditions of measuring the time taken in supervision, prompting or assistance over a week, one or other of those descriptors is satisfied over all the days in a week in which some therapy is undertaken, including days on which no therapy is actually undertaken.

8. There is a fundamental problem with the Secretary of State's submission. It is clear from the tribunal's findings that the overnight feeding, lasting up to 12 hours, started on one calendar day and finished on the next, with, as it found in paragraph 12C of its statement of reasons, assistance needed at the beginning and the end. Accordingly, on the assumption that the claimant was not, at the time when the pattern was of three nights a week, using the Broviac tube on consecutive nights, the relevant descriptor would be satisfied on two days for each occasion, not one. So on that basis there would have been no problem with the 50% rule on the three nights a week pattern.

9. Moreover, the tribunal's sole reliance on the PIP2 form for the number of nights of use of the Broviac line, apparently not having the 50% rule in mind (especially as the revision on mandatory reconsideration had awarded 2 points for descriptor 2c), was not supported by the other evidence. It must be borne in mind that the date of the decision under appeal was 10 July 2016 and the first day from which PIP could be awarded was 10 August 2016. For an award of PIP to be made for a day, the necessary descriptors must be satisfied for the three months ending on that day and for a period of nine months beginning with that day (regulation 7(3) of the PIP Regulations). The PIP2 form was signed on 29 April 2016. The letter dated 24 February 2016 from the Intestinal Failure Unit (page 61) referred to the current regimen being three nights a week, but indicated that that was going to be considered at the next appointment as the claimant had recently lost a little weight. At the examination by a healthcare professional on 6 June 2016 the claimant apparently said that she used the Broviac line three to four times a week (page 67). Then, most significantly, in the information in support of her request for mandatory reconsideration apparently received on 3 August 2016 (page 85) the claimant said that she currently connected to the line four times a week, sometimes five, dependent on her weight. She also said this under the heading of managing therapy:

> "The person from ATOS has said that I can manage my own HPN [home parenteral nutrition] feeds, however, I did not say this. Although I have been trained to administer my own feeds, I am unable to do this without assistance. I need support from a family member to be able to attach the line to the feeding bag. Without this support the bags will burst. I also need reminding to clamp the line before changing my bionectar, otherwise blood will gush out as it leads to the main artery right next to my heart. When I am coming off the feed I need support as I am very shaky. I have to again have a family member with me when I come off the line as I am unable to do anything. I have to have supervision to remove the line and ensure that I am alright. I then go to lie down until the shakiness passes."

10. On that evidence the officer who carried out the revision on mandatory reconsideration and awarded the 2 points for descriptor 2c plainly did not see the 50% rule or its satisfaction in the applicable three-month past period as any obstacle to that award. In those circumstances those elements of the case were not in issue in the appeal, so that arguably those elements did not form part of what the tribunal of 10 January 2017 was required to consider (Social Security Act 1998, section 12(8)(a)). Whether or not in the light of section 12(8)(a) the tribunal's decision could have been set aside solely on the ground put forward for the Secretary of State on activity 2, I conclude that that ground is not made out in substance. The tribunal's apparent acceptance in paragraph 12C of the statement of reasons of what the claimant had said the PIP2 cannot be taken as a definitive finding of fact in relation to activity 2 when the impact of the 50% rule had not been raised in the

appeal. Then, as has been shown in paragraphs 8 and 9 above (either of which on their own would carry the point), there was sufficient evidence before the tribunal to indicate that as at 10 August 2016 the claimant was using the therapeutic source on more than 50% of the days of the week and had been doing so for at least the previous three months. There appears to be no problem about the prospective nine-month condition. Therefore there was no error of law on activity 2 on the ground put forward for the Secretary of State.

11. However, when re-making the decision on the claimant's appeal against the decision of 10 July 2016 as revised, I can look again at all the aspects of activity 2. It is plain from paragraph 12C of the statement of reasons of the tribunal of 10 January 2017 that it, with the benefit of the expertise and experience of its wing-members, accepted that the assistance required by the claimant to set up and remove the HPN equipment came within the special meaning of "assistance" in paragraph 1 of Schedule 1 to the PIP Regulations. The claimant in her statement on page 85 of the papers naturally used ordinary language like "support" and "assistance" and "supervision" without thinking about whether those words had any special meanings for PIP purposes. But in my view it is clear enough that what she described included "physical intervention". In my judgment physical intervention with the equipment to be used at the point of attaching the lines to the feeding bag (and it emerges from decision CSPIP/386/2015 that the bags are heavy at the beginning of the process) is to be taken into account. Physical intervention when coming off the feed was also indicated. Thus for each night, assistance was required on two days. I am quite satisfied that the requirement for such assistance was the result of the claimant's physical condition. Even though the claimant might have minimal mental health, musculoskeletal and cardiovascular issues, the particular problems caused by the nature of the equipment needed for the quite dangerous procedure and her shakiness at the end of it quite clearly resulted from the condition that necessitated the HPN feeding. Equally clearly, that assistance was required for the claimant to manage the therapeutic source. The term "manage" must include the things necessary to undertake the feeding and to cope with the ending of it, not just what goes on while nutrition is actually being taken. I make findings of fact to that effect. Accordingly, I conclude that descriptor 2e (needs assistance to be able to manage a therapeutic source to take nutrition), scoring 6 points, is the appropriate descriptor, not 2c, and was satisfied on more than 50% of the days in the required period.

Conclusions

12. For the reason given in paragraphs 5 and 6 above, the decision of the tribunal of 10 January 2017 must be set aside as involving an error of law. In the notice of appeal the Secretary of State suggested that the case be remitted to a new First-tier Tribunal for rehearing, but I do not consider that the further delay and expenditure (of money, time and emotional effort) that would be involved is necessary. So far as the points made by the Secretary of State are concerned I can substitute a decision correcting the error of law that I have accepted and otherwise adopting the findings of fact made by the tribunal of 10 January 2017, supplemented by the further findings in paragraph 11 above (that in my judgment do no more than apply the tribunal's findings in paragraph 12C of its statement of reasons that it did not adopt in paragraph 12B because of some kind of misunderstanding). It might be possible for arguments to be made for the claimant that what she said on page 85 might indicate some requirement for prompting or supervision that could come within descriptors 3c to 3f on managing therapy, so that extra points might be scored. However, that would require a further hearing to explore how far what the claimant described there in

ordinary language fitted or did not fit within the special definitions of prompting and supervision in paragraph 1 of Schedule 1 to the PIP Regulations. Since my substituted decision already gives the claimant the enhanced rate of the daily living component, any potential extra points could not change the outcome. I have concluded that it is better to reach a definite conclusion now. I must though remind the claimant that, although the award made runs to 17 August 2020, she is under a continuing obligation to report any changes of circumstances that might affect the continuance of entitlement or the amount of benefit and that the Department for Work and Pensions has the power to look at any time at whether the conditions of entitlement are still satisfied.

13. In her reply dated 18 January 2018 the claimant put a lot of stress on a letter of additional information dated 26 April 2017 being missing from the papers although she had sent it to the Department several times. That might well have been important if the case had been referred to a new tribunal for rehearing (although any new tribunal would have been prohibited by law from taking into account changes of circumstances after 10 July 2016). However, as it is I have been able to deal with the Secretary of State's appeal to the Upper Tribunal and to confirm the same outcome as that produced by the decision of the tribunal of 10 January 2017 without needing to consider what might or might not have been in that letter.

14. The decision of the tribunal of 10 January 2017 having been set aside, in re-making the decision on the claimant's appeal against the decision of 10 July 2016 as revised I adopt the points awarded by the tribunal of 10 January 2017 on the mobility component and on activities 1 (2 points), 4 (2 points) and 6 (2 points), together with its findings of fact underpinning those scores. I award no points on activity 3, for the reason given in paragraphs 5 and 6 above. I award 6 points on activity 2, for descriptor 2e, based on the findings of fact and reasons in paragraph 11 above. The total points for daily living are therefore 12, enough to qualify for the enhanced rate of the daily living component. The decision giving effect to those conclusions is set out at the beginning of this document.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 23 March 2018