DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Gray **CPIP/3622/2016**

Decision: This appeal by the claimant succeeds.

Having given Permission to appeal on 19 December 2017 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at Wolverhampton and made on 4 December 2015 under reference SC 024/15/03898. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Directions

1. These directions may be supplemented or changed by a District Tribunal Judge (DTJ) giving listing and case management directions.
2. The case will be listed as an oral hearing in front of a freshly constituted tribunal. The appellant is advised to attend.
3. She should be aware that the new tribunal will be looking at her health problems and how they affected her day-to-day life in relation to the qualifying periods for entitlement to a Personal Independence Payment, but that it must not take into account matters which did not obtain at the date that the decision under appeal was made 9/7/2015. That does not mean than later matters are never relevant, but their relevance is limited to them shedding light on what the position was likely to have been at that time.
4. The new panel will make its own findings and decision on all relevant descriptors bearing in mind the points that I make below.

Reasons

1. The appellant is a woman aged 56 at the date of the Secretary of State's decision, who suffers from extensive chronic discoid lupus and coronary heart disease (according to the report of her rheumatologist at page 96), angina, osteo-arthritis and depression. The appeal to the First Tier tribunal (FTT) was against a decision of the Secretary of State made on 9 July 2015 that she was entitled to the standard daily living component of the allowance, scoring 9 points, but not to an award of the mobility component, as she scored 4 points only. The decision had been made upon the appellant being invited to claim PIP: she had previously been entitled to the higher rate of the mobility component and the middle rate of the care component of DLA.
2. Both parties agree that the decision of the tribunal was made in error of law. I am grateful for the matters set out in Ms Naeem's submission on behalf of the Secretary of State, which largely accepts the points I made when I granted permission to appeal. I was of the view then that there may have been errors in the approach of the FTT in relation to a variety of issues and I said:

2 *First was it permissible to place emphasis on the appellant's optimising her medication (paragraphs 9 and 19), given the expert opinion of her consultant rheumatologist at page 96 to the effect that she had been tried on numerous medications in the past which had been discontinued either because of adverse effects or a lack of efficacy. The tenor of the statement of reasons is that were the applicant to take more or different medication she would reduce her pain and have better functionality; that may be an overly simplistic approach given the consultant's evidence.*
3 *Secondly did the tribunal adopt too high a test as to activity 9 and in relation to mobilising? The FTT seem to be using a test of reasonable necessity (see paragraph 14) as to her engaging with other people, and one of walking as "reasonably required" (see paragraph 19). It is arguable that it is not for the appellant to restrict her activities to those which she can comfortably accomplish; as an example, should she not have the choice that those without disabilities have to meet people when she wishes, and not when it is "reasonably necessary" (to use the tribunal's phrase)?*
4 *Is it a matter of contradiction to award points for preparing food on the basis that assistance was required over 50% of the time, but not in relation to dressing and undressing? Is it a potential error of fact, alternatively is there a need to explain, how the lesions on her hands which might prevent her from doing up small buttons or zips will nonetheless allow her to manipulate appliances designed for that purpose?*
5 *Generally it seems arguable that the FTT failed to take into account the overall effect of the mental element on her ability or motivation to accomplish a number of the activities.*

3. Despite the support of the Secretary of State for the setting aside of the decision as erroneous in law, and the remitting of the case to a fresh tribunal, there are certain matters which I would wish to clarify, and I take issue with some of the detail in Ms Naeem's argument.
4. I will deal firstly with the observations of the tribunal concerning the appellant's medication.

The medication issue

5. The appellant's rheumatologist had made a report, and at page 96 of the tribunal bundle said *"she has been tried on numerous medications in the past which have been discontinued either because of adverse effects or lack of efficiency, and she is presently taking hydroxychloroquine 200 mg daily, prednisolone 5 mg daily and in addition dermotave ointment".*
6. The FTT found that the appellant's *"functional ability might be improved by more regular and better pain relief."* They awarded 2 points for activity 1b, the need and aid or appliance, rather than the personal assistance which was contended for. A similar approach was taken to activity 6 dressing and un-dressing, the finding being qualified by the phrase *"especially given the availability of better pain relief".*
7. Ms Naeem agrees that the approach of the FTT was wrong but suggests that if the FTT was of the opinion that she could take more dosage of the prescribed medication it was required to use its inquisitorial function to explore whether the medication was working to ease the pain caused by her lesions.

She goes on to hypothesise what the tribunal could have extrapolated from the results of that enquiry. In my judgment that goes too far. Whilst the tribunal has the function to enquire, there are certain clinical matters which should be respected. In particular in this case there was the evidence of the consultant that a variety of medication had been tried but was unsuitable. In that circumstance it seems to me beyond doubt that the FTT was wrong in basing its assessment upon her being able to take additional medication to improve her function. In any event the tribunal should, in my judgment, be highly circumspect in such an approach.

8. It is one thing to infer the severity of a condition, for example, from the level of medication or a failure to refer or a discharge from specialist treatment, and very properly that inference may bear upon the expected level of functional disability. It is quite another where there is evidence of treatment and the reasons for it, for the tribunal to go behind the clinical judgement of those treating the appellant or impute treatment that is not being given. Despite its undoubted expertise the tribunal has only a limited view of the medical picture; even where it has clinical notes and letters its level of knowledge is almost inevitably lower than will be the case for a treating clinician, but in addition, and importantly, it has a prescribed role which it may not exceed; it is not the task of the tribunal to look at ways of improving the claimant's health or their function. Its task to assess the probable extent of actual functional limitation in the light of all the evidence in the case. What the tribunal cannot do is to assess function on the basis of there being a better prognosis if prescribed medication is altered.
9. It is different if an appellant tells the tribunal that they are not taking their medication (other than on advice) because they don't feel that it works, or that, for no medical reason, they just don't like taking painkillers. Other than where those treating an appellant expect their patient, knowing their own illness well, to alter the dose of their medication to suit differing circumstances (such as increased activity) it would not be unreasonable for the tribunal to conclude that, if medicated in accordance with their clinicians' judgment, function would be improved. That is, however, far from being the position in this case.
10. I agree with Ms Naeem's final point on that issue, that the approach taken by the tribunal as to the claimant's optimisation of medication to manage her pain levels was also a factor in their consideration of activity 6, and it is probable that this erroneous approach fed through into the consideration of other activities.

Activity 9

11. I turn to activity 9, engaging with other people face-to-face. The appellant's evidence was that whereas she does engage with family and close friends she finds it difficult to mix with other people, and in particular feels uncomfortable to be with new people due to the lesions and scars on her face. The FTT reasoned at [14], following observations as to her appearing to engage satisfactorily with health professionals and with the tribunal, that she would be able to engage with others "whenever reasonably necessary". That is the wrong test.
12. The definition of "engage socially" informs activity 9 *(SF-v-SSWP (PIP) [2016] UKUT 543 (AAC))*. It includes the ability to establish relationships. The

ability, therefore, to engage with people known to her (family and existing friends) or with whom she needs to engage for a specific and limited purpose (health professionals or the tribunal) is insufficient to engage the baseline (zero scoring) descriptor. Further, there is no legal basis for limiting the assessment of her ability to engage with others face to face to such engagement as is reasonably necessary. The purpose of PIP, like DLA before it, is to assist those with disabilities to live, as far as possible, the life that they would wish to live, and any mitigating behaviour adopted because of that disability must be disregarded. As I said (in respect of an appellant with hearing difficulties) in *EG-v-SSWP (PIP) [2017] UKUT 101 (AAC):*

47. The statement of reasons reads as if the appellant could and should avoid certain consequences of her disability, for example the difficulties communicating with people in a noisy public space, by choosing a quiet environment, and it assessed her on that basis. This is the wrong approach. To assess the true effect of the disability in performing an activity, steps routinely taken to make that activity possible or easier must be filtered out; if that does not happen the descriptors that deal with the type of help needed are not being compared with the baseline criteria of a person without a relevant disability who, using activity 7 descriptor a as an example, "can express and understand verbal information unaided". That descriptor does not envisage a person who is continually seeking out quiet locations in order to do so.

13. Ms Naeem makes the distinction at [4.3] between the FTT being able to take account of difficulties engaging with others which are due to her depression, but not what she describes as her preference to avoid engaging with other people due to the lesions on her face. Whilst the lesions do not of themselves impair the ability to communicate, the link between them and the appellant's reluctance to engage with new people cannot be ignored; her preference may be due to anxiety caused by a lack of confidence which can be taken into account. A further passage from *EG* may be helpful:

50. It is the task of the first-tier tribunal to decide what aspects of a claimant's daily life are attributable to choices made because of their personality or their disability. Somebody who says that they don't much care for outdoor activity but prefer to curl up with a good book may feel that way because the effort of walking is too great or because that is really how they want to spend their time. The issue is whether the choice is because of a person's inherent make-up or is due to how they have become. Where disabilities come later in life it may be easy to establish how somebody behaved before the disability and whether their preferences have changed. If they have changed then, in the absence of other very cogent factors, on the balance of probability that is likely to be because of their disability. If somebody has long-standing or congenital disability it may be harder to assess whether their preference might have been different but for that, however the tribunal is no place for deep philosophical debate given the evidential test of whether something is more likely than not.

Daily Living Activities 1 and 6

14. I move on to the possible error in the findings of the FTT in relation to activity 6 (dressing and undressing) and activity 1 (preparing food). Ms Naeem has

correctly pointed out that the FTT awarded points for the use of aids or appliances in respect of each of these. In so far as the acknowledged difficulties were accounted for by the lesions on the appellant's hands which were found to impede her abilities to both prepare food and dress and undress, an explanation was required as to how she could manipulate the aids designed to assist in these matters which, without such explanation, appear to require similar manual skills.

15. I disagree with the analysis in the Secretary of State submission at [4.4] in relation to the use of adapted clothing being a definitive answer to the Activity 6 issue on two bases. Upper Tribunal Judge Jacobs in *PC -v-SSWP (PIP) [2016] UKUT (AAC)* made it clear that there is a balance which must be struck in relation to this particular activity; whilst an appellant cannot manipulate a points award by, for example, insisting on being assessed wearing clothing with tiny buttons, equally and critically, to assess a claimant only in relation to easy to put on clothing such as pull up trousers and Velcro fastenings may be to define away their disability.
16. Additionally, Ms Naeem's solution to the problem which was not one that the FTT embraced, preferring the approach of aids to dressing. I am not looking at what the FTT might have done on the available evidence; I am considering its actual approach to the case and whether or not that was correct in law and sufficiently explained: within the strictures I discuss above the FTT might properly have considered adapted clothing, but it did not. I cannot, save in re-deciding the case myself or giving guidance to a fresh tribunal, consider possible options to which it has not made reference. I made similar but more detailed remarks to this effect in *MW-v-Secretary Of State for Work and Pensions (PIP) [2016] UKUT 76 (AAC).*

Mobility

17. In granting permission to appeal I identified a possible error in respect of the tribunal's approach to Mobility Activity 2, "Moving Around" (at [19] of the statement of reasons). It appeared to restrict its consideration of her need to walk to that *'reasonably required'*, which I was concerned may be too high a threshold. In fact the error may be due to an overly narrow interpretation of that phrase, and I discuss that below.
18. The difficulties identified concerned discomfort in walking. The report of the rheumatologist to which I referred earlier speaks of what are described as *"the most troublesome lesions"* (caused by Lupus) being on the appellant's fingers, hands, feet and toes. Her toenails are also affected, being thickened, long and almost impossible to cut; indeed a chiropodist was not able to do so and she has been further referred. There is other discomfort caused by arthritic pain in her knees. The tribunal found that the appellant was *"reasonably likely to be able to walk 50 m but not more than 200 m safely, as often as reasonably required, to a reasonable standard and in a reasonable timescale."*
19. It seems likely that this phraseology was used in recognition of the test set out under regulation 4, and the definitions at 4(4) of the terms used in 4(2A), in particular the definition of *"repeatedly"* in 4 (2A) (c), which appears at 4 (4) (b):

(b)"repeatedly" means as often as the activity being assessed is reasonably required to be completed.

20. To the extent that this definition was interpreted to exclude the appellant's choice as to how often she would 'move around' (in the words of the schedule; I might use the expression 'walk'), and replace that choice with an objective test of how often she needed to do so, that was wrong. I reiterate my observations in *EG* cited above. If the tribunal looked at the concept *'repeatedly'* on one walk to a local shop and then back home each day, which an appellant could accomplish at one stretch, perhaps because it felt that she would be able to pick up what she needed on such an outing, that would be to assess her on an overly limited basis: she may wish to walk on to the park, or meet a friend, and why should she not? That extended walk may necessitate rest periods thus the concept of repeatedly is wider. Using Judge Jacobs point in relation to dressing, to which I also refer above, a tribunal does not need to accept the genuineness of an extreme routine put forward in an apparent attempt to "generate" points, but if it is accepted that somebody would like to walk further or more frequently and such activity is not inherently unreasonable then that wish should be factored in to the calculation of how often the activity being assessed is reasonably required to be completed. To address this matter otherwise would be to calculate entitlement upon the tribunal's view of what the disabled person's activities should be. Directly in the PIP context I draw support for that proposition from the comments of Upper Tribunal Judge Hemingway in *CE-v-SSWP (PIP) [2015] UKUT 643 (AAC)* at [34*]:*

It seems to me it makes no sense to say a person is able to perform an activity as often as reasonably required if they cannot do so for a part of the day in which they would otherwise reasonably wish or need to do so. (my emphasis).

I pick up on a different aspect of that comment in my closing remarks. I also consider pertinent the dicta of Lord Slynn of Hadley in *Secretary of State –v- Fairey (R(A) 2/98)*; although made in the context of the Attendance Allowance scheme the assessment was of attention "reasonably required".

' In my opinion the yardstick of a "normal life" is important; it is a better approach than adopting the test as to whether something is "essential" or "desirable". Social life in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life. It is not in any way unreasonable that the severely disabled person should want to be involved in them despite his disability. What is reasonable will depend on the age, sex, interests of the applicant and other circumstances. To take part in such activities sight and hearing are normally necessary and if they are impaired attention is required in connection with the bodily functions of seeing and hearing to enable the person to overcome his disability. As Swinton Thomas LJ in the Court Of Appeal said "Attention given to a profoundly deaf person to enable that person to carry on, so far as possible in the circumstances, an ordinary life is capable of being attention that is reasonably required."

The appellant's points

21. I do not ignore the other points that the appellant makes to me. The tribunal will also have those before it, and must consider them fully; they will be subsumed in the new appeal; that is to say that the new tribunal will start again and take all relevant matters into account. In relation to those matters I

note that in her grounds of appeal, a document to which the appellant clearly devoted a great deal of care, she mentions her confusion at the approach of the tribunal, in that a lot of the questions were not, she felt, directed at her illnesses or her needs. The tribunal has a great deal of expertise in relation to the medical and practical aspects of disability and in questioning people to elicit particular issues. They will not always ask direct questions related to an activity such as bathing or cooking. They are able to draw inferences about how people manage those tasks by asking about other things which may involve similar physical or mental qualities, for example manual dexterity or planning. It would be unusual if in the course of answering such questions an appellant was not able to explain the nature of the difficulties that they had, but if that is the position it needs only for an appellant to ask if there is something else that they can add, and that opportunity should be given to them if not at the time, then at the end of the hearing.

Assistance for the fresh tribunal

22. I need add only that, given the nature of the appellant's problems it will be critical for the FTT to establish whether any of the activities set out in the Schedule are affected by the level of her pain, and to what extent, with focus on the terms of regulation 4 in relation to the quality of performance of the activities in addition to the rule set out in regulation 7 as to the need for performance to be affected for the majority of the time. As to the application of regulation 7 the decision of Upper Tribunal Judge Hemingway in *TR-v-SSWP (PIP) [2015] UKUT 626 (AAC)* is likely to be pertinent. It is in this context that I reiterate his point in *CE*, set out above. *TR* establishes that if a claimant is unable to perform an activity for part of a day that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34].
23. As to pain in relation to mobility, I refer the FTT to the decision of Upper Tribunal Judge Markus QC in *PS-v-SSWP [2016] UKUT 326 (AAC).* In deciding that the tribunal was wrong not to consider what the impact of pain was on the Appellant's ability to mobilise over the distance found to an acceptable standard [15] she quoted with approval from the PIP assessment guide on that point, and said:

[13] This was also the approach taken by Upper Tribunal Judge Parker in CPIP/2377/2015 where she said of regulation 4(2A) and 4(4):

> *"6. … Matters such as pain, and its severity, and the frequency and nature, including extent, of any rests required by a claimant, are relevant to the question of whether a claimant can complete a mobility activity descriptor 'to an acceptable standard'…*
>
> *7. Whether a claimant can stand and then move to a particular distance 'to an acceptable standard', inevitably links with two of the further relevant matters under regulation 4(2A): 'repeatedly' and 'within a reasonable time period'. As these terms are statutorily defined, unlike the phrase 'to an acceptable standard', then if a claimant fails to satisfy that statutory test in either respect, it is unnecessary to give consideration to 'an acceptable standard'; however, it might still technically be possible for a claimant, who is unable to show that he cannot carry out an activity repeatedly or within a reasonable time period, yet notwithstanding to establish that he is unable to do so 'to an acceptable standard'. Such instances must be rare but may*

exist; for example a claimant who forces himself to walk quickly and repeatedly, through stoicism, despite a very high level of difficulty caused by matters such as pain, breathlessness, nausea or cramp."

24. Whilst not obviously relevant, in an abundance of caution I mention the decision of the three-judge panel as to mobility activity 1 *MH & others –v- Secretary Of State for Work and Pensions [2016] UKUT 531 (AAC)*. It has been widely reported that the decision in *MH* did not represent Parliamentary intention, and new regulations have been made. They came into effect on 16 March 2017 as I understand it. Whilst I do not now need to consider what cases they affect, I can say that they will have no effect on this appeal, which must be conducted by the fresh FTT on the basis that they are bound by the decision in *MH*: there has been no application by the Secretary of State to stay any cases so affected pending further legal processes, and *MH* represents the law up to the point where, and insofar as the new regulations change that.
25. The appellant must understand that the fact that her appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course.

Paula Gray

Judge of the Upper Tribunal **Signed on the original on 7 April 2017**