



UA-2023-000634-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2023-000634-PIP

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

LM

v.

Secretary of State for Work and Pensions

Before: Upper Tribunal Judge Sutherland Williams

Determination on the papers

Decision

1. **This appeal by the claimant succeeds.** Permission to appeal having been given by myself on 27 November 2023, and 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 on 6 September 2022 (under reference SC286/22/00058) and remit this matter to a differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the Directions given below.
2. Both the appellant and the respondent agree that the decision of the tribunal was made in error of law. Having considered the papers and the submissions, I am satisfied that I can make a decision on this appeal without directly hearing further from the parties. The submissions and respective positions are clear.
3. This appeal concerns the First-tier Tribunal's ('FTT') analysis surrounding the appellant's receipt of Carer's Allowance ('CA') at the time of her Personal Independence Payment ('PIP') claim.

4. The facts, in short, are as follows: the appellant, has a range of health issues, including chronic obstructive pulmonary disease; chronic bronchitis/emphysema; anxiety, depressive disorders and back pain. The appellant lives with her husband, who is severely disabled, and her three-year-old daughter. In addition to caring for her daughter, the appellant also claims CA for care provided to her husband. This includes help assisting him with food, washing, dressing and using the toilet.
5. Following her claim, the appellant was assessed by a Healthcare Professional, who recommended a score of 0 points for each of the daily living and mobility activities.
6. Upon mandatory reconsideration, the decision maker granted 2 points for daily living (activity 9, 'Engaging with other people face to face'). All other activities scored 0 points.
7. The tribunal at first instance upheld that decision on 6 September 2022.

Reasons

8. In my judgement, the FTT placed disproportionate weight on the appellant's carer responsibilities without properly making the required findings needed to establish the type of care provided and the activities involved. In so doing, the FTT erred in law by inferring the claimant had a level of ability to manage her own needs based upon assumptions made about the care given to her husband.
9. In *MC v SSWP [2012] UKUT 337 (AAC)*, Upper Tribunal Judge Wikeley confirmed that [at 14]:
 - (1) An award of CA is not of itself inconsistent with an award of DLA being made to the person who is herself providing the care.
 - (2) Findings need to be made to establish the type of care provided and the activities involved.
10. Similar confirmation of the position is found in *PB v SSWP [2017] UKUT 493 (AAC)*, where Upper Tribunal Judge Gray said [at 10]: "If a Carer's Allowance is in payment to somebody claiming a disability benefit on their own behalf it is understandable for a tribunal to wish to examine that. However, it is not axiomatic that the receipt of Carers Allowance precludes entitlement to PIP, and the enquiry cannot start from that premise."
11. Regulation 4 of the Social Security (Invalid Care Allowance) Regulations 1976 states that entitlement to CA "... shall not be treated as engaged or regularly and substantially engaged in caring for a severely disabled person on any day in a week unless, as at that week s/he is, or is likely to be, engaged and regularly engaged for at least 35 hours a week in caring for that severely disabled person".

12. In terms therefore of a claim for PIP, it is pertinent to consider what those 35 hours of care entails, and whether that is consistent with the claimed difficulties in the PIP application.
13. Of import, when a tribunal is considering a PIP claim from a person who is also in receipt of CA, the tribunal should bear in mind that caring can extend to supervision as well as active assistance: see para. 17 of *MC*.
14. In the instant matter, the appellant does not suggest that the FTT proceeded on the assumption that her award of CA precluded her entitlement to PIP. However, Counsel on behalf of the appellant submits that in circumstances where the FTT refer to the full-time care provided by the appellant in their assessment of the evidence, in so doing, the FTT was required to investigate the extent to which the care provided was inconsistent with the claimed limitations in respect of daily living and mobility activities.
15. Counsel cites material issues in his submission to this Upper Tribunal. For example:

“...in the “facts found” section of the SoR, at para. 19, the FTT refer to the fact that A was “a full-time carer for her disabled husband”, and that her husband “has his own health issues”. Nothing more is said about in the “facts found” section about what the FTT understood to be the nature of A’s husband’s disabilities and “health issues”, and what care was being provided by A. Para. 23 merely records that A was in receipt of CA. Daily living activity 1 (“preparing food”)

20. In relation to daily living activity 1, the SoR at para. 34 relies on the finding that A is in receipt of CA (as well as being the carer for her child), and “she is feeding them on a daily basis”. A had indicated that she fed them because otherwise her husband and daughter would not eat (see SoR para. 29) and that, “in the absence of caring responsibility, she would not prepare and cook food herself”. Although the FTT also found discrepancies in her account, it is clear that a principal factor was the caring role. This was relied upon without carefully investigating whether the care provided was consistent with her claimed limitations (in this case, the claimed need for prompting).

21. A submits that it is entirely consistent to require prompting to prepare or cook a simple meal whilst also needing – as a matter of necessity – to feed her severely disabled husband and young child. Daily living activity (3) (“managing therapy or monitoring a health condition”)

22. As to daily living activity (3), the FTT noted that HCP’s recording that A “looked after her husband’s medicines due to his difficulties” (SoR para. 37) but did not venture any further as to enquiring what precise assistance was provided and whether this was consistent with her own claimed limitations.

23. The clear evidence was of a complete lack of ability to reliably take her necessary medicines. The FTT at para. 41 of the SoR relied up on the fact that

A “is also looking after her husband and there is no one else looking after her medications. As a result of Carers Allowance she has undertaken to provide care for 35 hours a week for her husband”. Again, whilst the FTT was entitled to have regard to this matter, it could only do so with a fuller understanding of the consistency of her claimed needs and the care provided. It appears that the FTT were unduly swayed by the mere fact of CA receipt, rather than doing the necessary fact-finding. Daily living activity (4) (“washing and bathing”)

24. The evidence recorded at SoR para. 43 is that it is precisely because of the physically and mentally exhausting demands of her care for her husband and daughter that she needs prompting to be able to wash or bathe: “she can sit in her pyjamas to help wash her husband and daughter but not bothering for herself, being tired and wanting to sleep a lot”. At para. 46, the SoR records a representation that “caring for a disabled husband is entirely different to having the motivation to wash and [bathe] herself”. She relies on her “long term in severe mental health suggesting she reasonably requires prompting to wash herself”.

25. Again, the FTT’s primary finding at SoR para. 48 is that “the Appellant is assisting her husband to shower at least twice per week”. The FTT has not adequately understood that the overwhelming responsibilities of being a full-time carer were having severe mental health implications for A, and had created a need for prompting to wash and bathe. Instead, the FTT appeared overly influenced by the fact of the caring responsibility and did not understand the role this played in generating her own limitations and needs. Daily living activity (6) (“dressing and undressing”).”

16. The Secretary of State supports the above reasoning, and states as follows:

“I concur with the general point made in the claimant’s grounds of appeal, in that at times the Tribunal have inferred a level of ability of the claimant to manage her own daily living needs based on assumptions about the care given to her husband....

I submit these assumptions coloured the way the Tribunal approached these activities and were significant enough to render the overall findings on these activities insufficient. I therefore submit the Tribunal erred in law in relation to the daily living component.

On the mobility component, I submit the argument is less strong...However, I will not explore that further – as I have already argued for a material error in relation to the daily living component this matter will be subsumed into any rehearing.”

17. I share the above concerns. I am satisfied that the Tribunal erred in law and the matter should be remitted for rehearing before a freshly constituted FTT.

18. For completeness, although it is suggested by the appellant's representative that this appeal is of wider public importance, I am not persuaded about that. It requires a degree of speculation in terms of the final outcome and I am satisfied that the existing case law and legislative scheme answers the central concerns raised.
- 19. I wish to emphasise that the fact that the appeal has succeeded at this stage is not to be taken as any indication about what the First-tier Tribunal might decide in due course. The FTT must work through the various tests and considerations, but that does not mean it is bound to find the PIP criteria to be satisfied.**

AND I DIRECT:

1. The decisions of the First-tier Tribunal sitting via video on 6 September 2022 under reference SC286/22/00058 is set aside.
2. This matter shall be referred to a District Tribunal Judge to give listing and case management directions. These directions should take into account the length of time this appeal has been in the system and the size of the bundle, which may require an extended time slot.

M. SUTHERLAND WILLIAMS

Judge of the Upper Tribunal

Signed on the original on 11 June 2024