

Update on the Personal Independence Payment

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Introduction to PIP

- Introduced by Part 4 of the Welfare Reform Act 2012.
- Replacing Disability Living Allowance (“DLA”) for working-age people (16-64) (estimated completion: 2019-20)
- Non-means tested benefit to help with the extra costs caused by long-term ill-health or a disability.
- Two components:
 - Daily living component: “the person's ability to carry out daily living activities is limited by the person's physical or mental condition”
 - Mobility component: “the person's ability to carry out mobility activities is limited by the person's physical or mental condition”

- Two rates:
 - If ability is “limited”, standard rate at £55.10 (daily living) and £21.80 (mobility)
 - If ability is “severely limited”, enhanced rate at £82.30 (daily living) and £57.45 (mobility)
- Ability is assessed by a points-based test, which considers how your condition affects your ability to undertake specific daily living activities and mobility activities.
- Under each activity, there is a list of “descriptors”, which describe different difficulties or types of help needed, and each descriptor has a points score. In total, you need:
 - 8 points for “standard” rate
 - 12 points for “enhanced” rate

The PIP Regs

- The daily living activities and mobility activities are prescribed by Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (“the PIP Regs”).
- See Reg. 2 and para. 1 of Schedule 1 for key interpretations.

Reg. 4: Assessment of ability to carry out activities $\frac{L}{C}$

- (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 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.

Reg. 4 continued



(4) (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.”

Recent legislative changes (1)

- Social Security (Disability Living Allowance and Personal Independence Payment) (Amendment) Regulations 2016 (29 June 2016)
- This follows the Supreme Court's decision in *Mathieson v SSWP* [2015] 1 W.L.R. 3250 (automatic withdrawal of DLA from a child who was hospitalised for more than 84 days violated his human rights under ECHR art.14). Reg 29 of the PIP Regs, which blocks PIP for in-patients, was amended so that it doesn't apply to people under 18 when they become an in-patient.

Recent legislative changes (2)

- Personal Independence Payment (Transitional Provisions) (Amendment) Regulations 2016 (4 April 2016)
- If entitlement to PIP is established for a person transferring from DLA to PIP, then that person is not entitled to PIP until a period of 28 days has elapsed, starting with the first pay day after the making of the PIP decision.
- The amendment creates an exception to the 28 day rule for terminally ill patients – much quicker transfer (only if PIP higher than DLA). Section 82(4) of 2012 Act: “terminally ill” = progressive disease with reasonable expectation of death within 6 months.

Abandoned reforms

- December 2015: consultation on tightening up PIP for those using an “aid or appliance”.
- Despite strongly negative response from disability groups, government announced on 11 March 2016 that the number points would be halved for aids and appliances in relation to the “dressing and undressing” and “managing toilet needs” activities. 290,000 claimants would no longer receive the daily living component, and a further 80,000 would receive the standard rather than enhanced rate. Budget 2016 estimated additional savings of £1.3 billion a year by 2019-20.
- IDS resigned on 18 March 2016 – proposals ditched.

Case law



- In the higher courts:
 - *R. (on the application of Sumpter) v Secretary of State for Work and Pensions* [2015] EWCA Civ 1033 (dismissed JR of consultation to replace DLA with PIP)
 - *R. (on the application of C) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) (successful JR of delays and other flaws in PIP administration – breach of public law duty to deal with PIP claims within a reasonable period of time).

Some recent Upper Tribunal decisions



PE v SSWP [2015] UKUT 309 (AAC): striking the balance between “entitlement generation” and “self-defeating definitions”.

“Activity	Descriptors	Points
6. Dressing and undressing	a. Can dress and undress unaided.	0
	b. Needs to use an aid or appliance to be able to dress or undress.	2
	c. Needs either –	2
	(i) prompting to be able to dress, undress or determine appropriate circumstances for remaining clothed; or	
	(ii) prompting or assistance to be able to select appropriate clothing.	
	d. Needs assistance to be able to dress or undress their lower body.	2
e. Needs assistance to be able to dress or undress their upper body.	4	
f. Cannot dress or undress at all.	8”	

SSWP and FTT say no points because claimant could wear “easy to wear” clothes.

PE v SSWP



UTJ Jacobs:

“16. There must be a balance struck that prevents claimants generating their own entitlement while at the same time not allowing their own disability to be used against them. The solution lies in concentrating on the functions that are involved in dressing and undressing and on the claimant’s condition that is said to limit their ability to perform those functions.”

“19. ... tribunals must apply a uniform standard for all claimants”

PE v SSWP, para. 19 cont.

- ... dressing is not an abstract activity. We dress for a particular purpose or occasion. The clothing we wear depends on whether we are going to be inside or out as it will on the temperature and weather. The tribunal should not limit itself to the minimum clothing necessary for warmth and decency.
- This does not mean that the claimant is entitled to specify the type of clothing by way of preference or requirement, for example, in a particular job. That would defeat the uniform nature of the test.
- But the tribunal is entitled to consider reasonable and practical alternatives. For example: claimants who cannot raise their arms to put on a pullover, may be able to put on a cardigan.

Overlapping and “double-counting”

- *GP v SSWP* (PIP) [2015] UKUT 498 (AAC)
- *MF v SSWP* (PIP) [2015] UKUT 554 (AAC)
- *HB v SSWP* (PIP) [2016] UKUT 0160 (AAC)

If individual's problems are assessed as creating limits within one activity, there is nothing stopping the same problems also being assessed as creating limits within another activity. There is no such rule against “double counting”. The question is simply whether the specific descriptors in issue are satisfied and the descriptors should be separately considered on all the evidence.

Part v whole of day

- What is the proper approach to a case where a claimant is unable to perform a task specified in a descriptor for part of each day but not the whole of each day?
- *TR v SSWP* (PIP) [2015] UKUT 626 (AAC)
- [32] “for a descriptor to apply, on a given day, then the inability to perform the task or function must be of some significance, that is to say something which is more than trifling or, put another way, something which has some tangible impact upon a claimant’s activity and functioning during a day but not more than that.”

“Aid or appliance”

- Reg 2 of the PIP Regs: aid or appliance “means any device which improves, provides or replaces C’s impaired physical or mental function”.
- “an aid does not have to be specifically designed, made or sold for the purpose”: *NA v SSWP* [2015] UKUT 572 (AAC)
- “Whether something is an aid depends on whether it assists in overcoming the consequences of a function being impaired in the carrying out of that activity. That function must be one that is required in order to carry out the particular aspect of an activity, not merely one of a range of functions that could be employed”: *CW v SSWP* [2016] UKUT 197 (AAC)).

Other cases – mobility component

- Mobility activity 1 – Planning and following journeys: *MH v SSWP* [2016] UKUT 0531 (AAC) (resolves discordance in the case law concerning the relationship between descriptors 1(a)-(f))
- Mobility activity 2 – Moving around: *KL v SSWP* [2016] UKUT 0545 (AAC) (whether a relatively slow pace of walking which nevertheless amounts to walking “within a reasonable time period” can be taken into account as one of a range of factors in considering whether a claimant is able to stand and then move “to an acceptable standard”)

Other cases – daily living component

- Daily living activity 1 – Preparing food: *AI v SSWP* [2016] UKUT 0322 (AAC) (a microwave is not an “aid or appliance”)
- Daily living activity 4 – Washing and bathing: *SP v SSWP* [2016] UKUT 190 (AAC) (the word “or” is used in descriptor 4e in the disjunctive sense, and whether or not the claimant satisfies descriptor 4e must be determined by reference to an unadapted bath or shower)
- Daily living activity 7 – Communicating verbally: *TC v SSWP* [2016] UKUT 0550 (AAC) (what is included within the definition of “communication support”)
- Daily living activity 10 – Making budgeting decisions: *RB v SSWP* [2016] UKUT 0393 (AAC) (physical rather than mental limitations not excluded, but highly unlikely to arise).

Cases to watch (1)

- *AH v SSWP* [2016] UKUT 0276 (AAC) – permission granted to appeal to the Court of Appeal (hearing listed for Oct 2017) concerning the meaning of “social support” in descriptor 9(c): “needs social support to be able to engage with other people”. Social support is defined in the PIP Regs as “support from a person trained or experienced in assisting people to engage in social situations.”
- The issue is how this is to be distinguished from descriptor 9(b): “needs prompting to be able to engage with other people”. “Prompting” is defined as ‘reminding, encouraging, or explaining by another person.’ The question on appeal is whether the difference between 9(b) and (c) is simply the status of the provider, or some qualitative difference in the assistance provided.

Cases to watch (2)

- CPIP/2980/2015 – Case pending before a three-judge panel of the Upper Tribunal.
- The issue is whether the Personal Independence Payment (Transitional Provision) Regulations 2013 are discriminatory and/or ultra vires insofar as they provide that PIP for transfer claimants is payable only from 28 days after it is awarded, rather from the date of claim, particularly insofar as they preclude a supersession of DLA in the intervening period.

Cases to watch (3)

- CSPIP/97/2016, CSPIP/106/2016, CPIP/1599/2016 – hearing before three-judge panel of the Upper Tribunal on 24 November 2016. Judgment expected in February 2017.
- Meaning of the word “unlikely” in the statutory definition of “safely”: “in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity ...”
- Is the likelihood threshold “probable / more than 50%” or “real possibility that ought not to be ignored”.
- A question of statutory construction having regard to the nature and gravity of the harm in question. “Real possibility” option would align position with DLA / Attendance Allowance – see in *Moran v Secretary of State for Social Services* (unrep.) 13 March 1987.

Meaning of “unlikely”

- *In re H. and Others (Minors) (Sexual abuse: standard of proof)* [1996] AC 563.
- In cases of alleged sexual abuse by a parent, section 31 of the Children Act 1989 empowers a court to make a “care order”. Section 31(2)(a): “A court may only make a care order or supervision order if it is satisfied ... that the child concerned is suffering, or is likely to suffer, significant harm”.
- *“In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?”* (Lord Nicholls)



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