IN THE UPPER TRIBUNAL **Appeal No. CPIP/2229/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Security and Child Support)

Between:

Mr DE

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge L. Joanne Clough

Decision date: 27 August 2021
Decided following an oral hearing (heard virtually) on 18 February 2021,

Representation:
Appellant: Mr M. Robinson, Darlington Citizens Advice
Respondent: Ms J. Smyth

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 30 April 2019 under number SC262/17/00947 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh Tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing, to be listed as the first available opportunity which is convenient for all parties;**

2. **The Tribunal that re-determines this appeal must not include any member of the panel whose decision is set aside in both of the Upper Tribunal proceedings in this case;**

3. **The First-tier Tribunal is not limited to determining the issues dealt with in this appeal. It must consider all aspects of the case, both fact and law, entirely afresh;**

4. **If the Appellant wishes to put any further written evidence or argument before the First-tier Tribunal, this must be received by the First-tier Tribunal's office within one month of the date on which these directions are issued.**

5. **These Directions may be supplemented and/or varied by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

REASONS FOR DECISION

Background

1. The Appellant had made claims for Personal Independence Payment (PIP), in July 2014, April 2015 and December 2015, all of which were unsuccessful. Each of these claims were made on the basis of alcohol dependence and related physical conditions.

2. A fourth application for PIP was made by the Appellant on 6 April 2017. He claimed difficulties in relation to all the PIP activities, on the basis of osteoporosis, cervical spondylosis, degenerative disc disease, neuropathy and cataracts, all of which he stated were "alcohol related". The Appellant attended a PIP medical assessment on 9 May 2017. On 16 May 2017, the Secretary of State determined that the Appellant scored two points for daily living activity 1(b) of Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013 (requiring an aid to prepare and cook a simple meal), based on the decision maker's reasoning that the Appellant required an aid such as a perching stool to overcome his inability to stand on his lower limbs for a prolonged period. No points were scored for any of the mobility descriptors. Consequently, the Appellant was not entitled to Personal Independence Payment (PIP) from and including 22 March 2017. The Appellant requested a mandatory reconsideration of this decision and on 12 July 2017 the decision was reviewed but remained unchanged.

3. The Appellant appealed to the FtT and the case came before the Tribunal at Darlington County Court on 15 February 2018. The appeal was refused, with the FtT confirming

the two points awarded for activity 1(b). A Statement of Reasons, dated 25 June 2008, stated the FtT found that "Mr E is alcohol dependent…. He drinks sufficient to keep him ticking over. He does not get drunk… Mr E had no disability arising from the alcohol dependence syndrome" (paragraph 10). The Appellant's application for permission to appeal this decision was refused by the FtT on 6 September 2018 so he renewed his application for permission to appeal, directly to the Upper Tribunal. The appeal was allowed by Upper Tribunal Judge Jacobs on 11 February 2019, who determined that the FtT's finding that the Appellant had no disability arising from alcohol dependence was inconsistent with the evidence before it.

4. The case was remitted to the FtT for re-hearing, which took place at Darlington County Court on 30 April 2019. On this occasion, the Appellant was represented by Darlington Citizens Advice, who submitted, in writing, that the Appellant was entitled to points for activities 1(e), 2(d), 3(b), 4(c), 5(b), 6(c), 9(c), 11(d), and 12(b) due to physical conditions as well as symptoms related to his alcohol misuse including memory loss, lack of motivation, depression, aggression and mood swings. The FtT dismissed the appeal and confirmed the decision of the Secretary of State dated 16 May 2017 i.e., the Appellant retained the two points for activity 1(b) only. Following the preparation of a Statement of Reasons, dated 22 July 2019, the Appellant requested permission to appeal the decision of the FtT once again. This request was refused by the FtT on 3 September 2019. On 30 September 2019, the Appellant renewed his application for permission to appeal directly to the Upper Tribunal.

5. Permission to appeal was granted by Upper Tribunal Judge Jacobs on 4 November 2019 with the following comment:

"2. I have not limited my grant of permission, but I am particularly interested in how the activities and their descriptors apply when a Appellant is functioning under the influence of alcohol that is related to a recognised condition. In particular, is the tribunal to test his ability to perform with the benefit of alcohol or on the assumption that he is abstaining? How is the tribunal to apply regulation 4(2A) of the Employment and Support Allowance Regulations 2008 [sic]*? What amounts to an acceptable standard? Is the Appellant safer when under the influence and able to function or when he is not?"*

6. On 31 January 2020, the Secretary of State made a submission to the Upper Tribunal supporting the appeal, with no objections to a short decision on the papers, with limited reasons, if the submission was accepted in its entirety. On 9 February 2020, the Appellant responded, in broad agreement with the Secretary of State, also not requesting an oral hearing of the matter but seeking a decision with reasons on the basis that "the nature of the case is such that the Tribunal would gain some benefit from guidance" in the matter.

7. Having read the extensive bundle of papers in this case as well as the detailed submissions from both sides, I directed an oral hearing to be listed. Although this was a supported appeal, the case required consideration of novel legal issues as referred to in the grant of permission to appeal prepared by Upper Tribunal Judge Jacobs. Although I could have requested further written submissions, I considered it appropriate to give both parties the opportunity to make full submissions orally and to provide the opportunity for open discussion.

8. In preparation for the oral hearing, the Appellant, through his representative, was directed to submit a skeleton argument addressing the following issues clearly and distinctly:

    (i) In this case, has the First-tier Tribunal erred in law in their consideration of the Appellant's consumption of alcohol in his ability to undertake the PIP activities reliably, as required by Regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013?

    (ii) In the case of any Appellant who is functioning under the influence of alcohol that is related to a recognised medical condition:
        (a) should the tribunal test the Appellant's ability to perform the PIP activities with the benefit of alcohol or on the assumption that he is abstaining?
        (b) how should the Tribunal apply the "safely" aspect of Regulation 4(2A) of the PIP Regulations 2013? Is the Appellant safer when under the influence of alcohol and able to function or not?
        (c) how should the Tribunal apply the "acceptable standard" aspect of Regulation 4(2A) of the PIP Regulations 2013 in such a case?

(d) Are there any relevant considerations in applying the "repeatedly" and "reasonable time period" aspects of Regulation 4(2A) of the PIP Regulations 2013?
(e) Are there any relevant considerations in applying Regulation 7 of the PIP Regulations 2013?

9. The Respondent was directed to submit a skeleton argument in response, dealing clearly with each of the same issues. The skeleton arguments were received from both sides as requested.

10. An oral hearing of the appeal took place via video conferencing facilities on 18 February 2021. The Appellant was represented by Mr M. Robinson from Darlington Citizens Advice and the Respondent was represented by Ms J. Smyth of Counsel. The focus of the hearing was predominantly, but not exclusively, on the question of what guidance would assist a First-tier Tribunal in dealing with an alcohol dependent Appellant, with particular reference to the questions addressed by the parties in their skeleton arguments regarding the application of the PIP Regulations 2013 to a "functioning alcoholic". I now set out my decision, followed by the guidance requested, in that order.

Appeal against the decision of the FTT: The Arguments

11. The primary issue in this case is the question of whether the FtT materially erred in law in making its decision. The Appellant's representative submits that the FtT erred in law for the following reasons:

(1) it does not explain its failure to consider the Appellant's evidence;
(2) it uses the wrong test to interpret activity area 9;
(3) it does not adequately explain its conclusion that his difficulties are simply a "lifestyle choice";
(4) it does not adequately consider the mobility descriptors; and
(5) it does not explain why descriptors under activity area 4 were not awarded.

12. In support of the appeal, the Secretary of State submits that alcohol misuse is a medical condition which may be taken into account for the purposes of a claim to PIP. However, the finding that "on balance that appropriate functionality [to undertake the PIP activities]

was not dependent upon reliance on alcohol for the majority of the time" (paragraph 13 of the Statement of Reasons, page 564), was not adequately reasoned as the FtT failed to investigate the consequences of the Appellant's alcohol misuse and the years of misuse. The Secretary of State also submits that the FtT failed to consider the Appellant's blackouts and hence any "safety" aspect of the ability to complete a PIP activity as required by Regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations 2013). Furthermore, the Secretary of State submits that the FtT failed to provide adequate reasons for the conclusion that the Appellant could undertake some of activities "reliably" under that same provision. Taken together, it is the Secretary of State's submission that the FtT's decision is thereby rendered materially in error of law.

13. These submissions were supplemented by both parties within the skeleton arguments presented in preparation for the oral hearing, and fully expanded upon during the oral hearing.

Analysis of the case

14. In the appeal bundle, the FtT were presented with a full and detailed history of four unsuccessful benefit claims by the Appellant, spanning across approximately four years. The first, relating to an Employment and Support Allowance (ESA) claim, was an ESA medical assessment report, dated 12 February 2013, which recorded the Appellant as consuming eight cans of beer per day, feeling that his body was dependent on alcohol but reporting that his GP said he was not an alcoholic. He also reported monthly blackouts at that time, along with mild depression. The Appellant's first claim for PIP (PIP2 form dated 3 July 2014) raised a number of medical conditions including alcohol misuse. At a medical assessment on 26 November 2014, it was recorded that he denied being an alcoholic, but confirmed that he consumed ten pints of beer daily as his body depends on it. He reportedly explained that alcohol misuse had no functional impact on his day-to-day life as he was "not going to do things anyway". The HCP noted to observe a "strong smell of alcohol but no slurred speech" from the Appellant and that he was aggressive and argumentative regarding the PIP process. No points were scored and hence no award was made on this occasion.

15. From the bundle, the Appellant had submitted a second benefit claim, this time for Personal Independence Payment (PIP) (on a PIP2 form dated 30 April 2015) on the basis of similar physical medical problems and alcohol misuse. A supporting letter from his GP dated 5 February 2013, stated that the Appellant suffered from osteoporosis, cervical spondylosis, degenerative disc disease, and "harmful alcohol use" with possible early neuropathy. A GP Factual Report dated 18 May 2015, requested by the DWP following submission of the PIP claim, reported that the Appellant had alcohol misuse syndrome since 2004, poly-neuropathy due to harmful alcohol use since 2012, a cataract due to be removed, osteoarthritis since 2013, and osteoporosis. The Appellant attended a PIP medical assessment for this claim on 28 May 2015, following which he was awarded seven points for daily living descriptors 1(b), 3(b), 4(b), 6(b), and four points for mobility descriptor 2(b), because of a combination of physical restrictions (neuropathy, poor grip, reduced leg power). These points did not meet the threshold for an award of either component of PIP.

16. The Appellant submitted a third benefit claim (on PIP2 claim form dated 10 December 2015) based on the same medical conditions including alcohol misuse and alcohol related poly-neuropathy. During a PIP medical assessment on 29 January 2016, the Health Care Professional noted that the Appellant consumed 12 cans of strong beer daily and stated that a 2012 referral to the North East England based alcohol intervention service, NECCA, had no impact on reducing the Appellant's drinking. It was also recorded that the Appellant had gout in both feet. The decision maker scored the Appellant four daily living points for descriptors 1(b) and 4(b) based on poor fist grip and lower limb power, and four mobility points for mobility descriptor 2(b), owing to his slow walking pace, reduced lower limb power, pain and fatigue. Once again, this was insufficient to entitle the Appellant to an award of either component of PIP.

17. The decision in issue before the FtT, on both occasions, was the Appellant's fourth benefit claim, his third claim for PIP. On a PIP2 claim form signed on 6 April 2017, the Appellant made a claim on the basis of osteoporosis, cervical spondylosis, degenerative disc disease, neuropathy, and cataracts, stating that "all these health conditions are alcohol related". He claimed to be taking thiamine, co-codamol, ergocalciferol, lansoprazole, gabapentin and zoledronate infusions to deal with these conditions. He made no reference in his claim form to alcohol intake, but as a result of his "alcohol

related" physical conditions, he claimed to require aids/help with all the daily living and mobility activities. The only limitations he clearly linked to his alcohol consumption on the claim form, were the activities of communicating and mixing with others, which he said were impacted by his aggression and disinhibited behaviour arising from his alcohol consumption. He also stated that the alcohol caused him to suffer with anxiety about choking when eating.

18. The Appellant attended a PIP medical assessment on 9 May 2017 during which the Health Care Professional (HCP) reported details regarding osteoporosis, spondylosis, neuropathy and cataracts. There was little mention of alcohol consumption within the report, save for the HCP recording that the Appellant had "a few beers" and went "to the town every day for a pint. The decision maker, as a result of physical conditions, recommended that the Appellant needed an aid or appliance to prepare and cook a simple meal as a result of poor standing ability over a pro-longed period and would therefore benefit from the assistance of, for example, a perching stool. A decision was made by the Secretary of State on 16 May 2017, that the Appellant was awarded two points for activity 1(b) hence was therefore ineligible for any award of PIP. This was confirmed by the FtT at Darlington, when the Appellant first appealed the decision at a hearing which took place on 15 February 2018. The decision of the FtT was overturned on appeal to the Upper Tribunal hence the case was remitted to the FtT for redetermination. The Appellant's appeal against the initial decision of the FtT was heard once again before Darlington County Court on 30 April 2019.

19. At the second appeal hearing on 30 April 2019, the proceedings to which this decision relates, the Appellant was represented by Mr M. Robinson from the Citizens Advice Bureaux. There was no Presenting Officer in attendance on behalf of the Secretary of State. Mr Robinson had made lengthy and detailed written representations to the FtT, putting all the PIP activities in issue, except the activities of reading, communicating and budgeting (7, 8, and 10). The activities in issue, it was claimed, were impacted primarily, as a result of the Appellant's alcohol misuse, but also by related physical health conditions. Mr Robinson highlighted to the FtT, the GP's medical findings and comments in relation to the Appellant's alcohol misuse, as well as highlighting an ongoing issue with blackouts. The Appellant gave oral evidence at his appeal hearing, and it is noted in the Record of Proceedings that he told the panel that (I paraphrase) he

drank every morning and had consumed two pints of beer prior to his hearing which commenced at 10am that day. It is recorded that he confirmed he was "ok" to give evidence and that he did not need help for his drinking. He stated that neuropathy and osteoporosis were the most debilitating of his conditions and that he needed someone with him in case of collapse, which had occurred twice in the previous two years, resulting in hospital attendances. It is noted that he talked of shaving every three days, of washing only his face in the sink as he couldn't be bothered taking a bath or shower due to "problems in his head", but could wash when he wanted to. It is written that he washed his hair after his twice-yearly haircut or when bathing (one bath that year). It is written that he reported drinking to be his hobby, agreeing that he could cook a meal but chose to eat one meal a day, as he preferred to drink alcohol rather than eat. It is recorded that he told the FtT that his problems were "internal rather than outside ones", that he felt depressed and that he wanted justice and a happy life again. It is noted that he reported symptoms of anxiety for four years and the alcohol helped him deal with it. He explained in evidence, according to the Record of Proceedings, that if he refrained from drinking, he got the shakes, couldn't feel his legs, had a bad head and could do nothing.

20. At the conclusion of the hearing, the FtT dismissed the appeal and confirmed the decision of the Secretary of State dated 16 May 2017 that the Appellant was not entitled to PIP, having scored two points for activity 1(b). A statement of Reasons was prepared by the FtT and issued to the Appellant on 29 July 2019, explaining the decision.

Error of law

21. In the first instance, the Appellant, through his representative, contends that the FtT is in error of law by failing to explain why it did not accept the Appellant's evidence. Related to this, in my view, is the third ground advanced by the Appellant: the FtT do not adequately explain their conclusion that his difficulties are a "lifestyle choice". Further connected, is the submission of the Secretary of State, that the FtT failed to investigate the consequences of the Appellant's alcohol use and years of misuse. I agree that the FtT have materially erred in law in all three of these respects and my reasons are set out in the forthcoming paragraphs. I do not propose to look at any of the other grounds of

appeal advanced, either by the Appellant or by the Secretary of State, as it is not necessary to do so.

22. In evidence, before the FtT in this appeal, the Appellant explained his medical conditions, his alcohol use, and his lack of functionality. Additionally, in the papers, there was a four-year history of unsuccessful benefit claims and medical assessments, referring to the Appellant's medical conditions, effects, patterns of behaviour and his alcohol consumption. Bearing in mind all this interconnected evidence, it is unsurprising that the FtT came to the conclusion that the Appellant's medical "conditions and medication [were] not in dispute" (paragraph 8 of the Statement of Reasons). More specifically, in relation to the Appellant's alcohol consumption, the FtT went on to find: the Appellant, "at all material dates was suffering from effects of alcohol misuse; at the hearing he described drinking as his hobby…." (paragraph 8 of the Statement of Reasons). The FtT found as a matter of fact that the Appellant suffered from osteoporosis, cervical spondylosis, degenerative disc disease, neuropathy and cataracts, and notes that the GP opines that the musculoskeletal pain affecting the Appellant's joints was neuropathic and related to his alcoholism, as was his osteoporosis (paragraph 9 of the Statement of Reasons).

23. The FtT went on to confirm, in their Statement of Reasons, that the Appellant was "a credible witness" (paragraph 8) and "he was a reliable historian about his condition" (paragraph 11). From these comments, it can reasonably be assumed that the multitude of repeat evidence in relation to the Appellant's medical conditions and the effects they had upon him, was accepted evidence by the FtT, and not information that had been disregarded by the Panel.

24. However, in reaching its decision, it is clear that the FtT did not accept the Appellant's evidence in full. It appears that while the FtT accepted the Appellant's evidence regarding his medical conditions, it rejected the element of the Appellant's evidence about the effects his medical conditions had upon him. By confirming the two points already awarded by the Secretary of State for activity 1(b) (requiring an aid to prepare and cook a simple meal), and awarding no other points, the FtT confirmed the Secretary of State's decision that no award of PIP was appropriate for this Appellant. On the face of it, I take no issue with this determination, as a Tribunal is entitled to reach whatever

conclusion it finds based on the accepted evidence before it. However, no reason was advanced as to why only half of the Appellant's evidence, that of a "credible witness" and "reliable historian", was accepted. An independent observer, reading the Statement of Reasons would quite rightly ponder the question: if the Appellant was found to be a "credible witness" then does it follow that the Appellant's claims regarding his limitations were not accepted despite his medical conditions being agreed? Clear reasons were required to make sense of the finding that the Appellant's "credible" evidence regarding his medical conditions including alcohol misuse was accepted, yet the impact he explained these medical conditions had upon his ability to complete the PIP activities, was not so accepted. There were no such reasons advanced within the Statement of Reasons to rationalise the FtT's conclusion in this regard.

25. One example is the activity of washing. It is written in the Record of Proceedings that the Appellant gave evidence to the FtT that he rarely bathed, showered or washed his hair and simply washed his face in the sink every day. His evidence is recorded as explaining that he did not wash the rest of his body because he had so many problems in his head and couldn't be bothered. In the Statement of Reasons, the FtT states:

> *"It was represented that [the Appellant] lacks motivation and has forgetfulness leading to a need for prompting. At the hearing [the Appellant] stated that he can wash himself when he wants to. This included washing his hair in the bath, which occurred after a haircut, once every six months. His oral evidence was that he cannot be bothered to bathe, but washed his face in a washbasin. The Tribunal determined that there was insufficient persuasive evidence that the limited washing pattern was due to the effect of the medical conditions and nor was there medical evidence to support that [the Appellant] has a mental health condition such as to cause him to be unwilling to bathe." (paragraph 19)*

26. Of course, the FtT are entitled to make a finding that the Appellant's lack of washing was not connected to his medical conditions, but when the FtT also finds the Appellant's evidence to be credible, then it is difficult to comprehend why the comments of the Appellant as to why he does not wash or bathe due to "problems in his head" were not accepted also. There was sufficient evidence before the Tribunal to call into question a possible lack of motivation, of forgetfulness and/or of a need for prompting, in line with

the representations of the Appellant's representative, but, from the Record of Proceedings, it appears that this evidence was not fully explored at the appeal hearing. The Appellant, according to the Record of Proceedings, told the Tribunal that he didn't wash or bathe because he couldn't be bothered but the FtT did not investigate why he couldn't be bothered. One possible reason, the effects of alcohol misuse, had been advanced by the Appellant's representative in written submissions prior to the hearing, and was one apparent reason emerging throughout the paper evidence, and that reason ought to have been tested in the oral evidence. The Appellant's reason given in oral evidence could be either accepted or otherwise, but no such reason was sought. Consequently, the reasoning by the FtT that there was "insufficient persuasive evidence that the limited washing pattern was due to the effect of the medical conditions", in the absence of reasons for finding the evidence of a "credible witness" unpersuasive, is something of a perverse finding on a material matter in the case. The FtT did not make a positive finding as to why the Appellant did not wash or bathe – it simply said that this was not a result of the medical conditions. If a reason had been given as to why the evidence was not persuasive, for example, if there was a lack of consistency, or if the evidence was not supported by independent medical opinion, then it is perfectly acceptable to reject the oral evidence of the Appellant. However, given the extent of available evidence, the absence of adequate exploration of that evidence, and the absence of adequate reasoning for not accepting the evidence (in whole or in part), demonstrates that the FtT materially erred in law.

27. It is further presented on the Appellant's behalf, in connection with this point, that despite the conclusions reached about the Appellant's evidence, the FtT "fails to make findings of fact regarding specific issues of relevant evidence or fails to explain why certain evidence is not taken into account". With this submission, I agree. Having made a finding that the Appellant suffers from disabling medical conditions for the purposes of a claim for PIP, the FtT needed to thereafter make findings of fact about the effect of the Appellant's medical conditions upon him. The FtT, found that the Appellant, "at all material dates was suffering from effects of alcohol misuse" (paragraph 8 of the Statement of Reasons), but it did not enquire about, nor did it make any findings of fact about, the exact effects of the Appellant's alcohol misuse it was referring to. This, it is submitted by the Secretary of State, amounts to a material error of law, of which I also agree. Furthermore, there were no findings of fact made about the alcohol misuse in

general, for example, about the type of alcohol typically consumed by the Appellant, the times that he typically consumed the alcohol, the frequency across the days or week that he consumed the alcohol, the effects of that alcohol consumption either physical or mentally upon him, both at the time of the actual drinking as well as possible ongoing long term effects, nor whether he had the self-control required to refrain from that alcohol consumption if he chose to. Did the alcohol consumption make him feel intoxicated? Sleepy? Argumentative? Did it cause him to lack motivation for life? Did he feel depressed as a result? How did he feel when he was not drinking alcohol? It is entirely unclear what the FtT found the effects of the Appellant's alcohol consumption to be, and from a reading of the leading case of *R(DLA)* 6/06, there may have been a wide range of different effects (noting of course, that the medical diagnostic criteria and terminology referred to in that case has since been updated). The FtT accepted that the Appellant suffered from alcohol dependency, yet despite having made no enquires or findings of fact regarding the effects of the Appellant's alcohol misuse and consumption, it rejected his claims, from both the paper and oral evidence, relating to the effects on him and his connected limitations on functionality. Such a conclusion is incomplete and not adequately reasoned, and therefore amounts to a material error of law.

28. In relation to the third ground of appeal advanced by the Appellant's representative, it is correct that the FtT found, in general terms, that the Appellant's "failure to undertake a number of activities to an acceptable standard were to a large extent through his *life-style choice* [my emphasis], rather than an inability to carry them out." (Statement of Reasons, paragraph 8). Within the Record of Proceedings, it is written that the Appellant stated he had "internal problems", that he felt depressed, that he felt anxious, that alcohol helped him, and that he wanted to feel good again. However, there is no apparent note on the Record of Proceedings indicating that the FtT made any enquiry as to why he felt like this and indeed whether this was one of the effects of alcohol misuse that it referred to him as having "at all relevant times". Bearing in mind that alcohol misuse can lead to depression, low mood, lack of motivation and disinterest in one's wellbeing, it seems to me that one reason for the limitations claimed by the Appellant is that very same alcohol misuse which the FtT accepted was in operation in this case. For example, regarding washing and bathing once again, the Appellant said he could not be bothered, and the FtT accepted this as it stood, without any further investigation as to why the Appellant could not be bothered. Although the FtT made a finding that "there

was insufficient persuasive evidence…. to support that [the Appellant] has a mental health condition such as to cause him to be unwilling to bathe" (Statement of Reasons, paragraph 19), in fact Alcohol Dependency Syndrome, is exactly the "mental health condition" which may have been the cause of this functional limitation (see paragraph 18 of *(R)DLA 6/06,* and now referred to as Alcohol Use Disorder). That is a matter for the FtT to determine of course but in this case, the FtT dismissed the Appellant's claims for limited functionality without giving reason as to why. I have no doubt that there were reasons behind the FtT's decision, but without stating the reasons clearly in its Statement of Reasons, the FtT's decision is difficult to rationalise and amounts to an error of law.

29. It is clear that the FtT took detailed evidence from the Appellant, covering a number of medical conditions and dealing with all the PIP activities and descriptors in issue in the appeal. While it is entirely appropriate for the FtT to make any finding it sees fit, this must be done with an explanation of the reasons for the findings. This is especially so, if the FtT disregard what the Appellant says about the activity in question, and where the determination of the FtT runs contrary to an apparent weight of evidence contained within the papers and oral evidence. Of course, the Appellant may strongly disagree with a FtT's finding against him or her, but this is difficult to challenge when it is adequately reasoned. What is apparent from the evidence taken from the Appellant during the appeal hearing however, was the fact that certain important matters were not adequately dealt with in the fact-finding process, for example the Appellant's blackouts and in particular the effects of his medical conditions, especially the alcohol misuse, upon him. Without findings about the effects of the alcohol misuse and other medical conditions upon the Appellant, the reasons for the Appellant's apparent lack of functionality regarding the various PIP activities and descriptors cannot be adequately rationalised. It is an Appellant's right to understand the reasons why a Tribunal reached the decision it did, even if the Appellant does not agree with those reasons or with the ultimate conclusion. It is fair to say, that in the absence of reasons for the conclusions reached by the FtT in this case, particularly the contradiction of the Appellant's "credible" evidence on the matter, as well as a finding of him suffering from alcohol misuse but that his limited functionality was due to a "lifestyle choice", it is difficult to comprehend how this decision was reached. By failing to adequately reason its findings in these regards, the FtT have materially erred in law in this case.

30. One of the options open to me to resolve this error of law, is to re-make the decision of the FtT and given the length of time which has elapsed since the original decision was made, this is my preferred option. However, it is not open to me to make the findings of fact which are required in order for me to re-make the decision. Therefore, in the absence of the findings of fact regarding the effects of the Appellant's undisputed medical conditions upon him and upon his ability to undertake the PIP activities, I have no option but to remit this case back to the FtT for re-determination.

31. In order to ensure that this case does not return to the Upper Tribunal for a third time, and as requested by the Appellant's representative, I have outlined some guidance for a Tribunal to follow in order to comprehensively deal with a potentially alcohol dependent Appellant. With particular reference to the issues raised by Upper Tribunal Judge Jacobs, I also deal with the questions he poses in dealing with a functional alcoholic, which is one of the conclusions that could possibly have been reached, or subsequently be reached, in the present case.

The Alcohol Dependent Appellant and PIP

Alcohol misuse: a medical condition

32. Alcohol Use Disorder (AUD) is a medically recognised condition which falls within the category of Substance Dependence in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM-5). The Manual has been updated since the 4th edition, the DSM-IV, which was referred to by expert evidence presented in the leading case of *R(DLA) 6/06*. The updated condition of AUD combines the former categories of Alcohol Abuse and Alcohol Dependence into a single category of "Alcohol Use Disorder", which is considered to have either mild, moderate or severe sub-classifications. AUD (in a similar manner to ADS) is defined as a "maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by two (or more) [of a list of specified markers], occurring at any time in the same 12-month period". The severity of AUD is based upon the number of markers met. The list of markers can be found within the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5). Alcohol Dependency Syndrome, the previous definition,

was previously characterised by three or more markers within DSM-IV as set out within paragraph 18, *R(DLA) 6/06*. DSM-5 updates the diagnosis methods by eliminating "legal problems" as a criterion, while adding a new criterion of "craving alcohol" as an indication of AUD. The language within DSM-5 is also updated and some of the criterion descriptions are modified. A Tribunal should refer to the DSM-5 if considering a case involving potential Alcohol Use Disorder. The legal guidance within *R(DLA) 6/06* still remains applicable.

33. Alcohol Use Disorder is a discrete illness, characterised predominantly by a loss of self-control over alcohol use, typically rendering a person incapable of refraining from alcohol consumption despite any impacts it may be having on their health and ability to function (see *R(DLA)* 6/06, and the updated DSM-5). AUD, while a mental health condition in itself, can cause the sufferer to develop additional secondary physical conditions such as liver damage (cirrhosis), bleeding in the gastrointestinal (GI) tract, alcoholic ketoacidosis, damage to brain cells, high blood pressure, pancreatitis (inflammation of the pancreas) and nerve damage, to name but a few. Equally secondary mental health conditions can arise as a result of alcohol abuse, such as early onset dementia, depression and Wernicke-Korsakoff syndrome, a brain disease that causes symptoms such as confusion, vision changes and/or memory loss. In extreme cases, the impact of long term or severe alcohol misuse can lead to death.

34. An AUD patient, depending on the severity and dominated by the impact of addiction, may engage in a variety of behaviours including, and of course not limited to, drinking excessively at any time of day or night, becoming violent or angry, eating poorly or not at all, neglecting personal hygiene, missing work or appointments because of alcohol, making excuses to enable them to drink alcohol, and giving up important social, occupational or recreational activities because of their alcohol use. An addict may experience occasions of wishing to get better, but the fear of the possible symptoms of alcohol withdrawal can stand in the way of treatment and can cause re-lapses soon after attempting to stop drinking alcohol or to cut down. Equally, denial of the extent of the problem may be another barrier to treatment for alcohol misuse, as a refusal to acknowledge the lack of self-control over the consumption of alcohol, the amount of alcohol consumed, the duration of the problem and/or the full impact of its effect on life, does not lend itself well to reaching out for, or accepting, the offer of assistance, which

will inevitably require mental health input to address the addiction, as well as treatment for any linked physical or mental conditions.

35. The reality of alcohol addiction is therefore highly variable in nature, hence while one person may struggle with their addiction and is unable to function well in day-to-day life, another person, sometimes referred to colloquially as a "functioning alcoholic" may be capable of maintaining an appearance of normality by continuing to hold down a job and maintain relationships despite the hold that alcohol consumption has over his or her life. Functioning alcoholics may present as "normal" to an outsider looking in, even while under the influence of alcohol, and may not suffer additional medical conditions or exude the stereotypical demeanour of "an alcoholic". While some of this may be down to luck, it may also be the case that the functioning alcohol addicted Appellant is cleverly masking an otherwise difficult problem, perhaps due to shame or embarrassment, and their ability to do so is hiding an extremely tough and mentally exhausting existence.

Alcohol Use Disorder and PIP: The Tribunal's approach to eligibility

36. Two cases are essential reading for a Tribunal tasked with determining whether an alcohol reliant Appellant is eligible for PIP. The first is *R(DLA) 6/06* which, although relating to Disability Living Allowance, sets out important (although now updated) expert evidence regarding alcohol misuse as a medical condition. Although the DSM-IV as referred to in *R(DLA) 6/06* has since been updated to DSM-5, the legal guidance arising from the case remains on point, and the now termed Alcohol Use Disorder, is the medical condition to be considered. The case has been held to be relevant towards Employment and Support Allowance claims (*JG v SSWP (ESA)* [2013] UKUT 37 (AAC)). The second essential case is *SD v SSWP (PIP)* [2017] UKUT 310 (AAC), which provides some guidance on how to assess an alcohol dependent claimant.

37. The formerly termed Alcohol Dependency Syndrome (ADS), now termed Alcohol Use Disorder, has been held to amount to a recognised medical condition which is capable of giving rise to eligibility for PIP (*SD v SSWP (PIP)* [2017] UKUT 310 (AAC)). As is clear, it is an acutely complex and highly variable medical condition depending upon the individual patient, and as such, it requires the Tribunal to gain a clear and detailed understanding of, not only the Appellant's drinking habits, but also the impact the drinking (or not drinking, as the case may be) has on the Appellant's day to day life. In a

similar manner to the application of the legal framework to any medical condition, the assessment of whether an Appellant with AUD meets the statutory criteria for an award of PIP, requires consideration of the functional effect of the condition on the prescribed PIP activities and descriptors contained within Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013 (PIP Regulations 2013). It also requires a detailed consideration of the legal requirements within Regulation 4, in particular "safety" and "acceptable standards", as well as Regulation 7 of the PIP Regulations 2013.

38. The case of *SD v SSWP (PIP)* [2017] UKUT 310 (AAC), set out the correct approach for a tribunal to adopt when faced with the question of whether an alcohol dependent Appellant is eligible for PIP. In short, findings should be made by the tribunal on: (1) the severity of the addiction; (2) the frequency and degree of intoxication within each day; and (3) the impact on the ability to perform the PIP activities reliably (paras 18-19). A diagnosis of alcohol misuse, abuse or alcohol use disorder, does not automatically imply that an Appellant cannot complete any PIP activities, but careful fact finding must be undertaken, in order to apply the statutory criteria to the facts and circumstances of each individual Appellant's case. Upper Tribunal Judge Hemmingway stated, at paragraphs 24 and 25 of the judgement:

> *"24. … findings may have to be made as to whether the effects of intoxication cause such significant impairment as to render the Appellant incapable of fulfilling and relevant tasks or functions at all (and if not the process may stop there); when if there is such impairment it would typically take hold during a day; which functions would be impaired; which activities and descriptors would be in issue; and whether any limited period of incapability through intoxication would properly lead to a conclusion that that incapacity is capable of having a tangible impact upon the Appellant's activity and function during a day.*
>
> *25. I appreciate that fact finding of the nature indicated above is difficult. I do not wish to make things any more difficult for busy tribunals than they already are. But a number of such cases might be relatively straightforward either because it is obvious an alcohol dependent Appellant is nevertheless functioning in the manner referred to above or because it is obvious that intoxication takes hold*

> *and has an impact of significance at an early stage in any given day. Where the matter is not clear cut a tribunal will simply have to do its best, take a broad view of the evidence where appropriate and rely upon its expertise."*

39. Consequently, the devil is very much in the detail of the fact-finding process to ensure that the legislation can be accurately applied to the facts of each individual case before the Tribunal. Of course, the fact-finding process is entirely a matter for the FtT to determine, based on the individual case, the expertise of the panel and its assessment of the evidence before it. While never an easy task, the Tribunal should always assess the reliability and credibility of all evidence presented to it, including the oral evidence of any party at an oral hearing of an appeal (*R(DLA) 6/06*), should state the evidence (or part of it) it accepts and rejects and should give reasons for its conclusions accordingly. This is particularly important when assessing whether a functioning alcohol dependent Appellant meets the statutory criteria for an award of PIP or otherwise. Despite the name, it would be incorrect to assume that a "functioning alcoholic" meets the functionality threshold for PIP and is therefore ineligible, as the legislation requires thorough fact finding, rather than jumping to such a conclusion.

The "physical or mental condition": Alcohol Use Disorder

40. As is well known, the key issue involved in the determination of all PIP cases, is whether an Appellant's ability to carry out daily living and/or mobility activities is limited (or severely limited) by the Appellant's physical or mental health condition (ss.78-79, Welfare Reform Act 2012). The starting point, as with any assessment of eligibility for PIP, is to make findings of fact on what, if any, medical conditions are in operation for the required period around the date of the PIP claim (Welfare Reform Act 2012, s.81; PIP Regulations 2013, Regulation 14). Alcohol Use Disorder is a "mental condition" which has the potential to impact on the Appellant's functionality for the purposes of PIP (applying the principles in *R(DLA) 6/06*).

41. In a case involving an alcohol reliant Appellant, the fact-finding process to determine whether that is the medical condition at play will be straightforward where there are medical records with a confirmed medical diagnosis of AUD and/or reference to alcohol misuse within the appeal papers. In such a case, assuming the medical records and/or

diagnosis is based on reliable evidence which is accepted by the FtT, it can be taken that a Appellant diagnosed with Alcohol Use Disorder, misuse or abuse, has a qualifying "physical or mental condition" (a known mental condition) which, if subsequently found to cause limited or severely limited ability to carry out the daily living and/or mobility activities, i.e., to cause a "tangible impact" upon the Appellant's functionality and activity during a day, may well lead to an award of PIP (*SD v SSWP (PIP)* [2017] UKUT 310 (AAC)).

42. If alcohol misuse is not officially diagnosed within any disclosed medical evidence or otherwise within the papers, then "a Tribunal will simply have to do its best, take a broad view of the evidence where appropriate and rely upon its expertise" (*SD v SSWP (PIP)* [2017] UKUT 310 (AAC), at paragraph 25). The FtT should consider exercising its inquisitorial powers to adjourn to obtain relevant medical evidence within which such a diagnosis, or reference to alcohol use, is likely to be contained. This will inevitably require some discussion with the Appellant to ascertain whether such medical evidence is potentially in existence, and to ascertain whether the Appellant is willing and able to provide the FtT with it. If after speaking to the Appellant, it appears there is not likely to be such a medical diagnosis in existence or limited reference to alcohol abuse within his/her medical reports, for example in the case of an Appellant who is in denial of the amount of alcohol he/she consumes, or who rarely attends his/her GP to obtain medical assistance with the condition, it is within the remit of the medically qualified member of the panel to make suitably appropriate enquiries, along the lines of the guidance contained within *R(DLA) 6/06*, to gain a medico-legal understanding of the Appellant's alcohol consumption and whether such consumption is akin to that of alcohol use disorder, and to what extent. While it is never appropriate for the Tribunal to diagnose an Appellant with a medical condition, it may be highly evident from the evidence, if accepted, that the Appellant, as a matter of fact, drinks to excess in absence of self-control over that drinking, which in turn, has the potential to cause him/her to have limited or severely limited ability to function on a day-to-day basis. In *R(DLA) 3/06* it was decided that it was not necessary for an Appellant to have a diagnosis of a specific disease or medical condition in place, but simply to demonstrate that his/her limited ability had some underlying cause that was either physical or mental, with "mental" implying any mental health condition, intellectual impairment or cognitive impairment (*R(DLA) 3/06*). In short, the cause of limited functionality must simply be more than

irresponsible behaviour or a personality trait. Consequently, I take the view, that a diagnosis of AUD, which amounts to a recognised mental health condition in itself, is not critical to allowing the Tribunal to go on to make findings of fact that excessive alcohol consumption beyond the Appellant's self-control, potentially coupled with connected medical conditions (and combined or singular effects) are the underlying cause of an Appellant's functional limitations for the purposes of the PIP activities and descriptors.

43. Of course, if after expert questioning of the Appellant, the Tribunal find that they are dealing with an undiagnosed Appellant who drinks to excess, but not in such a way that is indicative of addiction, misuse and/or dependence, then it is unlikely that this is a case of alcohol use disorder leading to any possible functional limitation(s). If this is the panel's finding, then they need go no further in their exploration of the effect of functionality from the point of view of the Appellant's excess alcohol consumption, as this will not therefore be a disabling condition for the purposes of this Appellant's PIP claim. The FtT will of course give reasons as to why they consider the alcohol consumption not to amount to a medical condition for the purposes of the PIP claim so that all parties to the case can understand the thinking behind this finding.

44. A common reason advanced by a Tribunal to explain why they consider an Appellant not to be alcohol dependent, is that of "choice". It has been reasoned by some Tribunals that the Appellant has choice over when and how much alcohol he/she consumes therefore, there is no medical condition at play for the purposes of the PIP claim. Use of the term "choice" must be used carefully. As stated in *R(DLA) 6/06*:

> *32. …It is no part of a medical definition of alcoholism that the condition is "uncontrollable" in the sense that it is absolutely impossible for a person to control the condition, e.g. by becoming and remaining abstinent. We have already referred to the DSM IV diagnostic criteria for dependence (see paragraph 18 above). The definition is expressed in terms of consequences rather than causes and does not imply a complete loss of control, …. This definition shows that it is inappropriate to think in absolute terms of choice or no choice.*
>
> *33. Rather than a clear-cut distinction between dependence and choice, in our judgment it is more helpful to think in terms of the degree of self-control that is realistically attainable in the light of all of the circumstances, including the Appellant's*

> *history and steps that are available to him to address his dependence. A person who cannot realistically stop drinking to excess because of a medical condition and cannot function properly as a result can reasonably be said both to be suffering from disablement and to require any attention, supervision or other help contemplated by the legislation that is necessary as a consequence of his drinking. We can see no reason why the effects of being intoxicated should not be taken into account in determining his entitlement to the care component of DLA.*

45. So rather than "choice", a Tribunal should think of the alcohol consumption in terms of the amount of self-control an Appellant has over his/her drinking. Indeed, it may indeed be the case that the Tribunal find as a matter of fact that an Appellant has sufficient self-control, in which case alcohol consumption is not a disabling condition affecting his/her functionality. Again, reasons will be given as to how and/or why this conclusion was reached.

46. It is, however, imperative that the FtT do not make finding that the Appellant is alcohol dependent, *and* [my emphasis] that the consumption of alcohol is a "lifestyle choice" as was the case in the current appeal. These two findings are oxymoronic in nature. To say that an Appellant has alcohol misuse, and that his/her alcohol consumption is a lifestyle choice, is akin to saying that the Appellant has arthritis in his knees, and this arthritis, with associated pain in his knees, is a lifestyle choice: it does not make sense. Similarly, if drinking alcohol to excess is an Appellant's lifestyle choice, then the issue of alcohol misuse does not arise because self-control over when and how to consume alcohol implies an element of choice over the alcohol consumption; it is a lack of self-control towards the use of alcohol which is a key indicator of alcoholism. Consequently, to my mind, the FtT can make one of two findings: either the excess alcohol consumption is a lifestyle choice (giving reasons for this finding) in which case there is no alcohol misuse and no medical condition which is in play for the purposes of the PIP claim, *or* the Appellant is alcohol dependent, in which case, his/her drinking is not a lifestyle choice and there is a medical condition (alcohol use disorder) potentially affecting functionality. It is fair to say that alcohol misuse may have started as a result of lifestyle choice i.e., a conscious decision to drink excessively, which thereafter got beyond the point of an ability to exercise self-control over the amount and timing of any alcohol consumed to the point of addiction. Nevertheless, a Tribunal must not conflate any disapproval of the underlying cause of alcohol misuse with the fact that it is, in fact,

a medical condition. Any addiction, whether that be linked to drugs or alcohol, is difficult to overcome, can cause huge difficulties in life, and is therefore far from a lifestyle choice.

Other physical or mental conditions

47. Along with findings of fact regarding the Appellant's use of alcohol, the FtT should make findings about any other related or unrelated medical conditions suffered by the Appellant in the usual way. A separate medical condition arising from the excessive consumption of alcohol may give rise to disabling manifestations which may, in turn, be relevant towards assessing entitlement to PIP, regardless of whether the condition is related to alcohol dependence or not (*R(DLA) 6/06*). It may well be the case that an Appellant who does not have an official diagnosis of AUD, may have a diagnosis of other medical conditions, secondary to the alcoholism or otherwise. For example, an undiagnosed alcoholic, potentially a functional alcoholic who has ignored the symptoms, but who demonstrates dependence on alcohol and consumes it in the absence of self-control for the majority of the time, may actually suffer with diagnosed depression, and the fact that alcohol has never been mentioned to the doctor, is the reason why alcohol misuse has not been investigated to the point of diagnosis. If this is the sole medical condition at play, it is the issue of depression that will become the medical condition which is scrutinised for the purposes of the assessment of the Appellant's functionality for PIP. It should be borne in mind that a combination of a diagnosed medical condition, alongside alcohol abuse (or similar behaviour) may give rise to functionality issues when taken together. All medical conditions found as a matter of fact to be in operation at the date of claim, whether physical or mental, may give rise to issues of functionality with regard to the PIP activities and it is important that the FtT give reasons for their findings in relation to all the medical condition(s) they find to be involved in the Appellant's case, particularly if they are claimed by the Appellant but thereafter not considered by the Tribunal to be either disabling or relevant for the purposes of the claim for PIP.

48. If the FtT determine that there is a medical condition affecting functionality, whether that amounts to a diagnosis of AUD, behaviour which appears to be a case of undiagnosed AUD, or some other related medical condition, then the FtT must be satisfied that the condition(s) was (were) in operation at the time when the Secretary of State's decision

regarding the Appellant's eligibility for PIP was made (s.18 Welfare Reform Act 2012; Regulations 12 and 13 of the PIP Regulations 2013). In particular, the FtT must be satisfied that the required period, namely the pre-qualifying period of three months prior to the date of claim, together with post-qualifying period of nine months after the date of claim, is satisfied, or was likely to have been satisfied. The FtT will again give reasons for their findings, especially if there has been some change or a finding that one of the medical conditions was not in operation at the date of claim.

Effects of alcoholism: Short term and long term

49. If a Tribunal finds, as a matter of fact, that alcohol misuse is at play at the relevant time, findings should be made to determine the extent of this condition and how it effects the Appellant. The approach set out in the leading case of *SD* (see above) indicates that this can be achieved by consideration of: (1) the severity of the addition; (2) the frequency and degree of intoxication within each day; and (3) the impact this has on the Appellant's ability to perform the PIP activities reliably. The activities and descriptors pertaining to the daily living component appear in Part 2 of Schedule 1 of the PIP Regulations 2013 and those relevant to the mobility component appear at Part 3 of the same Schedule. The process of initially assessing the effects of alcoholism on the Appellant, will be a pre-requisite to assessing the Appellant's general functionality, and thereafter, to making findings about the Appellant's functionality in relation to the specific activities and descriptors contained within the PIP Regulations 2013. It is advisable, given the complexity of alcohol misuse, to break the fact finding down in this way.

50. While I am reluctant to make the approach more detailed for any busy, professional and time constrained Tribunal, I consider that some additional guidance may assist, not least to assist the already busy Tribunal in getting straight to the point efficiently. As the detail of the fact-finding process is especially important, without the appropriate detailed considerations, the ultimate question of eligibility for PIP may not be effectively determined without them. In the first instance, the Tribunal should ascertain, to the best of their ability: what alcohol the Appellant typically consumes and his/her daily drinking patterns; what time of day and/or week is alcohol typically consumed; and how much alcohol is consumed at those times? Is the Appellant able to exercise self-control over his/her alcohol consumption? Is the Appellant trying to withdraw from alcohol abuse?

Does the alcohol consumption (or withdrawal from it) have any short-term (i.e., immediate, at the time of consumption) effects on the Appellant? Are the short-term effects physical, mental or indeed both? The immediate effects of alcohol consumption are wide ranging and are likely to vary from person to person. Short term effects of alcohol may include, for example, loss of balance, slurred speech, intoxication, cravings, vomiting, nausea, memory lapses. The effects may be dependent upon whether the Appellant is drinking or withdrawing from alcohol, or whether he/she is somewhere in between e.g., abstaining and/or re-lapsing. Short term withdrawal symptoms may include, for example, shaking, nausea, vomiting, and tremors. Do any short-term (immediate) effects vary in intensity throughout the day, dependent perhaps upon the amount of alcohol consumed (or not consumed)? The detail is important to consider.

51. Equally, alcohol abuse can lead to longer term effects, both physical and/or mental such as pain or lack of motivation. Such long-term effects may of course be discreate illnesses in themselves for example, depression, or cirrhosis of the liver (see paragraph 32 of this judgement). The Tribunal should make findings about any long-term effects, including the symptoms and effects of any related, and indeed unrelated, medical condition, as once again, such effects, when taken together, may impact upon the Appellant's ability to undertake the PIP activities and descriptors, which is ultimately the determining factor in any appeal.

52. The Tribunal should be mindful of the fact that the effects of alcohol misuse, potentially coupled with the effects of other medical conditions, may give rise to certain behaviours in the Appellant, for example apathy, social inhibition, or aggression towards others. Again, these behaviours may appear at differing times throughout the day dependent upon the drinking (or abstaining) patterns found to be the norm. Consider an Appellant who is found to drink 25 cans of strong lager every day, starting from the moment they wake and only concluding the moment they fall asleep. The effects of this pattern of drinking may result in the Appellant feeling physically tired, disorientated, and unbalanced throughout the day. These effects may increase steadily as the day progresses such that they are not felt at the start of the day but are much more obvious as the afternoon progresses into evening. Long term, this pattern of drinking, may have led to diagnosed depression causing the Appellant to feel mentally disinterested in their

life, and it may cause displays of angry and discourteous behaviour towards anyone who interrupts their daily routine of persistent alcohol consumption or who challenges them.

53. So, the effects of alcohol addiction are likely to be both short term (immediate) i.e., experienced at the time of the alcohol consumption, as well as long term, i.e., underlying the alcohol consumption, potentially discrete medical conditions in themselves, and such impacts may progressively get worse as the alcoholism continues over weeks, months and years. This creates something of a layered effect influencing the functional impact on the Appellant which again may vary over time (weeks, months and/or years) and according to how the addiction persists. Gaining an understanding of how the Appellant's typical day evolves (based upon accepted evidence), will assist a Tribunal in establishing the variation in effects, and thus any potential loss of functionality regarding the activities, as well as confirming whether those effects are related to the alcohol consumption, another medical condition, or something else entirely.

54. Of course, it may be the case that a Tribunal finds an Appellant is abstaining from alcohol and is thus withdrawing from his/her alcohol consumption arising from alcohol misuse. He or she may be somewhere in between, for example, undertaking spells of abstaining followed by spells of excessive re-lapsing. In this case, the FtT should make findings of fact as set out above, focusing on the pattern of drinking and/or abstaining, and the effects (long and short term) on the Appellant when under the influence of alcohol as well as when abstaining from alcohol.

55. The Appellant's "control" over his/her alcohol consumption is an enquiry to be made with caution at this stage, particularly if a finding of alcohol misuse has been made, as it has already been determined that self-control is generally absent by virtue of such a diagnosis/finding. It is always appropriate to double check levels of self-control at varying times of the day, particularly in an undiagnosed Appellant or with a functioning alcoholic. The latter may be able to manage avoiding alcohol until after work, at which point he or she drinks excessively and uncontrollably until falling asleep. In such a case, and perhaps after a long period of such a pattern of drinking, this may result in short term effects of inebriation, loss of balance, and slurred speech every evening, and longer-term effects each morning such as drowsiness, headaches, and joint pains which slow the Appellant down through the day, and symptoms of depression, which last until

they are relieved by the excessive alcohol consumption at the end of the following working day. And thus, the cycle continues. It is also worthy of note that a long-term alcoholic tends to develop an increasing tolerance to alcohol, which means that the same amount of alcohol will have less effect, and this may be the factor that assists a functioning alcoholic to disguise his or her addiction and give the impression that they are successfully achieving life. Equally, there would normally be complete recovery within about 6 hours of the consumption of alcohol such that a regular drinker may be less drunk in the morning than in the evening (see expert evidence given in *R(DLA) 6/06*) and this should be taken into account. A tendency to deny the reality of alcohol actually consumed is a possibility with any alcoholic, including a functioning alcoholic, usually done so as to retain employment and keep up appearances of normality. If it appears to be the case that denial is at play, then the evidence should be tested with subtle and non-judgemental questioning designed to tease out the reality. A Tribunal should be prepared to look behind the appearance and establish as accurately as possible what life is like for an alcohol dependent Appellant from a real-world context, rather than through the Appellant's rose-tinted spectacles, which may be used to hide shame or embarrassment.

56. From the conclusions on the effects of the Appellant's alcohol misuse, as well as any effects arising from linked or discrete medical conditions, the Tribunal can thereafter get to the crux of the appeal and make findings regarding the Appellant's functionality in relation to each of the specified PIP activities contained within Schedule 1 of the PIP Regulations 2013. In other words, the question for the Tribunal is: what impact do the effects of the alcohol addiction, both physical and/or mental, have upon the Appellant's ability to manage the list of prescribed daily living and mobility activities? Making findings on the general effects of alcohol addiction will assist in determining which activities are in issue in the appeal, especially in the case of an unrepresented Appellant who may be unsure of how best to proceed with his/her appeal. It may be, for example, that a lack of motivation caused by excessive drinking, causes the Appellant to be unable to do anything other than drink alcohol, eat snacks, use the bathroom and watch TV throughout the day, therefore the activities of preparing and cooking a meal, washing and bathing, dressing, engaging with others (for example) will be the obvious descriptors that may be impacted. Alternatively, it may be the case that an alcoholic manages to undertake all the PIP activities despite his alcohol addiction, in which case a closer look

will be required, as it is not simply a case of basic functionality which applies, but rather whether that apparent functionality can be achieved "reliably" as per Regulation 4 of the PIP Regulations 2013.

Regulation 4(2A) PIP Regulations 2013

57. In accordance with Regulation 4 of the PIP Regulations 2013, an Appellant's ability to carry out an activity is assessed as if wearing or using any aid or appliance which the Appellant normally wears or uses or could reasonably be expected to wear or use (Regulation 4(2)). Furthermore, in making the assessment of ability, regard must always be had to Regulation 4(2A) of the PIP Regulations 2013:

> ***Assessment of ability to carry out activities***
> *4.(1) …*
> *(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.*
> *(4) In this regulation—*
> *(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."*

Regulation 4(2A): Safely

58. An activity is completed "safely" if done so in a manner unlikely to cause harm to the Appellant or to another person, either during or after completion of the activity (Regulation 4(4)(a)). The question for the FtT is therefore one of risk: is there a

"possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm" (*Wallis v Bristol Water plc* [2010] PTSR 1986). An Appellant cannot be found to have accomplished a PIP activity safely "if the risk involved is one that cannot sensibly be ignored" (*RJ; GMcL; CS v SSWP* [2017] UKUT 105 (AAC). Risk is assessed on the basis of the degree and the likelihood of harm occurring, hence the Tribunal have to undertake something of a crystal ball gazing exercise in making findings on this point.

59. It is fair to say that the state has legislated for a safety element of alcohol consumption, when combined with functioning, in the form of drink driving laws. As a result of scientific evidence indicating that the consumption of alcohol adjusts the user's cognitive function and slows reaction times, it can be taken as a starting point that the consumption of alcohol by an alcohol dependent Appellant will have a similar effect, which absolutely calls into question the issue of safety in respect of each of the PIP activities for which safety is particularly relevant. In a case involving an alcohol dependent Appellant, a Tribunal has to undertake the guesswork exercise of risk assessment based upon its findings on the effects of alcohol on the particular Appellant; is there a real possibility that cannot be ignored, of harm occurring, with regard to the nature and gravity of the feared harm in the particular case, including both the likelihood of the harm occurring as well as the severity of the consequences (*RJ v SSWP* [2017] UKUT 105 (AAC); [2017] AACR 32) In other words, do the known effects of alcohol on the Appellant give rise to a real risk of harm that cannot be ignored? For example, an Appellant who suffers from tiredness, loss of balance and forgetfulness as a result of day-long drinking, may be at risk of leaving a pot on the hob to boil dry and risking a fire in the kitchen. Does the Appellant cook sufficiently often for this risk to be real? Are the effects so severe that the risk is increased? In the case of a functioning alcoholic, the Tribunal must proceed with caution. Long term alcohol use, may effect, for example, cognitive function more, therefore, despite appearances from the outside, an Appellant who is undertaking the activities seemingly without an issue, may actually be putting himself at risk because of his reduced cognition which means he is not sufficiently safe to follow cooking instructions or to react quickly and/or appropriately in an emergency. Matters such as this should be borne in mind and explored as appropriate.

60. Of course, it cannot automatically be assumed that an alcohol dependent Appellant, whether a functioning alcoholic or otherwise, will be unsafe to function, as the question

of functionality is much more subjective and fact specific. It may be that the consumption of alcohol steadies the alcohol dependent's balance and limbs to enable him or her to function safer in the kitchen, for example. Nevertheless, detailed findings of fact regarding how the Appellant achieves each of the activities will be required. Equally, the credibility of the Appellant's claims, either regarding an ability or lack of ability to undertake each activity, should be tested, remembering of course that AUD is a mental health condition, hence denial, bravado, shame or embarrassment can tint the reality. An example discussed at the oral hearing of the current case is a good one to illustrate this point; a city worker who consumes a half bottle of vodka before work at 9am and then goes into a business meeting may have no self-control over the consumption of alcohol but has built up a high tolerance to it, such that he makes his way to work while under the influence of alcohol and can engage with his colleagues effectively. He may well be able to manage through a business meeting with the alcohol in his system, perhaps heightening his performance and ability to function, but the question still remains, can he be said to be safe in the kitchen when under the influence of this alcohol in this manner? Might he fall asleep if he lies in the bath? Facts need to be found carefully and a decision made, setting aside the ability to apparently function successfully. The question is whether the Appellant's functioning in the specific PIP activities is actually safe i.e., are there any risks that cannot be ignored to be taken into account? Are there any linked medical conditions which may trigger such risks, for example, the risk of blackouts as a result of alcoholism, which were a feature in the current case, and which were mentioning sufficiently often in the paper evidence so as to be highly deserving of the Tribunal's attention and fact-finding in relation to the question of safety.

61. The element of safety does not feature as significantly for some of the activities, for example the ability to manage money safely is not necessarily as significant as the ability to cook safely. These assumptions still apply in relation to an alcohol dependent Appellant, although a broader view may have to be taken when considering that cognitive function and thinking skills may be impaired such that an alcoholic may request and/or send money to inappropriate places in haste, deal with a loan shark for example, or to lack an ability to manage money effectively (which may in fact relate to the question of acceptable standards). An open and enquiring mind must be maintained by the Tribunal when considering the evidence presented and the facts of the particular case.

62. Judge Jacobs posed the question: is a functioning alcoholic safer when under the influence [of alcohol] and able to function or when he is not? The answer must therefore be, that this will vary from case to case. The process of the activity in question must be considered in real and individual terms, and findings of fact must be made as to how, and in what state, the alcoholic Appellant undertakes that activity. Only then can a determination be made by the Panel as to whether the activity is completed safely or otherwise for the majority of the time. While the starting point must be that alcohol certainly has the ability to effect safety (as per the drink driving rules), the Tribunal cannot assume anything, must deal with this question on a case-by-case basis, keeping an open mind on the potentially questionable actions of an alcoholic dependent Appellant, and must not jump to conclusions one way or the other. This will involve an educated and well-informed risk assessment, with reasons given as to the conclusion, based on the findings of fact as to the effects of alcohol on the Appellant, arising from the typical pattern of drinking and alcohol consumed.

Regulation 4(2A) Acceptable standard

63. "Where [the Claimant's] ability to carry out an activity is assessed, [the Claimant] is to be assessed as satisfying a descriptor only if [the Claimant] can do so… (b) to an acceptable standard" (Regulation 4(2A), PIP Regulations 2013). The concept of an "acceptable standard" is not defined in the Regulations but it should be given its everyday meaning and should be determined with reference to both an objective viewpoint and a subjective viewpoint: does an independent outsider consider the activity to be done to an acceptable standard, and does the Appellant consider the activity is done to an acceptable standard also (*PA v SSWP (PIP)* [2019] UKUT 270 (AAC)). The Department of Work and Pensions PIP Assessment Guide, which is not legally binding but which provides helpful guidance, suggests that an acceptable standard is anywhere between an extremely high standard at the top end of the range and a "not perfect but sufficient" standard at the lower end of the range (paragraph 2.2.12). It can therefore be said that an acceptable standard is a standard which is "good enough".

64. The term overlaps with the concept of safety in that an activity cannot be done to an acceptable standard if it is not safe to undertake it in that manner. However, simply because an activity is completed safely, does not mean that it is being completed to an

acceptable standard, so the two concepts must still be considered separately. For example, putting on clothes which are malodorous is not dressing to an acceptable standard (*DP v SSWP* [2017] UKUT 156 (AAC)), but dressing in shorts and t-shirt during a snowstorm is both dressing to an unacceptable standard while also causing a risk of ill health to the Appellant, which contravenes the element of safety also. In this manner, if it is the Appellant's excess alcohol consumption which is causing him/her to make decisions about an activity, or to undertake an activity in a manner which falls below an acceptable standard, whether the activity is undertaken safely or otherwise, then the descriptor is satisfied, bearing in mind that the 50% rule must also be satisfied (see later).

65. An alcohol dependant Appellant may be dependent on alcohol for functionality. For example, the City worker who requires the consumption of vodka before going to work to make it through his or her meetings and business deals. While this gives the impression that functionality is satisfied, the Tribunal must give consideration to the potential that alcohol is the reason why the functionality is actually taking place; it may be something of a prop. The question therefore has to be: is it functioning to an acceptable standard if alcohol is required to secure the functioning? To my mind, it is not, but if course this is a matter of detailed fact finding for the Tribunal to undertake. How much alcohol is required to function? A small amount may not be as concerning as a larger amount although the question of safety must also be considered given that higher amounts of alcohol is likely to lead to increased effects on functionality. If alcohol was removed from the equation, could the Appellant function sufficiently without it? If so, then there is no causal link between the alcohol consumption and the functionality in which case, there is no issue. Are there potential risks involved in functioning with alcohol as the prop (returning to the question of safety)? The Tribunal may find that carefully comparing and contrasting the effects of functionality on an alcohol dependent Appellant, both with and without alcohol consumption, assist to make reasoned findings and conclusions on the question of acceptable standards.

Regulation 4(2A): "Repeatedly" and "reasonable time frame"

66. "Where [a Claimant's] ability to carry out an activity is assessed, [the Claimant] is to be assessed as satisfying a descriptor only if [the Claimant] can do so… (c) repeatedly; and

(d) within a reasonable time period." (Regulation 4(2A), PIP Regulations 2013). To complete an activity "repeatedly" means to do so as often as the activity being assessed is reasonably required to be completed (Regulation 4(4)(b), PIP Regulations 2013). An activity is completed in a "reasonable time period" providing it takes 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 the activity (Regulation 4(4)(c), PIP Regulations 2013).

67. Once again, an assessment of the impact of the Appellant's alcohol consumption and its effects on functionality will be the key findings to enable the Tribunal to determine how often an activity is able to be completed while under the influence of alcohol (or otherwise), and the length of time it takes an alcohol dependent Appellant to complete it. The Tribunal should bear in mind that cognitive function and judgement may well be affected by the excessive consumption of alcohol. A functional alcoholic must be considered carefully. He/she may appear to be able to complete an activity and to function more efficiently after consuming alcohol rather than without it, but he may be much slower than someone without an alcohol addition, due for example, to a repeated making of errors, to an unsteady hand, due to unsteady balance. Equally, a lack of motivation may mean that an activity, while completed effectively once per day, is not done as often as it is reasonably required to be done, due to the lack of motivation arising from alcohol addiction and perhaps a need to satisfy that addiction by excess consumption after work, to the detriment of all other activities. For example, an alcohol dependent Appellant who does not eat other than once per day in the evening, may not be able to prepare and cook a meal repeatedly because the alcohol causes him to prefer drinking over the activity of preparing a meal except when absolutely overwhelmed with hunger in the evenings. Bear in mind that the undertaking of an activity must not be within circumscribed situations for an Appellant so as to conveniently fit the legislative framework; he or she should be assessed on the basis of what the Appellant chooses to do (within reason) (*EG v SSWP (PIP)* [2017] UKUT 101 (AAC); *Secretary of State v Fairey* [1997] 1 W.L.R. 799).

68. In light of the rules contained within Regulation 4(2A) of the PIP Regulations 2013, the Tribunal should not jump to the conclusion that an alcohol dependent Appellant, who gives the impression of being able to function satisfactorily, is in fact functioning

"reliably". There are many potential considerations to take into account, bearing in mind this four-stranded legal test, and as such it demands careful investigation and reasoned fact finding which is tailored to each individual case.

Regulation 7: the "50% rule"

69. Regulation 7 of the PIP Regulations 2013, often referred to as "the 50% rule" is of particular use regarding an Appellant who has a variable condition and is therefore likely to be of significance to a functional alcoholic. This Regulation provides that points for a descriptor will only be scored if an Appellant satisfies it for 50% or more of the days of the assessment period ("the required period"):

> ***Scoring: further provision***
>
> *7.—(1) The descriptor which applies to C in relation to each activity in the tables referred to in regulations 5 and 6 is —*
>
> *(a) where one descriptor is satisfied on over 50% of the days of the required period, that descriptor;*
>
> *(b)where two or more descriptors are each satisfied on over 50% of the days of the required period, the descriptor which scores the higher or highest number of points; and*
>
> *(c) where no descriptor is satisfied on over 50% of the days of the required period but two or more descriptors (other than a descriptor which scores 0 points) are satisfied for periods which, when added together, amount to over 50% of the days of the required period–*
>
> *(i) the descriptor which is satisfied for the greater or greatest proportion of days of the required period; or,*
>
> *(ii) where both or all descriptors are satisfied for the same proportion, the descriptor which scores the higher or highest number of points.*
>
> *(2) For the purposes of paragraph (1), a descriptor is satisfied on a day in the required period if it is likely that, if C had been assessed on that day, C would have satisfied that descriptor.*
>
> *(3) In paragraphs (1) and (2), "required period" means —*

> *(a) in the case where entitlement to personal independence payment falls to be determined, the period of 3 months ending with the prescribed date together with–*
>
> > *(i) in relation to a claim after an interval for the purpose of regulation 15, the period of 9 months beginning with the date on which that claim is made;*
> >
> > *(ii) in relation to any other claim, the period of 9 months beginning with the day after the prescribed date.*
>
> *(b) in the case where personal independence payment has been awarded to C -*
>
> > *(i) during the period of 3 months following a determination of entitlement under a claim for the purpose of regulation 15, the period of 3 months ending with the prescribed date together with, for each day of the award, the period of 9 months beginning with the day after that date;*
> >
> > *(ii) in any other case, for each day of the award, the period of 3 months ending with that date together with the period of 9 months beginning with the day after that date.*

70. The "required period" during which the Appellant is assessed, in general terms, is the three months preceding the claim as well as nine months after the date of claim (as a general rule). Consequently, if it was the case that the Appellant attempted an activity every day over a period of one year, he or she should satisfy a descriptor on more than 50% of the days (the majority of days) over that year. If a descriptor applies at any time within a period of 24 hours, it should be regarded as applying on that day (*TR v SSWP* [2015] UKUT 626 (AAC)). If two or more descriptors are satisfied for the required period, the descriptor attracting the highest score is the one that applies (Regulation 7(1)(b)).

71. In a case involving an alcohol dependent Appellant, the Tribunal will no doubt return again to its findings of fact in relation to the medical condition(s), the effects upon the Appellant and the impact on the Appellant's functionality. The findings in relation to the Appellant's patterns of drinking behaviour and the variation of any effects of such drinking, will be most relevant towards the determination of whether the Appellant meets a descriptor when the Tribunal applies Regulation 7 to the facts of the case. The

example of the extreme alcoholic, who consumes alcohol to excess from morning to night, and who experiences feelings of being physically tired, disorientated and unbalanced throughout the day, coupled with long term depression and aggressive behaviour towards anyone who challenges him or her, is likely to meet the descriptors for over 50% of the required period quite easily and is therefore likely to score points. It may be more difficult to determine whether the descriptors are satisfied for a functioning alcoholic, in which case, the Tribunal will have to use their judgement and expertise as best they can. The findings of fact regarding the effects of the Appellant's drinking for over 50% of the time, across a typical week within the required period perhaps, will assist in assessing functionality on the basis of any limitations which are directly attributable to the alcohol addiction or any other medical condition (*AH v SSWP (PIP)* [2016] UKUT 541 (AAC). In a situation where multiple medical conditions, including alcohol addiction, affect an Appellant separately on different days of the week, the case of *AK v SSWP (PIP)* [2015] UKUT 620 (AAC) provides a formula for working out the probability of a descriptor being satisfied on over 50% of the time across all medical conditions or when there is a variation in functional effects from day to day. This case further highlights the importance of making detailed findings of fact in relation each effect and functional limitation arising from a medical condition, including alcohol misuse, so that an assessment of whether the descriptors are met can be made as accurately as possible.

72. Hence it will always be a significant undertaking to determine whether a functional alcoholic meets each of the descriptors at the various times of the day, whether under the influence of alcohol or not, and whether there is a difference in the effects of that alcohol consumption or not, as appropriate. A functional alcoholic may drink to excess at set times of the day and/or may manage to undertake the PIP activities despite any excess alcohol consumed at some times of the day and not at others. The causes of this limited functionality must be factually established. Some of the PIP activities usually take place at certain times of day or night, for example preparing and cooking a meal is typically undertaken three times per day, at in the morning, middle of the day and again in early evening. Other activities may take place as often as an Appellant may wish or require to undertake them (*CE v SSWP (PIP)* [2015] UKUT 643 (AAC)), for example taking pain medication and/or engaging with other people, hence these descriptors may be more easily satisfied depending upon the circumstances. Similar to *TR v SSWP*

(PIP) [2015] UKUT 626 (AAC), regarding the effect of medication at varying times of day, the consumption of alcohol and its impact at varying times of day may not inhibit the Appellant's daily activity in such a way that for at least 50% of the relevant period, a descriptor is satisfied, depending upon the activity in question.

73. An Appellant, in oral evidence, will no doubt inform the tribunal of his/her limitations with regard to each of the activities. The evidence should not be taken at face value but should be tested; this applies to both bold claims and those of denial. One alcohol dependent Appellant may state that he/she cannot leave the house but a simple question such as how he/she gets his/her alcohol from the shop may be a suitable check on that claim. Equally, an alcohol dependent Appellant in denial, may claim to be able to achieve all descriptors effectively. For example, he may state that he is able to get dressed and out of his pyjamas every morning but enquiring whether that change of clothes is into something clean and fresh each day, rather than into the same attire each day, is another such test on the evidence. Equally, a Tribunal must test the evidence of the medical assessment report. For example, given the findings on the variability of the Appellant's effects throughout the day, was he or she assessed for PIP at a particularly functioning time of the day? If so, that may explain a report which suggests no limitations on the activities. It may also explain a report which is full of limitations if undertaken at the end of the day when an alcohol dependent Appellant is completely intoxicated and most significantly under the influence of the effects of alcohol consumption.

74. So, if the Tribunal find as a matter of fact, that the Appellant is consuming alcohol such that it effects his function for more than 50% of the time, then it is likely to affect his ability to undertake the specific activities more than 50% of the time. If an alcohol dependent Appellant is abstaining from alcohol for more than 50%, the effects of that abstention will dictate his ability to undertake the specific activities for more than 50% of the time. If the Appellant only drinks excessively and without self-control at night but can manage without alcohol throughout the day, which amounts to more than 50% of the time, then this is how the activities are tested. An Appellant who drinks from dawn to dusk and remains in a state of constant intoxication for more than 50% of the time, will be tested on his ability to undertake the PIP activities on this basis. An alcohol

dependent Appellant must be tested on his ability to function according to how the Tribunal find him to be for over 50% of the required period.

Conclusion

75. Coming back to the case at hand, overall, I find that the FtT materially erred in law by failing to make findings of fact on some material matters, by making perverse findings of fact on some material matters, and by failing to give adequate reasons for its findings on some material matters. As a result, I set the decision of the FtT aside and I remit the case back to a differently constituted panel for re-determination. I request that the FtT, given the time that has elapsed since the original decision was made in 2017, should prioritise the listing of this case for re-determination at an oral hearing on a date which is convenient for the parties in the case.

76. The newly constituted Tribunal are to consider this appeal entirely afresh, and I trust it will do so in light of the guidance I have provided. In summary, this case, and others similar to it, require a careful process of fact finding. Alcohol Use Disorder is a complex mental health condition, which can have very serious implications for a patient. It may lead to secondary and/or possibly unconnected medical conditions, and will have mental and/or physical impacts on an Appellant. It is these impacts which may affect the Appellant's functionality in general and in relation to each of the PIP activities and descriptors. When a Tribunal makes a determination of eligibility for an alcohol dependent Appellant, it must be sure to very carefully consider "reliability" under Regulation 4 of the PIP Regulations 2013, as well as the 50% rule under Regulation 7 of the PIP Regulations 2013. Both physical and mental impacts must be taken into account, and the evidence must be adequately, yet respectfully, tested before it can be said to be credible and reliable.

77. Although I acknowledge that the procedural aspect of the guidance I have provided is not news to a Tribunal, who undertakes this process in every case it deals with, I bring particular attention to the process with regard to appeals involving an alcohol dependent Appellant as this is such a complex and highly variable condition. The addiction may well have arisen from a lifestyle choice to drink alcohol, and which has gone beyond the

point of choice to the point of substance addiction, however, it must be remembered that to have a recognised medical condition is not a choice in itself. Any form of substance addiction is not an overall pleasant experience for the sufferer, in the same way that anyone suffering from a more commonly encountered medical condition will not find it pleasant either. A Tribunal should be transparent with the Appellant in taking oral evidence; the appeal is not a moral judgement on his or her lifestyle and should never come across as being so. The Tribunal's decision as to whether his alcohol consumption effects his ability to function will require honesty on the part of the Appellant if the Panel are to be able to properly assess his appeal in accordance with the legal provisions. Consequently, an alcohol dependent Appellant should be encouraged to give his or her best evidence on the matter. This is more likely to be forthcoming if there is an open-minded atmosphere in the Tribunal room, which should be present within an inquisitorial jurisdiction in any event, and should in turn allow an Appellant to speak freely, and feel able to do so.

78. In the case of a functioning alcoholic, the same detailed fact-finding process must be adopted and no assumptions must be made. It is particularly important to engage the legislative rules contained within Regulations 4 and 7 of the PIP Regulations 2013 in such a case, as these rules will be the key determining factors in establishing whether a functioning alcoholic is eligible for Personal Independence Payment or not. A functioning alcoholic Appellant must be tested according to how he or she spends the majority of his time during the required period. In other words, if the Appellant is found by the Tribunal to be consuming alcohol and impacted by the effects of that consumption for more than 50% of the time, then this is how it must test the activities and descriptors. If the Appellant is found by the Tribunal to be abstaining and impacted by the effects of that abstention for more than 50% of the time, then this is how the PIP activities and descriptors must be tested. In considering safety, the Tribunal must remember that alcohol is known to effect cognitive function and reaction times, which implies that safety is potentially impacted, and particularly so as the amount of alcohol in the system increases. It cannot automatically be assumed however, that a functioning alcoholic is unsafe to function, hence detailed findings of fact must be made to determine the question in relation to each specific activity, based on the Appellant's functionality for more than 50% of the required period. While safety and acceptable standards are

interconnected, they are still exclusive concepts which must be considered as such. A functioning alcoholic may give the impression of functioning satisfactorily, but a detailed finding of facts based on the real-world experience of the individual Appellant, will allow the Tribunal to establish whether the activity is being performed at least to a "not perfect but sufficient" standard. Repeatability and time frames may also be impacted.

79. The overall question of functionality and indeed eligibility for PIP for any alcohol dependent Appellant, whether functioning or otherwise, will be entirely fact specific, and only the detailed findings of a specific and complex combination of facts as considered above, will be sufficient to adequately determine such a case.

Signed on the original
Authorised for issue on 27 August 2021

L. Joanne Clough
Judge of the Upper Tribunal