IN THE UPPER TRIBUNAL **Appeal No: CE/2276/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at York on 21 April 2015 under reference SC009/14/00462 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) The appellant is reminded that the tribunal can only deal with his situation as it was up to 18 November 2014 and not any changes after that date.

(3) If the appellant has any further evidence that he wishes to put before the tribunal which is relevant to his health and functioning in November 2014 this should be sent to the First-tier Tribunal's office in the Leeds within one month of the date this decision is issued.

(4) The First-tier Tribunal should have regard to the points made below.

REASONS FOR DECISION

Introduction

1. The central issue of law with which this appeal is concerned is whether the ½ or one litre carton full of liquid to be picked up and moved under descriptors 4(a) and 4(b) in Schedule 2 the Employment and Support Allowance Regulations 2008 (the "ESA Regs") is a closed or open carton. I have concluded that in context it has to be read as a closed carton. Spilling in the act of picking up and moving therefore does not arise.

2. This issue is important in this case because the appellant suffers from a medical condition termed 'hyperkinetic syndrome'. As described by his GP in a letter filed with Upper Tribunal at the permission to appeal stage:

> "This involves [the appellant] in having involuntary movements that are obviously out of his control. The movements are unpredictable and he also suffers with anxiety associated with this. This means that clinically his upper limbs can often be out of control….".

In a letter from a consultant neurologist from 2009 these movements are described as "twitches". The appellant referred to them as "involuntary spasms". All these descriptions are in my judgment referring to the same functional problem or difficulty. In the context of the appellant picking up and moving an *open* carton of full of liquid it is therefore likely that some of the contents of the carton will be spilled and so the exercise of moving such a ½ or one litre carton full of liquid will, arguably, not be able to be completed successfully (as once placed back down it will no longer be a ½ or one litre carton full of liquid).

Grounds of appeal

3. The above was but one of the grounds of appeal on which I gave the appellant permission to appeal from the First-tier Tribunal's decision of 21 April 2015 ("the tribunal"), after a hearing before me in December 2015. For convenience I repeat those grounds here.

> "**Ground one**. It is arguable that the tribunal erred in law in its approach to activity 16 (social engagement) in locating all of [the appellant's] problems under this heading as arising exclusively from his physical health condition of hyperkinetic syndrome. As Mr Cooper [for the Secretary of State] pointed out, the reasoning here arguably may be said to have failed to take account, or explore, whether [the appellant] had a mental health condition (anxiety) arising out of his physical health condition. All regulation 19(5) of the ESA Regs requires is, relevantly, that a claimant's incapability to perform activity 16 arises from a specific mental illness or disablement. The tribunal may arguably have failed to investigate adequately whether [the appellant] had a separate mental health disablement of anxiety, albeit one linked to his hyperkinetic syndrome. In that regard it may also be criticised for failing to address the HCP's finding (page 74) medically identifying [the appellant] as having the (separate) medical condition 'anxiety'. Further, even if on adequate investigation [the appellant] had not been awarded 15 points under activity 16, an award of some points under activity 16 may still have been relevant to whether the tribunal correctly approached regulation 29(2)(b) of the ESA Regs.
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> **Ground two**. It is arguable the tribunal erred in law in its approach to activity 5 (manual dexterity) in failing to address descriptor 5(d) under that activity (cannot use a suitable keyboard or mouse) – see page 129 and paragraph 30 of the reasons. The fact that [the appellant] previously owned and then sold his laptop *may* have been explained (this was not explored) on the basis that it was sold because he could not use it, and use of an ipad is not, at least without further by way of explanation, the same as using a keyboard or mouse. Descriptor 5(d) attracts 9 points if met. Had [the appellant] also been awarded 6 points under descriptor 16(c) then he would have qualified for ESA with the work-related activity component. On this basis, this ground amounts to an arguable material error of law.
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> **Ground 3**. This ground concerns descriptor 4(a) – cannot pick up and move a ½ litre carton full of liquid - worth 15 point[s] on its own. The tribunal recognised (paragraph 29 of its reasons) that [the appellant's] involuntary jerks may cause him to spill liquid from this carton in picking up and moving it. That neatly encapsulates the issue of law raised here: is the carton of liquid opened or closed? If it is open then on the tribunal's own analysis [the appellant] arguably ought to have scored 15 points because he does not complete this activity with the carton still full. Another way of raising the same

> point is to ask whether the task described under this descriptor is concerned only with hand/arm strength and grip or is also concerned with balance and coordination (so as not to spill the liquid). It may be instructive to note that the equivalent descriptors under the Incapacity for Work Regulations 1995 were concerned with "Cannot pick up and carry a 0.5 litre carton of milk with either hand" and "Cannot pick up and pour from a full saucepan or kettle of 1.7 litre capacity with either hand". The former did not include the word "full" (though it may be said to be implied because if not full then it would not be a ½ litre carton of milk) but did limit the liquid to milk. The latter does use the word "full" and was arguably concerned with items without a top, or at least not fully closed, as the liquid had to be poured out of them. Does this give any guidance as to what is meant by the carton full of liquid under activity 4? And do any Parliamentary materials (reports to SSAC, for example), identify why this particular wording was chosen?"

4. I refused the appellant permission to appeal on all or any other grounds he may have sought to advance. In particular, I concluded that there was nothing in the grounds advanced concerning, inter alia, allegations of bias and incompetence. The mere fact the tribunal found against the appellant did not amount to it being "biased". Nor was it "incompetent". Even if the tribunal did not correctly name or identify the appellant's main illness – hyperkinetic syndrome – its reasoning (subject to the above points) shows it correctly understood the functional effects of that illness and it is this which is key for the functional tests under ESA.

Discussion and conclusions

5. Having had submissions from both parties on the appeal, I allow this appeal on the basis that the tribunal erred in law on the first two of the grounds on which I gave permission to appeal. However I have concluded, primarily for the reasons given by the Secretary of State in his submission on the appeal of 6 January 2016, that there was no error of law on the third suggested ground.

6. I can deal with Grounds 1 and 2 relatively shortly as I am satisfied that the tribunal erred in law on both grounds. Had it addressed both areas

then it may have led to the appellant being awarded 15 points in total and therefore the errors of law are plainly material to the decision.

Ground 1

7. On activity 16 (social engagement) it is clear in my judgment that the tribunal focused, and founded, solely on the appellant's physical disablement – his hyperkinetic syndrome. This is apparent from paragraph 31 of its reasoning where it said in respect of activity 16:

> "so far as coping with social engagement is concerned, again, the Appellant's problems are not due to a cognitive impairment or mental disorder. The Appellant's embarrassment at involvement socially with third parties is due entirely to the understandable embarrassment that his condition does create when he is in the company of third parties. Again, however, his problems [here] are as a result of his physical condition and are not in any way related to a cognitive impairment or mental disorder and therefore.....the Appellant cannot score any points in respect of this descriptor."

8. This, however, leaves out of account, or at least fails to address, the appellant's medical condition of "anxiety" as medically identified by the health care professional (HCP) on the ESA85. It is noteworthy that the HCP did not find that the appellant scored no points under activity 16 because the cause of his social engagement problems was not due to a cognitive impairment or mental disorder. It was open to the tribunal to find that this was the case either (a) because, after investigation, it concluded that the appellant's "anxiety" had no causative role in his difficulties with social engagement (which might have been what it meant by its phrase "is due entirely"), or (b) because it did not accept he had a mental illness or disablement of anxiety at all. The fundamental problem with the tribunal's reasoning, however, is it does neither and, as I have noted, leaves the anxiety entirely out of account.

9. Moreover, if it was (a) then the reasoning does not address the anxiety at all and does not explain why it had no causative role in the accepted problems which the appellant had with social engagement. If this is a medical condition from which the appellant suffers as well as his

hyperkinetic syndrome then at face value it seems likely to have played some role at least in his social engagement problems. Moreover it did not need to be the sole cause of those problems. Following *MC –v- SSWP* (ESA) [2015] UKUT 0646 (AAC), at paragraph 9, the regulation 19(5)(b) ESA Regs "specific mental illness or disablement" only has to be an *effective* cause of the qualifying social engagement functional problems as set out in the descriptors under activity 16 and not the root or primary cause of those problems, although the anxiety condition must still amount to a cognitive impairment or mental disorder. As Judge Rowland explains further in paragraph 9 of *MC*:

> "...where a specific mental illness or disablement would not by itself have been sufficiently serious to enable a claimant to satisfy a descriptor, it is enough for the purposes of regulation 19(5)(b) that it has made the difference between the claimant being able to satisfy a descriptor and not being able to do so even though there may have been another, perhaps more important, cause."

The tribunal's analysis in this appeal fails to address the interaction between the appellant's anxiety and his hyperkinetic syndrome and whether the anxiety was the effective cause of any of the descriptors under activity 16 in Schedule 2 to the ESA Regs.

10. If, instead, (b) applies – that is, the tribunal was finding that the appellant's anxiety was not a specific mental illness or disablement - in so doing it had to act fairly and put the appellant on notice as to this, which it did not do: see paragraph 43 of *JG –v- SSWP* [2013] UKUT 37 (AAC); [2013] AACR 23.

Ground 2

11. Ground 2 concerns activity 5 - manual dexterity – and the appellant's ability "single-handedly to use a suitable keyboard or mouse". His appeal to the tribunal included argument that he could not use a computer mouse (page 27). If he could not also use a suitable keyboard then he may have qualified for 9 points under descriptor 5(d). The tribunal addressed activity 5 in paragraph 30 of its statement of reasons. The

only part of that paragraph which seems to deal with descriptor 5(d) said:

> "He does use an ipad and, having regard to the evidence presented in respect of this particular descriptor, ...the Appellant does not .....[score] any points."

12. This reasoning is not, in my judgment, an adequate explanation for why descriptor 5(d) was not met. To start with, it is difficult to discern just what the other relevant evidence was that the tribunal considered had been presented in respect of descriptor 5(d) apart from the use of the ipad. In the relevant part of the ESA50 it is true that the appellant had only referred to his writing but in his appeal he had expressly raised not being able to use a computer mouse. The ESA85 does not address the use of either a keyboard or mouse under manual dexterity but it does record under *Description of a Typical Day* that the appellant "had a laptop, but he sold it, he bought iPad about 10 months ago, He uses facebook and can send birthday wishes to his sister". This must have been the basis for the "ipad" comment in the tribunal's reasoning. However, on the basis of the language used by the tribunal in its reasoning there was other evidence which supported its conclusion, but that evidence is not explained.

13. Further, for the reasons I gave when giving permission to appeal, it is not obvious why use of an ipad, which does not have a keyboard (at least as a separate device from the ipad itself) or a mouse evidences an ability to single-handedly use a suitable keyboard or a mouse. What is left unexplored and unexplained is the use the appellant was able in fact to make of his ipad. The oral evidence recorded on the record of proceedings about the appellant seemingly needing extra big buttons on a telephone and dialling wrong numbers, not being able to use the buttons on his mobile phone as they were too small and seemingly only being able to use the up/down buttons on the remote, may all have suggested that the appellant would have had problems with a "suitable keyboard", but these issues are not addressed in the reasoning.

14. In the absence of a reasoned consideration of the other relevant evidence, and given the difficulties with the tribunal's reasoning on the ipad, a relevant consideration was why the appellant sold his laptop (e.g. was it because he could not use it), but this was not explored.

Ground 3

15. I turn now to the issue on this appeal which may have a wider significance, namely ground 3 above and whether the statutory carton full of liquid is opened or closed.

16. The statutory context is that activity 4 in Schedule 2 to the ESA Regs provides as follows.

"4.	Picking up and moving or transferring by the use of upper body and arms.	4 (a) Cannot pick up and move a o.5 litre carton full of liquid	15
		(b) Cannot pick up and move a one litre carton full of liquid.	9
		(c) Cannot transfer a light but bulky object such as an empty cardboard box.	6
		(d) None of the above apply.	0"

17. As I am in agreement with the Secretary of State, it will assist to set out first the relevant parts of the submissions of Michael Page on behalf of the Secretary of State on this issue.

> "9. The current descriptors make no reference either to the carton being closed or open or to the claimant having to be able to pour from it.
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> In the Personal Capability Assessment for Incapacity Benefit, descriptor 8(b) was "Cannot pick up and carry a 0.5 litre carton of milk with either hand". Descriptor 8(c) was "Cannot pick up and pour from a full saucepan or kettle of 1.7 litre capacity with either hand."
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> In the earlier version of the ESA Schedule 2 activities, descriptor 5(a) was "Cannot pick up and carry a 0.5 litre carton of milk with either hand" (the same as the IB wording) in respect of the Picking up and

moving activity, activity 5. Separately, in the Manual Dexterity activity, activity 6, descriptor 6(j) was "Cannot pour from an open 0.5 litre carton full of liquid".

I submit that both of these sets of wording from earlier versions of the test show that where the fact that the container was open was relevant to the test, the descriptor makes it clear. Where pouring is the test, openness of the vessel is required and is stated.

10. The 2001 amendments removed "pouring out of an open jug" from the descriptors altogether. The SSAC materials for the 2011 regulations reveal only the following references....

Paragraph 5.8

"**Descriptors 4 and 5: *Picking up and moving or transferring by the use of the upper body and arms, and Manual Dexterity*** 5.8 Respondents commented that it would be impractical for a disabled person who had difficulty picking things up from the floor in the workplace to repeatedly ask a colleague for assistance. It was also suggested that this descriptor should be rewritten so as to include the notion of '*locating*' an item, thus extending its scope to include sight problems."

11. Paragraph 2.10 in the explanatory memorandum from the same source refers to the changes from the earlier versions of the ESA descriptors.

"**Manual dexterity**

2.10 The changes to Schedules 2 and 3 – Upper Limb – change the descriptors relating to manual dexterity. They reflect the fact that a number of the descriptors identifying upper limb disabilities may not accurately measure capability for work. Descriptors identifying limited capability on the basis of functional limitation in one hand, or relating to co-ordinated activity involving two hands, have been removed as they are inappropriate in the assessment of limited capability for work. Descriptors which do not represent a significant limitation of functional capability in relation to the workplace – such as turning a star-headed tap – have been removed. These changes also facilitate clear and transparent application of the assessment."

It may be that, though not expressly stated, pouring from an open carton met the same fate as turning a star-headed tap for the same reason.

12. It is therefore the submission of the Secretary of State that, in the terms of the question posed by the Upper Tribunal Judge, the carton is closed. I am aware of no relevant case law about either the PCA or early ESA descriptors. The purpose of the descriptor is to assess a person's ability to pick up and carry objects over a brief distance, which any employer might ask an employee to do. Cartons of liquid and empty cardboard boxes are chosen as ordinary everyday objects of a similar size and weight to those that employees might be asked to move, thus avoiding the need to describe objects that differ from one

> workplace to another. It's not about the ability to move liquids in an open container – that would not capture the desired activity, which is what it says i.e. picking up and carrying. I submit that, in common with the empty cardboard box descriptor, it's the size, shape and weight which is relevant, not the contents. I submit that the purpose is not to test people's ability to ensure that they don't spill liquid from an open container; instead it is about their ability to pick up and move everyday objects."

18. As I have said, I agree with the above. In so doing I would emphasise the following two points.

19. First, this is an exercise in statutory construction and in construing the meaning of the words in descriptors 4(a) and 4(b) in Schedule 2 to the ESA Regs regard must be had to the statutory context in which they appear. That context, relevantly, starts with section 8(2)(b) of the Welfare Reform Act 2007 and regulation 19(2) and (4) of the ESA Regs, all of which focus on assessing a claimant's capability to perform the activities in Schedule 2. What has to be assessed therefore is the appellant's ability in "[p]icking up and moving or transferring by the use of the upper body and arms". It is thus the actions of the upper body and arms in *picking up and moving or transferring* that is the key consideration. The manner in which the activity is completed is not, therefore, directly in issue, as long as it involves something that may be described as "picking up" and then "moving" (or "transferring"). This focus in my judgment militates against consideration also being given to whether the task can be completed without shaking or with a lack of balance.

20. Different considerations might apply where the activity of picking up and moving cannot be completed because the item is dropped or thrown away involuntarily before it is moved or transferred. Then issues of whether the activity can be carried out reliably and repeatedly might come in to play. I would accept that the movement or transfer needs to be to a specific place and cannot involve random and involuntary throwing of the item (even though in one sense it would nonetheless have moved if thrown). This is not, however, to do with

manner in which the activity is carried out but whether the activity can in any reasonable sense be done at all.

21. On the tribunal's findings, however, these are not the facts of this case. It found that the appellant can move the carton of liquid to an intended place but he can spill its contents in so doing if it is open: he does not throw the carton randomly on picking it up, or at least that was not his evidence as the tribunal found it. However, as all issues are to be considered afresh by a new First-tier Tribunal it will for that tribunal to establish if the appellant is unable to pick and move the carton of liquid because of random and involuntary throwing, if such a case is argued by the appellant.

22. The second point of emphasis relates to Secretary of State's reliance on the ESA Regs using the word "open" elsewhere when needed and that therefore it can be construed from this that the carton of liquid in descriptors 4(a) and 4(b) is not intended to be an open carton. This is a submission which I consider has considerable, if not determinative, force. Put shortly, if the relevant carton is open then descriptors 4(a) and 4(b) would have said so. This is an argument from overall context. It has two supporting features.

23. The first supporting feature is that construing Schedule 2 to the ESA Regs as a whole, and in its different incarnations since 2008, the concern with <u>open</u> objects holding liquid has at all times been located within the activity 5 - "manual dexterity". This is an activity which is concerned with the ability to make coordinated hand and finger movements to grasp and manipulate objects. As part of testing those abilities, the activity concerned with "manual dexterity" (which was then numbered activity 6) in the version of Schedule 2 to the ESA Regs in place before 28 March 2011 had as descriptor 6(i) "Cannot pour from an <u>open</u> 0.5 litre carton full of liquid" (my underlining). That descriptor appeared in Schedule 2 separated from but near to the descriptors (then numbered 5(a) and 5(b)) under the activity "Picking up and moving" which were concerned (identically to here) with picking up

and moving a ½ or one litre carton full of liquid. From this it can be seen that the statutory concern with the function of pouring and with open liquid containers has at all times been found under the activity of manual dexterity in Schedule 2 to the ESA Regs.

24. This reinforces, in my judgment, the view that the activity of picking up and moving as found in Schedule 2 to the ESA Regs is limited to the tasks of 'picking up' and 'moving' (or 'transferring') and is not concerned with the manner in which they are achieved, save for the points made in paragraph 20 above. If balance and a steady hand are relevant considerations at all then they fall to be considered under manual dexterity and not picking up and moving.

25. In making this last statement I recognise that it may at first sight sit oddly with the fact that under the predecessor to the limited capability for work test, which Schedule 2 of the ESA Regs embodies, pouring from an open container (a kettle) was seen as being relevant, at least in part, to the activity of "lifting and carrying" and not to "manual dexterity". The detail of the statutory test before employment and support allowance was found in the Schedule to the Social Security (Incapacity for Work) Regulations 1995 ("the IFW Regs"). Activity 7 under that Schedule was concerned with "manual dexterity". None of the descriptors under that activity covered pouring liquid from an open object. Activity 8 in the same Schedule did, however, have as one of its descriptors "Cannot pick up and pour from a full saucepan or kettle of 1.7 litre capacity with either hand" (descriptor 8(c)). Activity 8, moreover, was concerned with the activity of "lifting and carrying by the use of the upper body and arms (excluding all other activities specified in Part I of this Schedule)". (Part I of the Schedule dealt with the ability to carry out physical, as opposed to mental, activities.). And it may be argued that the activity of "lifting and carrying" is equivalent to the activity of "picking up and moving" under Schedule 2 to the ESA Regs.

26. Even if that is so, however, it seems to me that two considerations point against the use of the word "pour" (and thus the objects being open) in descriptor 8(c) in the Schedule to the IFW Regs counting against descriptors 4(a) and 4(b) in Schedule 2 to the ESA Regs being open or manual dexterity more generally being concerned with pouring liquid from an open object.

27. First, the physical abilities needed to pick up and move so as to be able to pour from a full saucepan or 1.7 litre kettle focus as a matter of anatomy on the use of the arm and shoulder rather than on coordinated hand and finger movements. It is therefore not unusual that this particular descriptor in the Schedule to the IFW Regs was located under the activity concerned with use of the upper body and arms as that is what that descriptor was measuring. It is not in functional terms assessing manual dexterity.

28. Second, a ½ litre carton (of milk) appeared as descriptor 8(b) under the lifting and carrying activity in the Schedule to the IFW Regs with no reference to it either being open or pouring from it and alongside the pouring from the kettle/pan descriptor. Descriptor 8(c) in the Schedule to the IFW Regs thus contrasts with the descriptor covering cartons of liquid.

29. The second supporting feature can be dealt with much more shortly and in a sense is exemplified by the point made in the immediately preceding paragraph. It is the simple point that where the statutory scheme (or schemes if the IFW Regs are also considered) required an object to be "open" then that is (or was) stated in the statutory language. By way of contrast with the use of the word "open" in what was descriptor 6(i) in the pre 28 March 2011 version of Schedule 2 to the ESA Regs - "Cannot pour from an open 0.5 litre carton full of liquid" – the descriptors covering picking up and moving a ½ or 1 litre carton full of liquid do not use, and have never used (even at the time when they appeared in Schedule 2 with descriptor 6(i)), the word "open".

From this it is to be inferred, in my judgment, as matter of statutory construction that the absence the word "open" in descriptors 4(a) and 4(b) is deliberate and shows that the carton is closed.

30. The final point, albeit one I make somewhat tentatively and not one I therefore would suggest is determinative on its own, is to do with ordinary language usage. Ordinarily I would suggest that a carton of liquid is a container for storing the liquid and therefore, as a general starting point, would not be open. If it was an open container of liquid then a word such as "jug" or "cup" would be more appropriate. It seems to me, therefore, that as a matter of the ordinary use of language (and there can be no sensible argument that the words "carton full of liquid" is being used in any technical, non-ordinary sense), a carton full of liquid would normally be understood as meaning an object which is closed. It is not, therefore, a word which in ordinary usage would need to be qualified by the use of the word 'closed'. If, however, that ordinary use of language meaning is not to hold then it would be expected that the word 'carton' would be qualified by the addition of the word 'open'. That is not the case in respect of descriptors 4(a) and 4(b) and so supports the conclusion that the 'carton' in that statutory context is a closed carton.

31. Even if I am wrong in this ordinary English language thesis, however, there is nothing in my judgment in the ordinary usage of the word "carton" that tells the reader or user of the word that it is an open carton. If, therefore, ordinary language tells us nothing about whether a carton is ordinarily closed or open, the arguments in paragraphs 19 and 22-29 above still result in it being a closed carton in the statutory context with which this appeal is concerned.

32. The tribunal therefore did not err in law in discounting spilling when assessing the appellant's ability to pick up and move the cartons full of liquid under activity 4.

33. Given, however, the two material errors of law set out above, the tribunal's decision of 21 April 2015 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber) at a hearing and in accordance with views as to the law as expressed above.

34. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the new First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 4th February 2016