DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

CPIP/2651/2015

Before: Upper Tribunal Judge Paula Gray

DECISION

This appeal by the claimant succeeds.

In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Warrington and made on 16 January 2015 under reference SC 078/15/00119. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

DIRECTIONS

1. These directions may be amended or supplemented by those of a District Tribunal Judge at the listing stage.
2. The case will be listed before a differently constituted panel as an oral hearing.
3. The panel will take into account my observations in remitting the case set out below; it will, however, take a fresh view of the evidence and come to its own conclusions on the issue of eligibility for a Personal Independence Payment.

REASONS

Background

1. This matter concerns the question of the appellant's eligibility for a Personal Independence Payment. He had made a claim on 20 August 2014, and was awarded the standard rate of the mobility component in the decision under appeal, which was dated 16 January 2015. The award was made until 4 July 2017, which seems unusual being a

period of not quite 3 years from the date of claim. As I am remitting the case for a fresh decision and the issue of the length of the award is (under section 88(2) Welfare Reform Act 2012) a matter entirely for the fresh FTT, that is not a matter which needs to trouble me.

2. The decision had been made by a decision maker on the basis of an assessment carried out on 5 January 2015 by a health professional (HP), Nurse Snell. That assessment was clearly accepted by the decision maker. Nurse Snell was of the opinion that the appellant could stand and move more than 20, but no more than 50 metres. That scored the appellant sufficient points for the standard rate of the mobility component. In relation to activities of daily living, he was felt to merit 2 points because he needed an aid or appliance to wash or bathe and further 2 points in relation to a similar requirement dressing and undressing. No other needs were identified within the descriptors, and the level of need was insufficient for an award of that component.
3. The appellant was contending for entitlement beyond that awarded, and he appealed to the FTT.

Proceedings before the First-Tier Tribunal

4. The appellant had sought advice about his appeal, and a representative of the Benefit Information Services (perhaps Mr Brennan who has supplied the submission to the Upper Tribunal, but the name is absent) had made a written submission on his behalf.
5. Key points in that the submission were that the appellant had in his questionnaire identified a number of activities with which he had difficulties, the "constant thread" being that activities took "longer to perform" which in the context undoubtedly means longer than one would expect in a person without disabilities. Comments were made as to the notes of the clinical examination carried out by Nurse Snell being in effect contradicted by the scores that she recommended. A specific point was made as to a perceived link between cognitive difficulties and the need for prompting.
6. The matter had been listed as an oral hearing; however the appellant did not attend and the FTT, having established that he had been given sufficient notice of the hearing, quite reasonably in the circumstances, determined the matter in his absence on the basis of the evidence available. A brief decision notice was issued immediately following the hearing confirming the decision under appeal.
7. The appellant subsequently requested a statement of the tribunal's reasons for the decision, that is to say, an explanation of why the tribunal came to the conclusions that it did.
8. The statement of reasons appears to adopt the report of the HCP, the tribunal finding that it was thorough. It does not deal with the points made in the submission of the appellant's representative.

Proceedings before the Upper Tribunal

9. I granted permission to appeal essentially on the basis of the arguable inadequacy of the explanation provided by the FTT. I directed submissions which are now to hand. Neither party has requested an

oral hearing, and I am content that in this case I am able to do justice upon the basis of the written material.

The position of the Secretary of State

10. The Secretary of State does not support the appeal. He takes the grounds of appeal together with the observations that I made and deals with the matter on the basis of four central points:

(i) That the FTT may have fallen into error in adopting the report of Nurse Snell as to the appellant's ability to stand.

(ii) That the FTT erroneously said that it was for the appellant to provide medical evidence to refute the respondents evidence, otherwise the appeal must fail

(iii) that the FTT placed significant weight on the report without dealing with the criticisms made of it

(iv) The effect of the FTT's failure to deal with the criticisms of the HP report set out in the appellant's submission at page 97.

The position of the appellant

11. This is really set out in the response of the Secretary of State which deals in turn with the arguments in relation to the points raised by the appellant, and by me.
12. Mr Brennan makes one additional point at this stage, which reinforces a matter set out in his grounds of appeal as to the view of the FTT in relation to there being a lack of evidence corroborating that of the appellant, and the effect of that.
13. He takes issue with the Secretary of State saying that it is less likely that lay evidence will be preferred over other (medical) evidence. He points out that this was not what the tribunal said; additionally that if adopted that approach would always place an appellant at a disadvantage. He suggests the correct approach should be for the FTT to consider all the evidence and then decide what weight to give to the various parts. He concedes that it may then be that the appellant's evidence is not supported by the weight of the medical evidence, but describes that as a different situation than that put forward in the Secretary of State's submission.

My analysis

14. I deal with the issues under the headings from the grounds of appeal and my comments in granting permission as paraphrased in the submission of the Secretary of State

(i) That the FTT may have fallen into error in adopting the report of Nurse Snell as to the appellant's ability to stand.

15. The meaning of "stand" as the report appeared to interpret it was challenged by Mr Brennan in his original submission to the FTT on behalf of the appellant. His criticism of the use of the term "stand" by the health professional assumes that the words in the activity have their everyday meaning. This ignores the fact that in The Social Security (Personal Independence Payment) Regulations 2013 (the PIP

regulations), at paragraph 1 of schedule 1 *"stand"* is defined to mean *"stand upright with at least one biological foot on the ground"*

16. Accordingly I accept the view of the Secretary of State in relation to this issue, and reject the argument of the appellant.

(ii) That the FTT erroneously said that it was for the appellant to provide medical evidence to refute the respondents evidence, otherwise the appeal must fail

17. I am not persuaded that the statement of reasons did say this. It noted the fact that there was no medical evidence filed on behalf of the appellant, the comment being made "but the tribunal took into account that it was for him to provide evidence of his condition and needs." I do not read that as a requirement for medical evidence, nor even a requirement for corroboration. It is long settled law that there is no requirement for evidence to be corroborated *(R (I) 2/51[7] and are (SB) 33/85 [14]).* That is not to say, however, that corroboration is irrelevant; it may substantially increase the weight given to the original evidence.
18. On the basis that the appellant was represented the tribunal, not unreasonably, concluded that had there been further existing medical evidence it would have been put forward with the submission. That really or upon the position as to whether there was any missing evidence, given that the appellant had not attended the hearing and could not assist personally with that question.
19. The Secretary of State's submission (page 116 at paragraph 3) suggests that the chief reason for the FTT adopting the HP report was that it was the only **medical** (emphasis in the original) evidence available, and that, all else being equal, if one has to choose between expert evidence and lay evidence, it is not unreasonable to favour the expert evidence.
20. To the extent that this statement appears to suggest that there is a rule of thumb, even if not a rule of law, that expert evidence should generally be preferred to the evidence of an appellant I disagree. To prefer expert evidence is not inherently unreasonable if that conclusion is formed following a balancing exercise of all the evidence in that particular case. What is impermissible is a blanket assumption that expert evidence will always, or will generally, be of more value than the lay person's account. The decision of Upper Tribunal Judge Ovey, *CW v Secretary of State for Work and Pensions [2011] UKUT 386 (AAC)* contains useful comments on the matter:

24. In my judgment, the Secretary of State rightly regards CIB/16401/1996 as containing useful guidance. That decision makes clear that there is no general rule that where there is a difference between the evidence of a medical professional producing reports for the use of the Department of Work and Pensions in making decisions as to social security benefits and the evidence of a claimant, the evidence of the medical professional should be preferred. It may be a legitimate conclusion in a particular case that a medical professional's view is to be preferred because it is more objective and

independent, but that is a conclusion only to be reached after a consideration of the particular evidence, and the claimant should not be left in the dark as to what the tribunal made of his or her evidence: that is, whether it was honest but inaccurate, was an unconscious exaggeration or was a deliberate exaggeration.

21. So often the essence is not so much one of the value of expertise, but the credibility of the appellant's account. Whilst there is a need for a link between functional disability and ill-health, the extent to which a particular condition affects somebody is inevitably personal, dependent upon the severity of the condition itself and the ability of the individual to deal with pain or otherwise adapt to their limitations. Sometimes the adaptation comes with time. Some people never adapt, and will always have limitations. Some people may exaggerate those limitations, consciously or unconsciously. Whilst evidence of expert opinion may be of value, a tribunal is entitled accept the uncorroborated evidence of an appellant as to their functional impairment and the extent of it rather than the evidence of a healthcare professional which may come to a very different view as to the probable extent of functional difficulty. Were that not to be so, an appellant in a case such as this where the Secretary of State routinely obtains evidence from a healthcare professional, could never win. It is, however, open to the tribunal to prefer the healthcare professional's opinion because of its expertise; such a finding is in general tantamount to saying that the appellant's account of the extent of their disability is not wholly accepted, resulting in the more objective expert evidence being preferred, but a formulaic acceptance of the report of an examining medical practitioner, without consideration of the evidence as a whole, will be an error of law *(CIB/3074/2003).*
22. It is insufficient simply to say that the Secretary of State's evidence was against the appellant. In a contested appeal the Secretary of State's evidence will always be against him. The appellant must understand why his contentions about the extent of his functional disability were not accepted.
23. The issue has been described in the Secretary of State's submission as an application of the burden of proof, but it is not really quite that. Although an applicant bears the burden of showing entitlement in a new claim for benefit the "Kerr principle" *(Kerr v Department for Social Development [2004] UKHL 23)* emphasises the co-operative nature of cases concerning welfare benefit entitlement, in particular the placing of an evidential burden on the party in possession of the information necessary to inform an entitlement decision. In respect of his own medical condition to an extent that is an appellant, but it is also for the Secretary of State to ask the relevant questions about his condition, because it is the Secretary of State who knows the conditions of entitlement, and therefore what the claimant needs to show. It would be an unusual case in the field of disability benefits where a tribunal could not come to a positive conclusion on the basis of the evidence before it, and needed to revert to the burden of proof.

24. I broadly accept the arguments of the appellant's representative as to the proper approach on this issue. The FTT should weigh all of the evidence prior to coming to its conclusion: *(CIB/2308/2001[20]* and my remarks in *FR-v-SSWP (ESA)[2015] UKUT 151 (AAC) at [9-12]).*

(iii) That the FTT placed significant weight on the report without dealing with the criticisms made of it

25. This is the least in part an extension of the previous point.
26. The author of the submission made on behalf of the Secretary of State makes certain observations at paragraph 4, which appear to be justifying the reliance of the FTT upon the health professional's report; for example it says in relation to the nurse's assessment of the level of the appellants depression *'I would also note that the other main point with regard to the claim is depression with the type of medication he was receiving, which was those at a "very low dose" and also "taken for pain".*" The references incorporated in that observation are from the report of Nurse Snell. A further argument is made as to what the appellant's representative put forward as a limitation in the statement of reasons that the FTT failed to consider the position "most of the time" the health professionals report referring to matters "today"; the Secretary of State says that there is no indication in the report that "today" was not a typical day or the type of day that would be present for over 50%, as per regulation 7 of the PIP regulations.
27. The comments perhaps indicate a misunderstanding of the critical issue, although his making them actually highlights it: the issue for me is not whether or not there was sufficient material in the report to support the FTT relying upon it, but whether or not the FTT has sufficiently explained that reliance. The very points that the Secretary of State's representative makes are the sort of explanation one might expect to see in a statement of reasons had the FTT found them pertinent as to its assessment of the extent of the appellants functional disability, or otherwise in support of its view that the report was reliable. Had such references been there the appellant would have had an understanding of why the tribunal came to the view that it did; however they were absent, and the very general point which was made as to the "thoroughness" of the report as the reason for its acceptance (regarding matters of both fact and opinion) does not inform the appellant's understanding as to why his contentions were rejected. It is partly for this reason that is good practice for the FTT not simply to record a general acceptance of the HP report, but rather set out its own findings both generally and where necessary in the context of the descriptors considered *(CIB/4232/2007).*
28. It would not, I think, be unfair to say that this statement of reasons could have been written as a generic statement about any case in which the tribunal agreed with the Secretary of State's decision where that decision was based upon a healthcare professional's report. Having described the report as "thorough" the reasoning needs to deal with what it was about the report that made the tribunal form that view of it. It may be that the conclusions as to the functional disability were both internally consistent with the clinical findings recorded in the

report, and externally consistent with what the expert tribunal might have expected as a typical level of disability given the diagnoses.

29. I agree with the appellant's representative that there were arguably elements of inconsistency between the clinical findings, which may objectively have indicated potential functional problems, and Nurse Snell's conclusions which did not reflect them. That is neither to say that her conclusions are wrong, nor that the potential for inconsistency renders the report other than reliable; the assessment of the report will be entirely a matter for the fresh tribunal, but, whether they accept or reject the report in its entirety or in part they must when discussing the evidence between themselves articulate and note the reasons for the collective view that they take of it so that the judge can provide that explanation later if called upon to do so, and if there is an argument that there are inconsistencies in the report that argument will need to be addressed in the reasons.

(iv) The effect of the FTT's failure to deal with the criticisms of the HP report set out in the appellant's submission at page 97.

30. I have dealt to a large extent with this already. In order for reasons to be adequate they must deal with material issues. There is no need to deal with criticisms that are merely captious, but where they have substance or make a serious point it may be an error of law to fail, in a statement the purpose of which is to explain to the parties why the tribunal came to the conclusion is that it did, to deal with them, albeit shortly. In this case the points made in the submission were thought through and required the attention of the tribunal.

In conclusion

31. I set aside the decision as I have indicated in my decision above, for lack of reasons which are adequate to inform the appellant why he lost.
32. I am told that there has been no further claim; therefore the FTT is not considering a closed period in relation to any award it may deem legally appropriate.
33. As to the mobility question, which is set out at page 117 paragraph 4 (e), it will be for the FTT to evaluate the extent to which mental impairment affects the appellant's mobility under the descriptors. They may be assisted by a recent Upper Tribunal decision, *HL-v- SSWP [2015] UKUT 694 (AAC)* (Upper Tribunal Judge Ward) which I reproduce with this decision. It discusses two conflicting decisions of the Upper Tribunal on the point. Where there are conflicting decisions the FTT is entitled to choose which decision it follows, but it may find the discussion of the different points of view and Judge Ward's analysis helpful in that regard.
34. Finally I must caution the appellant that his success here is not a guarantee of success at the re-hearing.

Upper Tribunal Judge Gray

(Signed on the original on 27 January 2016)