IN THE UPPER TRIBUNAL **Case No** CE/2643/2015
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Enfield on 11 March 2015 under reference SC921/13/05347 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 25 of the Reasons.

REASONS FOR DECISION

1. Although the case raises other points also, the outcome of the appeal turns on the Secretary of State's attempt to resile from a concession previously made, in a decision which appears on the Chamber's website, FR v SSWP [2015] UKUT 0175. The point's significance will by now, with the passage of time, be much reduced.

2. In connection with the conversion from incapacity benefit to ESA, the claimant had completed a questionnaire in Form ESA50 on 6 December 2012. The markings on it are obliterated by the photocopying process on the material I have, but the claimant's solicitors tell me, and I accept, as it is what one would expect, that it was version 03/11. She claimed points for every activity, in both Parts 1 and 2 of Schedule 2 to the Employment and Support Allowance Regulations 2008 No.794 ("the 2008 Regulations"), with the exceptions of "communicating with others", "understanding others" and "staying conscious when awake". Following a medical assessment a decision was taken on 4 July 2013 that she was awarded 0 points. Her appeal to the FtT was heard on 11 March 2015, when she was awarded 9 points under descriptor 4(b) (picking up and moving). As her case still fell below the points threshold and the tribunal found that regulation 29 did not apply, her appeal failed. She applied to the Upper Tribunal with the assistance of solicitors and on 23 November 2015 I gave permission to appeal.

3. The grounds of appeal may be summarised as follows:

> (a) the tribunal gave insufficient reasons for rejecting the claimant's case in relation to the Part 2 descriptors;
>
> (b) in relation to the Part 2 descriptors, the tribunal misdirected itself in law by rejecting the claimant's contentions on the apparently sole basis that she did not have any mental health problems;
>
> (c) the tribunal found insufficient facts and/or gave insufficient reasons in relation to the mobility descriptor and, without limitation, failed to deal adequately with the variation in the claimant's condition;

(d) with regard to the lack of specialist involvement, the tribunal failed to apply R(M)1/95 correctly; and

(e) the tribunal erred by failing to explain why they found the claimant not credible.

3. The Secretary of State does not support the appeal. Neither party seeks an oral hearing and I am satisfied that it can properly be decided without one. Grounds (c) to (e) would not merit one. Grounds (a) and (b) (which are essentially two aspects of the same issue) might have done, for the issue is quite finely balanced, but in my view such a step would be disproportionate when the issue is rapidly becoming of historical interest only and neither party wants one. It would also run the risk of inequality of arms if the claimant did not wish, or was not in a position, to pay for her solicitor to represent her.

4. It has not proved possible to obtain a complete set of papers from the First-tier Tribunal. Though its statement of reasons records that it had a 108 page bundle, it was clearly not exactly the same bundle as is before me, where p108 is an application for permission to appeal against the tribunal's finding and so could not have been before it. Nor is there any record of proceedings, even though the claimant attended and gave evidence.

5. It will be recalled that (a) the claimant had put most of the Part 2 descriptors in issue in her ESA 50; and (b) the tribunal was sitting in March 2015, by now some 2 years on from the changes made to the descriptors around the start of 2013. As to the Part 2 descriptors, the statement of reasons ("SOR") indicates that:

> "[The claimant] confirmed that in July 2013 she had no mental health problems and that all her issues were in relation to her physical problems. The HCP made no abnormal findings on the Mental Health descriptors. There is no record of any mental health problems in her medical records. On the basis of all the evidence the Tribunal [concluded] that [the claimant] does not satisfy the criteria under any of the descriptors in this category."

6. It is not in dispute that the claimant does not have a mental health condition. Therefore, if one was needed in order to qualify for one or more Part 2 descriptors, this part of her claim was correctly rejected. Conversely, if one was not, then subject to materiality, it seems to me that the tribunal would have erred in law.

7. The relevant amendments were made by the Employment and Support Allowance (Amendment) Regulations 2012 No 3096 ("the 2012 Regulations"), which came into force on 28 January 2013.

8. The basic scheme in reg 2(1) was that they applied to various categories of claimant, including (by sub-paragraph (d)) those who were "notified persons" in relation to the migration from incapacity benefit to ESA, such as the present claimant. However, this was subject to paragraph (2), which provided:

> "(2) Where a person has been issued with a questionnaire which relates to the provisions of Schedule 2 of the ESA Regulations as they had effect immediately before the commencement date, regulation 5 does not apply for the purposes of making a determination on or after that date as to that person's limited capability for work under Part 5 of the ESA Regulations and, for those purposes, the provisions of Schedule 2 of the ESA Regulations are to continue to apply in respect of that person as they had effect immediately before the commencement date."

9. Para (2) was then disapplied to determinations made on or after 28 July 2013 -but the decision in the present case pre-dated that date.

10. Regulation 5 made a series of detailed amendments to schedule 2, which it is not necessary to set out.

11. Schedule 2 was (and continues to be) brought into play by regulation 19(2) of the 2008 Regulations, in the following terms:

> "(2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities."

12. Schedule 2 had always been divided into two parts. However, before the 2012 Regulations, the 2008 Regulations had provided:

> "(5) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 2, it is a condition that the claimant's incapability to perform the activity arises from—
> (a) a specific bodily disease or disablement;
> (b) a specific mental illness or disablement; or
> (c) as a direct result of treatment provided by a registered medical practitioner, for such a disease, illness or disablement."

13. A series of Upper Tribunal decisions (KP v SSWP (ESA)[2011] UKUT 216 (AAC); KN v SSWP (ESA) [2011] UKUT 229 (AAC); RM v SSWP (ESA) [2011] UKUT 454; AH v SSWP (ESA) [2011] UKUT 333 (AAC)) held that this did not limit the descriptors in part 2 to cases of mental disablement. Regulation 3 of the 2012 Regulations substituted a new reg 19(5) in the following terms:

> "(5) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 2, it is a condition that the claimant's incapability to perform the activity arises—
> (a) in respect of any descriptor listed in Part 1 of Schedule 2, from a specific bodily disease or disablement;

> (b) in respect of any descriptor listed in Part 2 of Schedule 2, from a specific mental illness or disablement; or
> (c) in respect of any descriptor or descriptors listed in—
> (i) Part 1 of Schedule 2, as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement;
> (ii) Part 2 of Schedule 2, as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement."

14. In FR, where the same point arose, I had given limited permission to appeal (not including this point) but the Secretary of State's representative, going somewhat out of their way, submitted that the tribunal also erred in dismissing the claimant's difficulties with initiating actions (a Part 2 activity) on the basis that it was "due to her physical limitations and not due to impaired mental function as is required by law to meet that test."

15. As I commented in that case (I have corrected a couple of typing errors):

> "Although the decision was taken on 8 February 2013, the claimant had completed the questionnaire version ESA50 03/11 and, by the terms of reg 2(2) and (4) of the Employment and Support Allowance (Amendment) Regulations 2012/3096, regulation 5 of those Regulations (which introduced from 28 January 2013 a changed version of Schedule 2, containing the descriptors) was disapplied and "the provisions of Schedule 2 of the ESA Regulations are to continue to apply in respect of that person as they had effect immediately before the commencement date." What brought into effect the separation between those descriptors which could be fulfilled on the basis of impaired physical function and those to be met due to impaired mental function was not the changes to Schedule 2 itself, but rather the amendment to regulation 19(5) , which was effected not by regulation 5 of SI 2012/3096 but by regulation 3. I interpret the Secretary of State's concession therefore as being that the requirement for the provisions of Schedule 2 "to continue to apply…as they had effect immediately before the commencement date" (my emphasis) is sufficient to maintain the pre-2013 position of no physical/mental split as part of how Schedule 2 "had effect"."

16. In the present case, the Secretary of State's representative relies principally on the submission that reg 2(2) states that the changes made by reg 5 do not apply to a person who has received the old form of questionnaire, but that the changes made to reg 19(5) were made by reg 3 and, he submits, were not covered by the savings. He also submits that it is clear from the Explanatory Note at the end of the 2012 Regulations that there was no intention that the change to regulation 19(5) was covered by the savings.

17. What the Secretary of State does not do is explain why my analysis of his concession in FR is wrong. In particular, he does not suggest why either grammatically, or purposively, the stipulation for the provisions of schedule 2

to apply “as they had effect immediately before the commencement date” should be interpreted narrowly or should be read so as to refer only to the wording of the schedule, divorced from regulation 19 which alone gives it life (or “effect”).

18. Though it still would not in any event remove the dilemma of how a particular text ”has effect”, I might have been somewhat more sympathetic to the Secretary of State’s position if the closing words of reg 2(2) had read “the provisions of Schedule 2 of the ESA Regulations as they had effect immediately before the commencement date are to continue to apply in respect of that person” but the actual ordering of the words emphasises the manner of how they apply, rather than of how the text stood. In that respect it differs from the opening clause of regulation 2(2) and I infer that the distinction was made advisedly. The wording in quotation marks is (more or less) what the Explanatory Note says: it is not, however, what the Regulation itself says.

19. The claimant’s representative submits that if the interpretation now favoured by the Secretary of State is correct “then the effect would be that people completing the old version of the ESA 50 prior to the commencement date of the statutory instrument could do so incorrectly as there would be no awareness of the amendment.”

20. It is true that the claimant competed the form on 6 December, before the 2012 Regulations were even made (13 December) much less came into force. The section of ESA50 in its then current form was still headed “mental , cognitive and intellectual functions”, even though, as we have seen, on the law at that time, any impairment of such functions was not required to arise from a specific *mental* illness or disablement. It seems to me that while that might have drawn a claimant who was fully conversant with the then state of welfare benefits law into giving details of impairment of such functions which did not so arise, the worst that could happen once reg 19(5) definitively came in would be that giving those details would have proved to be fruitless.

21. If (unlike cases caught by the amendment to reg 19(5) where there would have been a risk that evidence provided through replies on the form might merely have proved to be surplus following the changes), there had been a clear indication that the effect of the amendments to schedule 2 would have been that people on the old ESA50 simply would not have been asked about matters which as a result of those amendments had become material to their case, I might have been inclined to give more weight to the distinction between those amendments effected respectively by regs 3 and 5 of the 2012 Regulations. In fact, however, the amendments to schedule 2 were not such that they were particularly likely, of themselves, to have required changes in the questions on the ESA50 to obtain necessary evidence before they could be adjudicated upon. This is partly because a number of the changes were to restore what the DWP had believed the legal position to have been anyway (and so was presumably reflected in the ESA50 in any event), while others were largely matters of tidying up and clarification. Further, there is necessarily (because of the need to make a form usable by the public) very

frequently not a direct match between the wording of the schedule 2 descriptors and the questions asked on form ESA50.

22. I am not sure therefore that the claimant's argument materially advances her case but, for the reasons given in paras 15-18 above, she does not in my view need it.

23. I do not consider that I am in a position to conclude that what I have found to be an error of law was not a material error, nor am I in a position when I can fairly attempt to remake the decision, given that as noted both some of the documentary evidence and the record of the oral evidence is lacking. With hesitation therefore, given the age of the case, I set the tribunal's decision aside and remit it for rehearing before a differently constituted tribunal.

24. That makes it unnecessary to consider grounds (c) to (e) in any detail. Any error the tribunal may have been made will be subsumed by the rehearing. I do not consider they are matters which require me to give any guidance to the next tribunal.

25. I direct therefore that:

(a) The question of whether the claimant satisfies the conditions of entitlement for ESA is to be looked at by way of a complete re-hearing in accordance with the legislation and this decision.

(b) As the bundle from which the Upper Tribunal is working had to be obtained from the DWP rather than the First-tier Tribunal, it is that bundle which will have to serve as the starting point for the next hearing. The claimant or her representative will no doubt wish to try to work out what is missing from it and unless otherwise directed, must ensure that any further written evidence is filed with the First-tier Tribunal no less than 21 days before the hearing date.

(c) The tribunal will need to make full findings of fact on all points that are put at issue by the appeal.

(d) The tribunal must not take account of circumstances that were not obtaining at the time of the decision under appeal- see section 12(8)(b) of the Social Security Act 1998 - but may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: R (DLA) 2/01 and 3/01.

26. These directions are subject to any further directions which may be given by a District Tribunal Judge.

27. While it is not a matter for me to direct, it is suggested that the claimant should attend the re-hearing.

28. The decision on the re-hearing is a matter for the First-tier Tribunal and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

CG Ward
Judge of the Upper Tribunal
18 May 2016