

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: A J GAMBLE

Attendances:

For the Appellant: (Claimant): Mr C Orr, Welfare Rights Officer, Money Matters, Money Advice Centre.

For the Respondent: (Secretary of State): Mr J Komorowski, Advocate, accompanied by Ms Claire Montgomery, Paralegal, of the office of the Solicitor to the Advocate General for Scotland.

The claimant's appeal is dismissed.

The decision of the Glasgow First-tier Tribunal of 10 December 2015 is confirmed.

REASONS FOR DECISION

1. The point at issue in this case is whether falling asleep during the day can amount to "an involuntary episode of lost or altered consciousness" for the purpose of descriptors (a) or (b) of Activity 10, "consciousness during waking moments", of schedule 2 to the Employment and Support Allowance Regulations 2008.

2. The claimant appeals, with the permission of District Tribunal Judge Hutton who chaired the tribunal of 10 December 2015, against the decision of that tribunal. By that decision the tribunal confirmed a decision maker's decision of 3 August 2015, left unaltered at a mandatory reconsideration on 20 August 2015, that the claimant's entitlement to Employment and Support Allowance fell to be superseded from 3 August 2015. The decision maker's decision was taken following an assessment of the claimant by a Health Care Professional (a registered nurse) on 7 July 2015. In her decision the decision maker only awarded the claimant 6 points for descriptor 1(d), "mobilising", of the limited capability for work assessment.

3. The Registrar granted a request by the claimant's representative for a hearing. That hearing took place before me on 2 August 2016 when representation was as narrated above. The claimant did not attend. However Mr Orr was content that I should proceed in her absence. I did so. I am grateful to Mr Orr and Mr Komorowski for their contributions to the legal debate.

4. The claimant, a forty nine year old woman, has “a liver problem”. That condition necessitated her having a liver transplant on 7 July 2014. Since the transplant the claimant has had hypertension.

5. The claimant’s General Practitioner provided written evidence in document 91 that the claimant “has hypertensive issues and as a result of this she suffers from daily headaches, general fatigue and lethargy”.

6. In their finding of fact 19 on document 99, a finding which is undisputed by either party, the tribunal state:

“The appellant has a relatively sedentary lifestyle spending much of her time seated indoors. She falls asleep for 45 – 60 minutes each morning around 10:30am.”

They further find in finding of fact 21:

“The appellant spends much of her daytime sitting down at home.”

7. Having made the findings cited in paragraph 6 above, the tribunal hold under heading (d) of document 100 that the claimant should receive no points for Activity 10. They explain that decision thus:

“Activity 10 – Consciousness. The appellant told us that she falls asleep most mornings between 10.30 and 11.00 am. At other times she can feel tired but does not otherwise fall asleep during the day. Her daily activities are not interrupted by a sudden need to sleep. Her representative suggested that falling asleep with such regularity is indicative of lost or altered consciousness. The tribunal, applying its own expertise to these matters considered that many otherwise healthy people take a nap during the day and an individual with the appellant’s diagnosis coupled with a very sedentary lifestyle is likely to fall asleep at some point during the day. The tribunal considered that sleep is not altered consciousness. It is a natural and ordinary part of life. The appellant satisfies descriptor 10(c).”

8. Mr Orr represented the claimant before the tribunal. He invited them to award the claimant 15 points for descriptor 10(a). Before me he submitted that the tribunal had erred in law in holding that “falling asleep” did not amount to an episode of “lost or altered consciousness” or alternatively had not explained with sufficient clarity why in their view that was so. Mr Komorowski responded to Mr Orr’s submission by contending that as a matter of her sleep was not “lost or altered consciousness” for the purpose of Activity 10 and that accordingly the tribunal had not erred in law.

9. Activity 10, enacted in schedule 2 to the Employment and Support Allowance Regulations 2008, reads as follows:

“10. Consciousness during waking moments

- (a) At least once a week, has an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration.
- (b) At least once a month, has an involuntary episode or lost or altered consciousness resulting in significantly disrupted awareness or concentration.

(c) None of the above apply.

10. Mr Orr and Mr Komorowski were agreed that this appeal turned entirely on the correctness or otherwise of the tribunal's reasoning cited in paragraph 7 above. Each of them accepted that the tribunal had sufficiently linked the claimant's daily falling asleep to her "diagnosis" of hypertension resulting from her liver transplant for the purpose of regulation 19(2) of the above regulations. That provision requires the fulfilment of the terms of any descriptor of schedule 2 to be by reason of "some specific disease or bodily or mental disablement". However they differed sharply on whether that falling asleep was covered by the text of Activity 10 albeit that it resulted from medical conditions of the claimant.

11. Mr Orr's submissions in support of his contention narrated in paragraph 8 above were as follows:

- (a) The effect of sleep was to produce "lost" or at least "altered" consciousness. Thus in ordinary English usage sleep could be described by those terms.
- (b) He supported that proposition by reference to a medical article entitled "Sleep Talking: Sleep as an Altered State of Consciousness", documents 113 – 121. In particular he highlighted the article's opening sentence in document 113, "By definition, to be asleep is to be unconscious."
- (c) He drew my attention to *AB v Secretary of State for Work and Pensions [2012] UKUT (AAC) 151*, a decision of Upper Tribunal Judge Jacobs. He particularly highlighted paragraphs 6 – 10 of that decision, especially Judge Jacobs' statement in paragraph 8 that "natural tiredness even as a result of a medical condition" cannot be described as "involuntary and thus does not come within what is now Activity 10. He invited me not to follow that decision. On the other hand, he also cited *JG v Secretary of State for Work and Pensions [2013] UKUT (AAC) 496* and invited me to follow that decision by Upper Tribunal Judge Mark. He particularly stressed paragraph 10 where Judge Mark describes sleep as "a form of lost consciousness".
- (d) So far as disposal was concerned he drew my attention to paragraph 11 of *JG* and suggested that I give similar directions to a new tribunal for them to determine whether the claimants falling asleep came within the terms of either of the points scoring descriptors of Activity 10.

12. Mr Komorowski responded as follows:

- (a) He drew my attention to the material dealing with "the unconscious patient" in volume 3 the Oxford textbook of Medicine Fourth Edition, which he produced. He submitted that I should take judicial notice of that material as an authoritative statement of generally accepted medical opinion. In particular, he highlighted the definition of normal consciousness in that textbook which was to this effect:

"Consciousness is the state of awareness of the self and the environment when provided with adequate stimuli: normal consciousness is exhibited by those patients who are fully responsive to stimuli and show appropriate behaviour and speech.

Patients who are asleep can be roused and are then able to perform normally.” (my italics).

He submitted on the basis of the above passage that medical opinion was to the effect that sleep was not “lost” or even “altered” consciousness because people can be roused from it in contrast to the effects e.g. of stupor or coma. He conceded that a medical definition of “lost or altered consciousness” was *not* determinative of the construction of Activity 10. However it should be given consideration by me as part of the background to the enacted test of that activity especially as its application to an individual claimant was in the first instance carried out by doctors or other Health Care Professionals.

- (b) It was a necessary implication from paragraph 6 – 10 of *AB* that falling asleep did not constitute “lost or altered consciousness”. He invited me to follow and apply that decision and in so doing to hold that the tribunal’s reasoning was sound. Insofar as *JG* implied that sleep might be covered by Activity 10, at least in some circumstances, it was wrong and I should not follow it. He drew to my attention that Upper Tribunal Judge May QC in CE/2384/2014 had followed *AB* and had been doubtful, to say the least, about *JG*. See paragraph 9 of CE/2384/2014, document 144. I should take the same approach and dismiss the appeal.
- (c) I should construe the statutory text of Activity 10 by reading it as a whole. In particular, I should pay particular regard to the statutory formulation of the Activity by reference to “consciousness during waking moments”. That phrase meant when a claimant was not sleeping. Its effect was to exclude any application of the point scoring descriptors of Activity 10 to the claimant in the circumstances found in fact by the tribunal. Thus they did not err in law by taking the approach which they did to Activity 10.

13. I found Mr Komorowski’s submission narrated in paragraph 12(c) above compelling. I accept it. Indeed I consider it appropriate to determine the appeal on the basis of it. In my judgement, the point at issue in this case is, at the end of the day, one of statutory construction. The question before me is whether the tribunal correctly decided that none of the point scoring descriptors of Activity 10 applied to the claimant on the basis of the facts which they found. Reading the statutory formulation of Activity 10 as a whole, I am satisfied that it was not intended that episodes of falling asleep should be covered by those descriptors, given the reference in that formulation to “during waking moments”. The tribunal construed Activity 10 correctly. Their decision that neither of the point scoring descriptors of that Activity applied to the claimant was not an error in law. For the sake of completeness I hold that they also adequately explained why they took the approach which they did to Activity 10.

14. Regrettably, neither representative drew my attention to *DM v Department for Social Development (ESA) [2013] NI Com C17*, a Northern Ireland Decision by Mr Commissioner Stockman which is cited in the commentary on Activity 10 in volume 1 of Social Security Legislation 2015/16, page 1162. I am glad to find strong support in that persuasive decision for the decision I had independently reached and have laid out in paragraph 13 above. In paragraph 24 of *DM* the Commissioner puts matters thus in a succinct yet incisive passage:

“On the issue of sleep unconsciousness, the relevant Activity is headed “remaining conscious during waking moments”. It is long established that the heading to each activity is integral to understanding the scope of the descriptors within it, as stated by

Commissioner Brown in C2/98 (IB) and Chief Commissioner Martin in C31/98 (IB). Whereas those cases apply to IB, they are equally applicable to ESA. The correct approach to the activity excludes considerations of periods of normal sleep. *Falling asleep during the day does not equate to loss of consciousness.*" (my italics).

I entirely agree with the italicised sentence from the above quotation. It well summarises my decision.

15. For the reasons given in detail above the claimant's appeal is dismissed and the decision of the tribunal is confirmed.

(Signed)
A J GAMBLE
Judge of the Upper Tribunal
Date: 4 August 2016