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DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

CE/3475/2015

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 Barnsley East and made on 25 August 2015under reference SC0001/15/00209. 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 ESA
4. The appellant will file any medical or other evidence upon which he wishes to rely within 28 days of the issue of this decision, remembering that in order to be relevant evidence will need to shed light on the situation as it was at the date of the decision under appeal, 2 March 2015. This is not to say that further evidence is necessary or expected.
5. The Secretary of State will, within 28 days of issue, file with the relevant HMCTS office further information for the tribunal, namely
   - Details of the decision awarding or continuing an award of ESA prior to the one under appeal.
   - Details of relevant work related activity per IM.

REASONS

Background

1. The appellant suffers from epilepsy of very long standing. He had surgery in 2010 which reduced the level of epileptic seizures although a resultant brain haemorrhage may have caused different problems.

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2. His appeal to the First-Tier Tribunal concerned the disallowance of his ESA following a decision made on 2 March 2015 superseding the existing award.
3. That decision was made subsequent to a medical assessment conducted by Dr Balint on 10 February 2015.
4. An appeal was lodged, and heard on 25 August 2015 .
5. The decision of the Secretary of State was confirmed by the tribunal. Permission to appeal was refused by the District Tribunal Judge who had presided at the hearing and renewed before the Upper Tribunal.

The appeal to the Upper Tribunal.

6. Upper Tribunal Judge Lloyd-Davies granted permission to appeal on the basis that it was arguable that the findings made by the tribunal as to the frequency of the fits suffered were inadequate. The matter now falls to be decided by me.
7. As this is an ESA case all references are to the Employment and Support Allowance regulations 2008 and the Activities Schedule 2 thereof unless otherwise stated.
8. No party has asked for an oral hearing, and I am now of the view that the issues can be properly and fairly dealt with on the basis of the information in the papers before me. That follows the filing of a further submission by the Secretary of State at my direction.

The position of the Secretary of State

9. The Secretary of State supported the appeal from the outset. In a helpful initial submission his representative Mr Page pointed out that there were important discrepancies between the decision notice issued following the hearing and the full statement of reasons, and that there must be a question as to whether the FTT had determined the frequency of any loss of or altered consciousness properly.
10. I was, nonetheless, concerned that although the ultimate determination of the appeal, remission for further fact-finding, was agreed between the parties, and was clearly the right outcome, there remained legal issues upon which I would be required to direct the fresh FTT, and the approach to those matters was not agreed.
11. I made directions on 20 June 2016 in the following terms:

1. *In this appeal the Secretary of State argues for remission to the First Tier Tribunal (FTT) and I am inclined to agree with that view. However, on remission directions for the guidance of the FTT will be necessary, and there is a clear issue between the parties in relation to whether in the circumstances of the case the FTT is able to consider the application of the descriptors under Part 2 of Schedule 2 to the Employment and Support Allowance Regulations 2008 following the amendments effective from 28 January 2013.*
2. *The appellant suffers from epilepsy. His representative argues that as a consequence of an operation to alleviate that condition, during which he suffered a brain haemorrhage, he is left with residual problems that cause him difficulties under activities 11 12 and 13. At paragraph 6 of*

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the Secretary of State's response it is said that these could only be considered where they were due to mental illness, and in this case there is no diagnosis of that. It is also said that the FTT dealt adequately with the matter in the Statement of Reasons (SOR), and a specific part of that is referenced, however it is unclear to me whether the FTT precluded consideration of the descriptors on the basis that the appellant 'does not have a mental health condition' [16] of the SOR or whether they did consider the matter but found on the facts that the descriptors contended for did not apply. On my reading of the statement I think former more likely; however the position seems to be at best unclear.

3. *The issue seems to me to be whether the term 'mental disablement' in the amended regulation 19(5) covers a condition which may (and here the actual finding may be for the expert tribunal) be physical in origin (epilepsy or a brain haemorrhage) but which manifests itself in problems which are mental in nature. The directly relevant part of the amended regulation 19(5) reads*

(5) In assessing the extent of a claimant's incapability 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;

4. *My current inclination is that these descriptors should be able to encompass such conditions; my understanding is that they were at least in part designed to apply to people with learning difficulties whether congenital or through acquired brain injury, and either such learning difficulty seems to me to be analogous to cognitive impairment which develops following trauma or perhaps as a result of epilepsy itself. I would wish to give the Secretary of State an opportunity to comment on this important matter and my current understanding as set out, or clarify his existing submission in this regard; if there is still an issue following that I will direct an oral hearing.*

12. I have not felt it necessary to direct an oral hearing, because in the further submission, whilst disagreeing as to whether or not the appellant is likely to fall into activities 11 12 and 13 on the facts, Mr Page for the Secretary of State accepts that the term "mental illness or disablement" covers acquired brain injury, and it is permissible, given of course a factual finding of such disablement, for the FTT to consider them. That must be correct in law.

"Mental illness or disablement" in regulation 19 (5) (b)

13. The term 'mental illness or disablement' in the amended regulation 19 (set out in my direction is reproduced above) encompasses not merely mental ill-health in the form of conditions such as depression or schizophrenia but mental disablement of all kinds, for example

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learning difficulties and cognitive deficiency whether that be by reason of age or acquired brain injury. The purport of the assessment of a person's physical or mental condition, and specifically the terms of regulation 19 (1) make it clear that the matter being assessed is whether or not it is reasonable to require a claimant to work:

Regulation 19
(1) for the purposes of Part1 of the Act, whether a claimant' s capability for work is limited by the claimant' s physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.

(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

14. The capability for work is limited in subparagraph (1) by the claimant's "physical or mental condition"; that is a more inclusive term than mental illness.
15. In subparagraph (2) "mental disablement" is used. The term ‘disablement’ has been stated to be a state of deprivation or incapacitation of ability measured against the abilities of a normal person : CS/7/82.
16. Part 2 of schedule 2 is headed "Mental cognitive and intellectual function assessment". There is no indication in that heading that the limitation has to be in relation to what is commonly referred to as "mental illness” or “mental health issues those terms tending to encompass diagnosed problems of neurosis or psychosis.
17. Those matters persuade me that the regulations themselves are clear in relation to the breadth of mental disability which is to be taken into account. I do not consider them to be ambiguous. I would, however, note that Mr. Page refers to the advice that is issued to Healthcare Professionals by the Department of Work and Pensions in the Training and Development ESA Handbook, which is publicly available on the DWP website. Relevant in relation to the descriptors, in fact those relating to learning tasks in schedule 3, but which apply equally to schedule 2 it states *"it is the ability to actually learn how to do a task that is important. This activity is intended to be relevant to learning disability of whatever cause, including the result of acquired brain injury. It may also reflect difficulties in understanding language, for example following brain injury or stroke, such that the person is unable to learn how to complete a very basic task."*
18. In my judgement the purport of the legislation is to the effect that where are there are limitations amounting to incapacity caused by either physical or mental conditions or a combination of them such that it may not be reasonable to require that person to work, they

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must be taken into account howsoever those limitations are caused or described, save that the activities in Part 2 of schedule 2 deal with problems arising from mental disablement and those arising from physical disablement are calibrated under the activities in Part 1.

The application of these principles in this case

19. The FTT will find the facts, and if the facts themselves amount to a finding of mental disablement which warrants consideration of activities 11 and 12 and 13 then the FTT must examine them. They may reject the applicability of any of the descriptors in those activities because the appellant's degree of disablement is less than that envisaged by them; what they must not do is to fail to consider them at all because there is no diagnosis of "a mental health problem".

Regulation 19 (5) (c)

20. For completeness I set out the rest of regulation 19 (5) which, given the prescriptive nature of the application of part 1 only to incapability arising from direct treatment in relation to physical disability or disablement, and similarly the application of the part 2 activities only to incapability arising out of treatment in respect of mental illness or disablement, could not have assisted the applicant in this case in which it is said that he developed cognitive difficulties following an operation in respect of a physical illness, namely epilepsy. That further fortifies me in saying that the phrase "mental illness or disablement" in regulation 19 (5) (b) was intended to include those with congenital or acquired brain injury or other learning difficulties; were it not the residual cognitive problems of a person who suffered brain injury as a result of a medical accident could not be taken into account.

19 (5) in assessing the extent of the claimant's capability to perform any activity listed in schedule 2, it is a condition that the claimant incapability to perform the activity arises-

….

(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; or

(ii) Part 2 of schedule 2 of a direct result of treatment provided by registered medical practitioner for a specific mental illness or disablement

Regulation 29 (2) (b)

21. I take issue with Mr Page's initial submission also in relation to the regulation 29 point which he discusses at paragraph 10, concluding that the treatment of that issue by the FTT was adequate.

22. In my view the error in relation to findings as to the frequency of fits infected the consideration of the FTT as to the potential applicability of regulation 29(2)(b). Without any proper understanding of the

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extent of the fits, their presentation and the extent of any confusion or other incapacity due to the post-ictal state, the conclusions on the issue rather lose their meaning. In that context I note that an earlier report by the Health Care Professional Dr Balint, made after the appellant's brain surgery, refers to him ending up in hospital on two occasions during a three month period due to injuries from seizures.

23. The decision of a three-judge panel of the Upper Tribunal in *IM-v- SS WP (ESA) [2014] UK UT 412 (AAC),* whilst expressly concerned with regulation 35 may assist the fresh tribunal in any determination in relation to the regulation 29 issue, in particular the discussion in that case by the panel of the *Charlton* decision *Charlton –v- Secretary of State for Work and Pensions [2009] EWCA Civ 42*) at [79]-[84].

Possible further considerations

24. I deal with these out of an abundance of caution and in an attempt to be of assistance to the fresh tribunal as I am aware of some difficulties in relation to the current position should regulation 35 need addressing.

25. Should the FTT find either that the appellant scores sufficient points under schedule 2, or that regulation 29 applies to him it should go on to consider schedule 3 and if applicable regulation 35. Following the case of *IM* the Secretary of State has a duty to supply the FTT with information as to the range of work related activities which were available in the area in which the appellant lives at the relevant time, those being the activities with which she may have been required to engage. This information is required in anticipation of such a finding, even where the decision under appeal is that no such consideration would be necessary. Should this information not be forthcoming by the date of hearing the FTT must pay heed to the general principles set out in the conclusions of the three-judge panel in *IM,* in particular at [114-117].

26. I caution the appellant that the fact that he was successful here is no indication of success at the rehearing.

Upper Tribunal Judge Gray

(Signed on the original on 1 September 2016)