IN THE UPPER TRIBUNAL **Appeal No CE/1428/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Gray

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Stockport North Tribunal under number SC 944/16/00053 dated 10 March 2016 does not contain a material error of law. The decision stands.

REASONS FOR DECISION

1. The case concerned the appellant's entitlement to Employment and Support Allowance and all references are to the Employment and Support Allowance Regulations 2008. She appealed a decision made on 26 November 2015 that she did not have limited capability for work. The appeal came before the First-Tier Tribunal (FTT) on 10 March 2016. That tribunal confirmed the decision of the Secretary of State, and later, at the appellant's request, the judge provided a statement of reasons for the decision.

2. The District Tribunal Judge refused permission to appeal, however I granted permission on 28 June 2016. I felt that there were two arguable points in the case. The first was in relation to whether the FTT sufficiently considered the possible applicability of regulation 29 (2) (b), given the test set out in the case of *Charlton-v-SSWP [2009] EWCA Civ 42 (Charlton).* The second was the extent to which the reasons supplied by the judge dealt with the medical evidence.

3. I made directions for the filing of further submissions and those are now to hand. No party has requested an oral hearing. I am in a position to make a decision upon the papers that are now before me, and this is not a case in which oral submissions will assist me.

The submissions

4. The appellant's primary submission in respect of permission to appeal was that the FTT had regarded her condition to be fibromyalgia, whereas in fact she had other diagnoses which were in the medical evidence and, she said, were not taken into account. My observations in relation to possible inadequacy on the part of the tribunal in explaining their view of the medical evidence reflected that concern.

5. Her representative, Mr Adams- Corbett, a welfare rights officer employed by the Tameside Metropolitan Borough, maintains that the conditions of spinal stenosis and osteoarthritis were not taken into account. He argues that the facts were found on the basis of evidence which had not been fully explored.

6. Ms Needham, in the response of the Secretary of State says that I should dismiss the appeal. She refers me to a number of decisions of Upper Tribunal Judges, including one of my own, which deal with the type of circumstances in which regulation 29 should probably be considered, and with the extent to which findings must be made in relation to potential substantial risk under the umbrella of the regulation 29 considerations. I do not need to discuss those decisions further in the light of my analysis of the situation in this case.

7. My initial view was that there were arguable issues as I have set out above. That is not to say that they were bound to succeed.

8. Having considered the matter I accept the submission of the Secretary of State that there was no material error of law.

The background and FTT decision

9. The appellant suffers from chronic pain consequent upon a sharp pain caused when she lifted a child, but which was later medically established to have been the result of a degenerative condition of her spine. That is what the medical evidence before the FTT said.

10. Following departmental consideration of the ESA 50, the form in which the appellant had set out her practical difficulties, she was directed to attend a medical examination with a healthcare professional. This took place on 18 November 2015, and Nurse Harding who conducted the examination made a report. That report was a combination of what she had been told by the appellant in relation to her daily activities, and her opinion of the extent of her functional problems based upon that and her knowledge of her diagnosed problems and clinical treatment. There was little by way of clinical examination results in this case, because the appellant declined to perform most of the actions (of the reaching and bending kind) that were requested of her. The report states that written medical evidence, a GP letter and hospital correspondence, was reviewed by Nurse Harding.

11. The FTT accepted the evidence of the healthcare professional both in respect of it being representative of what the appellant had said, and in relation to the nurse's opinion.

12. The statement of reasons supplied by the judge says at paragraph 9 that the appellant had suffered with multiple joint and muscle pain for over 10 years. That is clearly an acceptance of her having medical problems. As to their origin the statement says this: *"her condition was initially attributed to spondylosis. It has recently been diagnosed with fibromyalgia (letter from Dr McBride). We find that she does also have spondylosis but not of any severity."*

13. The issue for the FTT is the extent to which physical or mental function is compromised by physical or mental disability. The question of precisely what condition or syndrome causes the limitation is not technically relevant. If a tribunal ignores or fundamentally mis-states the medical problems that are established by evidence that may amount to an error of law, the factual findings then being based on an irrational premise. However that is not the position here.

14. With regard to the appellant's medical evidence, it is clear from the statement, for example at paragraph 9 and 17, that the tribunal took it into account, but the point was made that she had not had any treatment for the conditions causing her pain in the last two years. There was acceptance of her suffering some pain, but the contention that it was severe and significantly compromised her function was rejected. The medical evidence as to the investigations between about 2005 and 2008 would not, even if it had been exhaustively discussed, have borne upon the severity of the symptoms. The tribunal was not saying that the appellant did not have these conditions; indeed had they done so that would have been an irrational finding given the medical evidence. The tribunal was entitled to say that it rejected the contention that she was in severe pain which limited her function provided that it explained that finding sufficiently.

15. In relation to the reasons underpinning the decision made the statement set out the appellant's comments in relation to physical activities, citing parts of her evidence that were consistent with the findings and observations made by the nurse who had examined her. The tribunal was entitled to rely on that consistency in looking at whether the findings and observations made by that nurse in relation to other issues was likely to be reliable. The acceptance of the nurse's opinion as to the extent of the likely functional problems had a proper basis.

16. Specifically as to the mental and cognitive issues the tribunal used their own specialist knowledge of the lack of treatment. This is set out at paragraph 8.

17. From these matters and the description of the typical day given to the nurse by the appellant at the work capability assessment examination, upon which the FTT clearly relied, it was open to them to find that although there were medical problems they did not significantly impair the appellants function. Aspects of her ability to function were said to be that she drove a manual car, shopped (carrying her own bags) and could shower and wash her own hair, all of which they found indicated likely reasonable function and there was little to indicate a significant effect upon the functional activities that deal with mental, intellectual and cognitive abilities. The tribunal was entitled to find that there was no significant mental health problem such as would engage the activities dealing with mental, intellectual and cognitive abilities. I appreciate that the representative has looked up the drug amitriptyline and points out that it is used in the treatment of mental health. This tribunal, however, is expert and its finding was that there was nothing in the prescribed medication (or any other treatment) which pointed to such a problem. I am unable to interfere with the factual finding of such a tribunal unless it is essentially irrational from a legal point of view, and this cannot be said to be the case, given the low dose of amitriptyline prescribed, which would be consistent with its use as a muscle relaxant to relieve pain, and inconsistent with its use as an antidepressant.

18. Overall the task of this tribunal, using its expertise, was to determine the probable level of functional ability from the facts found, and it was within the ambit of reasonable judgement for the FTT to conclude that, despite her having some pain, the lack of treatment in the recent past and the level of independent activity described were such as to preclude the likelihood of significant functional difficulty.

Regulation 29

19. As to the regulation 29 consideration, paragraph 25 deals with the FTT's approach to that. The tribunal found that the appellant drove a car regularly. As a consequence the failure to deal with the matter of risk on the way to and from work within the *Charlton* criteria if an error, was not material. As to risk within the workplace itself, the FTT was entitled to find that, given her stated abilities of driving and using the telephone, her previous experience of, amongst other things, factory work and, importantly, the lack of a mental health problem of any significance, there was a range of sedentary work that she could undertake without substantial risk to the physical or mental health of any person. That was sufficient to satisfy the test in *Charlton*.

My conclusions

20. Whilst it was arguable that there had been a failure to explain the appellant's medical evidence, on analysis I find that no such failure has been established as constituting a material error of law.
21. Regulation 29 whilst relevant at the outset of the appeal, really ceased to be so in view of the findings of the tribunal that the somewhat extreme difficulties the appellant put forward as being caused by her continuing chronic pain were not made out. The tribunal, using its own expertise and the report of Nurse Harding simply did not accept that she would have either the problems that she said she had, or, indeed, any problems at all under the descriptors. In those factual circumstances there could be no question of substantial risk. It would not have been inappropriate for the tribunal, having made its findings, to have decided not to formally consider regulation 29, or, to put it perhaps more accurately, to consider it only in order to confirm that it was not, or was not any longer, an applicable consideration in the light of those findings. In any event read as a whole the explanation satisfied the test set out by the Court of Appeal in *Charlton*.

22. For these reasons I do not interfere with the decision of the FTT, which continues to be of effect.

(Signed on the original) **Paula Gray**

Judge of the Upper Tribunal

25 October 2016