DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Gray

Decision: This appeal by the claimant is dismissed. The decision of the Basildon tribunal given on 22 February 2016 is correct as a matter of law and it stands.

Reasons

1. On 20 September 2016 I granted permission to appeal in this case on the basis of a small but critical procedural issue. The correspondence from the appellant's father, who represents her, indicates that he believes that the case concerns a number of other issues, and I will touch upon them to explain why that is not so, but I concentrate on the legal matter before me; I will explain the complex background only insofar as it is essential to understand that point.
2. The representative has asked for an oral hearing. Under rule 34 (1) Tribunal Procedure (Upper Tribunal) Rules 2008 I may make my decision without a hearing. Under subparagraph (2) of that rule I have regard to his request. I only gave permission to appeal in relation to the point concerning the constitution of the tribunal, which I now discover is a legal issue that is covered by existing, albeit recent, case law. The representative having made no observations on that point in reply to the Secretary of State's submission, I am of the view that an oral hearing would take the legal issue in the case no further, and I refuse that request.

Background

3. The appellant claimed an income related Employment and Support Allowance (ESA) from 2/05/14. A point came within that claim when the Secretary of State directed her to attend a medical examination. He has the power to do that, where people claim ESA, under regulation 23 (1) of the Employment and Support Allowance Regulations 2008. Where the Secretary of State has given proper notice of the examination and the claimant fails to attend or submit to it without good cause, they are treated as no longer having limited capability for work, the result being that their entitlement to ESA ceases under regulation 23 of the same regulations.
4. The date of the examination with which I am concerned was 17/04/15. The appellant did not attend. She had also purported to cancel, or had not attended, previously arranged examinations. The Secretary of State's decision maker disallowed her ESA from 18/04/15, the day following the missed examination. It is that decision with which I am now concerned.
5. The appellant sought a mandatory reconsideration of that decision. In that request it said that she had requested a home visit on 3 occasions, and had letters from her doctor supporting her inability to attend. The decision was not revised at the reconsideration, and she appealed.
6. It is at that stage where certain other matters come in to the picture. The grounds of appeal did not refer to the matters that had been raised in the mandatory reconsideration; the appellant, or more probably her father on her behalf, had for some time been insisting not only on a home visit, but a home visit by a doctor. There is in the bundle which was before the FTT and is now before me correspondence in

the form generally of notes appended onto letters from the Medical Services acting on behalf of the DWP, making it clear that a home visit was required, and that it "must be Dr only."

7. In correspondence Atos Healthcare said that they could not authorise a home visit given the medical evidence that they had received (the implication being that it was not sufficiently supportive of the need for such an arrangement) and a further remote appointment was arranged. A taxi to that appointment was later offered, but it seems not taken up.
8. Ultimately, once it is established that the notice of the appointment was sent to her, the issue of why the appellant did not attend and whether or not her reasons amounted to good cause for not doing so are the central issues for the FTT in the appeal against the termination decision.
9. A complicating factor here is that the appellant had had another appeal which had been heard on 4 August 2015 by Judge Reid and Dr Austin. That was not an appeal concerning a failure to attend a medical examination, but an appeal directly concerning whether or not she satisfied the criteria for an award of the Employment and Support Allowance, that is to say whether she had limited capability for work under the test known as the Work Capability Assessment applying regulation 19 and schedule 2 of the Employment and Support Allowance Regulations 2008. I say that this was a complicating factor because it might easily be thought to be an appeal on relation to similar subject matter, and I think it has raised certain expectations in the father, but in fact it is technically a different type of appeal and that difference is critical to my decision. I need say no more about that earlier tribunal decision than that it led to correspondence from which it is clear to me that the qualifications of the doctor who sat on that panel were a matter of concern to the father, who was also then acting as the appellant's representative. He demanded to know what they were. He had been told by Judge Reid, he said in that correspondence, that "the government had selected this doctor" but insisted that he was still entitled to know the doctor's qualifications.
10. I think it may be helpful at this point if I digress briefly to explain that it is not the government that selects Medical Members to sit on tribunal panels but the Judicial Appointments Commission, which is an independent body. Following the selection process they are appointed by the Lord Chancellor. Further, a Medical Member is not sitting in their capacity as a doctor, although they are qualified doctors with a GMC registration, but as a Judicial Office Holder. That is why it is not incumbent upon them to provide details of their qualifications and background to appellants who are interested; their appointment validates them to sit; their qualifications to do so do not need to be demonstrated on a case-by-case basis.

This appeal at the FTT

11. The appeal against the decision made on 18/04/15 was finally heard on 22 February 2016 at Basildon. The appellant did not attend, but her father (and also her mother) did. The judge heard what they had to say. He then made a decision that the appellant failed to attend the medical examination on 17/04/15, and that she did not have good cause for that failure. The decision terminating her right to receive Employment and Support Allowance therefore continued to be of effect. The appellant asked for a statement of reasons for the decision, and sought permission to appeal.
12. On 27/5/16 permission to appeal was refused by the District Tribunal Judge. An application for permission to appeal directly to the Upper Tribunal followed. The grounds of appeal at that stage concerned having a doctor at the tribunal, the representative requiring one as well as insisting upon his being advised in advance of

the doctor's qualifications. He asks the question "how can the judge make a proper decision… We are there for health reasons only... "

13. I granted permission to appeal. I thought there was an argument as to whether the issue in the appeal had been one of limited capability for work, which requires a Medical Member under the terms of the Senior President of Tribunals Practice Statement as to the Composition of Tribunals in Social Security and Child Support cases in the Social Entitlement Chamber on or after 1 August 2013. I pointed out that the case had been decided by a judge sitting alone which was impermissible if the appeal fell into that category. I thought that the matter was one on which there was no legal authority. I directed a response to be filed by the Secretary of State.

The Secretary of State's position

14. In that response Mr Spencer on behalf of the Secretary of State brought to my attention a recent decision made in Scotland by Upper Tribunal Judge May, *CSE/272/2016.* The point at issue was the same point that I felt was so critical. It was whether the tribunal was improperly constituted, although in that case the potential impropriety was because it included a medical member. The argument covered the Practice Statement to which I have referred, and whether the appeal involved the limited capability for work assessment.

15. The argument referred to regulation 19 (2) of the Employment and Support Allowance Regulations 2008 which provides that

> "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 activity is prescribed in schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities."

16. The argument continued that the decision under appeal did not assess the claimant by reference to the activities in schedule 2, it treated the claimant as not having limited capability for work (under regulation 23 (2)) because she was considered to have failed without good cause to attend a medical examination. Accordingly that part of the Practice Statement which permitted a Medical Member to sit on the tribunal did not apply. Judge May accepted that argument, and its extension that no other exception contained in the Practice Statement applied in the circumstances of an appeal against an alleged failure to attend a medical examination. Judge May remitted the case for a rehearing in front of a tribunal consisting of a judge alone.

17. The legal issues are on all fours with those in this case, which is to say that the same arguments apply. I agree with Judge May's decision and his analysis of the legal position.

18. Mr Spencer recommends that I remit this case for rehearing, but that is on the basis that the tribunal at Basildon did sit as a Judge and a Medical Member. Mr Spencer says that because the name of the Medical Member is on the record of proceedings. I am not persuaded, however, that the Medical Member did in fact sit. It is possible that the case was listed by HMCTS to be heard by both judge and a Medical Member, which would explain the note made on the record of proceedings by a member of the administrative staff; the position is (or was until Judge May's decision on the point) not entirely straightforward as to whether the panel should comprise a Judge and a Medical Member or a judge alone. But as to what happened at the

hearing the judge says clearly at paragraph 2 of the statement of reasons "although an appeal against an ESA decision, this was not a limited capability for work appeal, and was thus dealt with by judge alone." The decision of the judge, (if it was his decision following an error in also listing a medical member) to sit alone was correct as a matter of law and the tribunal was properly constituted.

19. There is no error of law which I have been able to find, and none which has been identified to me. I am satisfied that the tribunal's statement of reasons satisfactorily sets out the issues and explains why the judge reached the conclusion that he did; the appellant's representative's arguments as to his need to know the qualifications of the Medical Member on the panel fall by the wayside given my decision that this particular appeal did not require a medical member to sit because it was not an appeal that directly concerned limited capability for work.

20. Whilst it is not a matter that affects the decision before me Mr Spencer has helpfully referred to a case *RO-v- Secretary of State for Work and Pensions (ESA) [2016] UKUT 402 (AAC)* decided by Upper Tribunal Judge Mitchell which touches upon the matter which seems to have brought about the problems in relation to the appellants attending the medical, that is to say who should conduct that examination.

21. In that case Judge Mitchell referred to the regulations that empowered the Secretary of State to direct attendance at a medical examination, and who should conduct it. He cited Regulation 23 (1) of the Employment and Support Allowance Regulations 2008 which provides:
"Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by on behalf of a health care professional approved by the Secretary of State to attend for a medical examination"
Regulation 2 (1) of the same regulations defines health care professional as

    (a) a registered medical practitioner;
    (b) a registered nurse; (Judge Mitchell points out that the definition of "registered nurse" needs to be read with Schedule 1 to the Interpretation Act 1978 which reads "Registered" in relation to nurses and midwives means registered in the register maintained under article 5 of the Nursing and Midwifery Order 2001 by virtue of qualifications in nursing or midwifery, as the case may be."
    or
    (c) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under section 60 of the Health Act 1999.

22. From that I conclude, although my remarks are obiter, that is to say by the way comments not necessary for the resolution of the issue in this case, it is for the Secretary of State to decide on the type of health care professional who will conduct the examination, and for a claimant to refuse to submit to the examination on the basis that the healthcare professional chosen was not a doctor, or to insist as a pre-condition of attendance that it must be a doctor conducting the examination, would amount to a failure to attend. I make these concluding observations in an attempt to be helpful to the representative.

Upper Tribunal Judge Paula Gray

Signed on the original on 21 December 2016