

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CSE/472/2017

Before: Upper Tribunal Judge K Markus QC

DECISION

The appeal is dismissed.

REASONS FOR DECISION

1. The Appellant suffers from learning difficulties, dyspraxia and constipation. She applied for Employment and Support Allowance (ESA). On 15 October 2016 the Secretary of State decided that the Appellant scored 6 points for descriptor 15(c) but this was insufficient to entitle her to ESA. That is the decision against which the Appellant appealed to the First-tier Tribunal (FTT).
2. At an oral hearing attended by the Appellant on 5 June 2017, the Appellant argued that she also satisfied descriptors 11(c), 12(c) and 13(c). She did not rely on dyspraxia or constipation as giving rise to any relevant functional limitations. The Appellant's representative submitted that the Appellant satisfied descriptor 12(c) because she had previously been subject to exploitation for sex and had a support network in place to prevent people taking advantage of her.
3. The FTT decided that the Appellant scored 6 points in respect of each of descriptors 11(c) and 15(c). The total of 12 points was insufficient to entitle her to ESA and the FTT decided that regulation 29(2)(b) did not apply.
4. As for descriptor 12(c), the FTT said as follows:

“15. ...it was argued in the submission that [the Appellant's] trusting nature and potential vulnerability to exploitation would entitle her to points for this activity. However we do not consider this activity to be directed towards that kind of vulnerability given the reference, as examples, to “boiling water” or “sharp objects” and the requirement that a claimant should suffer a “reduced awareness” of these types of hazards. We found that [the Appellant] has sufficient awareness of the dangers associated with boiling water, sharp objects and other comparable hazards, that her learning disability is mild, that she travels independently and that she was considered safe to be left alone in the house for a week. We could not reconcile this with the claim that she would require supervision to maintain safety in the manner envisaged by the descriptors.”
5. On 13 September 2017 the Appellant's representative, Angus Council Welfare Rights Service, sought permission to appeal on the ground that the FTT had failed to address activity 12 correctly. It was submitted that the FTT unduly limited the scope of activity 12 and should have considered whether the Appellant was vulnerable to “social hazards”.
6. I gave permission to appeal. Both parties have sent written submissions on the appeal. The Secretary of State does not support the appeal. Neither party has

requested an oral hearing of the appeal. I am satisfied that I can fairly determine the appeal without a hearing. The parties have made clear written submissions. There is no need for any oral evidence and I do not consider that I would be assisted by hearing from the parties at an oral hearing.

Activity 12

7. Activity 12 in Schedule 2 of the ESA Regulations reads as follows:

<i>Activity</i>	<i>Descriptors</i>	<i>Points</i>
12. Awareness of everyday hazards (such as boiling water or sharp objects).	12. (a) Reduced awareness of everyday hazards leads to a significant risk of: (i) injury to self or others; or (ii) damage to property or possessions such that the claimant requires supervision for the majority of the time to maintain safety.	15
	(b) Reduced awareness of everyday hazards leads to a significant risk of: (i) injury to self or others; or (ii) damage to property or possessions such that the claimant frequently requires supervision for the majority of the time to maintain safety.	9
	(c) Reduced awareness of everyday hazards leads to a significant risk of: (i) injury to self or others; or (ii) damage to property or possessions such that the claimant occasionally requires supervision for the majority of the time to maintain safety.	6
	(d) None of the above apply.	0

Submissions

8. The Appellant’s case is that the FTT was wrong to limit activity 12 to hazards which are similar to boiling water and sharp objects. Her representative says that the activity should be construed so as to include the range of hazards that might arise in the workplace including risk of exploitation or abuse by those with whom a claimant comes into contact, and potential harm “due to the interaction of a reduced awareness and ordinary working obligations” which a claimant might experience in the workplace. He submits that the descriptors are drafted in “open language since it is difficult to foresee what hazards might pose a threat when intending to cover a vast range of disabilities”. The representative submits that the test to be applied is “whether the condition places a sufficient barrier to keep the individual from work”. He submits that “injury” is not limited to “physical damage” but means “a disposition placing the individual at disadvantage causing unwanted suffering”. He submits that the Appellant “needs restricted contact or

support when in social environments due to being at risk due to her disability. [The Appellant] has low social intelligence she is highly suggestible and needs to be watched she has been exploited for money and for sex” [sic]. The representative says that the FTT should have explored this at the hearing.

9. The Secretary of State submits that activity 12 is intended to reflect risks arising from common hazards from everyday objects which may be encountered by people with reduced awareness of danger. Moreover, a lack of understanding of what is expected of a person in a workplace or failure to understand social norms would not directly lead to personal injury or damage to property.

Discussion

10. The task of the Tribunal is to interpret and apply the legislation as enacted. The meaning and scope of activity 12 is clear from the words of the activity itself. The hazards in question must be “everyday”. That word means “common place” or “ordinary”. It is not the same as “every day”. The words “such as” shows that “boiling water or sharp objects” are examples of the intended meaning of “everyday hazards”. The activity is concerned with hazards which are similar in kind to boiling water and sharp objects.

11. Section 3.5.3 of the Revised WCA Handbook gives other examples:

“When considering this functional category details you should ask about ability to cope with potential hazards. These may include:

- Ability to cope with road safety awareness
- How they manage if they live alone
- Driving
- Ability in the kitchen
- Awareness of electrical safety
- Responsibility for children/pets

It may be useful to consider the concept of whether the person could be safely left alone to manage basic daily life when you consider this functional category.”

12. This is guidance to healthcare professionals which has been approved by the DWP Chief Medical Officer. It is not a statement of the law, but in my judgment it correctly identifies a number of circumstances in which everyday hazards of the kind envisaged by the activity can arise. As the guidance says, the activity is concerned with a person’s ability safely to manage “basic daily life”.
13. People are faced with commonplace hazards such as boiling water or sharp objects when going about their daily life, for example when making hot drinks or chopping food. They face commonplace hazards when crossing roads or using electric plugs. People need to take care to avoid being injured when undertaking these activities. In order to take appropriate care, it is necessary to be aware of the risks posed by these hazards. Activity 12 recognises that some people, as a result of a health condition, may not have sufficient awareness and so cannot, without supervision, keep themselves safe.
14. There are other hazards which cannot be said to be commonplace or ordinary. Social interaction is not ordinarily a hazardous activity. However it may be if a person is particularly vulnerable in social situations, for instance (as is claimed by

the Appellant) because of suggestibility and risk of exploitation or abuse. That is not an “everyday hazard” as used in Activity 12.

15. I do not accept the representative’s definition of “injury” which is an ordinary word and should be given its ordinary meaning. But in any event this takes matters no further. Social interactions to which the Appellant claimed to be vulnerable are not “everyday hazards” within activity 12 and so it was not necessary for the FTT to have explored whether those situations posed a significant risk of injury to her.

16. Accordingly, the appeal is dismissed.

**Signed on the original
on 23 April 2018**

**Kate Markus QC
Judge of the Upper Tribunal**