IN THE UPPER TRIBUNAL **Case No.** CE/1316/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

The Appellant appeared in person.

The Respondent was represented by Mr Christopher Buckingham of counsel, instructed by the Government Legal Department.

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 11 January 2017 is set aside and the case is remitted to the First-tier Tribunal to be re-decided by a differently-constituted panel.

Direction: The Secretary of State must, if possible, provide the First-tier Tribunal with information as to the basis of the award of employment and support allowance that was superseded in this case on 20 August 2016 – *i.e.,* at least the descriptors found satisfied or the other ground upon which the decision had been made. If the Secretary of State cannot do that within one month of this decision being sent to her, she must explain to the First-tier Tribunal why she is unable to do so.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with permission granted by Upper Tribunal Judge Lloyd-Davies, against a decision of the First-tier Tribunal dated 11 January 2017, whereby it dismissed her appeal against a decision of the Secretary of State dated 20 August 2016 superseding her award of employment and support allowance and deciding that she was not entitled to employment and support allowance from that date.

2. The First-tier Tribunal accepted that the claimant had "multiple health problems" but found that she did not satisfy any of the descriptors in Schedules 2 and 3 of the Employment and Support Allowance Regulations 2008 (SI 2008/794) and also that the conditions of regulation 29 were not satisfied.

3. An appeal to the Upper Tribunal lies only on a point of law. The First-tier Tribunal was therefore the final judge of matters of fact or medical opinion and the Upper Tribunal can interfere with its decision only if satisfied that the decision was wrong in law. Understandably, the claimant has not put her arguments in terms of points of law but I will consider whether they do raise such points. First, however, I will consider the ground upon which Judge Lloyd-Davies gave permission to appeal following an oral hearing.

4. A failure to give adequate reasons for a decision is an error of law and Judge Lloyd-Davies raised the question whether the First-tier Tribunal ought to have explained why it had reached a different conclusion from that reached when the award of employment and support allowance was made following an assessment in 2013, given that her conditions were unlikely to have improved. The Secretary of

State does not argue that the First-tier Tribunal was not required to give such reasons, referring to R(M) 1/96, and concedes that the First-tier Tribunal did not expressly address the point. However, it is submitted on behalf of the Secretary of State that it is reasonably obvious from the First-tier Tribunal's findings why it did not renew the award and it is pointed out that the reasons for the 2013 decision made after the assessment were not revealed in the documents before the First-tier Tribunal.

5. The phrase "reasonably obvious" is drawn from R(M) 1/96 itself, where Mr Commissioner Howell QC, in a case concerning mobility allowance (since abolished), said –

> "15. It does however, seem to me to follow from what is said by the Court of Appeal in [*Secretary of State for Social Security v Evans* (reported as R(I) 5/94)], that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an apparent variation in the treatment of similar *relevant* facts appears from the record of their decision.
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> 16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance) then in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant 'not virtually unable to walk' without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow in my view that they will be in breach of [the duty to give reasons] and in error of law."

6. It is important to bear in mind the legal framework within which the Secretary of State and tribunals operate in employment and support allowance cases. There are two relevant aspects to this.

7. First, whether a person qualifies for employment and support allowance under Part 1 of the Welfare Reform Act 2007 depends on whether a person has, or is treated as having, limited capability for work. Whether a person has limited capability for work is determined not by considering in individual cases how reasonable it is to expect that person to work but by deciding whether the person satisfies descriptors in Schedule 2 to the 2008 Regulations so as to score at least 15 points under the Schedule (which was set out on pages 17 to 20 of the Secretary of State's submission to the First-tier Tribunal). There are circumstances in which a person who does not score 15 points under the Schedule may nonetheless be treated as having limited capability for work, but that is so only in certain circumstances, of which the only ones relevant to this case are set out in regulation 29.

8. Secondly, although mistake or ignorance of a material fact or a change of circumstances are grounds for supersession of an earlier decision, it is not necessary for the Secretary of State to show that a previous award was based on an error of fact or that circumstances have changed in order to supersede a decision in respect of an employment and support allowance that involves a determination that a person has or is to be treated as having limited capability for work. This is because regulation 6(2)(r) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), read with regulation 7A(1), provides that such a decision may be superseded if the Secretary of State has received new evidence from a health care professional. In other words, the Secretary of State may simply take a different view of the case in the light of the new evidence. That is why R(M) 1/96, which was actually concerned with a renewal claim rather than supersession (or its precursor, review), is nonetheless relevant. A claimant has no right to assume that the same decision will be made following the receipt of new evidence, but any apparent difference ought to be explained, although it may be sufficient merely to point to there being additional evidence or, indeed, merely to say that, on the totality of the evidence now available, the tribunal disagrees with the previous decision.

9. There is clearly a difficulty in giving detailed reasons for taking a different view of a case if the reasons for the original decision are not available. In some cases, fairness may demand that the evidence upon which the earlier decision was based should be obtained, together with such reasons as may have been given for the decision. In cases concerning employment and support allowance or personal independence payment, the descriptors chosen or any reliance on regulation 29 should be clear from the decision making the award, whether it was an original decision notice, a "mandatory reconsideration notice" or a decision notice issued by the First-tier Tribunal. However, whether such information should be obtained is a matter of judgment that depends very much on the circumstances of the particular case. Where it is not obtained so that the reasons for an earlier decision are unclear, it will usually be open to a tribunal to say that either there must have been a change of circumstances or it disagrees with the previous decision, without it being necessary to decide between the two.

10. In this case, the First-tier Tribunal mentioned at the beginning of its statement of reasons that there has been a previous award following an assessment but it made no further allusion to it when confirming the Secretary of State's decision to supersede that award. This may have been partly because the reason for the award, or the continuation of the award, was unknown to the First-tier Tribunal. The report made by the health care professional in 2013 was in fact in the bundle of documents before the First-tier Tribunal, but that report clearly did not support an award of employment and support allowance and so, unless there was a mistake or some other compelling evidence before the initial decision-maker, it seems likely that there was initially an decision adverse to the claimant that was then either revised by the Secretary of State or overturned on appeal in the light of other evidence. It seems unsatisfactory that the Secretary of State should provide a report that is adverse to a claimant without acknowledging that it could not have been the basis for the previous award and without either attempting to provide further evidence or explaining that the further information is not available. On the other hand, no unfairness appears to have arisen from that in the present case because it must have been obvious to the First-tier Tribunal that the report was not the basis of the original award and it did not rely on it.

11. What is the consequence of the First-tier Tribunal having failed expressly to give a reason for departing from a previous award? As the Secretary of State submits, R(M) 1/96 requires that the reason for departing from the previous award must be "reasonably obvious" from the First-tier Tribunal's other reasoning. The examples given in R(M) 1/96 are where there were clear findings of fact showing a change of circumstances or where the evidence relied upon was particularly clear. But, if there is "no entitlement to preferential treatment", I incline to the view that it is sufficient that the reasoning as a whole be particularly clear, even if, on the evidence, the case was on the borderline. In other words, the reasoning must be such as to be able to carry the clear implication that the First-tier Tribunal either found a change of circumstances or disagreed with the previous decision. This may mean no more than that the Upper Tribunal will be less likely than usual to give a generous reading of reasons – *e.g.*, by presuming that the First-tier Tribunal had familiar statutory provisions in mind when it has not expressly mentioned them – in a case where the First-tier Tribunal has failed expressly to acknowledge the implications of an earlier decision.

12. In the present case, permission to appeal was given on the premise that it was unlikely that there had been a change of circumstances that would justify terminating the award. I am not sure that I accept that premise. Some of the conditions from which the claimant has suffered are unlikely to have got significantly better, but that does not seem true of all of them. An acute asthma attack had caused the claimant to be hospitalised in 2014 but the First-tier Tribunal found her asthma to be stable and treated with inhalers at the time of the Secretary of State's decision in 2016. Similarly, the claimant suffers from chronic depression, but it does not necessarily follow that her mental health problems cannot improve. For instance, she gave evidence to the First-tier Tribunal that there had been, ten years earlier, a period in her life when she was drinking, had a mental health worker and sometimes behaved aggressively. Things had improved since then.

13. But, in any event, in most respects the First-tier Tribunal gave clear reasons for reaching the decision it did and, what is more, it did so largely on the basis of the claimant's own evidence as to what she did and on the basis of its own observations of her. In relation to conditions that were unlikely to have improved, looking at the claimant at the time of the hearing rather than at the time of the consultation with the health care professional or of the Secretary of State's decision would not have been unfavourable to her. Insofar as its findings and reasoning are unassailable, the necessary implication of them is that either it disagreed with the previous assessment in the light of the evidence before it or there had been a material improvement in the claimant's condition, and that was sufficient to explain why it did not continue the previous award in the absence of any evidence as to the basis of that award.

14. However, there are two respects in which I have come to the conclusion that the reasoning is not clear. At the hearing before me, the claimant referred particularly to her difficulties as regards controlling her bowel and bladder and to the effects of her depression and it is in relation to those conditions that I am not satisfied by the First-tier Tribunal's reasoning.

15. Descriptors 9(a) and 9(b) are in the following terms –

> "(a) At least once a month experiences:
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> (i) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or
>
> (ii) …
>
> sufficient to require cleaning and a change of clothing.
>
> (b) The majority of the time is at risk of loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder, sufficient to require cleaning and a change of clothing, if not able to reach a toilet quickly."

A history of actual loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder is not strictly required as a condition of satisfying descriptor (b).

16. I am inclined to accept that the First-tier Tribunal's reasoning explained why it did not find descriptor 9(a) to be satisfied, but it did not adequately address descriptor 9(b). I understood Mr Buckingham to accept that that is so. No reference was made to the precise terms of the descriptor and the findings of fact and reasoning do not entirely rule out the possibility of that descriptor having been satisfied. It is possible that the First-tier Tribunal addressed its mind properly to the terms of the descriptor but, given that this is a descriptor the precise terms of which are not uncommonly overlooked by both the Secretary of State and the First-tier Tribunal and given that it might have been found satisfied when the previous award was made, I am not prepared to presume that the First-tier Tribunal did properly consider the descriptor.

17. By itself, that error would not be material, as only 9 points are awarded in respect of descriptor 9(b). However, as regards the claimant's depression, consideration had to be given to her ability to initiate and complete personal action "which means planning, organisation, problem solving, prioritising or switching tasks". This is a matter that I have considered since the hearing before me, but the difficulty

with the First-tier Tribunal's reasoning as regards descriptor 13(c) is similar to the difficulty as regards descriptor 9(b).

18. Descriptors 13(a), 13(b) and 13(c) are in the following terms –

> "(a) Cannot, due to impaired mental function, reliably initiate or complete at least 2 sequential personal actions.
> (b) Cannot, due to impaired mental function, reliably initiate or complete at least 2 sequential personal actions for the majority of the time.
> (c) Frequently cannot, due to impaired mental function, reliably initiate or complete at least 2 sequential personal actions."

19. In her claim form, the claimant had said that her ability to start and finish tasks varied and the First-tier Tribunal said –

> "With reference to the mental health descriptors the tribunal accepted [the claimant] has been diagnosed as having depression. At the date of the decision she had been restarted on Sertraline 50mg by her GP. She has low mood and sadness particularly since she has suffered family bereavements in the last couple of years and she can feel hopeless and cause her family to worry about her lack of motivation and activity in her home. However with reference to the finding of facts particularly at paragraphs j k l m she is able to go out alone and socialise the majority of the time, and use public transport. She can complete basic tasks such as setting an alarm, making a snack, preparing her clothes and appearance when going out. She made good eye contact and was talkative and focussed at the appeal referring to documents and evidence. She is not receiving any counselling or secondary care."

20. Having regard to the findings of fact to which the First-tier Tribunal alluded, I am satisfied that the First-tier Tribunal has given clear reasons for finding that descriptors 13(a) and 13(b) were not satisfied. But the First-tier Tribunal has not referred to the precise terms of descriptor 13(c) or anywhere shown that it has considered whether, even if the claimant could reliably initiate and complete at least 2 sequential personal actions for the majority of the time, she *frequently* could not do so. Again, this is an area where mistakes can be made even by experienced tribunals, because for many activities one is concerned only with whether the activity can generally be carried out or can at least be carried out for the majority of the time and, both for that reason and because it is possible that this was a descriptor found satisfied when the previous award was made, I am not prepared to give the statement of reasons a generous reading and presume that the First-tier Tribunal had the precise terms of the descriptor clearly in mind.

21. Had descriptors 9(b) and 13(c) both been satisfied, the claimant would have scored the 15 points necessary for an award of employment and support allowance. Accordingly, I allow the claimant's appeal on the ground that the First-tier Tribunal's reasoning is materially inadequate. In the circumstances, it is necessary for the facts of the case to be reconsidered by a tribunal with a doctor among its members and I therefore remit this case to the First-tier Tribunal to be re-decided by a differently-constituted panel. This makes it necessary for me to consider the claimant's grounds of appeal because the same issues may arise again.

22. In her first ground of appeal, the claimant says that the health care professional's computer "crashed" so that she had to write up the results of the

consultation afterwards from memory. That, she says, is unlawful. Even assuming that that is what happened and that the health care professional was not able to recover information that had been put into the computer during the consultation, I do not accept that there would necessarily be anything unlawful in what was done. The question is simply whether the record of the interview was accurate. The claimant had the opportunity to challenge the findings before the First-tier Tribunal and indeed she produced an annotated copy of the report showing where she disagreed with it. The First-tier Tribunal plainly had that in mind because it made references to the annotations in paragraph 6 of the statement of reasons and it made references to specific areas of disagreement in other paragraphs. However, it was not necessary for it to resolve all the disagreements because the question it had to decide was whether she satisfied any of the descriptors and many of the disagreements could be regarded as not relevant. Thus, it did not matter whether or not she used cream for her psoriasis; what mattered was whether the condition affected her ability to satisfy descriptors and, in particular, whether it affected her manual dexterity to the extent that she satisfied any of the point-scoring descriptors in relation to "activity" 5. It did not matter whether she could walk for an hour or only 10 minutes because the First-tier Tribunal was satisfied that even on the claimant's own evidence she could repeatedly walk 200 metres so that none of the point scoring descriptors in "activity" 1 was satisfied. It did not matter whether she was physically examined by the health care professional because there was other evidence of the claimant's ability to carry out relevant activities upon which the First-tier Tribunal was content to rely. Whatever happened at the consultation with the health care professional, I am not satisfied that it rendered the decision of the First-tier Tribunal wrong in law.

23. Nonetheless, the panel hearing the remitted appeal will have to consider afresh the claimant's contention that the health care professional's report is unreliable and will have to reach its own conclusion as to what happened at the consultation and whether it can, or needs to, rely on the evidence in the report.

24. The claimant's second ground of appeal relates to the manner in which the hearing before the First-tier Tribunal was conducted. Her main point is that the judge commented that she did not look depressed and that her appearance was well kempt and the claimant says that she found the comments insulting, degrading and upsetting. I can see why that may be so but I am sure that the judge did not mean to be insulting or to upset the claimant. What the judge said was perfectly proper. The health care professional had recorded that the claimant was "well kempt", "looks well", had a "normal facial expression", "coped well at interview" and had a "normal manner". Those observations were obviously not conclusive as to the claimant's mental health but they were relevant, because the Secretary of State and then the First-tier Tribunal had to decide not just whether the claimant was suffering from depression and other conditions but whether the effects of those conditions were so severe that point-scoring descriptors were satisfied. For instance, because people who are severely depressed may present as unkempt because they do not take care of themselves, being well kempt can be an indication, although no more than an indication, that a claimant's level of depression is not particularly severe. I am not sure whether the judge was relying on her own observations or was merely referring to the health care professional's observations or both. (Although most judges are not also doctors, it is not necessarily inappropriate for them to make their own observations on such matters. Judges of the First-tier Tribunal who regularly sit with

doctors in order to decide cases may acquire more experience in medical matters than most other judges.) In any event, it was appropriate for the judge to mention the observations because that gave the claimant an opportunity to comment on them by, for instance, saying (if it was the case) that she only made an effort when she had to go out to an important appointment or that she had had help in getting ready to go out. I do not regard it as arguable that what the judge said showed the proceedings were unfair. On the contrary, it promoted fairness.

25. The other point about the hearing made by the claimant was that, in her view, it was rushed and she was not given time to explain why she could not work. As I have explained above, the question whether the claimant had, or was to be treated as having, limited capability for work could only be determined by applying the statutory criteria. The First-tier Tribunal was entitled to focus on those statutory conditions of entitlement and it is clear that it addressed issues arising in respect of most of the potentially relevant "activities" in some depth. However, that is perhaps not so as regards "activity" 13, although whether that was because the First-tier Tribunal felt under undue pressure of time or whether it was because it had not fully considered the terms of descriptor 13(c), I do not know and does not now matter.

26. I allow this appeal only because I am satisfied that the First-tier Tribunal's reasoning was inadequate. This gives the claimant another opportunity to put her case before the First-tier Tribunal. She cannot assume that, just because she has been successful before the Upper Tribunal, she will be successful before the First-tier Tribunal. However, all issues will be at large before the First-tier Tribunal, although it will, of course, have to apply the statutory criteria and do so without taking account of circumstances not obtaining at the date of the Secretary of State's decision two years ago.

Mark Rowland
31 August 2018