

**IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Appeal No. CE/2227/2018

BEFORE JUDGE WEST

DECISION

The decision of the appeal tribunal sitting at St Helens dated 28 March 2018 under file reference SC244/16/00741 involves an error on a point of law. The Secretary of State's appeal against that decision is allowed and the decision of the appeal tribunal is set aside.

The decision is remade.

The decision made by the Secretary of State on 13 October 2016 is upheld.

In applying the work capability assessment, the claimant is entitled to 6 points under descriptor 10(b), but not to any points under descriptor 9(a) from the activities and descriptors in Schedule 2 of the Employment and Support Regulations 2008.

The decision awarding the claimant employment and support allowance from and including 8 February 2012 is superseded. The claimant is not entitled to an award to employment and support allowance from and including 13 October 2016 because he does not have limited capability for work.

This decision is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

1. This is an appeal, with the permission of District Tribunal Judge Jones, against the decision of the appeal tribunal sitting at St Helens on 28 March 2018.

2. The appellant is the Secretary of State for Work and Pensions. I shall refer to him hereafter as “the Secretary of State”. I shall refer to the respondent hereafter as “the claimant”. I shall refer to the tribunal which sat on 28 March 2018 as “the appeal tribunal”.

The First Appeal

3. The claimant, who was born on 31 July 1964 and who suffers from seizures and eczema, originally made a claim for employment and support allowance from and including 11 December 2010 on the basis that he was suffering from seizures and epilepsy. He was originally awarded employment and support allowance from and including that date and again, following an assessment on 27 January 2012, on 8 February 2012. On 15 May 2016 he completed an ESA50 form. On 28 September 2016 he attended a face to face assessment with a healthcare professional. As a result of that assessment he scored 6 points under the physical health descriptors and 0 points under the mental health descriptors. The decision maker decided on 13 October 2016 that he did not have limited capability for work and superseded his award of employment and support allowance from and including that date. He requested a reconsideration of that decision on 24 October 2016. The decision was reconsidered, but not revised, on 8 November 2016. He appealed against that decision in person on 21 November 2016.

4. His appeal first came before the appeal tribunal on 8 February 2017. The claimant was present at the hearing and gave oral evidence. The appeal was allowed. It was held that the claimant was entitled to 21 points under the physical health descriptors (15 under descriptor 1(a) and 6 under descriptor 10(b)). Descriptor 1 under Schedule 3 applied with the result that the claimant was entitled to be placed in the support group.

5. The Secretary of State then sought permission to appeal from the Tribunal Judge on 17 March 2017, which was refused by District Tribunal Judge McMahon on 29 March 2017. The Secretary of State applied to the Upper Tribunal for permission to appeal on 6 April 2017.

6. On 12 May 2017 Judge Lane gave permission to appeal. She directed the claimant to provide a response to the appeal within 1 month of the date on which the notification of her directions was sent to the parties and for the Secretary of State to reply within 1 month thereafter.

7. The claimant provided his submissions on 3 September 2017, but did not support the appeal. The Secretary of State had no additional submissions to make on 13 October 2017.

8. The Secretary of State submitted that the tribunal had erred in law by failing to give reasons for its findings in relation to mobilising and in particular on the use of a manual wheelchair. He made four specific criticisms of the appeal tribunal's findings.

9. On 7 December 2017 I dismissed three of the grounds of appeal, but allowed the appeal on the fourth ground and remitted the matter for rehearing. I provide this foregoing chronology by way of background since the appeal tribunal conducted a complete rehearing of the matter.

The Second Appeal

10. The claimant's second appeal came before the appeal tribunal on 28 March 2018. The claimant was again present at the hearing and gave oral evidence. The appeal was allowed. It was held that the claimant was entitled to 21 points under the physical health descriptors (15 under descriptor 9(a) and 6 under descriptor 10(b)). No descriptor under Schedule 3 applied, with the result that the claimant was not entitled to be placed in the support group. The record of proceedings appears at pages 159 to 162. The decision notice appears at pages 163 to 164. The statement of reasons appears at pages 166 to 170. There are two typographical errors in paragraph 11 of the statement of reasons which refer to an award of 6 points under descriptor 9(b), but that should properly read descriptor 10(b), although nothing turns on it.

11. The claimant had previously been awarded 15 points for descriptor 1(a); now he was awarded the 15 points for descriptor 9(a) instead. The award of 6 points for descriptor 10(b) was common to both awards and was not in dispute on either occasion and is not in dispute on this appeal. (The tribunal explained with reasons in

paragraphs 11 to 15 why the claimant was not entitled to an award of points in respect of any of the descriptors in activity 1.) Activity 10 is “Consciousness during waking moments”. Descriptor 10(b) is defined as “At least once a month, has an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration”.

12. The Secretary of State sought permission to appeal against that decision from the Tribunal Judge on 13 June 2018 (pages 172 to 177), which was granted by District Tribunal Judge Jones on 24 August 2018 (page 226). The Secretary of State informed the Upper Tribunal of the grant of permission to appeal on 6 September 2018 (pages 227 to 230).

13. On 15 October 2018 I made further directions on the appeal (pages 237 to 239). I directed the claimant to provide a response to the appeal within 1 month of the date on which the notification of the directions was sent to the parties and for the Secretary of State to reply within 1 month thereafter.

14. The claimant provided his submissions on 18 November 2018 (pages 240 to 244), but did not support the appeal. The Secretary of State had no additional submissions to make on 19 December 2018 (page 245).

15. Neither party has requested an oral hearing and I do not consider that it is necessary to hold one in order to resolve the matter.

16. Given that this was the second appeal arising out of the same application, I asked the parties whether, in the event that I were to allow the appeal, they would consent to a remade decision or whether they would want the matter remitted for a yet further hearing. The Secretary of State was content with a remade decision; the claimant, however, could not say what his preference was, although understandably he drew attention to the long drawn out nature of the process thus far.

The Statement of Reasons

17. So far as material, the appeal tribunal found that

“7. The tribunal accepted [the claimant] lost control of his bladder at least once a month to the extent that he required to clean himself and change his clothes following an evacuation of his bowel or bladder.

8. In addition they accepted at least once a month [he] had an involuntary episode of lost consciousness resulting in significantly disrupted awareness/consciousness.

...

16. Although not in sequence the tribunal considered descriptor 9 next on the grounds that they felt that it was linked to the award of points under descriptor 10. In his ESA50, [the claimant] had said he had to wash/change his clothes monthly due to the loss of control of his bladder/bowels during his seizures. At the medical examinations he confirmed his seizures as about once per month and during this he loses control of his bowel and bladder. This was explored further at the hearing: he was asked about the onset of a convulsion and he confirmed the taste in his mouth prior to the onset, stiffening up of his limbs and the incontinence. He was asked about the pattern of his fits over a 6 months period and he said he had 1 or 2 per month on average. The tribunal considered the wording of descriptor 9: in their view as it was accepted the occurrence of fits was at least once per month and that each of these convulsions was accompanied by a loss of continence then [the claimant] came within 9(a) and [was] awarded 15 points.

17. The tribunal considered the wording of descriptor 9 and the reference to the loss of control “whilst conscious” in relation to [his] condition and in their view whilst the occurrence of incontinence was linked to his epilepsy it was not always during a period of being unconscious. Descriptor 10 is concerned with lost or altered consciousness and recognition that either condition warrants an award of points. In [the claimant’s] case the pattern of episodes was sufficient for an award of 6 points only. However the same occurrence of incontinence would attract 15 points due to the perceived effect of such accidents having [sic] on a person’s ability to work. Judge Mitchell in *PC v. SSWP (ESA) [2015] UKUT 285 (AAC)* points out the logic of this descriptor unlike the other descriptors which relate to function in a work setting:

‘A monthly incontinence event of the type prescribed is of itself unlikely to have any significant bearing on the performance of work tasks. There must be a different reason for the legislator deciding that anyone within descriptor 9(a) meets the condition of having limited

capability for work. I think it is obvious that this is connected to the deeply personal and potentially embarrassing and distressing nature of significant continence problems.’

18. The tribunal took the view that whilst [his] epilepsy attracted the scoring of points under descriptor 10, in their view it must be right that the significant continence problem arising (which is not the case in every person with epilepsy) is recognised in the person’s ability to work. They also found [he] was incontinent in periods of altered consciousness not just in loss of consciousness.”

The Basis of the Appeal

18. The essence of the Secretary of State’s appeal was that the tribunal had erred in law in awarding the claimant 15 points under descriptor 9(a) as the evidence suggested that the claimant only lost control of his bowel and bladder when a seizure occurred. In that case the decision of Judge Hemingway in *CE/1928/2017* applied. In that case he had held that a person having a seizure would be in a state of altered consciousness and, if he did have problems with incontinence when in that state, he could not be classed as being conscious for the purposes of activity 9. The claimant should not therefore have scored 15 points for descriptor 9(a) and that would leave him with an award of only 6 points under descriptor 10(b), which was not sufficient to have limited capability for work.

Activity 9

19. The Employment and Support Allowance Regulations 2008 provide for activity 9 and the descriptors thereunder as follows

“Activity

9. Absence or loss of control whilst conscious leading to extensive evacuation of the bowel and/or bladder, other than enuresis (bed-wetting), despite the wearing or use of any aids or adaptations which are normally, or could reasonably be, worn or used.

Descriptors

9 (a) At least once a month experiences

(i) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or

(ii) substantial leakage of the contents of a collecting device sufficient to require cleaning and a change in clothing.

15 points

(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 in clothing, if not able to reach a toilet quickly.

6 points

(c) Neither of the above applies.

0 points".

That is the current form of the activity and the descriptors which has been in force since from 28 January 2013.

The Authorities

20. Albeit in the context of activity 10 rather than activity 9, Judge Rowley considered the question of altered consciousness in *CB v. Secretary of State for Work and Pensions* [2015] UKUT 287 (AAC) where she said

“Lost consciousness” will, in most cases, be self-explanatory. As to “altered consciousness” I note what is said in the Training and Development WCA Handbook, which gives guidance to Healthcare Professionals on the scope of the descriptors. Whilst it is not binding on decision makers or tribunals, I agree with and adopt the following proposition:

“‘Altered consciousness’ implies that, although the person is not fully unconscious, there is a definite clouding of mental faculties resulting in loss of control of thoughts and actions.”

21. That explanation was adopted and followed by Judge Hemingway in relation to activity 9 in his decision in *CE/1928/2017* where he said that

“10. So, can a claimant who loses control whilst in a state of altered as opposed to lost consciousness, score points under

the descriptors linked to activity 9? I have decided that the answer to that question is no. Obviously if a person has lost consciousness it cannot be said that that person is “conscious” for activity 9 purposes. So it then has to be asked whether a person who is in a state of altered consciousness, as I accept a claimant may be when experiencing a seizure and possibly for a time in its aftermath, can be said to be “conscious” as the word is used in activity 9.

11. Prior to amendments to Schedule 2 to the 2008 Regulations made by the Employment and Support Allowance (Amendment) Regulations 2012 (SI 2012/3096) the activity did not contain the qualification that the relevant absence or loss of control, be that of the bowel or the bladder, had to occur whilst a claimant was conscious. So, there was a deliberate decision to alter that wording although the Explanatory Note to the above Statutory Instrument does not shed any light upon the precise intention with respect to that specific amendment.

12. In my judgment though, what is intended and what is actually achieved by the current wording is the drawing of a distinction between loss of control caused by other medical conditions and loss of control occurring because of a bout of changed consciousness which might amount to lost or otherwise altered consciousness. It would not make any sense to say that a person who loses control as a result of lost consciousness is excluded from scoring points under activity 9 but a person who loses control as a result of otherwise altered consciousness is not so excluded. There would be no reason for that distinction to be made.

13. As noted, the Secretary of State’s representative directs me to the current version of the Work and Capability Assessment (abbreviated to WCA above) Handbook.

14. As was said by the Upper Tribunal in *CB*, cited above, that Handbook is not binding on decision-makers or tribunals. But nevertheless I do accept that it is in fact, as it happens, an accurate statement of the law relating to this particular aspect of the application of the activity 9 descriptors.

15. Having concluded the above I must also conclude that the tribunal did not misdirect itself with respect to its consideration of the activity 9 descriptors. It was not required as a matter of law to take into account any loss of control resulting from altered consciousness brought about by the seizures which it found the claimant would experience.”

Analysis

22. I accept that, for the reasons given by Judge Mitchell in *PC v. Secretary of State for Work and Pensions (ESA)* [2015] UKUT 285 (AAC), the logic of descriptor 9(a) is unlike the other descriptors which relate to function in a work setting, though to make the point both that paragraph cited and the preceding one should be read in full:

“29. Most of the WCA activities and their associated descriptors apply the same logic. Anatomical operations and mental processes typically deployed to do work are identified, such as mobilising, standing and sitting, social engagement, and points are awarded if a person’s ability to do these things is limited to an extent that matches a point-scoring descriptor. In this respect, the intention of the WCA must be to identify the stage at which a person’s capacity to do the things typically done at work is so degraded that it is not reasonable to expect the person to work.

30. Descriptor 9(a), however, has a different logic. It is not about bodily and mental processes used to do work. A monthly incontinence event of the type prescribed is of itself unlikely to have any significant bearing on the performance of work tasks. There must be a different reason for the legislator deciding that anyone within descriptor 9(a) meets the condition of having limited capability for work. I think it is obvious that this is connected to the deeply personal and potentially embarrassing and distressing nature of significant continence problems.”

23. That does not, however, deal - and Judge Mitchell was not purporting to deal - with the question of what is meant by the words “whilst conscious” in activity 9. What the appeal in *PC* considered was the range of aids and appliances which might be incorporated into an assessment of continence under the work capability assessment. The appeal tribunal concluded that a bucket was an aid or appliance; that was an error of law. Secondly, the appeal raised the issue as to whether a person could score continence points for mobility problems alone, to which the answer was no.

24. I agree with Judge Rowley that “altered consciousness” implies that, although the person is not fully unconscious, there is a definite clouding of mental faculties resulting in loss of control of thoughts and actions, as would be the case where a person was in the course of suffering a seizure. Altered consciousness is therefore more akin to lost consciousness than to full consciousness. The distinction which

needs to be drawn is between full consciousness on the one hand and lost or altered consciousness on the other.

25. The appeal tribunal was therefore wrong seek to interpret descriptor 9 on the grounds that it felt that it was linked to the award of points under descriptor 10 as it stated in paragraph 16 of the statement of reasons. Descriptor 9 deals with an award of points where the person suffers from loss of continence when fully conscious. Descriptor 10 by contrast deals with an award of points where the person is suffering from an involuntary episode of lost or altered consciousness.

26. I also agree with Judge Hemingway that what is intended - and what is actually achieved - by the current wording of activity 9 is the drawing of a distinction between (a) loss of control caused by other medical conditions and (b) loss of control occurring because of a bout of changed consciousness which might amount to lost or otherwise altered consciousness.

27. As Judge Hemingway observed, it would not make any sense to say that a person who loses control as a result of lost consciousness is excluded from scoring points under activity 9, but that a person who loses control as a result of otherwise altered consciousness is not so excluded. There would indeed be no reason for that distinction to be made.

28. I am therefore satisfied that a claimant who loses control of his bowel or bladder whilst in a state of altered, as opposed to lost, consciousness, cannot score points under the descriptors linked to activity 9. If a person has lost consciousness, it clearly cannot be said that that person is “conscious” for the purposes of activity 9. A person who is in a state of altered consciousness, as a claimant may be when experiencing a seizure and possibly for a time in its aftermath, equally cannot be said to be “conscious” within the meaning of activity 9.

29. It follows from this that the Work and Capability Assessment Handbook is correct when it says in relation to activity 9 that

“Any problems with incontinence that occurred during sleep or during episodes of altered consciousness such as during seizures or under influence of alcohol or drug misuse would not fulfil the criteria for these descriptors. Thus for example:

- A person has epilepsy with grand mal fits occurring 1-2 times a month, with complete loss of consciousness and bladder incontinence during the fits – none of the scoring continence descriptors would apply in this case”.

Application of the Law to the Facts of this Case

30. The claimant’s representative sought to argue that the claimant was conscious during his recovery after a seizure, but that during that period he was still subject to incontinence. It is, however, apparent from evidence on the pages to which he referred (pages 10, 18, 26, 37, 41, 118-120, 124, 149, 156 and 162) that, whilst the claimant may well have suffered from exhaustion and the need to recover after he had had a seizure, the loss of control of his bowel and bladder *only* occurred when he was having a seizure and not during any period of consciousness thereafter.

31. Although at one point in paragraph 17, the appeal tribunal stated that the loss of control was “not always during a period of being unconscious”, it is apparent from paragraph 18 that it also found that the claimant was incontinent in periods of altered consciousness, not just in periods of loss of consciousness, but crucially it did not find that he was incontinent during periods of full consciousness.

32. In that event the claimant is not entitled to an award of points under any of the descriptors under activity 9 because he does not suffer absence or loss of control leading to extensive evacuation of his bowel and/or bladder “whilst conscious” within the meaning of activity 9.

The Decision on the Appeal

33. I am therefore satisfied that the appeal tribunal erred in law and that its decision should be set aside.

34. I therefore allow the Secretary of State’s appeal and set aside the decision of the appeal tribunal. The evidence in the case is sufficiently clear and the state of the law also sufficiently clear that it would serve no purpose to remit the case for a yet further

rehearing. Accordingly I will remake the decision and make the decision which the appeal tribunal should have made.

35. The decision made by the Secretary of State on 13 October 2016 is upheld.

36. In applying the work capability assessment, the claimant is entitled to 6 points under descriptor 10(b), but not to any points under descriptor 9(a) from the activities and descriptors in Schedule 2 of the Employment and Support Regulations 2008.

37. The decision awarding the claimant employment and support allowance from and including 8 February 2012 is superseded. The claimant is not entitled to an award to employment and support allowance from and including 13 October 2016 because he does not have limited capability for work.

Signed

**Mark West
Judge of the Upper Tribunal**

Dated

31 January 2019