Appeal No CE/3496/2017

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal is allowed.

The making of the decision of the First-tier Tribunal given at Oxford on 1 September 2017 under reference SC302/17/00555 involved the making of an error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

I draw the attention of the claimant to the fact that those directions are addressed to her as well as to the First-tier Tribunal.

DIRECTIONS

To the First-tier Tribunal

1 The First-tier Tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

2 The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge or medical member who made the decision I have set aside.

3 Without limiting Direction 1 above, the new Tribunal must resolve the conflict of opinion evidence between the health care professional and the medical services duty doctor (see paragraphs 9 and 10 below) and, if requested to provide a written statement of reasons, must state which evidence it has preferred and explain why.

To the claimant

4 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 1 September 2017 made a legal mistake, not because it has been accepted that you are entitled to employment and support allowance. Whether or not you are entitled will now be decided by the new tribunal.

5 You are reminded that the new tribunal must consider whether the Secretary of State's decision was correct at the time it was made. That means:

(a) it cannot take into account changes in your circumstances that occurred after 23 February 2017; and

(b) it can only consider evidence from after that date if it casts light on how you were on or before 23 February 2017.

REASONS FOR DECISION

Introduction

1 The claimant appeals to the Upper Tribunal against the above decision of the First-tier Tribunal.

2 Permission to appeal was given by a District Tribunal Judge on 10 November 2017.

3 Both parties agree that the Tribunal's decision was wrong in law and that the case should be remitted to a differently constituted tribunal with directions.

4 The Secretary of State's representative consents to my taking that course without giving reasons.

5 However, the claimant's representative, does not consent to a decision without reasons because, he says:

> "This case is one of a number of decisions made by Tribunals chaired by this FTT judge that have been subject to application for leave to the UT (and have been informally referred to the FTT Regional Judge)".

Elsewhere in the papers, the claimant's representative asserts that a number of the passages that are to be found in the written statement of reasons are in a standard form and are repeatedly used by the judge when writing his statements.

6 I must therefore begin by emphasizing that this decision is concerned solely with what has occurred in this case and that I am not in a position to comment on cases that are not before me.

7 I have no direct evidence of the other cases to which the claimant's representative refers. And, although I have dealt with a number of appeals against decisions of tribunals that the judge has chaired, I do not recollect having previously seen any of the passages that are said to be in a standard form in other statements of reasons that he has written. Moreover, even if I assume in the claimant's favour that her representative is correct, there is nothing inherently wrong with the use of standard form wording. Rather, what is wrong is to use such wording in circumstances where it is inapplicable, or to use it as a "mantra" where it does not represent the true reasons for the First-tier Tribunal's decision. It is therefore possible that:

(a) the use of the allegedly standard form wording in other cases was not an error of law even if it does amount to such an error in this case; or that

(b) the standard form wording correctly represents the law as applied to this case, even if its use amounted to an error of law in the circumstances of other cases.

Background

8 The claimant is a woman who was 48 at the date of the Secretary of State's decision. She had been awarded employment and support allowance ("ESA") from and including 7 November 2016 and this was the first work capability assessment under that claim.

9 The claimant completed a *Limited Capability for Work Questionnaire* (Form ESA50) on 29 November 2016 and, on 31 January 2017, she was assessed by a healthcare professional at Oxford Medical Examination Centre. The healthcare professional (a physiotherapist) recommended that the claimant should be awarded 12 points as follows:

Activity	Descriptor	Points
15. Getting about	(c) Is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person.	6
16. Coping with social engagement due to cognitive impairment or mental disorder	(c) Engagement in social contact with someone unfamiliar to the claimant is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the claimant.	6

Total	**12**

10 However, having taken further advice from a Medical Services "duty doctor"—who had not actually seen the claimant—the Secretary of State's decision maker concluded on 23 February 2017, that the claimant did not score any points under the work capability assessment and did not fall to be treated as having limited capability for work by virtue of regulation 29 of the Employment and Support Allowance Regulations 2008 ("the Regulations"). He therefore superseded the decision that had awarded the claimant ESA from and including 7 November 2016, so as to bring that award to an end from and including 15 February 2017.

11 The claimant appealed to the First-tier Tribunal against that decision. Her case is conveniently summarised in the application for mandatory reconsideration prepared on her behalf by her representative:

> "[The claimant] has had operations for arachnoid cysts. She had a shunt inserted which is rooted down her left side to the bladder. She continues to have frequent headaches and is prescribed Tegratol *[sic]* for epilepsy which can make her drowsy and lethargic.
>
> She has osteoarthritis in the hips and arthralgia in multiple joints resulting in constant pain.
>
> Due to pain in hips and knees she is only able to walk a short distance before needing to stop and rest before continuing
>
> She is unable to sit or stand for… prolonged periods due to pain and continually fidgets about moving on from seated to standing in order to manage pain.
>
> Due to the shunt in her neck movement in her neck and shoulders is restricted and she cannot raise her arms above her head. For the same reason she has difficulty with lateral movements, lifting and carrying. She would not be able to undertake activities that required these movements on a repeated or regular basis.
>
> She suffers from anxiety and rarely goes out alone.
>
> The following descriptors apply: 1c, 2c, 3c, 15c & 16c.
>
> Reg. 29(2)(b) also applies because she would not be able to undertake work-related activity as this would exacerbate her conditions."

12 Following a hearing on 1 September 2017, which the claimant attended with her husband, and at which an interpreter was present, the First-tier Tribunal confirmed the Secretary of State's decision.

The issues before the Upper Tribunal

13 The Secretary of State's representative expressly supports the appeal on one of the grounds advanced by the claimant's representative. In view of that support, the representative did not comment on the other grounds but expressed his willingness to do so should I so direct.

14 I have not felt it necessary to ask for the Secretary of State's comments on the other grounds because I have decided not to base my decision on them. I do, however, discuss those grounds below.

Should the claimant be treated as having limited capability for work under regulation 29(2) of the Regulations?

15 I will begin with the ground on which the Secretary of State's representative supports the appeal.

16 The Tribunal's written statement of reasons stated:

> "37. The Tribunal went on to consider whether there was a substantial risk to the appellant or to others if she were found not to have limited capability for work.
>
> 38. The Tribunal considered the range or types of work which the claimant was suited to as a matter of training or aptitude and which her disabilities did not render her incapable of performing; and then decide whether, within that range, there was work that she could do without the degree of risk to health envisaged by Regulation 29(2)(b).
>
> 39. The Tribunal noted that the appellant had not worked since 1992, when she worked as a cleaner. The work capability assessment report was a thorough assessment which indicated how the appellant's conditions were well controlled and there were no acute episodes or exacerbations.
>
> 40. The Tribunal considered what work the appellant might be able to do and the Job Centre through the work programme would assist the appellant to identify what work was suitable for her, taking account of the appellant's medical conditions. The Tribunal was satisfied she could return to work as a cleaner as her physical symptoms would not prevent that and she could work in a supermarket on the till what customer services desk. The skills she had to be able to meet others and engage with them meant she could also work in sales in a range of environments such as a receptionist in an office."

17 The grounds of appeal criticise that reasoning in the following terms:

> "17. The tribunal found that the appellant had not worked since 1992.
>
> 18. It recorded further standard paragraphs (paras. 38 & 40).
>
> 19. It made no findings of facts about her qualifications, training or aptitude.
>
> 20. The tribunal concluded:
>
> > … … the Job Centre through the work programme would assist the appellant to identify what work was suitable for her, taking account of the appellant's medical conditions.
>
> There was no evidence before the tribunal that she would be provided with that assistance. It reached a conclusion that was no more than a supposition (and a standard paragraph).
>
> 21. The SSWP provided two lists of 'work-related activity' [127-128]. However neither of the providers identified provide services in the area where the appellant lives.
>
> 22. The tribunal did not identify which work-related activities it would have been reasonable to have expect the appellant to undertake.
>
> 23. The tribunal recorded (para. 9) that the appellant required an interpreter in the Italian language.
>
> 24. The tribunal gave no reasons for concluding (given her very limited English) how she could work in a supermarket at the till, at a customer service desk, in sales or as a receptionist in an office. The tribunal did not provide any reasons why such employment might be available in workplaces where she would only be required to converse in Italian.
>
> 25. The tribunal's approach to Reg. 29 was erroneous in law [*Charlton; DB v SSWP* (ESA) [2017] UKUT 251 (AAC)]."

18 When giving permission to appeal, the District Tribunal Judge made the following observation (among others):

> "c. Regulation 29. The appellant's representative says the Tribunal's discussion is inadequate. The tribunal does not refer to the GP's comment about [the appellant's] inability to do paid work, …. Reference is made to

> customer-facing work but without dealing with the Healthcare Professional's conclusions about 16c."

19 The Secretary of State's representative submits as follows:

> "4. I agree with the claimant's representative that the tribunal erred in its approach to the application of Regulation 29. I submit that this was because, as suggested by [the District Tribunal Judge] when giving permission to appeal, in order to properly consider whether Regulation 29 applied, the tribunal needed to have regard to the claimed mental health issues and specifically the applicability or otherwise of activities 15 and 16. In the present case this will, in my submission, entail discussion of and reference to the contrasting positions taken by the Department's medical advisers.
>
> 5. I submit that the tribunal's failure to do so amounts to an error in law. …".

20 In my judgment, the overarching error made by the Tribunal—*i.e.*, the error that affects both this issue and the Tribunal's decision as a whole—was to fail to deal in sufficient detail with the evidence of the healthcare professional. In relation to the Activity 15, *Getting about,* and Activity 16, *Coping with social engagement due to cognitive impairment or mental disorder,* that evidence was wholly contrary to the conclusion the Tribunal reached.

21 I appreciate that, on the advice of the duty doctor, the decision maker did not accept the health care professional's recommendations. Nevertheless the Tribunal was under a duty to deal with the matter afresh. The health care professional's recommendations, and the clinical evidence on which they were based, were before the Tribunal and the written statement of reasons should have explained why, as was clearly the case, the Tribunal did not accept that evidence

22 It could be argued that, in the context of regulation 29, the error is immaterial: the Tribunal had already concluded that the claimant had no significant difficulties with Activities 15 and 16. However, that conclusion is also undermined by the Tribunal's failure to refer to the health care professional's evidence.

23 I therefore agree with both parties, and with the District Tribunal Judge, that the Tribunal erred in law in this respect. I set its decision aside and, as it is not expedient for me to re-make the decision, I remit it to the First-tier Tribunal for reconsideration.

The GP's evidence

24 Although I do not base my decision on them (because I have not asked for the Secretary of State's observations), there are two further aspects of the decision on which I wish to comment.

25 The first concerns the way in which the statement deals with the evidence of the claimant's GP.

26 The Tribunal had before it a supportive letter from the claimant's GP dated 10 April 2017 (pages 121-122), which—omitting formal parts—was in the following terms:

> "Thank you for your letter of 10 March 2017 regarding this patient of mine. I have been [the claimant's] GP for over 12 years, and have seen her quite frequently during that period for review of her health.
>
> Thank you for listing the symptoms which she finds troublesome in your letter of 10 March 2017. I confirm that I support the descriptors identified in this letter, and on the sheet which you kindly enclosed with the letter.
>
> I feel that [the claimant] continues to suffer from significant health anxiety and loss of confidence ever since her craniotomy for removal of meningioma back in June 1992. Her confidence was further shaken by subsequent temporal lobe epilepsy, and the finding of an arachnoid cyst which required aspiration in December 1994.
>
> *I confirm that the significant past medical problems continue to have an enduring impact on a daily basis now, and that this is likely to be a long-term situation*, making it very hard to visualise how she might be able to move towards any form of paid employment, having never been fit for paid work ever since her original surgery back in 1992" (my emphasis).

27 What the Judge said about that evidence (and an earlier factual report by the GP) in the Tribunal's written statement of reasons was as follows:

> "22. The totality of the evidence before the Tribunal showed how the appellant had been diagnosed with various conditions and various symptoms were referred to but there was little or no treatment to correspond to the diagnosis of the appellant's conditions and symptoms and the GP referred to historical matters. As a result the tribunal attached little weight to the GP's report and preferred its own assessment."

28 The claimant's representative says that the first sentence of paragraph 22 is an example of the Judge's standard wording. I find myself rather hoping that that is so.

29 It is certainly the case that the GP referred to historical matters. But the most natural reading of paragraph 22 is that the Tribunal is saying that the GP *only* referred to historical matters (otherwise, why not deal with the evidence that was not historical?). That, equally certainly, was not the case. The whole tenor of the GP's

letter, with its references to the descriptors that currently applied to the claimant, the statement that the claimant "continues to suffer from significant health anxiety and loss of confidence", and with the words that I have emphasised in the final paragraph, is that the claimant has *current* health problems which stem from, and are explained by, her past health problems.

30 I regret the need to say that the Tribunal's apparent conclusion that the letter was referring only to historical matters is irrational in the technical legal sense that no reasonable tribunal, properly instructing itself as to the law, could have interpreted the evidence in that way.

31 Although it would not be acceptable for the paragraph to have appeared in the statement as a result of a "cut-and-paste" error involving standard wording, I would much prefer to believe that that is the correct explanation and that the Tribunal did not actually decide to approach the GP's evidence on such a wrong-headed, and obviously unsustainable, basis.

Drawing conclusions about function from treatment

32 The claimant's representative also criticises paragraph 22 of the statement for drawing impermissible conclusions about the claimant's function from the treatment that she received, or didn't receive.

33 As the claimant's representative notes, the Tribunal's concern about the perceived lack of treatment is also stated in paragraph 34 of the statement, which is in the following terms:

> "34. The appellant's GP referred to the appellant suffering from a loss of confidence… but the Tribunal's medical member advised that the way to deal with that presentation and symptoms was potentially to refer the appellant to a range of treatment such as Talking Therapy, counselling or cognitive behavioural therapy and to encourage her to engage in activities. The Tribunal was unclear why there was no corresponding treatment for the appellant if her difficulties were known to the GP and the Tribunal was entitled to conclude that the appellant's symptoms were actually mild."

34 The claimant's representative comments:

> "A current lack of treatment is not by itself [a reason] including the appellant did not meet the qualifying criteria. … The appellant had had the conditions and symptoms for many years. It may be that management by the GP was currently considered the most appropriate by the appellant's own health care professional, other treatments and interventions having taken place over [preceding] years. The tribunal made no findings about prior treatments and interventions the appellant had undergone. … The tribunal should have put those concerns to the appellant and

> considered an adjournment to seek further evidence to address this issue.

35 I broadly agree with those observations. However, I do not agree that the tribunal should have put its concerns to the appellant. The claimant is not medically qualified and therefore lacked the knowledge to respond to any concerns the Tribunal may have had on this point. It is difficult to see how she could have commented other than to suggest that the treatment she received was a matter for her GP's professional judgment which she was not in a position to second-guess.

36 But, as presently advised, I do agree that if the Tribunal perceived a conflict between the GP's evidence and the treatment that the GP had offered the claimant, it should, in fairness, have put its concerns to the GP before resolving the issue against the claimant.

37 Some reading that last paragraph will regard it as hopelessly impractical. I agree. Further, there is no reason why the GP should have to waste time justifying his or her treatment decisions to a Tribunal that is likely, at most, only to have seen the claimant for about an hour or so, and may never have seen her at all.

38 However, the impracticality is an indication that tribunals should be very cautious about drawing inferences from the treatment received by claimants in the first place. It is not an indication that tribunals who do decide to go down that path should decline to adopt a procedure that is fair to the claimant.

39 When a Tribunal concludes that a claimant cannot be accurately describing the conditions from which she suffers because, if she were, she would be receiving different treatment, its reasoning is often reducible to this: that the Tribunal's medical member would not him- or herself treat a person with those conditions in that way. In this appeal, paragraph 34 of the statement makes that process of reasoning express.

40 But medicine is a broad church. As is recognised in other areas of the law, there is a wide spectrum of reasonable medical opinion and practice. And anyone who has ever sat as a judge or disability-qualified member in the Social Entitlement Chamber will probably be able to provide examples of medical members who hold widely differing views about the issues that commonly arise in appeals. Moreover, it is not unknown for professional people to believe that their own views and practices are more universally held and followed than is in fact the case.

41 Furthermore, particularly in relation to prescribing, treatment is an art as well as a science. Or, at least, it is a matter of professional judgment that can be heavily influenced by the individual doctor's own experience.

42 To take the current case as an example, the Tribunal's medical member may well be correct to believe that, across the population as a whole, talking therapies are effective to improve the type of anxiety and loss of confidence that are described in paragraph 34 of the statement. But the professional experience of the claimant's GP may be atypical. It may be that, for whatever reason, the results achieved by his patients from talking therapies in the past were disappointing and that he is therefore less inclined to refer his patients to such therapies than would otherwise be the case.

Alternatively, he may be aware of circumstances that are not known to the Tribunal, but which suggest to him that the claimant would not benefit from such therapies.

43 Finally, although I do not suggest that it is so in this case, some claimants will simply have a GP who is not very good at his or her job.

44 Assuming a normal distribution of medical excellence, a large proportion of the population will have a GP who is below average. That is not a reflection on the medical profession. It is also true by definition of most, if not all, fields of human activity. Not everyone can be above average.

45 There is therefore a real risk that drawing inferences about function from treatment will in some cases lead the Tribunal to conclude that claimants do not suffer from the loss of function they describe because they are not being correctly treated for it.

46 That is clearly not a permissible conclusion. But the Tribunal will often not be in a position to distinguish such cases from those (I suspect, few) cases in which the GP's evidence to the Tribunal is deliberately exaggerated.

47 For those reasons, in addition to those given by the claimant's representative, I do not agree that "the Tribunal was entitled to conclude that the appellant's symptoms were actually mild" from the fact that it "was unclear why there was no corresponding treatment for the appellant if her difficulties were known to the GP".

Conclusion

48 My decision is as set out on page 1.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

26 October 2018

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