IN THE UPPER TRIBUNAL **Case No.** CDLA/1733/2019
ADMINISTRATIVE APPEALS CHAMBER

Before **T H Church, Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal (which it made in Coventry on 24 July 2018 under reference SC015/17/00944) involved the making of an error of law, it is set aside and the case is remitted (sent back) to the First-tier Tribunal for rehearing before a panel that doesn't include any of the people who heard the appeal on 24 July 2018.

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS FOR THE REHEARING:

A. The First-tier Tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
B. The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel which heard the appeal on 24 July 2018.
C. In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: *R(DLA)* 2 & 3/01.
D. If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction C above).
E. The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.

REASONS FOR DECISION

Background

1. This appeal relates to the Appellant's claim for Disability Living Allowance made on 19 January 2017, and the decision made by the Respondent on 29 March 2017 that he didn't qualify for the benefit (the **"Decision"**). The Decision was confirmed on reconsideration.
2. The Appellant appealed the Decision to the First-tier Tribunal) and the appeal was listed for an oral hearing to take place on 20 December 2017 at Coventry. However, that hearing was adjourned with directions that a copy of the Appellant's GP records and associated

correspondence be obtained. The consent form sent to the Appointee for signature was not returned and further directions were issued on 12 April 2018 rescinding the earlier direction for the obtaining of medical records and directing the appeal to be listed for an oral hearing. On 08 June 2018 a panel of the First-tier Tribunal convened to hear the appeal but the Appointee did not attend and the panel decided to adjourn. A further panel of the First-tier Tribunal was convened on 24 July 2018 and again the Appointee failed to attend. This time she left a message with HM Courts and Tribunals Service to say that she was unwell and unable to attend. The panel decided to proceed in the absence of the parties. It decided that the Appellant did not satisfy the statutory criteria for either component of Disability Living Allowance at either rate and refused the appeal (the **"Tribunal's Decision"**).

3. The Appellant asked the Tribunal to look at its decision again but the judge member of the Tribunal decided that the Tribunal hadn't made any error of law so the Tribunal's Decision shouldn't be reviewed and it refused to give permission to appeal. The Appellant then applied to the Upper Tribunal for permission to appeal.

The permission stage

4. The application came to me. I gave permission to appeal. In my grant of appeal, which was addressed to the Appellant, I said:

> "4. In paragraph 6 of the statement of reasons produced by the tribunal which dealt with your appeal on 24 July 2018 (the "Tribunal") it is stated:
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> > "Without either evidence from his mother or up to date GP records the Tribunal was unable to make any reliable findings of fact with regard to his difficulties. His mother had set out a detailed letter saying what she perceived her son's difficulties to be. However, without any evidence to support them the Tribunal was unable to make findings of fact."
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> 5. In paragraph 7 the Tribunal returns to this theme:
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> > "However, without the GP records it is not possible to make any reliable findings of fact."
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> 6. And again in paragraph 8:
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> > "The Tribunal had used its best endeavours to obtain evidence to enable it to make reliable findings of fact. It had not been able to do so. The unsupported statements made by Nathan's mother apart from out of date statements obtained from the school and an undated statement were insufficient to allow the Tribunal to make satisfactory findings of fact."
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> 7. And finally, in paragraph 9:
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> > "The Tribunal not being in a position to make findings of fact dismissed the appeal and confirmed the Appellant was not entitled to Disability Living Allowance at either rate."
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> 8. This appeal was clearly a very frustrating one for the Tribunal to deal with given the lack of co-operation by your mother, but I find that it is arguable with a realistic

prospect of success that the Tribunal erred in dismissing your appeal without making findings of fact.

9. It is also possible that the Tribunal misdirected itself as to the law when it said that while it had a detailed letter from your mother setting out her evidence as to your difficulties and needs, "without any evidence to support them the Tribunal was unable to make findings of fact".

10. The Tribunal may also have overlooked relevant evidence in the form of the Child and Family Neurodevelopmental Service referral form on pages 29 to 47 of the appeal bundle, which was dated only the day after the decision under appeal

11. If the Tribunal did indeed err in one or more of the ways I have indicated above that it may have done I can't be confident that the outcome of your appeal wouldn't have been different had such error or errors not been made. This justifies a grant of permission to appeal to the Upper Tribunal."

5. I invited the Respondent to make submissions in response to the appeal.

Support for the appeal

6. Mr O'Kane on behalf of the Respondent made submissions supporting the appeal for the same reasons I had identified as being "arguable" in my grant of permission.
7. Mr O'Kane asked that the Decision be set aside and remitted to the First-tier Tribunal to be decided afresh by a different panel.

My decision on this appeal

8. When I considered whether to grant permission to appeal I had to be satisfied that it was arguable with a realistic prospect of success that the Tribunal got the law wrong in a way which was material. The test I now have to apply is whether the Tribunal did indeed get the law wrong as I suggested it might have done.
9. Regardless of whether or not there was corroborative evidence for the claims made by the Appellant's mother, the Tribunal was required to assess her evidence and to explain what it made of it. It then had to make a decision based on the evidence it had, or, if it could not make an evidence-based decision, it had to seek further evidence so that it could do so. The Tribunal had a broad discretion as to how it assessed the evidence, but it couldn't simply abdicate its role on the basis that there was no corroboration for what the Applicant's mother had said. I am satisfied that the Tribunal's decision making was in error of law in this regard.
10. The Tribunal also had before it evidence from the Child and Family Neurodevelopmental Service in the form of a referral form detailing the Appellant's mother's and school's view of the Appellant's difficulties. While that document was dated 30 March 2017 (i.e. the day after the decision under appeal was made) it was clearly relevant to the Appellant's condition as at the date of the decision under appeal, and yet the Tribunal made no reference to that evidence. The Tribunal's failure to address this piece of evidence also amounts to an error of law.
11. I am satisfied that the mistakes made by the Tribunal were material in the sense that had the Tribunal evaluated the evidence as it should, and had the Tribunal not misdirected itself that the Appellant's mother's evidence required corroboration if it was to be accepted, it

might have reached a different conclusion and the outcome of the appeal might have been different.

12. I therefore allow the appeal and set aside the decision under appeal. Because further facts need to be found I send the case back to be re-heard by the First-tier Tribunal.
13. At the rehearing the First-tier Tribunal should follow the directions I have given. The rehearing won't be limited to the grounds on which I set aside the Tribunal's Decision. The First-tier Tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it won't be limited to the evidence and submissions before the First-tier Tribunal at the previous hearing. It will decide the case on the basis of all the evidence before it, including any written or oral evidence it may receive.
14. Nothing in this decision of the Upper Tribunal should be taken as amounting to any view as to what the ultimate outcome of the remitted appeal should be. All of that will now be for the First-tier Tribunal's good judgment.
15. This appeal to the Upper Tribunal is allowed on the basis and to the extent explained above.

Signed

Thomas Church
Judge of the Upper Tribunal

Dated **09 January 2020**