



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2021-000723-PIP

Appellant: AW

Respondent: The Secretary of State for Work and Pensions

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE THOMAS CHURCH

Decision date: 24 November 2022

ON APPEAL FROM:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC315/20/00475
Tribunal Venue: Chesterfield (remote telephone hearing)
Hearing Date: 17 February 2021

This front sheet is for the convenience of the parties and does not form part of the decision

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2021-000723-PIP

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

AW

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decision Date: 24 November 2022

DECISION

The decision of the Upper Tribunal is to allow the appeal.

Decision: As the decision of the First-tier Tribunal (which it made at Chesterfield on 17 February 2021 under reference SC315/20/00475) involved the making of an error of law, it is set aside and the case is remitted to the First-tier Tribunal for rehearing before a differently constituted panel.

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 who heard the appeal on 17 February 2021.
- 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 panel of 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.
- F. Copies of this decision, the submissions made on behalf of the Secretary of State on this appeal, and my grant of permission to appeal to the Upper Tribunal, shall be added to the bundle to be placed before the panel of the First-tier Tribunal hearing the remitted appeal.

REASONS FOR DECISION

Background

1. This is an appeal by the claimant against a decision of the panel of the First-tier Tribunal sitting at Chesterfield which heard his appeal on 17 February 2021 (the “**Tribunal**”; the “**Decision**”) in relation to the Secretary of State’s decision that the claimant was not entitled to a Personal Independence Payment (“**PIP**”) with either component.
2. The claimant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal but the application was refused. He then exercised his right to apply to the Upper Tribunal for permission to appeal.

The permission stage

3. The claimant’s application came before me. I granted permission to appeal to the Upper Tribunal. In my grant of permission I said:
 - “5. The grounds that you argued in your UT1 application form amounted in substance to a disagreement with the healthcare professional’s report and the reliance placed by the panel of the First-tier Tribunal that heard your appeal (the “**Tribunal**”) on it, and a feeling that your evidence had been overlooked. Generally, the Upper Tribunal is reluctant to interfere with the First-tier’s role in assessing evidence and making findings of fact.
 6. However, the Upper Tribunal has an inquisitorial jurisdiction, which means that it can look for arguable errors of law even if they haven’t been raised by the claimant. I have subjected the decision to my own scrutiny and I have identified a possible error of law: in paragraph 8 of its statement of reasons the Tribunal said:
 - “8. Looking at the evidence, [the appellant] as previously noted, ticked “sometimes” with regard to activities 2-7. That, the Tribunal took as an indication that on more than 50% of the days he was able to perform those activities reliably.”
 7. I am satisfied that it is arguable with a realistic (as opposed to fanciful) prospect of success that the Tribunal erred in law in making the assumption it appears from this statement to have made, that ticking the “Sometimes” box necessarily meant that you didn’t experience difficulties with the activity in

question more than 50% of the days in the relevant period, when this assumption is not necessarily supported by the accompanying text in the narrative box and the other evidence available to it. The Tribunal has not said what it made of that other evidence and it may not have considered it. Had the Tribunal shown more curiosity about the difficulties you complained of it might have come to a different conclusion on the appropriate scoring of your needs under the PIP descriptors and the outcome of the appeal could have been different. This warrants a grant of permission to appeal to the Upper Tribunal.”

4. I made directions inviting the parties to make submissions in relation to the appeal and to indicate whether they wished to have an oral hearing.

The parties' submissions

5. Ms Elhakim, on behalf of the Secretary of State, provided written submissions in support of the appeal. She said that the Respondent accepted that the Tribunal had indeed erred in law and provided a careful analysis of the Decision and the Tribunal's statement of reasons.
6. Ms Elhakim invited me to set aside the Decision and remit the case back to the First-tier Tribunal for rehearing.
7. The claimant wrote to the Upper Tribunal to say that he felt that the healthcare professional who carried out the face-to-face assessment failed to pass on what he told them about the help that he receives from his parents.

Why there was no oral hearing of this appeal

8. Neither party requested an oral hearing of this appeal. Given the degree of agreement between the parties I could identify no compelling reason to hold one and I decided that the interests of justice didn't require a hearing. I decided that it was proportionate and appropriate to determine this appeal on the papers alone to avoid further delay.

My decision

9. In his PIP 2 questionnaire form the claimant detailed his physical health conditions and medications (at pages 33-34 of the appeal bundle), which the Tribunal acknowledged at paragraphs 2 and 4 of its statement of reason, as well as mental health conditions (PTSD, anxiety and depression).
10. In respect of daily living activities 2-7 the claimant indicated in his PIP2 questionnaire form that he would “*sometimes*” need to use an aid or appliance or requires assistance from another person to undertake those activities (see pages 37-59 of the appeal bundle).
11. The claimant's reported health conditions and prescribed medications were recorded by the healthcare professional in their report. These include pain relief and antidepressant medications (see pages 72-73 of the appeal bundle). The healthcare professional recorded difficulties that the claimant reported struggling with on a daily basis, which were said to comprise brain fog, fatigue, body pain, burning pain, pins and needles and weakness down his left arm and into his left-hand, muscle pain which he experiences all over his body, sharp pinching to the lower back, and difficulties lifting items. The claimant had reported quite specific difficulties with performing the various activities, and had reported receiving quite specific help as a result.

12. The Tribunal had a broad discretion as to how to weigh the evidence before it, and the Upper Tribunal will generally be very slow to interfere with a First-tier Tribunal's findings of fact. However, it appears from what the Tribunal says in paragraph 8 of its statement of reasons (see the passage quoted in my paragraph 3 above) that it inferred from the claimant's ticking of the "sometimes" box on his PIP2 questionnaire form that he would not require the use of an aid or appliance, or require assistance when undertaking daily living activities 2-7 to the required standard on more than 50% of the days of the required period. It appears that because of this the Tribunal failed adequately to consider or explore the difficulties the claimant has reported with activities 2-7.
13. The "yes", "no" and "sometimes" tick boxes in the PIP 2 questionnaire are a very blunt instrument. If they are all the First-tier Tribunal has, then it may need to draw inferences from them in the light of whatever other evidence it has, or it may need to seek more evidence. Where, as here, the claimant has provided substantial narrative comments in the text boxes, it is incumbent on the First-tier Tribunal to interpret the ticks in the light of the explanation provided in the narrative.
14. Of course, no First-tier Tribunal needs to accept what is said in the narrative box. What is written in the box has no special status: it is, rather, just another piece of evidence. But that evidence must be considered, and it may well be incumbent on the First-tier Tribunal to explain what it makes of it and how it evaluated that evidence to reach its findings.
15. A claimant's completion of the tick boxes in a PIP questionnaire cannot be used as proxy for application of Regulation 7 of the PIP Regs: "Sometimes" could mean many things to a claimant: it may mean "occasionally", or it may mean "most, but not all of the time", or it may very well mean something in between. It is highly unlikely that a claimant, especially one who completes the questionnaire without assistance from a welfare rights adviser, will have in mind the requirements of regulation 7 of the Social Security (Personal Independence Payment) Regulations 2013 (the "**PIP Regulations**"). The tick boxes do not, therefore, provide the First-tier Tribunal with a short cut obviating the need to make findings as to the frequency of a claimant's difficulties.
16. When deciding whether to grant permission to appeal, the test I had to apply was whether it was arguable with a realistic prospect of success that the Tribunal erred in law in a way which was material. The test I must now apply is whether the Tribunal did indeed make a material error of law.
17. For the reasons set out above I now find that the Tribunal did indeed err in law in a way which was material, namely in drawing an impermissible inference from the claimant's ticking of the boxes in his PIP2 questionnaire form (given the narrative that accompanied them), making insufficient findings of fact about the claimant's ability to manage the relevant activities to the standard required by Regulation 4(2A) of the PIP Regulations on more than 50% of the days in the required period, and in failing to explain its decision making adequately, so that it is unclear whether the Tribunal applied Regulations 4(2A) and 7 correctly.
18. I have decided that it is not appropriate for me to exercise my power to remake the Decision on this occasion. This is because significant further facts need to be found and the First-tier Tribunal, with its expert members, is best placed to hear and evaluate the evidence and to make the necessary findings of fact on which to base a new decision.

19. I therefore allow the appeal, set aside the decision under appeal, and remit the case to be re-heard by the First-tier Tribunal.
20. 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 have set aside the First-tier 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.
21. 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.
22. This appeal to the Upper Tribunal is allowed on the basis and to the extent explained above.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on:

24 November 2022