

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Case No UA-2024-000612-PIP
[2024] UKUT 271 (AAC)**

**Appellant: MB
Respondent: SSWP**

DECISION OF THE UPPER TRIBUNAL

E FITZPATRICK

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal: First-tier Tribunal (Social Security and Child Support)
Tribunal Case No: SC 053/23/00861
Tribunal Venue: Wolverhampton
Decision date: 23.10.23

**Decision date: 19th August 2024
Decided on consideration of the papers**

RULE 14 Order Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings.

to comment on observations the FTT made at the hearing relating to the claimant's walking ability on which it appeared to rely. The respondent has forwarded a submission supporting the appeal.

5. I have decided this case on the papers as I consider I have sufficient information to do so fairly, bearing in mind the overriding objective. Neither party requested an oral hearing. I have provided full reasons as I consider it may be helpful in assisting Tribunals when dealing with observations made on the day of hearing, adopting a holistic approach to the assessment of evidence, (particularly where that evidence may be contradictory) and how this should be addressed in the written reasons.

Discussion – error of law

Conflicts in the evidence, fact finding and adequacy of reasons

6. The FTT concluded at paragraph 6 of its written reasons that:
6. “The Appellant had previously applied for PIP in 2020, but at the time there was no mention of a problem with either knee. The Tribunal noted that in November 2022 a specialist had said that she had full functionality of both knees and no swelling. He advised the Appellant to go to the gym, which would be unlikely if he thought she was incapable of physical activity....”
7. Unfortunately, the FTT make no reference to the findings of the Health Care Professional (HCP) noted under History of conditions that the claimant has:
“Patella tendonitis, osteoarthritis, deep bone bruising, degenerative meniscus tear in the right knee pain & discomfort (September 2021)...Pain in arch of right foot (7 months ago)...High blood pressure (15 years ago)...Back pain (since 2021)...Adhesive Capsulitis (left shoulder) (May 2019)...”
8. The FTT also fails to refer to the evidence from the claimant's GP dated 31/8/23 included at addition A of the FTT bundle which states:
“...She has a medical history of osteoarthritis of her right knee and Plantar Fasciitis of her right foot. She has discomfort in her left knee too, which is due to the compensation effect from osteoarthritis in her right knee. An MRI scan confirmed osteoarthritis in her right knee...”

In response to the points in your letter:

Food preparation/cooking – she CANNOT stand for long periods to do this the right knee gives way when she does. There is too much strain on her right knee and back.

Washing and bathing – it is extremely difficult to get in and out of a bath, she has a walk in showed. She would be looking to get a seat in the shower.

Toileting – She is okay with this in general but has difficulty lowering herself on and raising herself off the toilet.

Dressing and undressing – She needs assistance with this. She CANNOT bend to put her socks and shoes on and needs help drying her lower extremities after a shower.

I confirm that despite taking pain killing medication she can remain in extreme pain, even if she has to walk short distances. She tends to walk/hobble around in pain in order to mobilise... ”

There is also an MRI report which provides :

“MRI Right Knee

Conclusion: Moderate osteoarthritic degenerative change within the medical compartment of the knee joint. Medical meniscal tear...”

9. It is incumbent upon the FTT to consider *all* the evidence. It is unclear if the FTT have considered the GP letter and the Radiologist report as noted above, as the written reasons are entirely silent on this issue. Of further significance is the FTT’s failure to adequately explain why it preferred the evidence of the Musculoskeletal report dated November 2022 to that of the claimant’s GP and the Radiologist. This is in error of law. Where, as here, there is a conflict in the evidence the FTT must state *which evidence it prefers and why*. This was an issue which the FTT should have explored further, making findings of fact rather than simply relying on the Integrated Musculoskeletal Service report. In this regard, in terms of weight to be accorded to specific pieces of evidence, while this is a matter for the primary fact-finding Tribunal, it could be argued the claimant’s GP may have been the health professional who knew the claimant and her condition(s) best. Again, I am not aware of the FTT’s view on this as it is not articulated in it’s written reasons. In my judgment therefore, the FTT was in error of law on a tripartite basis firstly, in failing in its inquisitorial duty to explore the evidence and find the relevant facts, secondly, to resolve the clear conflict in the medical evidence and thirdly, to provide adequate reasons for its decision.

Observations made at the hearing

10. The FTT in it’s written reasons at paragraph 3 states: *“...At the start of the hearing the Appellant was observed to walk into the tribunal room at a reasonable pace and with normal gait. She was not using a walking aid.”*. At paragraph 4(ii) the FTT further state: *“She indicated that she could not weight bear on one leg, but had not been apparent from the manner in which she had walked into the tribunal room...”* It is not clear what the FTT were inferring when making the observations, specifically given that the Tribunal hearing was 9 months after the date of claim. In my view, it is clear the FTT *did* attach weight

to its observations of the claimant on the day of the hearing. What is not clear is whether it gave the claimant the opportunity to address this as this is not referred to in the written reasons. This is a further error of law. The FTT should have afforded the claimant the opportunity to address inferences drawn by it from its observations on the day of the hearing which it intended to rely on and which were material to its findings of fact. Failure to do this is, at the very least, a breach of the principles of natural justice. On this point note the helpful guidance set out by Upper Tribunal Judge Wikely in *K.H. (by C.H.) -v- SSWP (DLA)* [2022] UKUT 303 (AAC) and the principles adumbrated by Judge Poole QC (as she was then) in *CC v Secretary of State for Work and Pensions* [SSWP] (ESA) [2019] UKUT 14 (AAC).

Regulation 4(2A) Safely

11. The claimant's representative submits the FTT failed to adequately consider Regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013, in particular safely. Given I have already found the FTT is in error of law on a number of grounds outlined above, I am not required to consider this point. I note the FTT did afford some consideration in its written reasons to whether the claimant had ever fallen as a result of mobility issues, albeit it did not specifically refer to the regulation or indeed to "safely". In my view this is a peripheral analysis of Regulation 4(2A) at best, however, given my findings above I do not consider it necessary to make a specific finding on this ground.

Conclusion

12. Although the FTT is entitled to afford weight to whatever evidence it chooses, where there is conflicting evidence, it must in the first instance explore and consider it in a holistic manner and provide sufficient reasons explaining why it preferred the evidence that it has. In this appeal the FTT has not done that. There is a lack of reference to the medical evidence which demonstrates the long-standing nature of the claimant's health conditions. For the reasons set out above the FTT have failed to give adequate reasons, making it difficult for the claimant and the Upper Tribunal to know whether the FTT applied the correct legal tests in assessing the evidence, making its findings of fact, and arriving at its decision.
13. Given the nature of the claimant's medical conditions which could impact on a number of the activities for both mobility and daily living, I consider the errors of law identified above are material as they may impact on the appellant qualifying for an award of either or both components of PIP. For the purposes of completeness, I note the claimant was awarded the standard rate of the daily

living component and the enhanced rate of the mobility component of PIP from 25/01/2024 to 23/04/2027.

14. I find that the First-tier Tribunal erred in law as set out above. The First-tier Tribunal's decision is set aside.
15. The appellant did not object to the Secretary of State's invitation to the Upper Tribunal to remit her case to the First-tier Tribunal for re-hearing and given further findings of fact are required, it is appropriate to remit the case back to the FTT. As a matter of law, the next tribunal cannot, in its reasoning, take into account the findings of fact or conclusions of the tribunal whose decision I have set aside. The undetermined grounds of appeal are just that – undetermined.
16. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view, on whether the appellant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

Directions for the re-determination of the appellant's appeal

I direct as follows:

17. The appeal against the Secretary of State's decision of 14th March 2023 is remitted to the First-tier Tribunal for re-determination.
18. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.
19. If the claimant wishes the First-tier Tribunal to hold an oral hearing before his remitted appeal is determined she must make a written request to the First-tier Tribunal to be received by that Tribunal within one month of the date on which this decision is issued.
20. If the claimant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.
21. Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.

22. The parties are reminded that the law prevents the First-tier Tribunal from taking into account circumstances not applying at the date of decision (section 12(8) of the Social Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if it says something relevant about the circumstances at the date of decision.

E Fitzpatrick
Judge of the Upper Tribunal
Authorised for issue 31st August 2024