



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**UT Ref: UA-2023-001806-DLA
NCN: [2025] UKUT 85 (AAC)**

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

Between:

PM (by his appointee)

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 11 March 2025

Decided on written submissions.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 26 September 2023 under case number SC154/21/00894 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and, with the agreement of the parties, redecide the appeal. In redeciding the appeal, I set aside the Secretary of State’s decision of 28 April 2021 (as revised on 25 July 2022) and hold that the appellant is entitled to the higher rate of the mobility component of Disability Living Allowance (DLA) and the highest rate of the care component of DLA from 27 January 2021 to 9 August 2026.

REASONS FOR DECISION

Introduction

1. This decision, ultimately, is about whether a person with “ADHD” is suffering from a state of arrested development or incomplete physical development of the brain under regulation 12(5) of the Social Security (Disability Living Allowance) Regulations 1991 (“the DLA Regs”).
2. The parties are agreed that I should give the decision in the above terms and I am satisfied that I should do so.
3. The appeal concerns entitlement to the higher rate mobility component (“hrmc”) of Disability Living Allowance (“DLA”) via the ‘severe mental impairment’ route under section 73(3) of the Social Security Contributions and Benefits Act 1992 (“the

SSCBA”) and regulation 12(5) and (6) of the DLA Regs. It is only regulation 12(5) of the DLA Regs which is in issue on this appeal.

The Law

4. Section 73(3) of the SSCBA provides as follows:

“The mobility component.

73(3) A person falls within this subsection if—

- (a) he is severely mentally impaired; and
- (b) he displays severe behavioural problems; and
- (c) he satisfies both the conditions mentioned in section 72(1)(b) and (c) above.

5. Regulation 12(5) of the DLA Regs sets out the following:

“Entitlement to the mobility component

12:-(5) A person falls within subsection (3)(a) of section [73(3) of the SSCBA] (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning.

The FTT’s decision

6. By its decision of 26 September 2023, the First-tier Tribunal (“FTT”) dismissed the appellant’s appeal on the basis that:

“[The appellant] who has ADHD did not come within the meaning of severely mentally impaired as defined by ss.73(3) of the Social Security Contributions and Benefits Act 1992 and Regulation 12(5).

This is because ADHD does not, according to current medical opinion, arise from “a state of arrested development or incomplete physical development of the brain”.

7. In the statement of reasons for its decision the FTT said the following of relevance:

“8. The Tribunal found, applying its specialist medical and disability expertise, that the Appellant’s condition, namely Attention Deficit/Hyperactivity Disorder (ADHD) did not come within the meaning of severely mentally impaired as defined by ss.73(3) of the Social Security Contributions and Benefits Act 1992 and Regulation 12(5).

9. This is because ADHD does not, according to current medical opinion, arise from “a state of arrested development or incomplete physical development of the brain”. The Tribunal found, applying its specialist medical expertise, that ADHD is caused by a combination of genetic and environmental factors. While some studies have found anatomical differences between brain grey and white matter while carrying out specific tasks, the Tribunal was not aware of any authoritative medical research identifying underlying problems with the structure of the brain as the cause of ADHD.

54. Arrested development need not be limited to the brain but it must have a physical cause; *SC v SSWP* [2010] UKUT 76 (AAC).....

55. ADHD was most recently considered by the Upper Tribunal in *CS v [SSWP] UA-2021-SCO-000005-DLA*.....In that case, however, both parties agreed that the appellant's combination...of medical conditions met the statutory criteria in Regulation 12(5) of the DLA Regulations.....

62. [The FTT's earlier directions had directed the appellant's representative] to provide a submission as to whether or not ADHD was caused by arrested development or incomplete development of the submission. [The representative's] submission....neglected to address this point and only reiterated that the Tribunal should look at the effects of the [appellant's] condition on his behaviour..... [In oral submissions the representative] again said whether the Appellant's condition was characterised as ADHD or ASD made no difference. The Tribunal disagrees. The relevant Regulation requires that the person "suffers from a state of arrested development of the brain, which results in severe impairment of intelligence and social functioning". There was no evidence before the Tribunal to show that the Appellant had a condition such as ASD which has been held to fit within the statutory definition.

63. While the Upper Tribunal suggested that it might be possible for Tribunals to conclude that ADHD falls within the definition in Regulation 12(5) (*CDLA/5153/1997*), it is implicit that this will require a Tribunal to have specialist and technical medical evidence to support such a finding.

75. In the absence of specialist and technical medical evidence showing that the present state of medical knowledge makes it possible to attribute ADHD to "a state of arrested development or incomplete development of the brain", the appeal must fail."

The grant of permission to appeal

8. Permission to appeal was granted by the FTT:

"on the narrow point of whether Attention Deficit Hyperactivity Disorder (ADHD) might constitute, "arrested or incomplete development of the brain" under Regulation 12(5) of Disability Living Allowance Regulations 1991".

9. Pausing at this point, it may not be apparent that the question of whether ADHD falls within regulation 12(5) of the DLA Regs raises an issue of law as opposed to an issue of medical fact.

Directions on the appeal

10. In giving directions on the appeal, I said that relevant issues that might arise on this appeal were:

(i) whether the Secretary of State would wish to file the most recent and authoritative medical evidence as to whether ADHD constitutes suffering from "arrested development or incomplete physical development of the brain" (in other words, has medical knowledge about ADHD moved on in this regard since *CDLA/5153/1997* was decided?);

(ii) whether the 2017 report in *Lancet Psychiatry* (2017 April; 4(4): 310-319) is sufficient evidence to show that ADHD “is an arrested development of the brain”. The Secretary of State should append a copy of this report, which featured in the appeal referred to at (iv) below, to his submission in this appeal;

(iii) if relevant, which of either *SC v SSWP* [2010] UKUT 76 (AAC) or *NMcM v SSWP* (DLA) [2014] UKUT 312 (AAC) was correctly decided on the construction of the wording in regulation 12(5) of the DLA Regs; and

(iv) whether the Upper Tribunal’s decision *CS v SSWP* (DLA), under UT file reference UA-2021-SCO-000005-DLA, is relevant to this appeal.

Discussion and conclusion

11. The Secretary of State has obtained a detailed report, dated 6 November 2024, from Dr David Foreman in response to the above directions. This is the same expert who provided evidence in the *CS* appeal referred to immediately above. The report takes account of the *Lancet Psychiatry* 2017 report by Hoogman et al as well as subsequent medical reports. Dr Foreman has been a consultant in Child and Adolescent Psychiatry since 1987, is a member of the NICE Technology Appraisal Committee C and is Culture Editor of the *BJPsych Bulletin*.

12. I remain of the view, as in the *CS* case, that *SC v SSWP* [2010] UKUT 76 (AAC) was wrongly decided and that *NMcM v SSWP* (DLA) [2014] UKUT 312 (AAC) correctly sets out the proper legal approach to the statutory test of “suffers from a state of arrested development or incomplete physical development of the brain in regulation 12(5) of the Disability Living Allowance Regulations 1991; though nothing turns on this for the purposes of this appeal.

13. The Secretary of State’s submission on this appeal reads, relevantly, as follows:

“2. In relation to the question of whether ADHD, in general terms, is caused by incomplete physical development of the brain or arrested development of the brain, Dr Foreman concludes that “*ADHD arises from some arrested development or incomplete physical development of the brain, the causes and details of which remain uncertain.*”

3. As to the question of whether there is evidence that the Appellant has incomplete physical development of the brain or arrested development of the brain, Dr Foreman concludes that he does, giving the following explanation in relation to the specific facts of this case:

“The circumstances of this Appellant differ from that of the case discussed in my Report of 2022 [on the CS appeal], where there was another diagnosis admixed with that Appellant’s ADHD. Here, the Appellant has only been formally diagnosed with ADHD. However, as mentioned above, he does show, at least, autistic features, and while the First Tier Tribunal (as reported in my LOI) suggested he had specific learning disabilities, his general IQ is also low. The observation of sub-threshold autistic features raises uncertainty about their clinical significance, complicated here by one of the diagnostic tools used having uncertain validity. In general, there is broadly equivalent impairment for cases that were marginally subthreshold for suspected disorders and, in ASD, some evidence

suggesting that diagnosed and subthreshold cases of ASD have similar metabolic abnormalities in addition to the findings around genetic risk discussed above. It therefore seems likely that literature relating ASD to brain development will be relevant to the Appellant. It follows that, even if subthreshold, ASD symptomatology may also be considered to reflect arrested or incomplete brain development, by applying evidential pluralism to the findings of Lukito et al and related literature. Possibly the strongest marker of arrested or incomplete brain development is intellectual disability (ID). This is diagnosed when there is both low measured IQ and significant impairment in adaptive functioning, as described in ICD-1116 and there is a close relationship between ASD and ID though they are separate conditions. The Appellant's full-scale IQ is reported as 71, and the threshold for ID is 70. Unfortunately, the 95% confidence intervals for the Appellant's scores are not given, but from my previous experience they will include the ICD-11 cutoff, which it makes clear should be used as an approximation. In these circumstances, diagnosis of ID will involve identifying significant impairment in adaptive function, and there is good evidence of that. He is described as "having severe difficulties with his expressive language skills"; he has been at risk of exclusion and he struggled with the meaning of common words or phrases. On that basis, I consider he does meet criteria for ID."

4. For the reasons set out below, SSWP submits that the appeal should be allowed.....

8. In summary, the background is as follows:

a. By decision dated 28 April 2021, upheld on mandatory reconsideration dated 21 June 2021, SSWP decided that the Appellant was entitled to the lower rate of the mobility component of Disability Living Allowance ("DLA"), and the care component of DLA at the highest rate.

b. By decision dated 5 May 202[3], supported by a statement of reasons ("SOR") dated 26 September 2023, the First-tier Tribunal ("FTT") dismissed an appeal against that decision. In summary, it decided that ADHD did not, according to current medical opinion, arise from a state of arrested development or incomplete development of the brain.... It considered, however, that the Appellant had severe impairment of intelligence and social functioning..., and that he exhibited disruptive behaviour which met the conditions in reg. 12(6)....

10. In a letter to the Tribunal dated 27 August 2024, following detailed internal consideration, SSWP set out that she considered that clarity was needed on the current state of medical knowledge on this issue, and therefore she would be instructing an expert to obtain a report.

11. The Tribunal's directions dated 2 October 2024 granted a further extension of time until 6 December 2024 for the report and accompanying

submissions to be filed. Those directions set out the intervening procedural history.

Secretary of State's position

12. SSWP's position remains that the case of *NMcM v SSWP* (DLA) [2014] UKUT 312 (AAC) determined the correct construction of the wording of reg. 12(5), namely that the provision applies where the claimant suffers from either arrested development of the brain or incomplete physical development of the brain.

13. In the light of Dr Foreman's report, SSWP accepts that a person with ADHD is capable of meeting the first condition in reg. 12(5) i.e. that they "suffer from a state of arrested development or incomplete physical development of the brain."

14. That does not, of course, mean that such a person will meet the second part of the test in reg. 12(5), namely that this state results in severe impairment of intelligence and social functioning. A claimant must also meet the condition in reg. 12(6) (severe behavioural problems). These conditions are intended to ensure that support is provided only to those with the most significant and clearly evidenced needs [and reference is here made to *MP v SSWP* (DLA) [2014] UKUT 426 (AAC); *R(DLA) 1/00*; *DM v SSWP* [2015] UKUT 87 (AAC)]. While individuals with ADHD may meet these criteria in certain cases, each case will need to be considered on its individual merits; a claim must, of course, be considered on the basis of the facts and the relevant evidence. It is anticipated that cases in which a person with ADHD alone meets the conditions in reg. 12(5) and (6) are likely to be relatively rare.

15. However, on the specific facts of this case, where the Appellant has ADHD, low IQ, speech and language difficulties, behavioural issues, anxiety, low self-esteem and ASD traits, and based on the report from Dr Foreman and the findings of the FTT in relation to the other elements of reg. 12(5) and (6), SSWP accepts that the criteria in reg. 12(5) and (6) are satisfied in the Appellant's case. For the purposes of s.12(8)(b) of the Social Security Act 1998, SSWP accepts that the report reflects the position as at the date of SSWP's decision.

16. Although the FTT cannot be criticised for reaching the conclusion it did in light of the decision of this Tribunal in *CDLA 5153/97*, SSWP submits that, in the very specific circumstances of this case, the FTT ought, in the exercise of its inquisitorial function, to have given a similar direction to that given by the UT in this case... In short, the FTT could not fully assess the Appellant's condition without updated expert input. Proceeding without such evidence was a material error. The giving of the direction in relation to expert evidence has led to SSWP obtaining a report from Dr Foreman, with the outcome described above.

17. In all the circumstances, SSWP respectfully invites the Upper Tribunal to set aside the decision of the FTT and substitute it with a decision confirming that, as of the material date, the Appellant is entitled to DLA (Mobility) at the higher rate and continues to be entitled to DLA (Care) at the highest rate, consistent with the current award dated from 27/01/2021

to 09/08/2026, with a review thereafter in accordance with relevant regulations and guidance.”

14. I accept this submission. The appellant does not disagree with it.

15. It is important to emphasise, however, that will not be an error of law in an FTT’s decision that a party in the FTT proceedings considers the FTT came to the wrong decision on the evidence (here, about whether a person with ADHD is suffering from arrested development or incomplete physical development of the brain). Putting this another way, it is not enough for the Secretary of State (or the appellant) to now accept based on Dr Foreman’s report that ADHD is in fact caused by arrested development or incomplete physical development of the brain. What first needs to be shown for this appeal to the Upper Tribunal to succeed is that the FTT erred materially in law in the decision it made on 26 September 2023 on the evidence it had before it in September 2023 (which did not (indeed could not) include Dr Foreman’s report of 6 November 2024).

16. In my judgement, the FTT’s decision was erroneous in law. Those errors of law were twofold.

17. First, it failed to provide an adequate explanation about “the current medical opinion” which the FTT considered showed that ADHD did not arise from a state of arrested development or incomplete physical development of the brain. Dr Foreman’s report refers to two reports, the Lancet Psychiatry 2017 report by Hoogman et al and Lukito et al’s 2020 report “Comparative Meta-analyses of Brain Structural and Functional Abnormalities during Cognitive Control in Attention Deficit/Hyperactivity Disorder and Autism Spectrum Disorder” in Psychological Medicine, 50(6). Dr Foreman’s report identified 10 other reports that provided “contrasting” findings to the Hoogman et al 2017 report as compared to 60 papers which supported the Hoogman et al report. Moreover, of the 10 “contrasting” reports, Dr Foreman states that “none denied that brain abnormalities were present [in people with ADHD]”. As for the Lukito et al report, Dr Foreman identified 3 other papers with contrasting findings as against 18 papers which supported Lukito’s findings.

18. This evidential mapping carried out in Dr Foreman’s report is about two reports from 2017 and 2020, both of which support ADHD having a cause in the arrested or incomplete physical development of the brain, and both of which reports have more than majority support in other similar reports. The importance of this mapping, for present purposes, is the contrast it provides with the FTT’s view that “ADHD does not, according to current medical opinion, arise from “a state of arrested development or incomplete physical development of the brain”” (the underlining is mine and has been added for emphasis). The ‘current medical opinion’ on which the FTT founded was, presumably, at the earliest the medical opinion current as at the July 2022 date of the decision under appeal, or in September 2023 when the FTT decided the appeal. However, in circumstances where Dr Foreman’s report shows that a body of medical opinion had existed from 2017, and then more so from 2022, which on the face of it stood contrary to the FTT’s view (and was supported in that contrary view by most peer reports), it was in my judgement incumbent on the FTT to do more than it did to explain the evidential basis for the current medical opinion which it found did not support ADHD being caused by arrested or incomplete physical development of the brain. And that error of law was a material error as it was clearly dispositive of the appellant’s appeal under the severe mental impairment route of entitlement to the hrnc of DLA.

19. Second, and in the alternative, the FTT failed to adjourn to obtain expert evidence from either of the parties about whether ADHD is, as Dr Foreman puts it, caused by arrested or incomplete development of the brain. The earlier reasoning of the FTT, as I have just noted above, appears to proceed on the basis of a positive finding that ADHD does not, according to current medical opinion, arise from state of arrested development or incomplete physical development of the brain. However, later in its reasons the FTT appears to be concerned with founding its decision not necessarily on that positive finding but on needing to have before it [per para. 63 of the FTT's reasons] "specialist and technical medical evidence" to support ADHD coming within the first part of regulation 12(5) of the DLA Regs. This is underscored near the end of the FTT's reasons where the FTT state that "[i]n the absence of specialist and technical medical evidence showing that the present state of medical knowledge makes it possible to attribute ADHD to a "a state of arrested development or incomplete [physical] development of the brain", the appeal must fail.

20. This later reasoning reveals a tension with the FTT's earlier reasoning in that it appears to suggest that the FTT's understanding of "current medical opinion" about ADHD could have been ousted by specialist and technical medical evidence. That itself raises an issue about whether the 'current medical opinion' on which the FTT relied was not itself based on specialist and technical medical evidence, but I need not explore this issue further. However, in circumstances where the FTT appear to have considered that such specialist medical evidence could have made a difference on this appeal, and where the appellant's representative had not addressed this evidential point and the Secretary of State's written submissions had not addressed section 73(3) of the SSCBA at all (see paragraph 36 of the FTT's reasons), and moreover where the FTT was aware from the CS case that the Secretary of State had provided specialist evidence in a similar case when asked (by the Upper Tribunal), in my judgement the FTT erred in law in not considering, as part of its inquisitorial role, adjourning the appeal to obtain specialist evidence from the Secretary of State.

21. The above errors of law mean in my judgement that the FTTs decision cannot stand and must be set aside. Having set aside the FTT's decision, I remake its decision.

22. All the other findings of the FTT under the severe mental impairment route were in favour of the appellant and are not disputed or challenged. The sole basis on which the FTT found against the appellant was because his ADHD did not come within regulation 12(5) of the DLA Regs. I am satisfied on Dr Foreman's report that a person with ADHD is suffering from a state of arrested development or incomplete physical development of the brain, regulation 12(5) of the DLA Regs is accordingly satisfied, and I therefore give the decision in the terms set out above.

**Approved for issue by Stewart Wright
Judge of the Upper Tribunal**

On 11 March 2025