[2025] UKUT 223 (AAC)
Appeal No. UA-2024-001686-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between

IC

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Fitzpatrick
Decided on consideration of the papers

Written representations:
Appellant: Self represented.
Respondent: Mr R. Naeem, DMA, Leeds.

On appeal from:
Tribunal: FTT (SEC)
Tribunal Case No: SC 314/24/00153
Tribunal Venue: Leicester Tribunal Hearing Centre
Decision Date: 20.08.24

The Appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.]

SUMMARY OF DECISION

1.In the application of Section 12(8)(b) of the Social Security Act 1998 it is the time to which the evidence relates that is significant, not the date when the evidence was written or given.

2. Medical evidence which does not specifically address the PIP descriptors should not automatically be accorded less weight by the FTT. In most cases evidence provided by an Appellant will not have been prepared for use at the FTT hearing and the blanket application of such an approach could result in unfairness to the Appellant. It is for the FTT to make its own findings of fact considering the totality of the evidence in a holistic way.

3. The FTT should approach "on the day" observations of the Appellant with caution and the Appellant should be afforded an opportunity to comment on observations particularly if they are material to the Tribunal's findings.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with this decision and the following directions

DIRECTIONS

1. The appeal against the Secretary of State's decision of 29th August 2023 is remitted to the First-tier Tribunal for re-determination.

2. 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.

3. If the Appellant wishes the First-tier Tribunal to hold an oral hearing before his remitted appeal is determined he 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.

4. If the Appellant 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.

5. Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.

6. 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. OBJ

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or First-tier Tribunal Judge.

REASONS FOR DECISION

Introduction

1. This is an appeal against the decision of the First Tier Tribunal (FTT) of the 20th of August 2024 in which the FTT confirmed the decision of the Secretary of State of the 29th of August 2023 that the Appellant was not entitled to either component of Personal Independence Payment (PIP).

2. I granted permission to appeal on 6th January 2025, and the Respondent has supported the appeal on all the grounds articulated in the permission decision. Given the recurring nature of these issues, I consider it may be helpful to set out the reasons for my decision.

Factual background

3. The Appellant appealed the SSWP's decision of 29th August 2023 to refuse to award him any points for either component of PIP.

4. The Appellant requested a Mandatory Reconsideration (MR) of that decision. However, following the MR on 10th November 2023 the decision was unchanged. The Appellant then lodged an appeal against the decision, with HM Courts and Tribunals Service (HMCTS) on 9th December 2023.

5. Following the appeal hearing held on 20th August 2024, the Tribunal refused the appeal and confirmed the Secretary of State's decision.

Legal framework

6. The Appellant's stated grounds of appeal are, in summary, that the FTT misapplied the law by failing to consider Regulation 4(2A) of the Social Security (PIP) Regulations 2013, that the FTT failed to consider the "50% rule" and that it applied the incorrect test for Activity 1 Preparing Food, Descriptor a.
7. Following the appeal hearing held on 20/08/2024, the FTT refused the appeal and confirmed the Secretary of State's decision awarding the Appellant 0 points in respect of both components of PIP.

The grounds of appeal and the parties' submissions

8. The Appellant's grounds of appeal are set out at paragraph 6 above. The Respondent supports the appeal on the basis of the potential errors of law identified by me in the grant of permission to appeal.

Analysis

The grounds on which permission to appeal was granted

9. Permission to appeal was granted on three grounds. Firstly, the FTT may have failed to consider if medical evidence (the MRI lumbar/sacral scan) which post-dated the date of the decision under appeal may, nevertheless, have been relevant at the date of the decision under appeal.

10. Secondly, paragraph 14 of the written reasons refers to the medical evidence lacking "detailed objective substantiation of the disabling functional effects claimed by the appellant across the PIP assessment activities." This is also referred to at paragraphs 17(a)(i), 19 and 23. Most medical reports (other than those that have been prepared for the specific purpose of tribunal proceedings) do not carry out an assessment of how an Appellant's physical or mental health issues impact on his functional ability in terms of PIP activities. It is for the First-Tier Tribunal to make its own findings of fact on this issue.

11. Thirdly, the FTT refers at paragraphs 102 and 114 of the written reasons to observations it made of the Appellant at hearing. There is no reference as to whether these observations were put to the Appellant to give him an opportunity to comment on them.

12. The Respondent supports the appeal on all three grounds.

Ground one - The date of the evidence and Section 12(8)(b) of the Social Security Act 1998.

13. This section provides that a tribunal: "shall not take into account any circumstances not obtaining at the time when the decision appealed against was made." This does not of course prevent a tribunal having regard to evidence that was not before the Secretary of State and came into existence *after* the decision was made or to "evidence of events after the decision under appeal was made for the purpose of drawing inferences as to the circumstances obtaining when or before the decision was made." (as per 1.456 Volume III Social Security Legislation).

14. This issue was considered by me in *UA-2022-000388-PIP [2024] UKUT 90 (AAC) UT.* Given it arises on a frequent basis before the FTT it may be helpful to summarise the relevant authorities. I note in particular the comments of Commissioner Jacobs (as he then was) in R(DLA) 2/01 when considering the scope of this provision particularly paragraph 9 where he states "...i*t is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If the evidence is written or given after the date of decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time, it is not admissible."*

15. Similarly in R(DLA) 3/01 Commissioner Jacobs at paragraph 55 concludes "..*It [section 12(8)(b)] refers to "any circumstances not obtaining at the time the decision was made." It does not refer to circumstances "not existing" at that time.... In its context, a circumstance must be "obtaining at the time when the decision appealed against was made" if it existed at any time during that period...Section 12(8)(b) only applies to fresh circumstances occurring after the decision was mad*e." While Commissioner Jacobs declined to precisely define fresh circumstance" he did give the example in that case that a slower than expected post operative recovery was not a fresh circumstance for the purposes of section 12(8)(b) whereas someone recovering from heart surgery who developed pneumonia did come within the meaning of "fresh circumstance".

16. *In JS VSSWP 2011 UKUT 243 AAC* Judge Ward follows the approach in R(DLA) 2/01 and R(DLA) 3/01, concluding evidence coming into existence after the date of the decision could be relied on so far as relevant to show the circumstances pertaining at the date of decision. In that case, where there was evidence of a recent diagnosis of depression, recent weight loss, low weight and very low body mass index (BMI), the tribunal in its inquisitorial role ought to have followed this up to see if this was a symptom of untreated depression or at least made clear what it made of this evidence.

17. In the present case the FTT does not explicitly refer to Section 12(8)(b) of the Social Security Act 1998 in its written reasons, but it appears this is what the Tribunal had in mind when referring to the MRI lumbar spine report. Paragraph 13(c) of the written reasons notes the MRI lumbar spine report "*post-dated the decision under appeal".* The FTT have failed to consider *the time period to which the evidence relates* not simply the date on which the report was produced. It

has also in my view, failed to articulate adequate reasons explaining what it made of this evidence and what weight if any was accorded to it. Consequently, the FTT is in error of law.

Ground 2 Medical evidence - the significance of addressing specific PIP descriptors

18. Paragraph 14 of the written reasons refers to the medical evidence lacking detailed objective substantiation of the disabling functional effects claimed by the Appellant across the PIP assessment activities. This is also referred to at paragraphs 17(a)(i), 19 and 23. As I observed in my grant of permission, most

medical reports (other than those that have been prepared for the specific purpose of tribunal proceedings) do not carry out an assessment of how an Appellant's physical or mental health issues impact on his or her functional ability with specific reference to PIP activities. It is for the First-Tier Tribunal to make its own findings of fact on this issue.

19. I am in agreement with the Respondent's submission that the danger with taking this approach means any medical evidence provided by a GP or medical specialist not prepared specifically for the Tribunal proceedings is rendered inadequate (or at least less persuasive) as they do not focus specifically on the PIP activities, rather, they are likely to provide a medical view on an Appellant's medical conditions.

20. This approach is problematic in a number of respects. To adopt a starting point that less weight should automatically be accorded to medical evidence which does not specifically address PIP activities is unfair to the Appellant, contrary to natural justice and in my view, in breach of an Appellant's Article 6 rights to a fair hearing by an independent and impartial Tribunal.

21. In my judgement this also has the effect of constraining the Tribunal in its task of holistically considering and properly weighing all the evidence in the appeal. For these reasons the approach taken by the FTT in its assessment of the medical evidence is in error of law. It is for the Tribunal to utilise its specialist expertise and exercise its inquisitorial duty to fact find and to determine in a holistic manner whether a claimant's reported restrictions are consistent with the available evidence. It will not be able to do this if it approaches this task with fixed views regarding a potential "hierarchy" of medical evidence.

Ground 3 Observations at hearing

22. The FTT refers at paragraphs 102 and 114 of the written reasons to observations it made of the Appellant at hearing. The observations were that the claimant "*did not exhibit indicators of disability*". It is unclear whether these observations were put to the Appellant to give him an opportunity to comment on them.

23. The issue of observations made at hearing has been the subject of numerous decisions. In particular I 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).*

24. It is important to remember the hearing usually takes places some months after the date of the decision and is in effect a "snapshot" of an Appellant's presentation on that particular day over a relatively short space of time. Attaching weight to "on-the-day observations" should therefore be approached with caution by the FTT. It is crucial the Tribunal affords the Appellant the opportunity to comment on observations it may have made otherwise unfairness to the Appellant can result. I note the decision of Upper Tribunal Judge L T Parker In CSPIP/45/2016 on this issue specifically paragraph 7 ;

"Notwithstanding a tribunal is entitled to take observations into account, this is always subject to its overriding duty to provide a fair hearing; this will usually mean allowing a claimant to comment on such observations before any final adjudication is made."

25. In this case while it is clear the FTT made observations of the Appellant at hearing, it is not clear from its written reasons if it gave him the opportunity to comment on them. This is in error of law both in terms of the FTT's failure to afford the Appellant this opportunity and, given the written reasons are silent on this point, to provide adequate reasons of how it dealt with this issue.

Conclusion

26. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal subject to the directions above.

What happens next

27. I have found that the First-tier Tribunal erred in law as set out above. The First-tier Tribunal's decision is set aside.

28. The Secretary of State has suggested the Upper Tribunal remit this 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.

29. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view on this case. 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.

Edell Fitzpatrick
Judge of the Upper Tribunal

Authorised by the Judge for issue on 19th June 2025