



Neutral Citation Number: [2025] UKUT 326 (AAC)
Appeal No. UA-2024-001710-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

LB

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

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

Representation:

Appellant:

Sue Blackshaw, Derbyshire County Council

Respondent:

Clare Keates, Decision Making and Appeals (DMA)
Leeds

On appeal from:

Tribunal:

First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No.:

SC319/23/02036

Digital Case No.:

1697311749672389

Tribunal Venue:

Nottingham

Decision Date:

7 August 2024

SUMMARY OF DECISION

41.1 Personal Independence Payment: general

This appeal highlights the danger of a tribunal drawing inferences from evidence of the medical treatment that a claimant has received (or has not received) as to the degree of a claimant's likely symptoms and any consequent functional limitations.

The Upper Tribunal says that while the drawing of such inferences will not always be impermissible, a tribunal relying on such inferences would be wise to direct itself as to the risks associated with doing so, and to give a careful explanation of its decision making in that regard.

The appeal relates to a PIP claim, but the principles apply equally to other benefits. It confirms the decision of the Upper Tribunal (Judge Poynter) in **MM v SSWP (ESA)** [2018] UKUT 446 (AAC).

Please note that 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

As the decision of the First-tier Tribunal involved the making of an error of law, it is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (the “**2007 Act**”) and the case is **REMITTED** to the First-tier Tribunal under section 12(2)(b)(i) for rehearing before a differently constituted panel.

DIRECTIONS FOR THE REHEARING

1. 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.
2. The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 7 August 2024.
3. 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**.
4. 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 3 above).
5. 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

What this appeal is about

1. This appeal highlights the danger of a tribunal drawing inferences from evidence of the medical treatment that a claimant has received (or has not received) as to the degree of a claimant's likely symptoms and any consequent functional limitations.

2. The Upper Tribunal says that while the drawing of such inferences will not always be impermissible, a tribunal relying on such inferences would be wise to direct itself as to the risks associated with doing so, and to give a careful explanation of its decision making in that regard.

Background

3. The Appellant (to whom I shall refer as the “**claimant**”) claimed a Personal Independence Payment (“**PIP**”) on 30 November 2022 and returned a completed PIP2 questionnaire form dated 28 December 2022 identifying various health problems affecting her daily life.
4. The claimant underwent a telephone assessment with a healthcare professional, and on 3 February 2023 a decision maker for the Secretary of State wrote to the claimant to inform him that she had scored no points in respect of either the daily living activities or the mobility activities, and therefore did not satisfy the entitlement conditions to any award of a PIP with either component at either rate from 30 November 2022 (the “**SoS Decision**”).
5. The claimant disagreed with the SoS Decision and requested a mandatory reconsideration. However, the SoS Decision was confirmed on reconsideration. The claimant appealed to the First-tier Tribunal.
6. On 7 August 2024, a three-member panel of the First-tier Tribunal (Social Entitlement Chamber) convened at Nottingham (the “**Tribunal**”). The Tribunal heard evidence and argument. The complainant complained of back and shoulder pain, osteoarthritis in both her knees, breathlessness, pain in her feet and bilateral carpal tunnel syndrome, as well as headaches, blurred vision and dizziness, resulting in falls.
7. The Tribunal decided to confirm the SoS Decision that the claimant scored no points and was not, therefore, entitled to any award of a PIP with either component at either rate from 30 November 2022 (the “**FtT Decision**”), which it explained in a decision notice dated 7 August 2024 and a statement of reasons dated 26 September 2024.

The permission stage

8. The claimant sought permission from the First-tier Tribunal to appeal to the Upper Tribunal on several grounds, but a District Tribunal Judge refused permission to appeal. The claimant then exercised her right to apply to the Upper Tribunal for permission to appeal and the matter came before me.
9. In a clear and succinct submission, Ms Blackshaw of Derbyshire County Council (for the claimant). She identified evidence in the ESA85 report produced in connection with the claimant’s application for another benefit that she says was relevant to the claimant’s appeal but was not addressed in the Tribunal’s statement of reasons or its decision notice, so it is impossible to know what the Tribunal made of this relevant evidence or indeed whether it considered it at all.
10. Ms Blackshaw also voiced a concern that the Tribunal appeared to have made assumptions about the degree of the claimant’s symptoms and her resulting functional limitations based on the treatment she had received. Ms Blackshaw argued that the claimant should have scored points for the daily living activities of preparing food, washing and bathing, toileting and dressing and undressing,

and the Tribunal's errors of law were material because had she been awarded points in respect of those activities the outcome of the appeal would have been different (as the 8 point threshold for an award of the standard rate of the daily living component would have been reached).

11. In my permission decision, which was addressed to the claimant, I said:

"6. There are several places in the Tribunal's statement of reasons for the FtT Decision that indicate that the Tribunal may have drawn impermissible inferences from evidence about the treatment that you have received.

7. The Tribunal may have erred in law by failing to follow the Upper Tribunal's decision in **MM v SSWP (ESA)** [2018] UKUT 446 (AAC), in which Judge Poynter said (at paragraphs [45]-[46]):

"When a Tribunal concludes that a claimant cannot be accurately describing the conditions from which she suffers because, if she were, she would be receiving different treatment, its reasoning is often reducible to this: that the Tribunal's medical member would not him- or herself treat a person with those conditions in that way." ... "There is therefore a real risk that drawing inferences about function from treatment will in some cases lead the Tribunal to conclude that claimants do not suffer from the loss of function they described because they are not being correctly treated for it. That is clearly not a permissible conclusion."

8. The Tribunal appears to have dismissed your evidence about the functional limitations you experience due to your health problems because of the evidence of what treatment you were (and were not) receiving. It also appears to have made assumptions about the effectiveness of surgery that you had undergone (rather than making evidence-based findings as to the impact of that treatment on your functioning).

9. I am satisfied that it is arguable with a realistic prospect of success that the Tribunal erred in law, and its error may have been material (in the sense that the outcome could have been different had the Tribunal not made such an error) because such an error (if made) might have affected all its decision making. This justifies a grant of permission to appeal to the Upper Tribunal. My grant of permission extends to each of the grounds argued by Ms Blackshaw."

12. I made Case Management Directions for the parties to make submissions and indicate whether they requested an oral hearing of the appeal.

The positions of the parties

13. Ms Keates, on behalf of the Secretary of State, indicated support for the appeal on the basis that she considered that the Tribunal had erred in its fact finding and in failing to give adequate reasons for its decision making. She invited me to set the FtT Decision aside and to remit the matter to be reheard by another tribunal.

14. The claimant's representative encouraged me to publish a reasoned decision on the appeal on the basis that she considered that it would be helpful to highlight the issue of drawing impermissible inferences from evidence about

treatment (or lack of treatment) because in her experience it is a common practice.

15. Neither party requested an oral hearing.
16. Given the degree of agreement between the parties, I decided that the interests of justice did not require an oral hearing.

Why I have allowed the appeal

17. At the permission stage I was required to decide whether the claimant's grounds of appeal were "arguable" with a realistic prospect of success. At the substantive stage I must be satisfied (on the balance of probabilities) that the Tribunal did indeed err in law in a way that was material.
18. The Tribunal heard evidence about the treatment that the claimant received for her various health conditions, and as to whether she had been provided with any aids or appliances to help her. That was relevant evidence which the Tribunal was entitled to take into account in its decision making.
19. However, there are several passages in the Tribunal's statement of reasons that indicate that it drew inferences from the care she received from the medical professionals treating her (as well as the treatment that could have been offered her but was not), that her difficulties were not likely to be as great as she claimed:

"10. The tribunal considered whether or not [claimant] would need an aid or assistance to cook. The tribunal notes that she has not acquired any aids to assist with the chopping despite having had carpal tunnel syndrome for a number of years. She has had operations on her hands and has not been re-referred for treatment following this. While prior to her operations for carpal tunnel syndrome [the claimant] may have required some aids, the tribunal does not accept she would require an aid to ensure she could use her hands effectively after these operations..."

"13. ...She indicated that she had difficulty getting the lids off child-proof bottles. While accepting this may be more difficult for her than for some because of the historic [sic] difficulties with her hands, the tribunal considers that to a large extent this would have been addressed by the two operations on her hands..."

"15. She is reported, which the tribunal accepts at the time was accurate to sit on the edge of the bath and to swing her legs into the bath while holding on to integral handles. However, she had not acquired any handles or grab rails to assist her in and out of the bath..."

"16. ...It noted that she had not acquired a raised seat or frame nor had her doctor, or other person suggested an occupational therapy referral...However, given the level of treatment she was receiving and the fact that no attempt had been made to provide aids or assistance with toilet needs...the tribunal is not persuaded..."

"18. ...Her movement is somewhat restricted by arthritis in her back but, as indicated above, the tribunal does not consider, given the level of treatment and intervention for musculoskeletal problems..."

“22. ...Some of that walking may have been with significant pain and discomfort but when considering the level of treatment, she was receiving...”

20. As Judge Poynter recognised in **MM v SSWP**, the drawing of inferences about the degree of a claimant's symptoms from the level of treatment they have received, is fraught with danger. The treatment a claimant receives is not necessarily a reliable proxy for the degree of that claimant's symptoms because there are several factors that could feed into a medical professional's treatment decision. For example, a GP's decision not to prescribe a treatment that might be expected to be appropriate for a severe case of the condition the claimant complains of might be based on the patient having a history of unwanted side effects with that medication, rather than the GP having assessed the severity of the patient's symptoms as less severe. There could be other reasons for a claimant not having received a high level of medical input: their GP may be exceptionally busy, or not particularly sympathetic, or even incompetent. The claimant may be exceptionally stoic in their description of their difficulties to their GP, or they may lack assertiveness.
21. Care also needs to be taken if drawing inferences about the existence or otherwise of a claimant's claimed symptoms, or the likely degree of any such symptoms, from the fact the claimant has received a particular treatment. It may well be that a particular procedure, such as a hip replacement or (as in this appeal) surgery for carpal tunnel, generally has a high success rate, but the tribunal should seek to equip itself with evidence of how successful this particular claimant's procedure was, any complications experienced, what tasks they have attempted since the procedure and any difficulties experienced, allowing the tribunal to make clear findings of primary fact (exercising its inquisitorial jurisdiction where appropriate).
22. None of these potential difficulties mean that a tribunal cannot draw inferences from evidence as to treatment a patient has received (or as to a lack of treatment) at all, but they mean that considerable care needs to be taken. However, if a tribunal is to draw such inferences, it would be wise to direct itself as to the risks associated with drawing such inferences, and to give a careful explanation of how it went about its decision making in this regard.
23. Very similar considerations apply where inferences are drawn from the fact that a claimant has not been seen by an occupational therapist to assess whether they need aids, appliances or adaptations to their home: the fact that such an assessment has not taken place does not necessarily mean that such an assessment is not indicated.
24. The decision notice and statement of reasons in this case do not suggest that the Tribunal was alive to the potential difficulties of using the claimant's treatment and her not having been provided with aids or appliances as proxies for the severity of her symptoms. I am satisfied that it erred in law in this regard, and that the error was material.
25. Having found that the Tribunal erred in law in a way that was material, I consider that the interests of justice require me to exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (the “**2007 Act**”) to set the FtT Decision aside.

Disposal

26. Having decided to set aside the FtT Decision under section 12(2)(a) of the 2007 Act I have a discretion whether to remit the matter to the First-tier Tribunal for redetermination, or to remake the decision for myself. Because further facts need to be found, and because the First-tier Tribunal with its expert members is the most appropriate forum for finding such facts, I exercise my discretion to remit the matter to the First-tier Tribunal to redetermine the appeal.
27. To the extent that the Tribunal made any other errors of law, those will be subsumed by the rehearing.

**Thomas Church
Judge of the Upper Tribunal**

Authorised for issue on: 30 September 2025