



NCN: [2025] UKUT 356 (AAC)
Appeal No. UA-2025-000324-DLA

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

T.C.

Appellant

by

N.C.

Appointee

- v -

Secretary of State for Work and Pensions

Respondent

**Before: Upper Tribunal Judge Wikeley
Decided on consideration of the papers**

Representation:

Appellant: By Appointee in person

Respondent: Mrs A. Watts, Decision Making and Appeals, DWP

On appeal from:

Tribunal: First-Tier Tribunal (Social Security and Child Support)

Tribunal Case No: SC014/23/00293

Digital Case No : 1698751865634946

Tribunal Venue: Kidderminster

Hearing Date: 26 April 2024

Judicial summary

This case concerns the “severe mental impairment” (SMI) rules for entitlement to the higher rate of the Disability Living Allowance (DLA) mobility component. The decision of the First-tier Tribunal (FTT) that the claimant did not meet the criteria in the SMI rules, and in particular the “severe behavioural problems” test, was not adequately explained. The Upper Tribunal set aside the FTT’s decision and re-made the decision

under appeal, awarding both the highest rate care component and the higher rate mobility component for the period in issue.

Keywords

10.4 DLA, AA. MA: general – severe behavioural problems

11.1 DLA. MA: mobility – children under 16

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) and section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and re-make the decision of the First-tier Tribunal as follows:

The Appellant's appeal is allowed.

The decision made by the Secretary of State on 9 June 2023 as revised on 18 September 2023 is set aside.

The Appellant is entitled to the highest rate of the DLA care component and the higher rate of the DLA mobility component for the period from 26 October 2022 to 2 June 2024.

An award is made for the above closed period as there is a more recent award in place at the same rates covering the period from 3 June 2024 to 2 June 2027.

REASONS FOR DECISION

Introduction

1. This appeal is about a young boy who was aged 3 at the relevant date. To protect his privacy, I refer to him as Timothy (not his real name) and have changed any references to his name in documents in this appeal to that pseudonym. The appeal is brought on his behalf by his mother, who acts as his Appointee.
2. The issue raised by the appeal was whether Timothy qualified for the higher rate of the mobility component of Disability Living Allowance (DLA) on the basis of the Severe Mental Impairment (SMI) rules.
3. The Appellant's appeal to the Upper Tribunal succeeds and so the First-tier Tribunal's (FTT's) decision on Timothy's DLA appeal is set aside. It is not necessary to remit the case to a fresh FTT for re-hearing as there is sufficient evidence available for me, with the agreement of the parties, to substitute my own decision for that of the FTT. I therefore re-make the decision under appeal.

The factual background

4. Timothy was born in August 2019. He is non-verbal, has developmental delay, autism spectrum disorder, stimming behaviour and mobility and sleeping issues.
5. On 23 November 2021 Timothy's mother made a claim for DLA on his behalf. The Secretary of State's decision-maker decided that Timothy was entitled to the middle rate of the DLA care component as from the date of claim until 25 October 2022, based on his assessed day-time care needs. As he was aged two years at the date of claim, the mobility component could not be awarded (see Social Security Contributions and Benefits Act 1992, section 73(1A)).
6. In 2022 Timothy's mother applied for a supersession of that decision, providing additional information. On 9 June 2023 a decision-maker refused that application. This refusal to supersede was on the basis that Timothy was not unable to walk or virtually unable to walk and did not require prolonged or repeated attention at nights. On 14 August 2023 Timothy's mother applied for that decision to be reconsidered, arguing that "he has excessive night-time needs and struggles with walking and the dangers involved". On 18 September 2023 the DWP issued a mandatory reconsideration notice. This increased the award of the DLA care component from the middle rate to the highest rate (for the period from 26 October 2022 to 25 October 2024) but maintained the decision to refuse any award of the mobility component.
7. Timothy's mother then lodged an appeal with the FTT giving the following summary of her reasons:

I would like to appeal under SMI. My son has severe Global Delay and has suspected Autistic (undiagnosed). He attends a specialist school and needs constant supervision for his elopement. He cannot walk unattended or without an aid and has no sense whatsoever of danger and can be a great danger to himself if left unsupervised.

The decision of the First-tier Tribunal

8. The FTT (in substance) refused the appeal. The FTT confirmed the DWP's decision of 9 June 2023 (as revised) that Timothy was entitled to the highest rate of the DLA care component, albeit that the FTT extended the period of the award by one year (so covering the period from 26 October 2022 to 25 October 2025). Again, no award was made of the mobility component.
9. The FTT helpfully summarised its reasons at some length in the decision notice:
 4. [Timothy] has global development delay and autistic spectrum disorder. He was 3 years old at the date of decision. Only the highest rate of the mobility component was in issue. He is too young to be considered for an award of the lowest rate. He toe walks, but is not unable or virtually unable to walk. He likes to run and climb, and is described as being very quick on his feet. The issue in this appeal is "severe mental impairment". The tribunal accepts that he has an arrested or incomplete development of the brain and severe impairment of intelligence and social functioning. In relation to behaviour, he likes to try and run off and will do so at the slightest opportunity. He also likes to climb to get to windows and so furniture has to be arranged carefully, doors and windows have to be kept locked, and other physical barriers are utilised, such as stair gates. He has sensory issues and is a long way behind in relation to his play and socialisation. He can have meltdowns, but these are not so unpredictable as to meet the statutory test. They often focus around his frustration if something changes or he cannot go where he wants. He has pinched other adults and children, which is often when they are making a noise that he wants to stop. He has not caused any injuries. He has now started school. Staff are prohibited from using any form of physical restraint. They use a buggy to move him around the school so that he doesn't run off, and have familiarised him with getting in and out for himself. The test for "SMI" is a high one. It is that he displays severe behavioural problems which are extreme and disruptive and which regularly require intervention and physical restraint to stop injury to himself, others or property, and that the behaviours are so unpredictable that it requires someone to be present and watching over him all the time he is awake. Although [Timothy] has very significant difficulties and that steps have to be taken to keep him safe, the tribunal find that he does not meet the very high legal threshold.
10. The FTT also issued a full statement of reasons (SOR), expanding on the summary reasons in the decision notice.

The grant of permission to appeal to the Upper Tribunal

11. I gave Timothy's mother permission to appeal to the Upper Tribunal, making the following observations:

The context of this application for permission to appeal

3. The central issue in this case was whether Timothy qualified for the higher rate of the DLA mobility component on the basis of the so-called SMI rules.

At the outset I should make the point that there are many very seriously disabled children who present with extreme behavioural problems yet who still do not meet every element of the demanding statutory tests under the SMI rules.

4. In particular, regulation 12(6) of the Social Security (DLA) Regulations 1991 (SI 1991/2890) requires that the claimant exhibit:

“disruptive behaviour which—

(a) is extreme,

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.”

5. The proper application of those cumulative statutory tests was considered in some detail in my decision in *MG v Secretary of State for Work and Pensions [SSWP] (DLA)* [2012] UKUT 429 (AAC) and in the more recent decision by Upper Tribunal Judge Church in *XTC v SSWP (DLA)* [2020] UKUT 342 (AAC).

6. The decision in *MG v SSWP* can be accessed on the Upper Tribunal’s old website at

<https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3591>.

7. The decision in *XTC v SSWP* can be accessed on the Upper Tribunal’s new website at

<https://www.gov.uk/administrative-appeals-tribunal-decisions/xtc-v-secretary-of-state-for-work-and-pensions-dla-2020-ukut-342-aac>.

Analysis of this application for permission to appeal

8. In as much as the grounds of appeal are an attempt to re-argue Timothy’s case on its facts, they are not especially persuasive. This is because of the limited scope of the right of appeal ... The facts are for the FTT to determine. However, on closer scrutiny it may be arguable that the FTT erred in law in at least two respects.

9. First, it is possible that the FTT may have improperly elided the statutory tests in regulation 12(6). At para 21 of its reasons, the FTT recorded that “the tribunal found that the behaviour was not extreme, and so unpredictable that it required regular restrains [*sic*] and for him to be watched over whenever he was awake.” This passage appears to collapse the discrete requirements of regulation 12(6)(b) and 12(6)(c) into one composite test. However, on a proper interpretation of the regulation ‘unpredictability’ is not

part of the statutory test for ‘regularly requiring intervention and physical restraint’. However, even if this passage in the FTT’s reasoning may not have been happily phrased, it is possible that any error in this respect was not material to the outcome of the appeal.

10. Secondly, there may be an argument that the FTT failed to find sufficient facts or give sufficient reasons for its conclusion that Timothy did not meet the very strict requirements of regulation 12(6). The passage cited above from para 21 of the FTT’s reasons is at best arguably a rather garbled restatement of the statutory test. As such, although the FTT appears to have engaged in quite detailed fact-finding, it may be that it has not provided an adequate explanation for its decision. So, for example, has the FTT really explained why Timothy’s behaviour was not “extreme”? – on which see the guidance in both *MG v SSWP* and *XTC v SSWP* – or is this perhaps just a matter of inference. Furthermore, has the FTT actually made an evidence-based finding of fact (in paras 14 to 21) which addresses the question whether Timothy “requires another person to be present and watching over him whenever he is awake” within regulation 12(6)(c) (putting to one side for the moment the issue of unpredictability). In my experience of hearing SMI appeals it is often the need to satisfy regulation 12(6)(c) which is the stumbling block to a successful appeal. A relevant question to be asked in such cases is e.g. can the child be left alone in a room to watch TV? If they can, then the appeal will fail, regardless of the degree of disability. I have to say that on an objective reading of this FTT’s decision the answer to that crucial question in this case is not immediately clear.

The Secretary of State’s submission on the appeal to the Upper Tribunal

12. The Secretary of State’s representative supports the appeal to the Upper Tribunal for the following reasons:

4.2 In addressing UT Judge Wikeley’s PTA at paragraph 9 - 10 (detailed above), it is my submission that the FtT has erred in law in both its fact finding and duty to provide adequate reasons for its decision. The conclusion from the FtT on how it assessed whether the claimant met the Severe Mental Impairment (SMI) criteria appears limited in its reasoning. It seems that what the FtT has provided at paragraphs 20 - 21 of the SOR is a conclusion without an adequate explanation. I submit that my views are generally aligned with those of the UT Judge that the FtT has arguably erred materially in law for the reasons set out below.

4.3 The UT Judge’s first ground of appeal concerns the fact that the FtT may have erred in law by improperly eliding the statutory tests set out in regulation 12(6) of The Social Security (Disability Living Allowance) Regulations 1991. Specifically, UT Judge Wikeley notes that at paragraph 21 of the SOR, the FtT have collapsed the discrete requirements of regulation 12(6)(b) and 12(6)(c) into one composite test, and that on a proper interpretation of the regulation ‘unpredictability’ is not part of the statutory test for ‘regularly requiring intervention and physical restraint’. The UT Judge also notes, however, that even if this passage in the FtT’s reasoning may not have been properly phrased, it is possible that any error

in this respect was not material. Respectfully, I submit that I concur with the UT Judge that while the FtT's phrasing at paragraph 21 of the SOR may show an improper paraphrasing of The Social Security (Disability Living Allowance) Regulations 1991, this miswording was likely immaterial - particularly given an alternative way in which the FtT may have erred in law which will be detailed in the following paragraphs.

4.4 The UT Judge's second ground of appeal concerns the fact that the FtT may have erred in law by failing to find sufficient facts or give sufficient reasons for its conclusion that the claimant did not meet requirements of Regulation 12(6). Regulation 12(6) of The Social Security (Disability Living Allowance) Regulations 1991 forms part of the statutory test for the SMI criteria. In considering an award under the SMI criteria, it is submitted regard must be had to the provisions of s73(3)(b) (severe behavioural problems) and in particular the provisions of regulation 12(6) of The Social Security (Disability Living Allowance) Regulations 1991.

Section 73(3)(b) provides:

(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.

S. 73(6) authorised the making of regulations specifying the cases falling within s. 73(3)(a) and (b). They are to be found in Reg. 12(5) and (6) of the Social Security (Disability Living Allowance) Regulations 1991:

“(5) A person falls within subsection (3)(a) of section 73 of the Act (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.

(6) A person falls within subsection (3)(b) of section 73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which–

(a) is extreme,

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.”

4.5 In considering whether the claimant met the SMI criteria, the FtT found that that he satisfied the first part of the test – to be suffering from a state of arrested development or incomplete physical development of the brain (Reg

12 (5)). At paragraph 10 of the SOR, quoting the decision notice, the FtT stated:

“The tribunal accepts that [the claimant] has an arrested or incomplete development of the brain and severe impairment of intelligence and social functioning.”

4.6 When considering whether the claimant met the second part of the test concerning severe behavioural problems (Reg 12 (6), outlined at paragraph 4.4 above), the FtT repeated much of the medical evidence in the bundle and came to the conclusion at paragraphs 20 – 21 of the SOR:

“20. As mentioned in the summary reasons, it is a very high bar in relation to the regulations concerning extreme behaviour, restraint and watching over. We accepted that [claimant] had strong tendency to want to run away, and that those supervising him would have to keep a close eye on keeping doors and windows shut. Furniture had to be arranged carefully given [claimant’s] propensity to climb. He could have meltdown’s [sic] but for a lot of the time, these were predictable. These often occur when [claimant] is not allowed to do what he wants, such as been [sic] put back in the highchair. He will also sometimes struggle with sensory issues such as noises, but in general terms, could play alongside his peers. He had pinched another child at school and pinched his older brother if he was making too much noise. It was apparent that this was not done with aggression and he had not caused any injuries.

21. The tribunal fully accepted that [claimant’s] behaviour was hard work and required careful management. However, the tribunal found that the behaviour was not extreme, and so unpredictable that it required regular restrains and for him to be watched over whenever he was awake.”

4.7 I would respectfully submit that here, the FtT have erred in law by failing to properly explain its reasoning for why it concluded that the claimant did not meet the SMI criteria. The evidence the FtT rehearses at paragraphs 15 – 19 of the SOR does appear to show significant difficulties with the claimant’s behaviour. For example, at paragraph 17 of the SOR, the FtT noted:

“...there were extra measures in place when arriving or leaving school, or when getting from one place to another on the school premises. There were also measures in place on his transport to and from school in the form of a special vest which was used to position the seatbelt so he could not escape from his seat during journeys. In the past, when the bus had been stationary, [claimant] would try to get off, which had been causing the driver and the escort staff a lot of problems. He also had a McLaren pushchair which was used to take him to and from his classroom straight from the bus. Again, this was to stop him running off and to ensure his safety. Measures also been put in place a school to try and stop [claimant] from climbing on the tables and furniture. In relation to issues when out of the house, [parents] had to use reins or a buggy at all times because he was unaware of the dangers around

him. In addition, if [claimant] did not want to go a certain way, he would throw himself on the floor kick-off his shoes, and “start to bang his head on the concrete”.

Later, at paragraph 18 of the SOR, when noting the appointee’s oral evidence about the claimant’s behaviour in the home, the FtT states:

“Oral evidence at the hearing presented a similar picture. At home, the family had to keep all the doors closed and locked, as well as the windows, and would always use stair gates. They were very attuned to the fact that he could elope, and he was very fast on his feet when that happened.”

4.8 There was also extensive evidence in the bundle which would appear to support the notion that the claimant was displaying disruptive behaviour which was extreme, both from his appointee and from healthcare professionals (HCPs). For example, in the original DLA1 form at p. 34 of the FtT bundle, the claimant’s mother and appointee notes how:

“The frustration that comes with being non-verbal can result in meltdowns and uncontrolled behaviour, [claimant] does not cope well with change in routine and becomes anxious and upset. Meltdowns are very physical but because [claimant] has a high pain threshold he does not always cry when he hurts himself. He can lash out and hurt himself and others by throwing his head back.”

Later in the same document at p. 41 of the FtT bundle, she explains how:

“[Claimant] is extremely sensory. He pulls hair as a means of comfort. We have had to shave his hair off as he had bald patches and was then eating it. He also pulls my hair out strand by strand and I have had to get a bonnet to wear as it is very painful.”

At p. 48 of the FtT bundle, a speech and language therapist involved in the claimant’s care notes his tendency to throw objects:

“[Claimant] will explore items through mouthing and throwing items, although he is not yet showing early play routines.”

At p. 88 of the FtT bundle, a community paediatrician assessing the claimant noted that:

“In clinic today he was making high pitched noises, squealing, he was stimming, covering his ears. He was fidgeting, flapping his hands. He had a blank stare and occasional eye contact. He followed his agenda. There was a vacant stare on his face. He was climbing on Mums’ lap and constantly touching her hair.”

At p. 110 of the bundle, a specialist nursery nurse stated that:

“He was observed to do lots of climbing on tables, chairs and the water tray and did not respond when verbally told “[Claimant], feet on the floor”, needing to be physically removed. He needs constant adult supervision [HCP’s underlining] as will constantly climb and does not show any fear”.

An educational psychologist involved in the claimant’s care also noted how:

“[Claimant] can be upset if told no. He will put his hands over his ears and closes his eyes. He will also push his teeth with his fingers and sometimes pinch key adults.”

4.9 The FtT does not explain what it makes of this evidence which would appear to show that the claimant was exhibiting disruptive behaviour which was extreme. Indeed, as referenced at paragraph 4.6 of this submission, it did note some of this evidence for itself, but I would respectfully submit that its conclusions at paragraphs 20 – 21 of the SOR do little to explain how it reconciled this evidence with its assertion that *“the behaviour was not extreme”*. For example, the FtT notes the specialist vest for the claimant’s seatbelt and the buggy used to transport him from the school bus to school and back again, but does not explain whether it considered this to amount to regular restraint. Instead, it simply states that it did not find that regular *“restrains”* [sic] were necessary. It also noted how the claimant’s parents were very *“attuned”* to the fact that he could escape at any moment but does not appear to consider this its conclusion that constant supervision was not needed. Without an explanation of how it reconciled its conclusion with the aforementioned evidence, I would respectfully submit that it is difficult for the appointee to know how the FtT reached its decision that the claimant did not meet the SMI criteria. Here, I courteously submit that the FtT has erred materially in law.

4.10 In view of the above paragraphs, I agree with the UT Judge that the inadequacy of reasons makes it difficult for the appointee to know whether the FtT applied the correct legal tests in assessing the evidence, making its findings of fact and arriving at its decision. Notwithstanding my support of the above grounds, I respectfully submit that I concur with UT Judge Wikeley that the FtT has failed to explain its findings that the claimant did not meet the SMI criteria and that therefore he was not entitled to the higher rate mobility component.

Subsequent developments

13. I interpose here the observation that following a more recent successful supersession request and mandatory reconsideration, Timothy was awarded the highest rate of the DLA care component and the higher rate DLA mobility component for the period from 3 June 2024 to 2 June 2027.

Summary analysis

14. I agree with the detailed analysis of the Secretary of State’s representative in her written submission on the appeal, as summarised above.
15. I am accordingly satisfied that the First-tier Tribunal erred in law for those reasons. I therefore allow the Appellant’s appeal to the Upper Tribunal and set aside (or cancel) the Tribunal’s decision.
16. I do not consider it necessary to remit the case for re-hearing before a fresh FTT. The Secretary of State’s representative is content for the Upper Tribunal to re-make the decision under appeal so as to make an award of the higher rate mobility component on the basis of the SMI rules for the period in issue.

17. The decision that the FTT should have made, and which is now substituted for the decision of the FTT, is as follows:

The Appellant's appeal is allowed.

The decision made by the Secretary of State on 9 June 2023 as revised on 18 September 2023 is set aside.

The Appellant is entitled to the highest rate of the DLA care component and the higher rate of the DLA mobility component for the period from 26 October 2022 to 2 June 2024.

An award is made for the above closed period as there is a more recent award in place at the same rates covering the period from 3 June 2024 to 2 June 2027.

Conclusion

18. I therefore 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. I also re-make the First-tier Tribunal's decision under section 12(2)(b)(ii), as set out above. My decision is also as set out above.

**Nicholas Wikeley
Judge of the Upper Tribunal**

Authorised by the Judge for issue on 17 October 2025