



Neutral Citation Number: [2026] UKUT 358 (AAC)
Appeal No. UA-2025-001184-ESA

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

SHAUN GLEESON

Appellant

-v-

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

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

Representation:

Appellant: C Andrews, RNIB Legal Rights Service
Respondent: T Kay, Decision Making and Appeals (DMA) Leeds

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Panel: Tribunal Judge Haywood and Medical Member Dr Underwood
Tribunal Case No.: 1725-4460-1845-3255
Tribunal Venue: Derby Justice Centre
Decision Date: 27 February 2025

SUMMARY OF DECISION

Employment and Support Allowance (40); WCA activity 1: mobilising unaided (40.34)

This decision is about the need for the Tribunal to apply the tests set out in the descriptors faithfully. The Tribunal found that the claimant experienced “some pain” when walking but commented that claimants were “not expected to mobilise pain free”.

The descriptors in relation to activity 1 refer to mobilising distances “without stopping in order to avoid significant discomfort or exhaustion”. That was the test that the Tribunal had to apply. The Upper Tribunal allowed the appeal, set the decision aside and remitted the appeal to the First-tier Tribunal for rehearing.

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 27 February 2025.
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 is about the need for a tribunal to apply the test set out in the legislation.

Background

2. The Appellant (to whom I shall refer as the “**claimant**”) has had an award of Employment and Support Allowance (“**ESA**”) since 2012. On 22 December 2023 the claimant completed an ESA50 questionnaire and underwent an assessment with a healthcare professional by telephone on 18 June 2024. Following the issue of a report by the healthcare professional which did not recommend the award of any points, a decision maker for the Secretary of State decided on 9 August 2024 that the claimant did not have limited capability for work and did not require to be treated as if he had limited capability for work from 9 August 2024 (the “**SoS Decision**”).

3. The claimant disagreed with the SoS Decision and appealed to the First-tier Tribunal (the requirement to seek a mandatory reconsideration having been waived).
4. On 27 February 2025 a two-member panel of the First-tier Tribunal (Social Entitlement Chamber) convened at Derby to consider the appeal (the “**Tribunal**”). The Tribunal decided to award the claimant 9 points in respect of his difficulty with activity 2 (standing and sitting) in Schedule 2 to the Employment and Support Allowance Regulations 2008 (the “**ESA Regulations**”). However, because the threshold for establishing limited capability for work is an award of at least 15 points, the Tribunal confirmed the SoS Decision that the claimant was not entitled to ESA (the “**FtT Decision**”).

The permission stage

5. On 6 June 2025 the claimant sought permission from the First-tier Tribunal to appeal to the Upper Tribunal on several grounds, but on 2 July 2025 Tribunal Judge Ennals refused permission to appeal. The claimant then exercised his right to apply to the Upper Tribunal for permission to appeal and the matter came before me.

The grounds of appeal

6. The claimant’s representative argued that the Tribunal provided inadequate findings of fact and gave inadequate reasons to explain the FtT Decision, particularly in relation to its scoring of activity 1 (mobilising) in Schedule 2 to the ESA Regulations.
7. On 17 October 2025 I granted permission. In my decision notice(which was addressed to the claimant) I said:

“8. In her letter accompanying your application for permission to appeal your representative, Ms Andrews of RNIB Legal Rights Service, argued that the Tribunal erred in its decision making in relation to the activity of mobilising. In particular, she pointed out that the Tribunal found your evidence to be “largely credible” and it reported that you had said that while you can “walk for 15 minutes into the local town, covering less than 1 mile in that time” and also walk “5 minutes frequently without stopping” to visit friends, and told the Tribunal that your walking place was “slow”. The Tribunal accepted that you “may be in some pain when walking” and “may be walking slightly slower than average because of some pain”, but said the rules for the benefit were such that you were “not expected to mobilise pain free”.

9. The Tribunal found that you could repeatedly walk more than 200m unaided by another person within a reasonable time period and could walk more than 200m unaided by another person on level ground without stopping. It therefore awarded you no points in relation to the activity of mobilising.

10. Your representative argues that the Tribunal erred in law by making inadequate findings of fact and explaining its decision making with inadequate clarity.

11. I am persuaded that it is realistically arguable that, having found your evidence to be “largely credible”, and having heard you describe being “in some pain” when walking, the Tribunal was required to make findings about

how far you could walk before experiencing significant discomfort or exhaustion. It may also have been obliged to make clearer findings about the pace of your walking and the distances covered.

12. If the Tribunal did err in the way I have said it is arguable that it may have done, such error or errors could have been material in the sense that, had such errors not been made, the outcome of the appeal could have been different.

13. This warrants a grant of permission to appeal to the Upper Tribunal. My grant of permission is unrestricted.

8. I made Case Management Directions for the parties to make submissions on the appeal.

The positions of the parties

9. Mr Kay, on behalf of the Secretary of State, indicated support for the appeal and encouraged me to allow the appeal and remit the matter to a fresh panel of the First-tier Tribunal for redetermination.

10. The claimant had no further comment to make.

11. Neither party requested an oral hearing.

12. 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

13. 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.

14. The Tribunal accepted that the claimant had back, hip and thigh pain for which he took pain medication which eased the pain but did not take it away completely.

15. In paragraphs 12 of its written reasons the Tribunal addressed activity 2 (mobilising) of Schedule 2 to the ESA Regulations as follows:

"Mobilising – The Appellant told the Tribunal that at the time of the decision in August 2024 he could walk 14 minutes into the local town, covering less than 1 mile in that time. He added that walking on the flat is less of a problem. He also walks 5 mins frequently without stopping, to visit friends. The HCP report records the Appellant as saying he walks these distances at a normal pace, but the Appellant told the Tribunal that his pace is slow. It was accepted that the Appellant may be in some pain when walking and that he may be walking slightly slower than average because of some pain, but an Appellant is not expected to mobilise pain free. Accordingly, the Tribunal found that the Appellant could repeatedly walk more than 200m unaided by another person within a reasonable time period and that he could walk more than 200m unaided by another person on level ground without stopping."

16. That paragraph mixes recitals of the claimant's evidence with the Tribunal's own findings based on the evidence. The reasons could have been improved by separating these elements out so that it is clear what the Tribunal accepted and what it did not. However, it is adequately clear that the Tribunal accepted that

walking sometimes caused the claimant pain and caused him to walk slightly slower than average. The Tribunal said that claimants to ESA were not expected “to mobilise pain free”.

17. The descriptors in relation to the activity of mobilising do not speak of “pain” but they do speak of “significant discomfort or exhaustion”. Having found that walking could sometimes cause the claimant “some pain”, it was incumbent on it to make findings as to whether, and if so how often, the claimant needed to stop mobilising in order to avoid “significant discomfort or exhaustion”. The Tribunal should have made clear findings about how far the claimant could walk without needing to stop to avoid significant discomfort or exhaustion, and whether he would walk such a distance repeatedly. In other words, it had to apply the tests set out in the descriptors in Schedule 2 to the ESA Regulations faithfully.
18. Because the claimant had been awarded 9 points under activity 2, any award of points under activity 1 would have taken him to at least 15 points, with the result that he would have been found to have limited capability for work. As such, the error was material.
19. 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

20. 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.
21. To the extent that the FtT Decision involves any other errors of law, those will be subsumed by the rehearing.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on: 16 September 2026