[2025] UKUT 184 (AAC)
Appeal No. UA-2024-001717-ULCW

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

AL

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

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

Representation:
Appellant: In person
Respondent: Mr R J Whitaker (DMA Leeds)

On appeal from
Tribunal: First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC007/24/00643
Tribunal Venue: Leeds (on the papers)
Decision Date: 18 September 2024

SUMMARY OF DECISION

LIMITED CAPABILITY FOR WORK (45.3)

The appellant had been accepted by the Secretary of State as having limited capability for work (LCW) on the basis that "there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work", but not as having limited capability for work-related activity (LCWRA) on the same basis. The First-tier Tribunal dismissed his appeal and confirmed the decision of the Secretary of State, but for reasons from which it would have followed in this case that the appellant should not be treated as LCW either. The Upper Tribunal holds that the First-tier Tribunal's reasons were inadequate in failing to recognise and address this inconsistency. The First-tier Tribunal also erred in proceeding on the assumption that the opinion of the healthcare practitioner (HCP) as to risk was addressing the risk by reference to the relevant legal test when there

was no evidence before the Tribunal that the HCP was aware of the most onerous work-related activities that the appellant might be asked to carry out.

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 the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The new First-tier Tribunal should not involve any person previously involved in considering this appeal on 18 September 2024.**

3. **The appellant is reminded that the new First-tier Tribunal can only consider the appeal by reference to their health and other circumstances as they were at the date of the original decision by the Secretary of State under appeal (namely 24 September 2022).**

4. **If the appellant has any further written evidence to put before the First-tier Tribunal relating to that period, including any further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.**

5. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The appellant appeals against the First-tier Tribunal's decision of 18 September 2024 refusing the appellant's appeal against the decision of the Secretary of State of 24 September 2022 that the appellant was not entitled to the Limited Capability for Work Related Activity (LCWRA) element of Universal Credit (UC) under Part

1 of the Welfare Reform Act 2012 (WRA 2012) and The Universal Credit Regulations 2013 (SI 2013/376) (the UC Regulations).

2. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 27 October 2024 and permission to appeal was refused by the First-tier Tribunal in a decision issued on 13 November 2024. The appellant filed the notice of appeal to the Upper Tribunal on 3 December 2024 (in time) and I granted permission to appeal in a notice sent to the parties on 23 January 2025.

3. The Secretary of State has responded to the appeal and indicates that the appeal is supported to the extent that the appeal should be allowed and the case remitted for rehearing before a fresh Tribunal. The appellant has also made submissions in reply, which I have considered.

4. Both parties are content for me to issue a decision on the papers and I am satisfied that it is appropriate for me to do so as the core of the appeal is a straightforward issue on which an oral hearing will not assist either the parties or the Upper Tribunal.

Background

5. In this case, the sole issue for the First-tier Tribunal to decide was whether the appellant was to be treated as having LCWRA because he "is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity" (see Sch 9, para 4 to The Universal Credit Regulations 2013 (SI 2013/376) (the UC Regulations)). The appellant had already been accepted by the Secretary of State as having LCW on this basis under the equivalent provision in paragraph of Schedule 8.

6. Paragraph 4 of Schedule 9 to the UC Regulations is equivalent to regulation 35(2) of The Employment and Support Allowance Regulations 2008 (SI 2008/794) (the ESA Regulations) and the case law on regulation 35(2) remains relevant. "Substantial risk" means a risk "that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" (*IM v SSWP (ESA)* [2014] UKUT 412 (AAC), [2015] AACR 10 at [86] and [110]). It is a risk that has to be judged by reference to the work-related activity that the claimant might be required by the Secretary of State to do as a condition of continuing entitlement to the LCW benefit (i.e. by dint of the Secretary of State's power under regulation 3 of the *Employment and Support Allowance (Work-Related Activity) Regulations 2011* (SI 2011/1349) to require a person to undertake such activities as the Secretary of State considers reasonable).

7. The decisions of the Upper Tribunal in *IM* and a number of subsequent cases have established that the Secretary of State is obliged in all cases to provide an accurate list of the least and most demanding forms of work-related activities (which may include, by section 16(3)(e) of the Welfare Reform Act 2012 (WRA 2012), work placements or work experience), so that the risk can be assessed

against the most onerous forms of work-related activity that the claimant may be required to undertake: see *MD v SSWP (UC)* [2020] UKUT 215 (AAC) at [1]-[3] and [7].

8. In this case, the list of work-related activities at p 235 of the First-tier Tribunal bundle included among the 'most demanding' activities that the appellant may be required to "Attend a work placement at a community hub/café/other placement of community benefit".

Ground 1 – inconsistent decisions on LCW and LCWRA

9. The first ground of appeal was, in substance, that the First-tier Tribunal's decision on LCWRA was inconsistent with the Secretary of State's decision on LCW and that the First-tier Tribunal had failed to give adequate reasons to enable anyone to understand why the appellant had not succeeded on LCWRA when he had succeeded on LCW. The Secretary of State agrees that the First-tier Tribunal has erred in law in failing to give adequate reasons in this respect, and I agree.

10. Given that the HCP and Secretary of State had accepted that the appellant's mental health difficulties were such that being required to work would give rise to a substantial risk, the Tribunal's reasons for concluding that the same risk did not arise in relation to work-related activity are inadequate. The Tribunal has essentially concluded that the appellant's mental health difficulties are minimal and there is no real risk of significant harm to his mental health/suicide. However, that begs the question as to why that is the case if the risk does exist in relation to work. Given that one of the 'most demanding' work-related activities that the appellant could be required to carry out essentially required him to do actual work by attending "a work placement at a community hub/café/other placement of community benefit" it was in my judgment an error of law for the Tribunal to conclude that the appellant was not entitled to LCWRA when he was entitled to LCW without explaining its reasoning in that regard.

11. I acknowledge that it may be that the Tribunal essentially disagreed with the Secretary of State's decision in relation to LCW. If that was the case, though, that needed to be explained in its reasons. Further, if that was the position, then the Tribunal ought also to have considered and explained why it was not in those circumstances contemplating reducing the appellant's award. These situations do sometimes arise where the Tribunal would not have made the same decision as the Secretary of State on one part of the award, but nonetheless considers that part of the award is not an issue "raised by the appeal" and that it would be unfair to open up that issue to remove that part of the award (cf section 12(8)(a) of the Social Security Act 1998 and *BTC v Secretary of State for Work and Pensions* [2015] UKUT 0155 (AAC) and *EG v Secretary of State for Work and Pensions* (PIP) [2015] UKUT 0275 (AAC)). If that is the situation, however, the Tribunal needs to explain that so the parties understand why they have won or lost and the Upper Tribunal can see that no error of law has been made.

12. Ground 1 therefore succeeds.

Ground 2 – HCP lacking relevant expertise

13. The second ground of appeal was that the First-tier Tribunal erred in relying on the opinion of the Healthcare Practitioner (HCP) given that the HCP was a physiotherapist and therefore not qualified to advise on mental health difficulties. The appellant relied on the decision of the Upper Tribunal in *JH v SSWP (ESA)* [2013] UKUT 0269 (AAC) at [22] in this respect. However, as the Secretary of State has pointed out, that decision was largely disapproved in the reported decision of *ST and GF v SSWP* [2014] UKUT 547, [2015] AACR 23 for the sound reason that all HCPs are trained to carry out assessments in relation to all physical and mental health conditions and accordingly a particular HCP's qualification does not by itself provide a reason for a Tribunal not to regard that HCP's opinion as being of value. Further, in this case, the other medical evidence before the Tribunal indicated that the claimant did not have very significant mental health difficulties, so there was nothing to suggest that the HCP's opinion was out of line with that of other medical experts who had dealt with the appellant. There was therefore no reason for the Tribunal to consider adjourning to obtain evidence from 'a suitably qualified HCP' as the appellant contends. This ground of appeal does not therefore succeed.

Ground 3 – HCP opinion flawed as a result of lack of knowledge of work-related activities

14. At [27] of its decision the Tribunal observed that it had placed the most weight on the HCP report because that was the only report that "directly address[ed] the issue of risk in circumstances envisaged by the regulations". The appellant argues, and I agree, that the Tribunal's reasoning in that paragraph leaves out of account a relevant factor. There was no evidence before the Tribunal to indicate that the HCP was aware of the list of work-related activities that the appellant may be required to carry out. In the absence of such evidence, I do not think it was open to the Tribunal to assume that the HCP was aware of that list and that the HCP was therefore 'addressing the issue of risk in circumstances envisaged by the regulations'.

15. Given what we know of the process from *IM* and subsequent cases, the HCP assessment comes before the Secretary of State's decision and before the work-focused interview at which decisions are made about which work-related activities a claimant will be asked to carry out. The outcome of *IM* was that the Secretary of State was required to ensure that the Tribunal had before it a list of the most and least onerous activities that a claimant might be required to carry out so as to enable the Tribunal to determine whether any substantial risk might arise from the claimant being asked to undertake any of those activities. Nothing was said about such a list being provided to the HCP as well.

16. In those circumstances, I consider that the only rational approach is for a Tribunal to assume, unless there is evidence to the contrary in a particular case, that the HCP does not have access to the list of work-related activities. That will potentially be an important factor for the Tribunal to bear in mind when considering what weight it should give to the opinion of the HCP. In this case, the Tribunal erred in law by apparently proceeding on the assumption that the HCP's

assessment was addressing the same legal question as it needed to address itself.

Conclusion

17. I therefore conclude that the Tribunal's decision involved errors of law and I set its decision aside. The case is remitted for re-hearing before a fresh Tribunal in accordance with the directions set out above.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 13 June 2025