Neutral Citation Number:[2024] UKUT 199 (AAC) Appeal No. *UA-2024-000145-ULCW*

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

MR

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:	Jessica Coleman, DMA Leeds

On appeal from:

Tribunal:	First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No:	SC043/23/00294
Digital Case No.:	1685204560398214
Tribunal Venue:	High Wycombe (on the papers)
Decision Date:	4 September 2023

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings.

SUMMARY OF DECISION

Employment and Support Allowance (40) – Tribunal Practice and Procedure (Fair Hearing) (34.2)

The First-tier Tribunal erred in law by failing to adjourn the paper hearing to an oral hearing in order to allow the appellant an opportunity to respond to its concerns about his credibility. In particular, the First-tier Tribunal should have given the appellant an opportunity to respond to assumptions it made about: (a) the distance he would have had to walk in the supermarket car park before he obtained his Blue Badge; and (b), his functioning in the light of the nature of the treatment he was receiving. The First-tier Tribunal also failed to give adequate reasons for its decision to proceed on the papers.

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 was made in 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 the tribunal judge, medical member or disability member previously involved in considering this appeal on 4 September 2023.**

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 18 May 2023).**

4. **The new First-tier Tribunal will be dealing with appellant's entitlement to LCW/LCWRA during the closed period from 18 May 2023 to 15 August 2023.**

5. **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.**

6. **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 4 September 2023 refusing the appellant's appeal against the decision of the Secretary of State of 18 May 2023 that the appellant was not entitled to the Limited Capability for Work (LCW) or Limited Capability for Work-Related Activity (LCWRA) elements of Universal Credit (UC).

2. The Secretary of State had awarded the appellant 0 (zero) points against the descriptors in Schedules 6-9 of The Universal Credit Regulations 2013 (SI 2013/376) (the UC Regulations). The First-tier Tribunal agreed and dismissed the appeal.

3. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 7 December 2023 and permission to appeal was refused by the First-tier Tribunal on 22 January 2024. I also initially refused permission to appeal by a decision sent to the parties on 14 March 2024. However, the appellant applied for my decision to be set aside and by decision sent to the parties on 9 May 2024 I granted that application and also granted permission to appeal.

4. The parties have each consented to a decision being made on the papers without an oral hearing (as permitted by Rule 34(1) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules)), and I am satisfied that it is appropriate in this case, and in accordance with the overriding objective in Rule 2, for this appeal to be determined on the papers without an oral hearing because this is a straightforward case.

Background

5. When initially refusing permission to appeal, I observed as follows:-

> 11. In this case, the appellant had elected to have his appeal determined on the papers. Provided that the Tribunal was satisfied that it was fairly able to determine the appeal on the papers (and did not materially err in law in so concluding, as I am satisfied it did not in this case), it was therefore entitled to decide the case on the basis of the documentary evidence before it, drawing reasonable inferences from the documents as appropriate.
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> 12. In his reasons for appealing, the appellant argues that the First-tier Tribunal erred in law by making assumptions about the evidence, in particular that prior to obtaining a Blue Badge he must have been parking 'some distance away' from the shop he goes to. He provides evidence, not put before the Tribunal about the distances involved. I am sympathetic to the appellant's argument that the Tribunal should not have made this assumption. It also concerns me that the Tribunal has gone so far as to question the correctness of the PIP award in circumstances where he was assessed as meeting the criteria for PIP by the Healthcare Practitioner (HCP) and given that the PIP criteria are different (see below). If it was arguable that these elements of the Tribunal's reasoning had made a difference to the outcome for the appellant, I would have granted permission, but I am afraid I have concluded that it is not arguable that these potential errors made any difference to the decision for the following reasons.
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> 13. The tests for LCW and Personal Independence Payment (PIP) are different. Whereas PIP (and a Blue Badge) may be awarded, as happened in the appellant's case as a result of the Healthcare Practitioner (HCP) assessment, if the appellant is accepted as being able to "stand and then move unaided more than 20 metres but no

more than 50 metres" to an acceptable standard, repeatedly and within a reasonable period of time (see reg 4 and Sch 1 to The Social Security (Personal Independence Payment) Regulations 2013 (the 2013 Regulations), the mobility descriptors for LCW in Schedule 6 to The Universal Credit Regulations 2013 (SI 2013/376) (the UC Regulations) are quite different.

14. The LCW test requires consideration of what an individual can do "mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally or could reasonably be worn or used" (emphasis added). Not being able to mobilise more than 50 metres (using a wheelchair if reasonable) will still only meet the 15-point threshold necessary for an award of LCW if it cannot be done "without stopping in order to avoid significant discomfort or exhaustion" or "repeatedly … within a reasonable timescale because of significant discomfort or exhaustion".

15. Putting aside the potential errors of reasoning identified above, the other evidence relied on by the Tribunal in its decision more than justifies a finding that the main LCW descriptor is not met. The evidence in the PIP HCP assessment on which PIP was awarded (p 142 of the First-tier Tribunal bundle) does not contradict that conclusion as it does not address whether he experiences "significant discomfort or exhaustion". Nor is consideration of wheelchair use any part of the PIP test, whereas if this First-tier Tribunal had not concluded that he could mobilise to the necessary extent without a wheelchair, it is inevitable that it would have concluded that he could if necessary reasonably use a wheelchair to mobilise as the HCP assessment for the UC credit application noted (page 72 of the First-tier Tribunal bundle).

16. Although points may be scored against the LCW descriptors for limited ability to mobilise more than 100m or more than 200m, again wheelchair use must be considered, and it is in any event only if the 50m descriptor applies that 15 points may be awarded. It is only if 15 points are awarded that this appellant would have been entitled to LCW. This is because the appellant in his reasons for appealing identifies no alleged error in any other parts of the Tribunal's decision in relation to the other descriptors, so there is no arguable basis on which the appellant could have obtained any further points so as to entitle him to an LCW award even if he met the 100m or 200m descriptors.

17. I should also make clear that, exercising the Upper Tribunal's inquisitorial jurisdiction, I have considered for myself whether there is any arguable error of law in the First-tier Tribunal's decision. I am satisfied that there is not. Although some criticism may be made of the Tribunal's reasoning First-tier Tribunal has properly directed itself in law and reached conclusions on the facts that were properly open to it.

6. When setting aside that refusal and granting permission, I observed as follows:-

5. I am satisfied that at least one of the pre-conditions for exercising the power to set aside is met as the appellant has included with his application documents relating to further decisions relating to his PIP and LCW entitlements as a result of

which it is apparent that the Secretary of State by mandatory reconsideration decision of 18 February 2024 accepted him as being entitled to LCW/LCWRA from 17 August 2023 so that this appeal is now only concerned with the closed period from the appellant's date of claim to 16 August 2023. The further PIP decisions also demonstrate that the appellant's evidence about his conditions has repeatedly been accepted as credible by the Secretary of State and other Tribunals. These are documents relating to the proceedings that were not sent to the Upper Tribunal at an appropriate time (vis before I made my decision). Rule 43(2)(b) is therefore satisfied.

6. Unusually, I am also satisfied that it is in the interests of justice in this case to set the decision aside and to grant permission for the following reasons.

7. When I first looked at this appeal, I identified potential areas of concern with the First-tier Tribunal's approach to this appeal, but decided that those errors were not material for the reasons I set out. On reflection, and taking note now of the Secretary of State's own approach to the appellant's case as reflected in particular in the subsequent LCW decision, it seems to me that it is more than arguable that I was wrong to regard it as inevitable that the outcome in the appellant's case would have been the same were it not for the matters that concerned me.

8. On reflection, it seems to me that it is arguable that the First-tier Tribunal erred in law in this case by proceeding on the papers rather than exercising its inquisitorial case management powers (cf eg JP v SSWP [2011] UKUT 459 (AAC)) to adjourn the hearing to enable the appellant to attend in circumstances where it considered the appellant's credibility was crucial to the decision.

9. It was arguably unfair for the Tribunal to dismiss the appellant's case on the basis it found him not credible without giving him a chance to answer the Tribunal's concerns in person. That is particularly so in circumstances where, as the Tribunal was aware, the appellant's evidence had been accepted for the purposes of a PIP award and where the Tribunal placed reliance on assumptions about such matters as the distance he had been parking away from the shop before obtaining a Blue Badge.

10. Although, as I observed when initially refusing permission, the tests for LCW and PIP are different, and the possibility of wheelchair use is relevant to LCW, on reflection I do not consider that it was right for me to proceed on the basis that if the First-tier Tribunal had considered this issue it would have concluded that it was reasonable for the appellant to use a wheelchair. I infer that that was not the approach that the Secretary of State has taken in his subsequent consideration of the appellant's LCW entitlement.

11. The other grounds of appeal raised by the appellant may also be arguable.

7. The Secretary of State in submissions dated 19 June 2024 supports the appeal for the following reasons:

2. The appellant has submitted several grounds of appeal that Judge Stout confirmed may be arguable. However, the crux of the appeal is that the appellant was not given the

opportunity to comment on points raised by the Tribunal. This ground of appeal is the focus of my submission.

3. The Tribunal's statement of reasons (SOR) states that the appellant has "significantly exaggerated the effects" of their condition, in regards to the difficulties the appellant has with their knee [UT Bundle pages 19 - 20 (7)]. The same paragraph confirms that the appellant "has provided little information on his ability to walk".

4. Additionally, the SOR [UT bundle page 20 (9)] states that the appellant "had again exaggerated his restrictions" and labelled the appellant's claims to be "unsustainable and exaggerated". The same paragraph further states that the appellant's "exaggerations case some doubt on his other evidence and the Tribunal treated it with caution".

5. Regarding both SOR paragraphs mentioned above, the Tribunal have called into question and reached a decision on the appellant's credibility without allowing the appellant the opportunity to answer any questions the Tribunal may have had. The Tribunal confirmed in paragraph 7 [UT bundle pages 19 – 20 (7)] that there was limited evidence but did not see fit to adjourn to allow the appellant the opportunity to address the Tribunal's concerns in person.

6. In choosing to decide the case on the papers and not to adjourn, the Tribunal have failed in their overriding objective to deal with cases fairly and justly [The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, Part 1, Rule 2 (1)], and also failed to properly consider Rule 27 (1)(b).

My decision

8. In *JP v SSWP* [2011] UKUT 459 (AAC) Judge Poynter held that the Tribunal would have failed to give adequate reasons for deciding to proceed with a paper hearing if it simply states that it has considered the provisions of the rules and is satisfied that it is appropriate to go ahead on that basis. Some reasons for concluding the rules are met must be given:

> 12. The statement shows the tribunal knew that, even in the light of those requests, it had to hold a hearing unless it considered that it was able to decide the matter without one (see rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ('the Rules') and the recent decision of Judge Mesher in MM v SSWP (ESA) [2011] UKUT 334 (AAC)). I am satisfied that the tribunal consciously exercised its discretion to proceed without a hearing.
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> 13. However, whether the tribunal has given adequate reasons for the exercise of that discretion is a more difficult issue.
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> 14. The effect of rules 2 and 27(1)(b) of the Rules is that the tribunal could not have proceeded on the papers unless it "felt that [it was] able to deal with the appeal fairly and justly in accordance with the overriding objective". For the tribunal to say, without more, that that is the case is to re-state its decision to proceed in different words, rather than to explain it. It amounts to saying that the tribunal decided to proceed because it formed the view that

> the criteria which permit it to do so are satisfied. However, in my judgment, what is required by the decision in MM v SSWP (ESA) is an explanation, however brief, of why the tribunal concluded those criteria are satisfied.

9. In this case, the Tribunal committed the error identified by Judge Poynter in *JP* of simply stating that it had considered the rules and case law and was satisfied that it was able to proceed to determine the appeal without an oral hearing. That is merely stating the rules, not providing reasons.

10. Moreover, the error in this case was in my judgment more than a mere failure to give adequate reasons. The question of whether or not to proceed on the papers is one that must be kept under review by the Tribunal up to the point of decision: see *MH v Pembrokeshire County Council* [2010] UKUT 28 AAC at [11]-[13] *per* Judge Jacobs.

11. If matters arise in the course of deliberation which fairness would have required be put to the appellant if they were present at an oral hearing, then it is likely that fairness will also require that the Tribunal adjourn to give the appellant to respond to those points, whether in writing, by the provision of further evidence, or by the opportunity to attend an adjourned hearing.

12. The governing principles on what fairness requires in terms of matters being put to appellants were conveniently summarised by Judge Poole QC in *CC v SSWP (ESA)* [2019] UKUT 14 (AAC) at [3] as follows:-

> 3.1 Parties before a tribunal are entitled to a fair hearing, conducted in accordance with natural justice. What natural justice requires in any given case varies according to context and circumstances.
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> 3.2 An aspect of natural justice is the right to be heard. In practice this means parties should have been given notice of the written papers before any hearing. If present at the hearing they should be given a fair opportunity to give evidence on matters in issue, including correcting or contradicting evidence.
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> 3.3 The general position is that, in the context of social entitlement tribunals, natural justice does not demand matters of inference or credibility be specifically put to claimants at oral hearings. Demeanour (including tearfulness before the tribunal) also does not have to put to a claimant for specific comment. Claimants who have put particular Activities and Descriptors before tribunals can reasonably expect the tribunal to make observations relevant to those matters, and if appropriate take them into account, without specifically putting them to claimants for comment. Claimants have had papers, and are at the oral hearing with an opportunity to give evidence, so in the normal course none of these matters are capable of characterisation as truly new or taking claimants by surprise.
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> 3.4 The caveat to this general position is that natural justice is always assessed in the particular circumstances of a case. It will be contrary to natural justice if a case is decided on a basis a claimant had no fair chance to address. Accordingly, when a new matter arises at the hearing, not foreshadowed in the papers, which is determinative of the appeal, then a claimant should be given a reasonable opportunity to be heard about it.

> In these circumstances specific matters may need to be put to claimants for comment. In keeping with the ethos of the social entitlement chamber, where possible this should done in an enabling manner.

13. In this case, two particular matters came up in the course of the Tribunal's deliberations which were material to its decision and which in my judgment fairness required be put to the appellant as falling within paragraph 3.4 of Judge Poole's guidance above:

    a. At [6], the Tribunal rejected the appellant's evidence about his walking ability as recounted to the Healthcare Practitioner (HCP) and set out in his appeal documents, finding that he had "significantly exaggerated" the effects of his condition in part because it assumed that, before he got his Blue Badge, he must have been walking "some distance in the supermarket car park". As a matter of fact, MR disputes that and it is in any event a point that it should have been obvious to the Tribunal could not fairly be assumed to be true without it being put to MR. There is nothing in the decision to suggest that the Tribunal knew the supermarket, or where MR was able to park. The Tribunal has just made an assumption about a matter that was not foreshadowed in the papers and which MR did not have a fair opportunity to address.

    b. At [7], the other significant plank of the Tribunal's reasoning in rejecting the appellant's evidence about walking is that he is not receiving the treatment that the Tribunal expected he would be receiving if his condition was as bad as he says. In *MM v SSWP (ESA)* [2018] UKUT 446 Judge Poynter at [40]-[46] observed that there may be many reasons why someone is not receiving treatment for a condition and that ([45]) *"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 describe because they are not being correctly treated for it."*. Although it will not always be an error of law for a Tribunal to draw an inference from function, caution is always required. In this case, I am satisfied that it was an error of law because it was unfair for the Tribunal to draw the inferences it did in order to reject the appellant's evidence about his functioning as not credible without giving the appellant an opportunity to respond to its concerns.

14. It seems to me that these errors in the Tribunal's approach may also have affected its assessment of the appellant's case against the other descriptors.

15. For all these reasons, the Tribunal erred in law and the appeal must be allowed.

What happens next

16. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view, on whether the appellant is entitled to LCW/LCWRA (and, if so, which component(s) and at what rate(s)). 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.

17. In doing so, the new Tribunal will have to focus on the appellant's circumstances as they were at the time of the decision on 18 May 2023. This is because the new Tribunal must have regard to the rule that a tribunal "shall not take into account any circumstances not obtaining at the time when the decision appealed against was made" (section 12(8)(b) of the Social Security Act 1998).

18. As the appellant has since been awarded LCW from 16 August 2023, the new First-tier Tribunal will be dealing with appellant's entitlement to LCW/LCWRA during the closed period from 18 May 2023 to 15 August 2023.

Conclusion

19. 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.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 10 July 2024