DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the St Helens First-tier Tribunal dated 26 October 2017 under file reference SC244/17/01015 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> ***"The Appellant's appeal is allowed.***
>
> ***The Secretary of State's decision of 20 September 2016, superseding the award of Employment and Support Allowance (ESA) at the support group rate dated 28 November 2013, is revised. The Appellant is treated as having limited capability for work-related activity by virtue of regulation 35(2) of the Employment Support Allowance Regulations 2008. The Appellant therefore remained entitled to ESA at the support group rate."***

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal concerns the application of regulation 35(2) (exceptional circumstances) to a claim for employment and support allowance (ESA). The Appellant's appeal to the Upper Tribunal succeeds. I can also re-make the decision taken by the First-tier Tribunal. My decision is that the Appellant remained entitled to ESA at the support group rate.

2. The Appellant, who is now aged 59, suffers from several medical conditions including hypertension, ankylosing spondylitis and asthma. His entitlement to ESA was reviewed by the Department in both 2013 and 2016.

The factual background: the 2013 medical examination and decision

3. On 18 November 2013 the Appellant underwent an interview and medical examination for the purposes of his ESA claim. His blood pressure was noted to be "poorly controlled" but "managed by GP". However, under the heading "Exceptional circumstances" the examining doctor also recorded as follows:

> "This was confirmed by the significantly high reading (BP 206/110 and pulse 96/min) and the fact that he is already on four different types of anti-hypertensive medication. Based on this finding, he would be at substantial physical risk if he was found fit for work and work-related activity".

4. In that context I note that the NHS website indicates that any blood pressure reading over 140/90 is regarded as high, so 206/110 is in the stratospheric range. Accordingly, the examining doctor answered "Yes" to the question on the November 2013 ESA85 form based on the wording of regulation 29(2)(b) of the Employment Support Allowance Regulations 2008 (SI 2008/794; "the 2008 Regulations"), i.e. that there was a "substantial risk" to his "mental or physical health". The examining doctor also advised the Appellant to consult his GP as soon as possible.

5. The current appeal papers include no other documentation dating from 2013. However, there seems no doubt that a decision was made on 28 November 2013 to put the Appellant in the ESA support group. This was presumably taken on the basis that he met the conditions of both regulation 29(2)(b) (for limited capability for work) and regulation 35(2) (for limited capability for work-related activity) of the 2008 Regulations.

Regulations 29 and 35

6. This is an appropriate juncture at which to revisit the scope of both regulations 29(2) and 35(2) of the 2008 Regulations.

7. Regulation 29 deals with the situation (or "exceptional circumstances") where an ESA claimant fails to achieve 15 points under the limited capability for work assessment (see the descriptors in Schedule 2 of the 2008 Regulations) but is still to be treated as having limited capability for work and so entitled to at least the ordinary rate of ESA. This applies (and the qualification in paragraph (3) is not material for present purposes) where:

> "(2) Subject to paragraph (3) this paragraph applies if–
>
> (a) the claimant is suffering from a life threatening disease in relation to which–
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> (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and
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> (ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or
>
> (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be
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> a substantial risk to the mental or physical health of any person if the claimant
>
> were found not to have limited capability for work."

8. It follows that there are, in effect, two alternative limbs to regulation 29(2). These are what might be termed the *very* exceptional 'uncontrollable life-threatening disease' exemption (regulation 29(2)(a)) and the exceptional 'substantial risk to health' exemption (regulation 29(2)(b)). On the basis of the examining doctor's report, the Appellant fell into the latter category in November 2013.

9. Regulation 35 deals with certain claimants who are treated as having limited capability for work-related activity (rather than work), even though they do not satisfy any of the descriptors in Schedule 3 of the 2008 Regulations. Regulation 35(1) deals with the special cases of terminally ill people, claimants receiving certain types of cancer treatment and some pregnant women at risk. None of those narrowly defined categories applies here. Regulation 35(2) then provides more generally as follows:

> "(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if–
>
> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
>
> (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity."

10. Thus regulation 35(2) (on work-related activity) acts as a mirror to regulation 29(2)(b) (on work) in providing for an exception where there is a substantial risk to health. But regulation 35 includes no provision that is parallel to regulation 29(2)(a) (the 'uncontrollable life-threatening disease' exception).

The factual background: the 2016 medical examination and decision

11. On 5 September 2016 the Appellant underwent a further interview and medical examination for the purposes of his ESA claim. In the ESA85 report the examining nurse noted the contents of the GP report (dated 19 April 2016), which had stated that the Appellant "has had significantly high BP despite having the maximum tolerated dose of anti-hypertensive medications (4 in total for BP)". In the report on her clinical examination, the examining nurse wrote as follows:

> "Assessment curtailed due to client's blood pressure … Readings manually to the left and right arms read 220/130. Client has been advised to attend Accident and Emergency, client declined ambulance and has no symptoms. Client's partner is present and his brother is to drop them off at A&E".

12. Elsewhere on the September 2016 ESA85 the examining nurse noted "severe physical cardiac problems appear likely which are uncontrolled". She also sent the GP a "*Report of unexpected findings following assessment*", detailing the Appellant's blood pressure reading and reporting the assessment had been cut short. Under the heading "Exceptional circumstances", the examining nurse answered "Yes" to the question based on the wording of regulation 29(2)(a) (i.e. uncontrollable life-threatening disease). However, the question based on the wording of regulation 29(2)(b) (substantial risk) was answered "No". The evidence leading to that latter opinion was expressed in this way:

> "The evidence does not suggest the client has a condition which means there would be a substantial risk to the physical or mental health of any person if they were found capable of work or work related activity. The condition history, physical examination, medical knowledge of the condition and FRR2 [the report from the GP] suggests that, by making reasonable adjustments in the workplace and by taking prescribed medication, the client's Bladder Problem, Cardiovascular Problem, Musculoskeletal Problem and Respiratory Problem would not mean there would be a substantial risk to the physical or mental health of any person if they were found capable of work or work related activity."

13. On 20 September 2016 a decision-maker superseded the decision of 28 November 2013 that had awarded ESA at the support group rate. She concluded that the Appellant scored 0 points for the Schedule 2 descriptors but should be treated as having limited capability for work under regulation 29(2) (but not limited capability for work-related activity under regulation 35(2)). As a result, the Appellant's ESA entitlement was reduced from the support group rate to the ordinary rate. An application for a mandatory reconsideration led to no change in that decision. The Appellant lodged an appeal, in effect relying on regulation 35(2). His representative from Merseyside Law Centre provided a detailed written submission for the appeal, stating (amongst other arguments) that "there is no improvement in the symptoms from his medical conditions between the two medical assessments and [the Appellant] considers that it is wrong that the nurse conducting the assessment in September 2016 arrived at a different assessment than the doctor who assessed him in 2013".

The First-tier Tribunal's decision

14. The First-tier Tribunal ('the Tribunal') dismissed the Appellant's appeal and confirmed the Secretary of State's decision of 20 September 2017, holding that none of the Schedule 3 descriptors applied and that also regulation 35 did not apply. With regard to the latter, the Tribunal adopted the Secretary of State's list of the least-demanding types of work-related activity and found that "there would be no risk, substantial or otherwise, in the Appellant undertaking any work-related activity of that nature. For example, in his oral evidence, the Appellant stated that he spent the day doing a crossword, reading the newspaper and watching TV. The Tribunal simply did not accept the evidence of the Appellant that he could do no work-related activity at all."

15. I subsequently gave the Appellant permission to appeal.

Where did the First-tier Tribunal err in law?

16. Mr Peter Thompson, the Secretary of State's representative in these proceedings, supports the Appellant's appeal to the Upper Tribunal. In short, he submits that the Tribunal went wrong in law by failing to identify the basis on which the Department was justified in superseding the previous decision to place the Appellant in the support group. In addition, given the similarity of the evidence at the two assessments relating to the Appellant's high blood pressure, the Tribunal had failed adequately to explain why the Appellant had not remained in the support group. Mr Thompson relied on the general statement of principle about the adequacy of reasons in Social Security Commissioner's decision R(M) 1/96 (at paragraph 15).

17. I broadly agree with Mr Thompson's analysis, and so do not need to deal with the various other grounds of appeal advanced by the Appellant's representative. As Upper Tribunal Judge Rowland has recently observed (in *VH v Secretary of State for Work and Pensions (ESA)* [2018] UKUT 290 (AAC) at paragraph 8 (emphasis added)):

> "8. Secondly, although mistake or ignorance of a material fact or a change of circumstances are grounds for supersession of an earlier decision, it is not necessary for the Secretary of State to show that a previous award was based on an error of fact or that circumstances have changed in order to supersede a decision in respect of an employment and support allowance that involves a determination that a person has or is to be treated as having limited capability for work. This is because regulation 6(2)(r) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), read with regulation 7A(1), provides that such a decision may be superseded if the Secretary of State has received new evidence from a health care professional. In other words, the Secretary of State may simply take a different view of the case in the light of the new evidence. That is why R(M) 1/96, which was actually concerned with a renewal claim rather than supersession (or its precursor, review), is nonetheless relevant. *A claimant has no right to assume that the same decision will be made following the receipt of new evidence, but any apparent difference ought to be explained, although it may be sufficient merely to point to there being additional evidence or, indeed, merely to say that, on the totality of the evidence now available, the tribunal disagrees with the previous decision.*"

18. It is instructive to consider what the Tribunal in the present case had to say in its statement of reasons about the Appellant's high blood pressure. There are just five short references to that issue. First, the Tribunal referred to the fact that the Appellant had been placed in the support group in 2013 "on the basis, it seemed, of

hypertension" (at paragraph [7]). Second, the Appellant's written evidence that "he was still under the care of a consultant in relation to his high blood pressure" was noted (at paragraph [8]). Third, the Appellant's oral evidence that "his previous award had been made as a result of his high blood pressure condition" was recorded (at paragraph [9]). Fourth, the fact that the GP's records referred to "raised blood pressure" was mentioned (at paragraph [10]). Finally, and in the most extensive discussion of the condition, the Tribunal noted that in the GP's factual report "the main problem was raised blood pressure. While this is a serious condition, it did not impact on the Appellant's functional ability to mobilise."

19. The Tribunal's treatment of the Appellant's condition of high blood pressure was deficient in several respects. There was no mention whatsoever of that condition in the Tribunal's lengthy discussion of regulation 35 (paragraphs [12] and [13], running to almost a page in length). Yet this had been the basis of the November 2013 decision to place the Appellant in the support group. Astonishingly, there was not even any mention of the fact that the 2016 medical assessment had been cut short and the Appellant directed to attend at A & E forthwith. There was no discussion whatsoever of the different reasons why regulation 29(2) had been applied in 2013 and 2016 respectively and the implications of those differences for any findings under regulation 35. The point about the need for consistency of approach made by the Appellant's representative (see paragraph 13 above) was simply not addressed at all. Yet, as Judge Rowland put it, "*any apparent difference ought to be explained*". This Tribunal did not adequately explain the difference in approach.

The Upper Tribunal's disposal of this appeal

20. I therefore find that the Tribunal's decision involves an error of law and should be set aside. Mr Thompson for the Secretary of State proposes that I remit the appeal for re-hearing before a fresh Tribunal. The Appellant's representative has not expressed a view on the appropriate mode of disposal. I am satisfied that I can re-make the decision under appeal. This appeal already relates to matters that are two years old and a new Tribunal is unlikely to be provided with any fresh evidence that relates to the historic period in question. Whilst it might be desirable to have input from a medical member to decide the substantive issue on this appeal, I do not regard that as essential in the particular circumstances of this case.

21. To return to Judge Rowland's formulation, the Appellant "*has no right to assume that the same decision will be made following the receipt of new evidence*" in 2016 as compared with 2013. However, the examining doctor in 2013 had explained why he had come to the decision that both regulation 29(2)(b) and regulation 35(2) applied to the Appellant's circumstances. The Appellant's blood pressure reading was very high when examined in 2013 and it was even higher still when seen at the medical assessment in 2016, resulting in that assessment itself being curtailed (and hence the 2016 ESA85 report includes only sketchy details of the clinical examination, precisely because it was abandoned).

22. Very high blood pressure can cause death directly or indirectly through a multitude of mechanisms including stroke and aortic dissection. Persistently high blood pressure can also cause organ damage which may in turn lead to death e.g. through kidney failure or heart attack. In this case the Appellant's blood pressure is indisputably high and uncontrolled. Moreover, the high readings were not confined to the two ESA medical assessments in 2013 and 2016. The Appellant's GP records, included in the appeal file, revealed that his blood pressure readings were recorded at the surgery as being 175/85 (22 April 2016), 144/82 (17 May 2016), 156/84 (7 September 2016, two days after the second assessment) and 158/86 (7 October 2016). Whether or not the Appellant's condition is a life-threatening disease, I am

satisfied on the facts that by reason of that condition there would be a substantial risk to his physical health if he were found not to have limited capability for work-related activity. Both regulation 29(2)(b) and regulation 35(2) apply.

23. The examining nurse's justification for selecting regulation 29(2)(a) to the exclusion of regulations 29(2)(b) and 35(2) at the 2016 assessment, in contrast to the reasoning of the 2013 report, is unpersuasive. There is no evidential basis for her assertion that "by making reasonable adjustments in the workplace and by taking prescribed medication" any substantial risk to the Appellant's health can be avoided. On the contrary, the evidence was that despite medication and consultant-level treatment the condition was uncontrolled. It is also well known that experiencing stress can itself result in the condition of raised blood pressure being exacerbated (and so increase the serious health risks identified above). The Appellant's representative helpfully reminds me that the Department's own guidance to decision-makers gives as an instance of "immediate substantial risk" in the context of regulation 35(2) the following example:

> "A claimant with hypertension which is uncontrolled despite medication may be at substantial risk of a stroke or heart attack, even if they do not satisfy any of the LCWRA descriptors" (see *ESA: Work-related activity and substantial risk*, Memo DMG 17/15, paragraph 25(3)).

24. That example could have been written with the Appellant himself in mind. The Secretary of State may well have obtained a new medical report in 2016. However, weighing all the factors described above into account, I conclude that the Secretary of State has not shown any proper ground for superseding the November 2013 decision to place the Appellant in the support group. On the facts the Appellant's situation remains the same, namely that by reason of his condition of hypertension there would be a substantial risk to his physical health if he were found not to have limited capability for work-related activity. Both regulation 29(2)(b) and regulation 35(2) apply on the facts.

Conclusion

25. I therefore allow the Appellant's appeal to the Upper Tribunal and set aside the First-tier Tribunal's decision for error of law (Tribunals, Courts and Enforcement Act 2007, sections 11 and 12(2)(a)). However, I can re-make the decision under appeal to the First-tier Tribunal (section 12(2)(b)(ii)) and do so as follows:

> ***"The Appellant's appeal is allowed.***
>
> ***The Secretary of State's decision of 20 September 2016, superseding the award of Employment and Support Allowance (ESA) at the support group rate dated 28 November 2013, is revised. The Appellant is treated as having limited capability for work-related activity by virtue of regulation 35(2) of the Employment Support Allowance Regulations 2008. The Appellant therefore remained entitled to ESA at the support group rate."***

Signed on the original
on 18 October 2018

Nicholas Wikeley
Judge of the Upper Tribunal