DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Secretary of State.

The decision of the Chester First-tier Tribunal dated 4 April 2017 under file reference SC065/16/01255 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the claimant's appeal against the Secretary of State's decision dated 21 November 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the tribunal judge or medical member previously involved in considering this appeal on 4 April 2017.

(3) The claimant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 21 November 2016).

(4) If the claimant has any further written evidence to put before the tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Chester within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> of the Secretary of State under appeal (see Direction (3) above).

(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 Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. It is axiomatic that the First-tier Tribunal's decision notice and (if requested) its statement of reasons should be capable of being read together so that the parties (and, if called upon, the Upper Tribunal) can understand what the Tribunal decided and why.

2. Regrettably that was not the case in the present appeal. So, irrespective of the Secretary of State's own separate and successful ground of appeal, this First-tier Tribunal's decision must be set aside as in error of law.

The background to this appeal to the Upper Tribunal

3. On 21 November 2016 the Secretary of State's decision-maker ruled that the claimant, who suffered from a knee problem, no longer qualified for employment and support allowance (ESA), as she scored nil points on the various physical and mental health descriptors in Schedule 2 of the Employment and Support Allowance Regulations 2008 (SI 2008/794).

4. On 4 April 2017 the First-tier Tribunal (FTT) allowed the claimant's appeal, finding that she scored 9 points for mobilising descriptor 1b and 6 points for standing & sitting descriptor 2c. The total of 15 points meant that the claimant now met the threshold for qualifying for ESA.

5. On 20 June 2017 the FTT Judge issued a statement of reasons for its decision at the claimant's request. Amongst other things, this stated that there had been a typing error on the decision notice. It stated that the FTT had in fact awarded 9 points for mobilising descriptor 1c and not 1b (both descriptors carry the same scores but for different criteria). A corrected decision notice was issued.

6. The Secretary of State then appealed to the Upper Tribunal. The ground of appeal was short and to the point:

> "The FTT awarded 9 points in respect of Activity 1(c). Its Statement of Reasons gives no indication that the FTT had considered whether or not the claimant would be able to use a manual wheelchair. There is nothing to suggest that the claimant has any problems with her upper limbs or with her breathing. The claimant is also able to sit for a reasonable length of time."

7. A District Tribunal Judge refused permission to appeal.

The proceedings before the Upper Tribunal

8. The Secretary of State's representative then renewed that application for permission to appeal to the Upper Tribunal. I gave the Secretary of State permission to appeal. In doing so, I remarked as follows:

> "1. The Secretary of State's grounds of appeal are arguable. The Secretary of State says that the First-tier Tribunal went wrong in law because it failed to consider whether the claimant could use a wheelchair when mobilising.
>
> 2. There are at least two other problems with the First-tier Tribunal's decision, or so it seems to me.

> 3. First, the Tribunal's statement of reasons stated that it was dismissing the appeal (see paragraph 12), whereas the decision notice stated it was allowing the appeal. An inconsistency between the statement of reasons and the decision notice may be an error of law.
>
> 4. Second, the Tribunal found that the claimant could sit for more than hour with a combination of standing and sitting (statement of reasons paragraph 3), whereas the decision notice awarded 6 points for being unable to stand or sit (or stand and sit) for more than an hour. Again, such a conflict may amount to an error of law.
>
> 5. On the basis of the points above it seems to me plain that the First-tier Tribunal erred in law. Unless I hear compelling argument to the contrary, I am minded to allow this appeal by the Secretary of State, set aside the decision of the Tribunal and send the case back for re-hearing before a fresh Tribunal. I therefore give the Secretary of State permission to appeal."

9. The claimant's representative, Mr James Wright, resisted the appeal to the Upper Tribunal by the Secretary of State and so I invited further submissions from both parties.

The Secretary of State's ground of appeal

10. Mr Wright makes two points in response to this ground of appeal. First, he argues that the FTT can be assumed to have considered the issue of mobilising by wheelchair even though there was no direct assessment of that question. Second, he contends that in any event the claimant could not have reliably, repeatedly and safely used a wheelchair. The second point is a question of fact which the next FTT will have to determine. Unfortunately I cannot share Mr Wright's confidence in the first submission that he makes. I say that for three reasons.

11. First, the decision-maker's original decision expressly dealt with the issue of the claimant's ability to mobilise by using a wheelchair. If the FTT was going to make a finding contrary to that conclusion, it needed to explain why. It did not.

12. Second, the FTT's earlier confusion regarding mobilising descriptors 1b and 1c strongly suggests that mobilising with the use of a wheelchair was not exactly at the forefront of the FTT's thinking. Descriptor 1b, which was listed on the decision notice, refers to an inability "unaided by another person [to] mount or descend two steps even with the support of a handrail".

13. Third, and in any event, the FTT's confusion elsewhere in the decision notice and statement of reasons (see the other two grounds below) means that I cannot give it the benefit of any doubt.

14. The Secretary of State's ground of appeal is accordingly made out. That is not to say that the decision-maker was correct in her application of the ESA wheelchair test. But the next FTT can resolve that issue, if needed.

The other two grounds identified in the grant of permission to appeal

15. In an unreported decision *CCR/3396/2000* Mr Commissioner (now Upper Tribunal Judge) Jacobs held that "a contradiction between the decision notice and the statement of reasons" would be an error of law (at paragraph 14). Similarly in *CIS/2345/2001* Mr Commissioner Turnbull ruled as follows (at paragraph 17(2)):

> "a conflict between the reasons given in the Decision Notice and those given in the full statement is likely of itself to amount to an error of law in that, when the two documents are taken together, the Tribunal will not have made its actual reasoning sufficiently clear".

16. Mr Wright valiantly seeks to save the FTT's decision which is apparently in the claimant's favour. He argues that the sentence "Accordingly the appeal was dismissed" in paragraph 12 was simply a typographical or administrative error and should simply have read "Accordingly the appeal was allowed". One problem with that submission is that in the previous paragraph in the statement of reasons the FTT had explained why it concluded that regulation 29 (and regulation 35) did not apply. However, there was no reason to consider regulation 29 if the FTT was satisfied in its own mind that the claimant scored 15 points on the Schedule 2 descriptors.

17. As regards the standing and sitting point, there was a typographical error in the grant of permission. The FTT's decision notice awarded 6 points for the claimant being unable to stand or sit (or stand and sit) for more than an hour. In its statement of reasons, the FTT reviewed the evidence and found that "in our judgement she can sit for more than [an] hour, with a combination of standing and sitting (statement of reasons paragraph 13, emphasis added). So, contrary to Mr Wright's submission, this is not a case where the FTT omitted to deal with standing and sitting. On the contrary, it expressly reached a conclusion in the statement of reasons that was in flat contradiction to the finding in the decision notice (namely that she cannot stand or sit, nor stand and sit, for more than an hour).

The Upper Tribunal's assessment

18. I find that all three grounds of appeal – both the Secretary of State's original ground of appeal and the two matters identified in the grant of permission – are made out. I therefore allow the Secretary of State's appeal, set aside the FTT's decision and remit (or send back) the original appeal for re-hearing before a new and so differently constituted tribunal. I formally find that the FTT's decision involves an error of law on the grounds outlined above.

The hearing before the new First-tier Tribunal

19. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the claimant is entitled to ESA (and, if so, at what rate). That is a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact.

20. The fresh FTT will have to focus on the claimant's circumstances as they were as long ago as November 2016, and not the position as at the date of the new FTT hearing, which will obviously be some 18 months later. This is because the new FTT 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" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The decision by the Secretary of State which was appealed against to the FTT was taken on 21 November 2016.

21. In her own correspondence the claimant refers to a number of matters which have post-dated the ESA decision currently under consideration. For example, the fact that she was awarded the enhanced rate of both components of PIP as from 30 October 2017 may have limited relevance to her circumstances in November 2016, nearly a year earlier. She also refers to a period of hospitalization in January 2017 for

stress-induced psychosis. The previous FTT, whose decision has now been set aside, concluded that the claimant's mental health condition was a new condition arising after the date of decision and that "there was no evidence of a mental illness at the date of decision". That was a finding of fact which falls with the FTT's decision as a whole. The new FTT will need to take a fresh look at that issue and decide for itself whether mental health issues were in play in November 2016.

The Upper Tribunal's decision in summary and what happens next

22. The Secretary of State's appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal involves several errors of law. For that reason I set aside the FTT's decision. The case now needs to be reheard by a new FTT. I cannot predict what will be the outcome of the re-hearing. The fact that the Secretary of State's appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the original decision will be upheld *on the facts* at the re-hearing of the appeal before the new FTT.

Conclusion

23. 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 of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 12 March 2018

Nicholas Wikeley
Judge of the Upper Tribunal