UPPER TRIBUNAL CASE NO: CPIP/3058/2017

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 17 July 2017 at Chesterfield under reference SC308/17/00027) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on supersession under the decision made on 22 September 2016.

D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

A. Reasons – general principles

1. Tribunals must give reasons for their decisions. Those reasons must be adequate. In order to be adequate, they must deal with the issues raised by the appeal. In this case, the judge dealt with the relevant personal independence payment activities individually, explaining the tribunal's reasons for each. This approach is regularly taken by the First-tier Tribunal and in many cases it will provide a sensible structure for the tribunal's reasons. But it only works when the claimant's arguments coincide with the legal divisions between activities. In this case, they did not. What the judge should have done was to write reasons that provide the tribunal's *response to the claimant's arguments* through analysis of evidence and application of the law. It is not possible to tell from the way that the reasons were written whether or not the judge did that. This points to a lesson for tribunals. It is not sufficient just to deal with the individual activities. The tribunal's reasons must deal with the claimant's arguments and not merely follow the legal structure of the legislation. Ideally, the structure of the tribunal's reasons should follow from their content, but it does not matter how the judge sets them out. Adequacy depends on their content.

B. The decision under appeal to the First-tier Tribunal

2. The claimant has, amongst other conditions, chronic fatigue syndrome and fibromyalgia. He was awarded a personal independence payment consisting of the daily living component and the mobility component, both at the enhanced rate for the inclusive period from 20 November 2013 to 29 June 2017. His entitlement was reviewed, and the decision awarding benefit was superseded on 22 September 2016. The new award reduced the rate of both components to the standard rate and extended the period to 7 September 2020.

C. The appeal to the First-tier Tribunal

3. The claimant exercised his right of appeal to the First-tier Tribunal. The relevant part of his grounds of appeal is at page 9. He argued that he could not complete activities reliably, in a timely fashion, repeatedly and safely. In particular, he said that 'the cumulative effects cause me severe pain in my back, legs, shoulders, hips, hands and feet and I experience exhausting, disabling fatigue, which leads me to be unable to function normally.' That raises the issue of the application of regulation 4(2A) of the Employment and Support Allowance Regulations 2008:

> (2A) Where C's ability to carry out an activity assessed, C is to be assessed as satisfying a descriptor only if C can do so–
>
> (a) safely;
>
> (b) to an acceptable standard;
>
> (c) repeatedly; and
>
> (d) within a reasonable time period.

4. The tribunal dismissed the appeal. As I have said, the judge set out the tribunal's reasons in respect of each activity. I will take activity 1 (preparing food) as an example, as that is the one that the parties have discussed in their submissions on this appeal. The judge did not refer to regulation 4(2A) in the tribunal's reasons. They dealt with the claimant's problem of standing for long periods The tribunal found that this could be alleviated by using a perching stool and rejected the argument that this would cause pain. It also found that cooking would not cause significant exhaustion.

D. The appeal to the Upper Tribunal

5. I gave the claimant permission to appeal to the Upper Tribunal. The Secretary of State's representative did not support the appeal. She argued by reference to activity 1 that, although the tribunal had not expressly dealt with regulation 4(2A), that was not essential. The reasons, she argued, showed that the tribunal had in fact dealt with the issues raised under that provision. The claimant's wife has replied on his behalf, taking detailed issue with the Secretary of State's argument. What she says will be before the First-tier Tribunal at the rehearing.

6. I do not accept the Secretary of State's argument, because it does not deal with the cumulative effect of activities that the claimant mentioned in his appeal. The tribunal dealt with the exhaustion argument as if it arose from the cooking of a meal. That is not how the appeal was presented. The claimant may have been saying that cooking by itself would exhaust him, but he was also saying that activities generally exhausted him so that when it came to cooking he might already be exhausted from other activities. The tribunal's reasons do not deal with that. None of the reasons given for the relevant activities deal with it, individually or collectively.

7. There is a more fundamental flaw in the Secretary of State's approach. It assumes that the issues relevant to activity 1 were those, and only those, that were dealt with in its reasons. It may be that that was the tribunal's conclusion and that it found that there was no other cumulative effect. But if it did that, it did not say so. Treating it as having done so assumes what needs to be established – that the tribunal took account of and rejected the claimant's argument on cumulative effect.

8. For those reasons, I have set aside the tribunal's decision and remitted the case for rehearing by the First-tier Tribunal.

Signed on original
on 20 March 2018

Edward Jacobs
Upper Tribunal Judge