[2019] UKUT 324 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CPIP/2901/2018**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

AA

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 18 October 2019
Decided on consideration of the papers

Representation
Appellant: Birmingham Community Law Centre
Respondent DWP Decision-Making and Appeals, Leeds

DECISION

The appeal succeeds.

The making of the decision of the First-tier Tribunal given at Birmingham on 22 August 2018 under reference SC024/17/07825 involved the making of a material error on a point of law.

That decision is set aside.

The case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

I draw the claimant's attention to the fact that those directions are addressed to him as well as to the First-tier Tribunal and that Direction 6 below includes a time limit.

DIRECTIONS

To the First-tier Tribunal

1 The First-tier Tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 12(8)(a) of the Social Security Act 1998 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

2 The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge, medical member, or disability-qualified member who made the decision I have set aside.

3 Any summary of the new tribunal's reasons that is included on the decision notice should be accurate, reflect the circumstances of the case, and be consistent with any written statement of reasons that may subsequently be issued.

To the claimant

4 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 22 August 2018 made a legal mistake, not because it has been accepted that you are entitled to PIP. Whether or not you are entitled will now be decided by the new tribunal.

5 You are reminded that the new tribunal must consider whether the Secretary of State's decision was correct at the time it was made. That means:

(a) it cannot take into account changes in your circumstances that occurred after 4 October 2017; and

(b) it can only consider evidence from after that date if it casts light on how you were on or before 4 October 2017.

6 If there is any further written evidence that you would like the new tribunal to consider (and which relates to the period on or before 4 October 2017) you must

now send it to HM Courts and Tribunals Service at Sutton, quoting the reference, SC024/17/07825, so that it is *received* no later than **one month** from the date on which this decision is *sent* to the parties.

REASONS

1. This is an appeal by the claimant. It concerns his entitlement to personal independent payment ("PIP").

2. He claimed PIP with effect from 11 April 2017 and attended a face-to-face consultation with a health care professional, a registered nurse, on 13 September 2017.

3. On 4 October 2017, the Secretary of State refused the claim. That refusal was subsequently upheld on mandatory reconsideration.

4. The claimant appealed against the Secretary of State's decision to the First-tier Tribunal, which on 22 August 2018 refused his appeal.

5. He now appeals to the Upper Tribunal with my permission, given on 9 April 2019.

6. Both parties are agreed that the First-tier Tribunal's decision was made in error of law and that the matter should be remitted to the First-tier Tribunal for reconsideration.

7. In those circumstances, my reasons can be (relatively) brief.

8. In my judgment, the FTT's decision involved three errors of law. First the written statement of reasons failed to give an adequate explanation of what it made of the claimant's evidence; second the summary of reasons in paragraph 5 of the decision notice is inconsistent with the written statement of reasons; and, third, that summary suggests that the Tribunal adopted a procedure that was in breach of its duty to act fairly towards the claimant.

9. On the first of those grounds, I accept what has been said by Birmingham Community Law Centre on behalf of the claimant and by the Secretary of State's representative at paragraphs 8 and 9 of her submission. The standards against which the adequacy of a statement of reasons is assessed are well-known and I do not need to add anything further.

10. I do, however, wish to say more about the second and third grounds.

11. Paragraph 5 of the decision notice reads as follows:

> "5. Whilst the Tribunal accepts that [the claimant] has multiple health conditions the nature and extent of the resulting limitations are insufficient to score the required number of points and as a result [the claimant] does not qualify for either component of Personal Independence Payment. In reaching its decision, the Tribunal placed *particular reliance* upon the evidence of the appellant and the Tribunal bundle" (my emphasis).

12. I doubt whether the very long first sentence of that passage communicates any useful information to the reader. But neither does it suggest that the Tribunal made a legal mistake.

13. There are, however, two problems with the second sentence.

14. The first is that—if the written statement of reasons is to be accepted—then that sentence is not true.

15. From the statement, it does not appear that the Tribunal "placed particular reliance upon the evidence of the appellant". On the contrary, I cannot see that the Tribunal placed *any* reliance on that evidence. Whenever the claimant's evidence was in conflict with evidence from another source—usually that of the health care professional—the Tribunal preferred the conflicting evidence. In short, although the Tribunal may have taken into account the claimant's evidence, it did **not** rely on it. Rather, it *rejected* that evidence and relied instead on other evidence. Paragraph 5 of the decision notice should not have pretended otherwise.

16. The inconsistency between the decision notice and the statement amounts without more to a material error of law.

17. The second problem is that one cannot place *particular* reliance on everything.

18. The use of the phrase "particular reliance" implies that the Tribunal also placed some—albeit less—reliance on evidence that was not included in "the evidence of the appellant and the Tribunal bundle".

19. If it did so, that was an error of law because it would have involved having regard to evidence on which the parties had not had an opportunity to comment. Moreover, evidence not included in the appeal papers or given by word of mouth would probably have amounted to an irrelevance that the tribunal should not have taken into consideration.

20. And if it did not do so, then the Tribunal should not have used wording that implied it did.

21. I am, of course, aware that the phrase "in particular" appears in the standard wording on the computer template used by the Social Entitlement Chamber to generate decision notices about PIP and employment and support allowance.

22. However, that standard text is editable. And it ought to be edited to produce a wording that reflects the real reasoning underlying the Tribunal's decision. It is not supposed to be included as general "boilerplate". If, in the circumstances of an individual case, the standard text contains errors, the Upper Tribunal cannot be expected to overlook those errors merely because the wording is programmed into a computer template.

23. Further, it is desirable that the summary should be worded so that it provides useful information to the claimant and the Secretary of State. Removing the phrase "in particular" would avoid the third error of law I have identified, but it would also have the result that the sentence did no more than assert that the Tribunal had based its decision on the evidence.

24. But that is what *every* tribunal is supposed to do in *every* case. Asserting that it is so in a particular case serves no purpose. It will not protect the decision from being set aside by the Upper Tribunal if the written statement of reasons shows that the tribunal did not in fact base its decision on the evidence. On the contrary, the fact that the tribunal has chosen to assert what no-one would otherwise have doubted, has the effect of raising such doubts.

25. Moreover, that sort of mantra is almost always a substitute for giving a real explanation of the decision to the parties.

26. The summary given in this case contained nothing by way of actual explanation. It was not in dispute that the claimant suffers from "multiple health problems" (the Tribunal does not even bother to list them). Saying that the resulting limitations were insufficient to score the required number of points added nothing to what had already been stated at paragraphs 3 and 4 of the decision notice. The only new piece of information was that the Tribunal had relied upon the claimant's evidence and, as I have explained, that was not in fact the case.

27. It would have been much better if the summary had said briefly that the claimant had lost the appeal because the Tribunal did not believe him and did believe the HCP. If space and time allowed, perhaps one or two examples of why the claimant's evidence had been rejected could also have been given.

28. For all those reasons, I exercise my discretion to set the First-tier Tribunal's decision aside.

29. Further facts need to be found. As it is expedient that that should be done by a tribunal that includes a medically-qualified member and a disability-qualified member—and at a venue that is convenient for the claimant—I remit the case to the First-tier Tribunal for reconsideration in accordance with the directions that I have given above.

(Signed on the original)
on 18 October 2019

Richard Poynter
Judge of the Upper Tribunal