THE UPPER TRIBUNAL

Case No: CSE/22/2013

ADMINISTRATIVE APPEALS CHAMBER

Appellant: Mr Kevin Brade

Respondent: Secretary of State

Date of Decision: 26 February 2013

DECISION OF THE UPPER TRIBUNAL

L T PARKER
JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM: First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: SC942/12/00402
Tribunal Venue: Dumfries
Hearing Date: 5 September 2012 (the tribunal)

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The decision of the First tier Tribunal (Social Entitlement Chamber) sitting in Dumfries on 5 September 2012 (the tribunal) is wrong in law. I set aside the tribunal's decision and return the appeal to a new tribunal for a wholly fresh hearing. The Upper Tribunal is not in a position to remake the decision under appeal as further findings of fact are required. Permission to appeal was given by an Upper Tribunal Judge.

REASONS FOR DECISION

The issues

1. The appeal to the Upper Tribunal is not supported on behalf of the Secretary of State. However, after careful consideration of all the case papers, I agree with the submission made on behalf of the appellant by his representative (the representative) that there are flaws in the approach made by the tribunal when applying Activity 13 and its accompanying single Descriptor under Schedule 3 to the Employment and Support Allowance Regulations 2008 (SI 2008/794) (as amended) (the regulations); although not raised by either party, I judge that the tribunal also erred in law with respect to its application of regulation 35(2) of the regulations

The legislation

2. Regulation 34 of the regulations provides, so far as relevant:

> "(1) For the purposes of Part 1 of the Act, where, by reason of a claimant's physical or mental condition, at least one of the descriptors set out in Schedule 3 applies to the claimant, the claimant's capability for work-related activity will be limited and the limitation will be such that it is not reasonable to require that claimant to undertake such activity.
>
> (2) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.
> ....."

3. Activity 13 and its descriptor in Schedule 3 read:

"Activity	*Descriptors*
...	...
13. Coping with social engagement due to cognitive impairment or mental disorder.	Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the individual."

4. Regulation 35(2) of the regulations is to this effect:

> "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 or any person if the claimant were found not to have limited capability for work-related activity."

Interaction between regulation 34(2) and activity 13

5. Matters of judgement on the factual application of a statutory test are exclusively for a tribunal unless it misinterprets the constituents of a relevant test or its exercise of judgement is such that no reasonable tribunal could make on the basis of the facts found and having regard to the evidence.

6. The tribunal held:

> "In relation to activity 13, coping with social engagement due to cognitive impairment or mental disorder, the tribunal had to be satisfied that engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the individual. Clearly this can not apply. He was able to cope with the HCP, he was able to cope with attending at the hearing before the tribunal which lasted 15 minutes. He is able to attend his GP. It therefore cannot be said that engagement in social contact is always precluded.
> .....
>
> The appellant is reclusive as confirmed by his father's evidence and by the evidence from the GP but he is not that bad that he cannot cope with meeting strangers. He clearly did this at the hearing before the tribunal..."

7. The tribunal was wrong about the claimant coping with a Health Care Professional (HCP). Regulation 23 of the regulations leaves it to a decision maker's discretion whether to require a claimant to undergo a medical examination. In the present case, the claimant completed the questionnaire (ESA 50) and his General Practitioner (GP) on 4 January 2012 wrote a letter on the claimant's behalf. The result was that advice was provided on 23 January 2012 by an HCP (in the present appeal, a registered nurse) in the following terms:

> "... a return to work is unlikely in the longer term... Evidence suggests claimant is likely to meet threshold at revised WCA in areas or (*sic*) going out, coping with change and coping with social engagement. Indicates claimant is paranoid..."

8. Thus the claimant never had to undertake a medical examination for the purposes of the decision then made by a decision maker on 13 February 2012 that the claimant had "... scored at least 15 points from the appropriate descriptors and has limited capability for work". However, the decision maker continued:

> "I have also determined that by reason of his mental condition none of the descriptors set out in Schedule 3 to the ESA regulations apply. He does not have limited capability for work-related activities. He will be placed in the Work Related Activity Group."

A disadvantage in the decision maker's approach is that there is no determination how the score is reached nor are there any accompanying reasons; yet some of the Schedule 3

activities are in essentially identical terms to a counterpart in Schedule 2 (with respect to limited capability for work) and in such circumstances mirror descriptor (a) of the corresponding Schedule 2 activity.

9. Thus, for example, the provisions of activity 13 in Schedule 3 are in identical terms to those of activity 16(a) in Schedule 2. Under Schedule 2, satisfaction at that level gives the required 15 points. Alternatives, however, are descriptor 16(b) ("engagement in social contact with someone unfamiliar to the claimant is always precluded due to difficulty relating to others or significant distress experienced by the individual"), giving 9 points, and activity 16(c) ("engagement in social contact with someone unfamiliar to the claimant is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the individual") for which there is a score of 6 points. By implication, because the present decision maker determined that no descriptor under Schedule 3 applies, it must follow that it was previously considered that activity 16(a) of Schedule 2 was not satisfied, but only some lower descriptor and only possibly under that heading; however, the claimant is denied the reasons why this view is taken, which reasons it would be helpful to know in order to understand and address the Schedule 3 conclusion.

10. In a further letter from the GP dated 29 June 2012, the GP re-iterated his opinion that the claimant was unable to cope with social engagement; in his earlier letter of 4 January 2012 on which the HCP relied for her advice, the GP wrote:

> "The main mental health issues with [the claimant] are manifest in anxiety and depression. His anxiety appears to be mainly situational and is aggravated by contact with people. This has caused him to lead a very reclusive existence over the past five years and he is reluctant to go out of the home where he lives with his father. His father in effect acts as his main carer with regard to provision of meals and general care.
>
> I saw [the claimant] in the surgery most recently on 29 December 2011 when he appeared anxious...
>
> .....
>
> ... He frequently becomes quite paranoid on having to deal with people from outside his safe zone, which is the current address where he resides with his father. ...
>
> [The claimant] has been a very infrequent attender at our surgery over the past 5 years and this been largely due to his mental health problems which may at some stage require to be assessed formally by a Mental Health Team.
>
> .....
>
> ...I understand that [the claimant] may be interviewed by telephone or may be called for an interview to a medical centre. In my opinion he would find either of these two encounters very stressful and would not avail (*sic)* himself well in these situations."

The appellant attended his hearing accompanied by his father and the representative and the hearing lasted 15 minutes. There is recorded a short contribution by the representative at the outset and one from the father at the end, but almost two pages record the evidence given by the claimant to the tribunal.

11. The representative argues, in the grounds of the appeal and in the response to the Secretary of State's submission, that the tribunal has failed to take account of regulation 34(2) of the regulations, which must, it is submitted on the claimant's behalf, apply to descriptors in Schedule 3, how so ever they are worded. The argument on behalf of the Secretary of State, however, is the following:

> "Whilst regulation 34(2) provides a clause to the effect that the descriptor applies only if it applies to the claimant for the majority of the time I submit that this clause can only be read so as to apply to descriptors which do not exclude this possibility. In my

> submission descriptor 13 excludes the possibility of regulation 34(2) applying. The text of the descriptor is, I submit, clear. The words 'is always precluded' mean that it is not possible to consider whether or not the descriptor applies to the claimant for the majority of the time. It is, I submit, an all or nothing test. I therefore submit that although the tribunal have not explored the relationship between descriptor 13 and regulation 34(2) nothing turns on this."

12. Construing the regulations is not easy. The representative is correct that regulation 34 does not expressly exclude any Schedule 3 descriptors from its ambit; nevertheless, construing the regulations as a whole, a situation stricter than a straight application of regulation 34 to descriptor 13 must be intended. This is because, under activity 16 of Schedule 2, a distinction is drawn between those for whom (see 16(b)) "engagement in social contact with someone unfamiliar to the claimant is always precluded...," as contrasted with those for whom "engagement in social contact with someone unfamiliar to the claimant is not possible for the majority of the time...", which latter descriptor (16(c)) has a lower pointage; it necessary follows that "majority of the time", (which is also the test under regulation 34(2) of the regulations), is an easier test to satisfy than "always".

13. Notwithstanding, regulation 34(2) must be given some content in its application to activity 13 of Schedule 3 if that is at all possible without a strained construction. In the Concise Oxford Dictionary, "always" is defined thus:

> "**1** at all times; on all occasions (*they are always late*).
> **2** whatever the circumstances (*I can always sleep on the floor*).
> **3** repeatedly; often (*they are always complaining*)."

Reference to other dictionaries reveals a similar pattern; there is a primary meaning of "every time" and a more limited, secondary meaning of "repeatedly, persistent".

14. Therefore, in order to make use of regulation 34(2), but mindful of the distinction in activity 16 of Schedule 2 between "always" and "for the majority of the time", I conclude that "always precluded", as used in activity 13 of Schedule 3, and likewise as used in activity 16 of Schedule 2, is not an all or nothing test; rather, it means "repeatedly" or "persistent" or "often". A "majority" may be constituted by events which happen only on 50.1% of the possible occasions, but a greater frequency is required by the use of the word "always". It is a question of degree, but a fact finding tribunal is eminently suited to applying these subtle nuances of difference in a common sense way. It suffices to say in the present case, that because a claimant attends one tribunal hearing, and his GP accepts that he comes to the surgery very occasionally, does not *necessarily* entail the conclusion, as the tribunal clearly considered that it did, that it "cannot be said that engagement in social contact is always precluded".

Social Engagement

15. The representative argues that this concept does not include engaging with people in a formal, professional context, which has an element of compulsion, such as, for example, attending a medical examination, consulting a General Practitioner, attending a tribunal hearing. It is the representative's submission that descriptor 13:

> "relates to a person's ability to engage 'socially' with people voluntarily in a more informal context, among friends, relatives and strangers, in familiar or unfamiliar places".

16. The submission on behalf of the Secretary of State disagrees:

> "Whilst contact of the type suggested by the claimant's representative would fall within the scope of the descriptor it is my submission that contact of the type referred to by the tribunal would not be excluded. The ability to undertake social contact with doctors and lawyers in situations which are acknowledged to have the potential to be stressful is, in my submission properly to be taken into account when judging descriptor 13".

17. On balance, I prefer the argument made on behalf of the Secretary of State. The representative's suggested interpretation reads in words which are not included expressly or impliedly in the statutory language. "Social" qualifies "engagement" and "contact"; thus in its unadorned use, "social" is a simple reference to relations with other human beings and does not carry any connotations of leisure, pleasure and mutuality. Therefore, the tribunal did not err in relying, as constituting such "social engagement", on the kind of business visits to which it referred in its statement. The representative's objection that adopting the argument on behalf of the Secretary of State means that, for example, "anyone who claims the descriptor and attends the tribunal cannot succeed", is now undermined by my conclusion that "always" does not mean "on every single occasion"; attending a tribunal hearing constitutes "social contact", but if a claimant is otherwise reclusive, he may yet show that he is "always precluded" from "engagement in social contact". This is because "always" does not mean "every time" but only "repeatedly" or "often".

18. What conduct amounts to the necessary "contact" or "engagement" is also a matter of fact and degree, likewise eminently suitable for consideration by a tribunal as a matter of common sense having regard to all the circumstances. At one end of the scale, if a claimant sat silently throughout his tribunal hearing then, outwith exceptional circumstances, a reasonable tribunal could hold that this did not amount to the necessary "contact" or "engagement"; similarly, monosyllabic responses in such a context is a borderline scenario. However, where, as here, the claimant communicated with the tribunal on an extensive basis, according to the record, then a conclusion that such did not amount to any "social engagement" or "social contact" would have been irrational. Thus the tribunal did not err in how it understood either "social" or "contact" or "engagement"; where it erred was in applying too strict a test in determining whether such was "always precluded".

Regulation 35(2) of the regulations

19. The above is expressed in very similar terms to regulation 29(2) (b) of the regulations; except that the latter requires "a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work", whereas the former is about "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". Analagous considerations therefore apply to both, except that participating in work-related activity (which at present is restricted to taking part in work-focused interviews) is patently narrower than undertaking work. In *Charlton v. Secretary of State for Work and Pensions* [2009] EWCA Civ 42, the Court of Appeal at paragraph 34 of its decision said that regulation 29(2)(b) might be satisfied:

> "Where the very finding of capability might create a substantial risk to a claimant's health or that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused. Apart from that, probably rare, situation, the determination must be made in the context of the journey to or from work or in the work place itself".

It follows that in the same way it is necessary, under regulation 35, to make the evaluation of substantial risk, not just an exercise limited to the ability to cope with the work related interview at the Job Centre, but also "in the context of the journey to or from" such an interview. This point has particular relevance to a claimant arguing under activity 13 of Schedule 3. The tribunal therefore went wrong in applying too narrow a statutory test, saying only "he should be able to cope with a work related interview at the Jobcentre".

Summary

19. The appeal is therefore remitted to a new tribunal to begin again. It is emphasised that before the new tribunal there will be a complete rehearing on the basis of the evidence and argument available to the new tribunal and in accordance with the guidance above; the determination of the claimant's case on the merits is entirely for that new tribunal. Although the claimant has been successful in the appeal limited to the issue of law, the decision on the facts of this case remains entirely open.

(Signed)
L T PARKER
Judge of the Upper Tribunal
Date: 26 February 2013