

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal is allowed.

The decision of the tribunal given at Hamilton on 29 October 2012 is set aside.

The case is referred to the First Tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal.

REASONS FOR DECISION

1. The claimant, who has angina, diabetes, osteoarthritis, anxiety and depression, appealed against a decision made on 14 June 2012 refusing a claim for attendance allowance made on 11 May 2012. In a letter dated 18 June 2012 her representatives asserted among other difficulties a risk of stumbles and falls caused by the claimant's left knee giving way. The evidence before the tribunal included a letter from the claimant's consultant orthopaedic surgeon dated 2 July 2012 referring to a fall on a bus in late 2010 and stating that: "...globally there is no doubt that [the claimant] has therefore got an altered walking ability and there is an element of altered safety as well", and a further letter from the consultant dated 4 September 2012 stating that the claimant continued to have significant problems in terms of pain, falling and poor gait. In her evidence to the tribunal the claimant said that on one occasion she had had to summon assistance through an alarm system as she had been unable to get up after a fall at her home.

2. The EMP who examined the claimant on 7 June 2012 reported that there were no findings to support any undue susceptibility to falls and the tribunal expressly found [para. 17] that "the claimant does not have any undue susceptibility to falls". Having stated that they preferred the EMP's evidence to the evidence submitted on behalf of the claimant, the tribunal made the following more detailed findings [para. 59]:

"As to day supervision the Tribunal considered the evidence of falls in accordance with the guidance given in R(A) 3/89 and having regard to what the EMP said about falls, the fact that no serious injury has resulted therefrom, apart from the said incident in the bus in December 2010 which required surgery thereafter in December 2010, the Tribunal concluded that [the claimant] was not in substantial danger."

3. In a letter dated 17 January 2013 the claimant appealed through her representatives on the grounds that the tribunal's findings in relation to falls were not adequately explained in the light of the totality of the evidence on that issue, and on 2 February 2013 a tribunal judge gave permission to appeal to the Upper Tribunal on those grounds. In a written submission dated 15 March 2013 the Secretary of State's representative has also supported the appeal on the grounds set out in the application for permission to appeal.

4. For my part, I too am satisfied that the grounds of appeal must be upheld. The flaw in the tribunal's reasoning in this case seems to me to have been the common one of viewing the case as a contest between the EMP's evidence and evidence from other professionals involved in the claimant's care. Thus, the tribunal stated [para. 53] that the reason they preferred the evidence of the EMP to the evidence submitted on behalf of the claimant was that the EMP's report was an independent report, not subject to any pressure and in the view of the Tribunal set out in a logical and clear manner, which came to a reasoned conclusion based on clinical examination. However, whether the EMP was more independent or less susceptible to pressure than the claimant's orthopaedic surgeon may be open to question and, in any case, was not the point. The EMP and the orthopaedic surgeon both provided evidence from different perspectives, each of which was of value to the tribunal in reaching reasoned conclusions on the basis of all the available evidence. Thus, for example, the EMP gave a detailed account of the claimant's daily activities, but the orthopaedic surgeon gave an informed account of the claimant's orthopaedic history. The EMP did not state that the claimant was not susceptible to falls, but only that there were no findings to support such a susceptibility. It may well be that the problems reported by the orthopaedic surgeon which might cause a propensity to fall would not have revealed themselves on examination by the EMP, but in any case there was nothing in the EMP report which in my view provided a rational basis for rejecting the evidence of the orthopaedic surgeon and the claimant herself and for making an unqualified finding that the claimant had no undue susceptibility to falls.

5. I therefore consider that the tribunal's decision was erroneous in point of law and, accordingly allow the appeal and set aside the tribunal's decision. Since I cannot make the findings of fact needed to determine the claimant's entitlement to benefit, I remit the case to the first-tier Tribunal for rehearing in its entirety before a new tribunal.

(Signed)
E A L BANO
Judge of the Upper Tribunal
Date: 21 March 2013