

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CE/304/2010

Before Judge Mark

Decision: The appeal is allowed. I set aside the decision of the tribunal and remit the matter to be reheard by a new tribunal in accordance with the directions given below.

REASONS FOR DECISION

1. This is an appeal by the claimant with the leave of an Upper Tribunal Judge against a decision of the First-Tier Tribunal given on 30 September 2009 dismissing the appeal of the claimant from a decision of a decision maker dated 26 February 2009. That decision superseded the decision of another decision maker awarding Employment and Support Allowance from and including 3 November 2008. The supersession was effective from and including 26 February 2009 and followed an examination of the claimant by a health care professional on 20 February 2009.
2. The claimant did not claim any relevant physical problem, but suffered from depression. The health care professional, in fact a registered medical practitioner, had concluded that the claimant did not satisfy any of the descriptors relevant to the assessment of whether she had limited capacity for work and that assessment was accepted by the decision maker on 26 February 2010.
3. The claimant appealed to the First-Tier Tribunal. A few weeks before the hearing, her condition had worsened and her medication had been increased. The tribunal therefore disregarded how she presented at the hearing, and confined itself to considering her entitlement at the date of the decision under appeal. At that time it considered that her condition was mild, and although it appears to have concluded that descriptor 18(d) applied, entitling the claimant to 6 points, it did not consider that she scored any points on any of the other descriptors relied on. These were 19(c), 20(f) and 21(f).

The facts

4. The claimant was born in 1984, and suffered from depression for which, as at February 2009, she had been prescribed citalopram 20mg daily. Her depression had started many years previously. She had taken an overdose in May 2008 and had been admitted to hospital overnight. As reported to the health care professional (p.7b), she had seen a psychologist, had just started having cognitive behavioural therapy, and her medication had been increased. She had lived alone in a flat with two flights of stairs since the previous November. She was studying business administration at college for 14 hours a week and went there 3 days a week (p.7c).
5. Further information as to her typical day is at pp.7c-7d. She had a long term disturbed sleep pattern. If she went to college she would rise at about 8am and if not she would stay in bed until she felt like getting up. A friend would pick her up

at 9.15am to make sure she went to college because sometimes she did not feel like getting out. Friends would also give her a lift home, and she would return around 3.15 to 3.30pm. She would stay at home except for going to college and at the weekend to her parents, and going to a local shop to pay her bills. She sometimes enjoyed the company of friends. She sometimes enjoyed the company of friends and of her parents. She would work mostly at college and used a computer to work and listen to music. She watched Eastenders on TV.

6. She could generally look after her personal hygiene and dress herself and make hot drinks. She generally did not want to eat, despite being reminded by her mother, apparently because of concerns about her weight. She appears from her GP's report at p.14 to have had problems with obesity. She would go shopping for groceries weekly at the supermarket, being taken by her parents to make sure she had food in the flat.
7. It would appear from the GP's report that the claimant was diagnosed with insomnia on 11 March 2009, some two weeks after the date of the decision. It is a reasonable inference that she was suffering from it at the date of the decision and that zopiclone was prescribed to deal with this condition at the time. The claimant also submitted a mental health assessment from a local mental health clinic relating to an assessment on 8 July 2008 (p.19) which referred to her avoiding going out and isolating herself in her bedroom (she was still living with her parents at that time) and to her anergia and anhedonia. She was stated to feel anxious when she went out and that people were looking at her or talking about her. She had some panic attacks when in crowds but they were not severe or regular. Her sleep was poor. She appears to have been regarded as having moderately severe depression and a severe anxiety state, and was referred for counselling and anxiety management with close monitoring of her mental state.
8. A further report dated 9 June 2009 states that the claimant had attended five appointments at the clinic between 13 February and 20 March 2009 and had then failed to attend a further five appointments, and was therefore discharged (pp.21-24). She was regarded as at risk of impulsive overdose. She is described as continuing to struggle to attend her college course consistently and to be socially withdrawn at times.
9. The claimant attended the tribunal hearing with her mother and was represented by a caseworker from the Birmingham Tribunal Unit. By that time her medication had been increased to 30mg daily of citalopram, and she was also taking zopiclone for her insomnia and terbutaline.
10. The claimant gave evidence to the tribunal. The record is six pages long. The first page is said to have been missing, but on this appeal the claimant's representative accepts that there was nothing material in it. In fact it is at p.13, having become detached in the file from the rest of the record, and indeed contains nothing material to this appeal.

The descriptors relied on

11. The tribunal accepted that the claimant was frequently unable to get to a specified place with which she was familiar without being accompanied by another person. She therefore scored 6 points.
12. The second descriptor relied on was 19(c), that is that "Normal activities, for example visiting new places or engaging in social contact, are precluded for the majority of the time due to overwhelming fear or anxiety". The tribunal did not consider that this descriptor applied "having regard to the activities of her typical day". As it is clear that her typical day as described by them involved her returning to her flat and staying there after college, the reasoning is not entirely clear. The tribunal does not appear to have addressed the question of what normal activities the claimant might engage in but for her mental problems. It did decide, however, in paragraph 18 that her condition was mild only, and on the basis of that finding, I am unable to see how any normal activities can be said to have been precluded due to *overwhelming* fear or anxiety. I note that at p.28, in the record of the proceedings, the claimant is quoted as stating that she is OK if somebody is with her but if alone she gets panicky and feels she is being watched. Her heart races and she becomes sweaty. She also stated that she got panic attacks every time she went out, although by the time of the tribunal hearing she no longer went out, and she did not say when that state of affairs began or explain how it could have been the case in February 2009 if the reason for giving up college at that time was, as she stated to the tribunal, lack of motivation, and her daily routine was as described by her.
13. The tribunal appears to have based its conclusion on the finding that her panic attacks were not severe or regular, as stated in the mental health assessment at p.19. This assessment is of her mental state as at 8 July 2008 whereas the tribunal should have been concerned with her mental state at the date of the decision. The claimant was working in July 2008, and she was subsequently at college. She gave evidence that she had ceased her studies in February 2009, but she said this was due to lack of motivation, not because she was afraid to go out.
14. In the end, bearing in mind that the claimant was represented and that the representative was well aware of the terms of this descriptor, it appears to me that although the reasoning of the tribunal left something to be desired, it was entitled, and indeed bound by reason of its other findings, to conclude that this descriptor did not apply as there was no evidence that she was precluded from ~~normal activities due to overwhelming fear or anxiety. If there did come a time~~ when she had panic attacks every time she went out, it was not in February 2009, when her daily routine as described by her and confirmed by her mother was as set out in the health care professional's report.
15. Descriptor 20(f) is that the claimant "frequently demonstrates a moderately disproportionate reaction to minor events or to criticism but not to such an extent that the claimant cannot manage overall day to day life when such events or criticism occur." Descriptor 21(f) is that "The claimant misinterprets verbal or non-verbal communication to the extent of causing ... herself significant distress on a frequent basis."

16. The claimant's representative has pointed out on this appeal that the tribunal has failed to deal with the issue of her ideas such as people talking or laughing about her which she told the tribunal would cause panic attacks. The tribunal found that the attacks were not severe or regular, but made no findings as to whether they were frequent. It also made no findings as to the frequency with which the claimant would think, without good reason, that other people were talking about her or laughing at her or as to the distress this would cause her.
17. With regard to descriptor 20(f), a disproportionate reaction may be positive or negative. It could be a panic attack, it could be a decision due to depression to withdraw from a situation because of an inability to cope with it, it could be a hostile reaction. It appears to me that the tribunal has placed too much emphasis on the question of panic attacks in this respect and has not investigated the question of the claimant's reaction to minor events or criticism. With regard to descriptor 21(f), the tribunal does not appear to have considered the way in which the claimant misinterpreted the communications of others in relation to herself or the effect that this had on her. For this purpose, "verbal or non-verbal communication" need not be with the claimant. It is sufficient if it is seen by the claimant and misinterpreted by her.
18. These descriptors carry a total of 12 points, which with the 6 points awarded in respect of descriptor 18(d) would take her over the relevant threshold. It appears to me that the tribunal erred in law in failing to give adequate reasons, or to make adequate findings of fact in relation to these descriptors, and for that reason I set aside its decision. I am not in a position to substitute my decision on these matters, so that the case must be referred to a new tribunal. I express no view as to the outcome of the new hearing, but would point out that if, as is suggested by the comments of the tribunal under appeal, there has been a significant deterioration in the claimant's condition since February 2009, she may wish to consider making a new application.

(signed) Michael Mark
Judge of the Upper Tribunal

1 November 2010