CE/0234/2015

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by the claimant, brought with my permission given on 5th March 2015, succeeds**. In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting in Chesterfield and made on 28th May 2014 under reference SC031/13/05197. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

Directions

2. The claimant should consider requesting the tribunal to hold an oral hearing and in default of such request consideration should in any event be given as to whether an oral hearing should be held. The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written medical or other evidence. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course. The new panel of the tribunal will have to consider afresh all of the evidence and make its own findings of fact.

Background and Procedure

3. This decision is based on a point of law relating to the application of a provision of the relevant regulations. It is not necessary to discuss the evidence relating to the claimant's medical condition but I set out as much of the background as is necessary to set my decision in context.

4. The claimant is a woman who was born on 6th August 1956. She has a number of medical problems. She had been entitled to incapacity benefit on the basis that she was incapable of work. In due course incapacity benefit was replaced by employment and support allowance (ESA). On 20th August 2013 the claimant was examined in this connection by a registered nurse on behalf of the Secretary of State. On the basis of the report of that examination, on 9th September 2013 the Secretary of State decided that as from 2nd October 2013 the claimant did not have limited capability for work and was not entitled to ESA. On 9th October 2013 the claimant appealed to the First-tier Tribunal against that decision of the Secretary of State. The tribunal considered the matter on 28th May 2014. Claimants who have limited capability for work are placed in one of two groups. The First-tier Tribunal decided that the claimant had limited for work but not for work related activity. She was entitled to ESA but not to

be placed in the support group. Those in the latter group are not required to be available for work related activity and are entitled to receive a higher rate of the allowance.

5. On 22nd July 2014 a judge of the First-tier Tribunal refused to give the claimant permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal. On 12th January 2015 the claimant renewed her application direct to the Upper Tribunal. (According to her representatives the application had been lodged with the Upper Tribunal on 18th August 2014 but appears not to have been received). On 5th May 2015 I gave the claimant permission to appeal out of time. The Secretary of State opposes the appeal. Neither party has requested an oral hearing at this stage.

The Legal Provisions

6. ESA was introduced by section 1(1) of the Welfare Reform Act 2007. Section 9(1) of the Act provides that whether a person's capability for work related activity is limited by his physical or mental condition and whether it is reasonable to require him to undertake such activity shall be determined in accordance with regulations. The relevant regulations are the Employment and Support Allowance Regulations 2008. Regulation 34 and Schedule 3 provide the detailed basis for this determination and various descriptors are set out in Schedule 3. However, regulation 35 provides for certain claimants to be treated as having limited capability for work related activity even if they do not come within the relevant descriptors in Schedule 3. Regulation 35(1) is not relevant for the purposes of my decision but regulation 35(2) provides as follows:

> 35(2) 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 bodily or mental disablement, there would be 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.

7. This provision was considered by a three judge panel of the Upper Tribunal in IM v Secretary of State for Work and Pensions [2014] UKUT 412 (AAC), CE/3453/2013. The panel rejected an argument by the Secretary of State that in assessing the risk it is sufficient to identify some work related activity that a claimant could reasonably be expected to do without a substantial risk to anyone's health. It decided that although it is not necessary to identify the activities in which the claimant would be required to engage, it is necessary to identify the activities in which the claimant might be

required to engage. This is because of the risk of an inappropriate requirement being imposed on a particular claimant. It follows that the First-tier Tribunal ought to be provided with information about all types of work related activity in the area where the claimant lives.

The First-tier Tribunal

8. In the present case the First-tier Tribunal, having accepted that the claimant was incapable of work, went on to consider regulation 35(2). It concluded that (paragraph 5):

> "... no explanation was given as to why she might fall within regulation 35 in the representative's submission. Given that the Tribunal found her mental health problem to be mild ... the only issue was how her physical problem, her lumbar problem, might allow her entry into regulation 35. Would that problem be such that there would be a risk to her physical health or to any other person if she were found not to have limited capability for work - related activity? The [Secretary of State] had not indicated the work - related activity which [the claimant] would be expected to perform. The [registered nurse had not indicated any risk]. Given her back problem and looking at the broad spectrum of work – related activity , CV writing, courses, interviews etc it was hard to see how her back problem would be likely to bring her within regulation 35. Self – evidently work – related activity would not require physical labour of any kind. Such activity would be of a sedentary nature or might be performed sitting or standing if required ... The Tribunal did not feel it necessary to adjourn to find out what work – related activity was likely to be, in the circumstances it was self-evident that she did not fall within Regulation 35(2)."

Arguments and Conclusions

9. The Secretary of State has argued firstly that the First-tier Tribunal complied with the three judge panel decision in that it was accepted in that decision that there might be some claimants for whom it was obvious that regulation 35 did not apply, and secondly that the claimant had not identified what the substantial risk would be.

10. The Secretary of State has also referred to and relied on the decision of Upper Tribunal Judge Rowley in CE/3886/2014. In that decision Judge Rowley decided that on the facts of that case as found by the First-tier Tribunal there could be no serious argument that there was a substantial risk to the claimant within the meaning of regulation 35(2). I do not understand her decision to be establishing any further point of law.

11. The Secretary of State has now submitted a list of relevant activities for the claimant's region but cannot say what was actually on the list at the relevant date. It is

argued that it is clear that the list includes some activities that the claimant could undertake without risk, but this is the very argument that was rejected by the three judge panel.

12. It seems to me that there is a lack of logic on the parts both of the First-tier Tribunal and of the Secretary of State in expecting a claimant to identify what the risk would be without knowing what activity would be available or expected or required.

13. The submissions of the Secretary of State in this appeal are totally unpersuasive. I am particularly concerned that the First-tier Tribunal concluded that "Self – evidently work – related activity would not require physical labour of any kind. Such activity would be of a sedentary nature or might be performed sitting or standing if required" without having any evidence at all to this effect. I do not know on what basis the First-tier Tribunal gave examples of work related activity - it was certainly not based on any evidence and was therefore somewhat speculative.

14. For the above reasons I am satisfied that the decision of the First-tier Tribunal was made in material error of law and this appeal by the claimant succeeds.

H. Levenson
Judge of the Upper Tribunal
28th September 2015