THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal is allowed.

The decision of the tribunal given at Greenock on 18 July 2013 is set aside.

The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 10.

REASONS FOR DECISION

1. The claimant, now aged 56, was formerly employed as the Chief Pharmacy Technician in a hospital. In September 1985 she was involved in a road accident which resulted in a fracture of her femur. The fracture failed to heal and further surgery was needed, causing shortening of the claimant's leg of about two inches. As a result of the misalignment of her pelvis, the claimant now needs a left knee and right hip replacement and is in considerable pain.

2. Following her return to work, the claimant was found to have type 1 allergy to latex and certain fruits and she eventually had to give up work in 1998. In about 1996 the claimant had an anaphylactic reaction and was rushed to hospital, where she was treated with steroids. However, she was not given adrenalin and has not suffered any further anaphylactic reactions since that date.

3. The claimant was in receipt of incapacity benefit from 1999. Following her conversion to the ESA regime on 30 November 2012, she completed a Form ESA 50 in which she not only described her physical condition and its effects, but also asserted problems with initiating actions, coping with change, going out and coping with social situations. In response to the question on the form about care, support and treatment, the claimant stated that she was waiting for a referral to a community psychiatric nurse.

4. The claimant was found to have limited capability for work without a medical examination, but on 25 February 2013 she appealed against that decision on the ground that she should have been placed in the support group. At the hearing of the appeal, the claimant's experienced representative accepted that the only issue for the tribunal to decide was whether the claimant fell within regulation 35 of the ESA Regulations. In a written submission to the tribunal, the representative asserted that the environment in which work-related activity might take place and the work-related activities which the claimant might be asked to carry out could place her at risk.

5. The tribunal found (paragraph 15) that the claimant was an "honest, credible and reliable witness", but nevertheless held that regulation 35 of the ESA regulations did not apply to her for the following reasons:

> "19. The Medical Member of the Tribunal, using his expertise as a Consultant Anaesthetist, was extremely surprised that [the claimant] had not been treated with adrenalin 17 years ago when she suffered her one serious reaction which resulted in the attendance at Accident and Emergency.
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> 20. It was noted from the appellant's evidence that she was still driving, and it was within the combined knowledge of the Tribunal that motor vehicles were made up internally of a great deal of latex and of course had latex in their tyres.
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> 21. It was noted that the appellant shopped in the supermarket late at night, and whilst acknowledging that this would reduce the risk of contact with people, the possibility of coming in contact with substances to which the appellant was allergic was very high.
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> 22. The tribunal noted the final paragraph of [the representative's] submission where she described the expectations of some welfare to work providers, but the Tribunal considered that any reasonable welfare to work providers would make special allowances and arrangements if they were made aware of the appellant's allergies and potentially serious consequences if the appellant was forced into situations where it was known that her health would be put at risk.
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> 23. The Tribunal had the greatest of sympathy with [the claimant] and appreciated that her allergies must make her daily life very difficult and was also mindful of the very considerable steps which she took to safeguard her own health.
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> 24. The deciding factors in refusing regulation 35 were the fact that the appellant had only had one anaphylactic reaction in the last 17 years, and that whilst she had been issued with an Eipen she had never had cause to use it.
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> 25. In reaching its decision, the Tribunal was fortified by the evidence of the HCP [ ], who also opined that the evidence did not suggest that there would be a substantial mental or physical risk if the appellant were found capable of work-related activity."

6. The claimant applied through her representative for permission to appeal, on the grounds that the tribunal's rejection of her evidence with regard to the risks to her of work-related activity were inconsistent with their finding that she was an honest, credible and reliable witness, and that the tribunal had failed to take proper account of the very serious consequences to the claimant of even a remote possibility of an anaphylactic reaction. The grounds of appeal also asserted that the tribunal's finding that a welfare to work provider would make special arrangements for the claimant was without foundation, and that the tribunal erred in not taking into account the claimant's mental health problems in assessing the risks to her of being found capable of work-related activity. Permission to appeal was given by a regional tribunal judge on 4 October 2013, but in a submission dated 20 November 2013 the Secretary of State has supported the appeal only on the ground that in applying regulation 35 the tribunal failed to take into account the claimant's mental health problems.

7. Although I agree that the appeal must be allowed on that ground, I have also come to the conclusion that the tribunal erred in their approach to deciding whether "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." (Regulation 35(2)(b) of the Employment and Support Allowance Regulations 2008). The tribunal stated that they accepted the claimant's evidence, that she "greatly modified her lifestyle to avoid a serious reaction" (paragraph 18), and that they were "mindful of the very considerable steps which she took to safeguard her own health" (paragraph 23). However, it seems to me to be unclear whether the tribunal accepted that the risks to the claimant were as great as she claimed. The references in paragraph 20 to the claimant's exposure to latex substances without ill-effects when driving suggest that they thought that the claimant might be exaggerating the risks. In paragraph 19 the tribunal refer to the medical member's surprise that the claimant was not treated with adrenalin when she was admitted to hospital 17 years earlier, but the significance of the medical member's view is to my mind unclear. The medical member may have thought that the claimant had not been competently treated, which was irrelevant. On the other hand, the medical member may have been sceptical as to whether the claimant's admission to hospital resulted from an allergic reaction, in which case the tribunal should have made that clear. Despite the tribunal's stated acceptance of the claimant's evidence, I agree with the claimant's representative that their decision leaves in doubt whether they accepted the claimant as a reliable witness of the degree of risk to which she is exposed as a result of her allergic condition.

8. The claimant appealed (page 10) specifically on the basis that there was a risk to her of anaphylaxis and death if she came into contact with the type of latex substances frequently found in workplaces. The evidence before the tribunal with regard to latex in the home environment (pages 20 and 21) refers to articles frequently also found in offices, such as rubber carpet backing, erasers and rubber bands. Latex allergy is apparently also associated with allergy to foods with high salicylate levels, in particular banana and avocado, and the warning card which the claimant is required to carry at all times specifically refers to those foods. I agree with the claimant's representative that the tribunal's finding (paragraph 22) that "any reasonable welfare to work provider would make special allowances and arrangements if they were made aware of the appellant's allergies..." fails to take proper account of the risks specific to the claimant. The claimant was unable to tolerate even the highly controlled environment of a hospital pharmacy. Even if the welfare to work provider could be made fully aware of the claimant's allergies prior to a meeting between her and an employment adviser, the tribunal's decision fails to explain what could be done about items in the provider's premises such as rubber backed carpets or furniture containing latex products, or even to prevent the claimant from coming into contact with food allergens brought in to the premises by the provider's employees for their own consumption.

9. I accept the claimant's representative's submission that the seriousness of possible harm to a claimant is relevant in deciding whether the risk of such harm is substantial. In *R(A) 2/89* the Commissioner had to decide for the purposes of entitlement to attendance allowance whether a claimant with tetraplegia reasonably required continual supervision to avoid substantial danger to himself or others. The Commissioner considered that the serious consequences of the claimant being unable to fend for himself if a fire occurred at night would place him in substantial danger, even though the risk of such an event occurring was low. I see no reason to take a different approach under regulation 35 of the ESA regulations, and in my judgment both the probability of a harmful event occurring and the seriousness of the possible harm resulting from such an event need to be taken into account when deciding whether any risk to the physical or mental health of any person from a finding that the claimant does not have limited capability for work-related activity is 'substantial'.

10. For those reasons, I consider that the decision of the tribunal involved the making of an error on a point of law. I therefore set aside the tribunal's decision and refer the case to the First-tier Tribunal for complete rehearing before a fresh tribunal. In deciding whether regulation 35 of the ESA regulations applies to the claimant, the new tribunal should take into account both the claimant's physical and mental health conditions. The tribunal should take into account all the possible consequences if the claimant were found not to have limited capability for work related activity in terms of what the claimant would then be required to do. The tribunal should make explicit findings on the nature and degree of risk to which the claimant would be exposed as a result of those requirements and on the probability and seriousness of a harmful event occurring. On the basis of those findings, the tribunal should then decide whether any risk of harm to the claimant was 'substantial' in the sense of "considerable, solid or big" - see *R(A) 1/73*.

(Signed)
E A L BANO
Judge of the Upper Tribunal
Date: 9 January 2014