

**THE UPPER TRIBUNAL**

**ADMINISTRATIVE APPEALS CHAMBER**

**DECISION OF THE UPPER TRIBUNAL JUDGE**

**The claimant's appeal is allowed.**

**The decision of the Greenock First-tier Tribunal of 4 November 2013 is set aside.**

**The case is remitted to the First-tier Tribunal (Social Entitlement Chamber) for redetermination by a freshly constituted tribunal in accordance with the directions in paragraph 6 below.**

**REASONS FOR DECISION**

1. This is an appeal by the claimant against the decision of the Greenock First-tier Tribunal of 4 November 2013. It is brought with the permission of Upper Tribunal Judge May QC.
2. By that decision the tribunal confirmed a decision maker's decision of 2 May 2013 that the claimant's former entitlement to incapacity benefit fell to be converted into one to employment and support allowance from 14 June 2013 but that she should be placed in the work-related group, not the support group.
3. I sisted these proceedings on 18 November 2014. However, I lifted that sist on 10 December 2014.
4. The Secretary of State supports the appeal in his latest submissions to this tribunal, documents 190 – 191.
5. I entirely agree with those submissions. The tribunal erred in law in the manner described in paragraph 8 of document 191. I set their decision aside on that basis. Contrary to a submission made by the claimant's representative on document 150, I do not consider it appropriate for me to remake it. Rather, as submitted by the Secretary of State in paragraph 9 of document 191, I consider it appropriate to remit the case for redetermination in accordance with the directions in paragraph 6 below.
6. My directions for the rehearing are as follows:
  - (a) The task of the new tribunal will be to determine whether the claimant should be placed in the support group of employment and support allowance.
  - (b) They should determine that question on the basis of the circumstances which pertained on 2 May 2013, the date of the decision maker's decision, ignoring any subsequent improvement or deterioration in the claimant's condition. Evidence postdating that date should be considered if its content relates to those circumstances.

- (c) The new tribunal should first of all determine which, if any, of the descriptors in schedule 3 to the Employment and Support Allowance Regulations 2008 were applicable to the claimant.
- (d) In the event that they hold that none of those descriptors are applicable to her they should then determine whether, in the alternative, she should be held to have satisfied regulation 35(2) of the above regulations.
- (e) To assist the new tribunal in deciding the question described in sub-paragraph (d) above, I direct that the Secretary of State should lodge with the First-tier Tribunal within one month of the date of this decision a submission setting out all the various types of work-related activity that a claimant living in Greenock in May 2013 might have been required to do, identifying with reasons any that it is submitted this claimant would not realistically have been expected to do. This case should not be relisted for rehearing until such time as that submission has been lodged unless by specific contrary judicial direction.
- (f) The new tribunal should decide the question identified in sub-paragraph (d) above on the basis of the information contained in any submission lodged in accordance with the above direction by the Secretary of State and all other relevant information. In doing so they should follow and apply the decision of the 3 Judge Panel in *IM v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 412 (AAC), documents 153 – 189.

7. The claimant's appeal succeeds. She should draw no inference from that success as to her eventual success on the merits of her claim that she should be placed in the support group. That question will be determined by the new tribunal rehearing her case and applying the directions in paragraph 6 above.

(Signed)  
A J GAMBLE  
Judge of the Upper Tribunal  
Date: 12 January 2015