



IN THE UPPER TRIBUNAL

Application No: CE/5555/2014

ADMINISTRATIVE APPEALS CHAMBER

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

Appellant: [REDACTED]
Respondent: Secretary of State for Work and Pensions
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal venue: [REDACTED]
Tribunal Case No: [REDACTED]
Tribunal hearing date: [REDACTED]

DETERMINATION

I give permission to appeal.

REASONS

1. I give permission to appeal as it is strongly arguable that the First-tier Tribunal erred in law in not having evidence of the work-related activity which was available in Mr [REDACTED] local area in April 2014 before it when it came to its decision on regulation 35(2) (per *IM-v-SSWP (ESA)* [2014] UKUT 412 (AAC)). The need for this information was arguably especially relevant in this case given the tribunal's view about the content of work-related activity and its observations about Mr [REDACTED] being unable to withstand the daily rigours of work (see paragraph 32 of statement of reasons on page 89).

2. A further difficulty is how the First-tier Tribunal could properly and adequately address regulation 35(2) absent a proper articulation from the Secretary of State as to the actual basis on which Mr [REDACTED] was found to have limited capability for work on 14 April 2014. What does “client is likely to meet the threshold under ESA Regs due to fatigue” on page 44 actually mean in terms of a “score” under Schedule 2 or satisfying regulation 29(2)(b)? The Secretary of State’s decision on page 50 helps only to the extent of seemingly deciding that regulation 29(2)(b) was not in play and that Mr [REDACTED] had scored (exactly) 15 points under Schedule 2, but the basis on which he had met the 15 points under Schedule 2 is not set out.
3. Although *AC-v- SSWP (ESA) [2013] UKUT 0229 (AAC)* may be correct in terms of saying that generally a First-tier Tribunal faced with a Schedule 3 appeal need not enquire into how the claimant met Schedule 2, different considerations may arguably be in play where, as here, a tribunal is seeking to assess the risk arising from engaging in work-related activity in a context where the person has been found to have limitations in his ability to work arising from his health problems.
4. If the tribunal erred in law in its approach to regulation 35(2) then either I or a new First-tier Tribunal will need to address the basis on which Mr [REDACTED] satisfied Schedule 2 as at 14 April 2014 in order to determine the types of work-related activity that Mr [REDACTED] could have safely engaged in at that time (i.e. without substantial risk to his or another’s health).
5. I am well aware from the *Dukes and Wheatland* appeals what the Secretary of State’s position is on “scrutiny” cases (that is cases, like this one, which involve an ESA85A). His position is that although he does not need to record the scores under Schedule 2, either the HCP or the decision-maker will in fact have conducted such a scoring exercise and on direction can produce that score.
6. In these circumstances I make the additional directions directed to the Secretary of State below.

CASE MANAGEMENT DIRECTIONS

1. The parties to the appeal are: (a) Mr [REDACTED] who is the **appellant**; and (b) the Secretary of State for Work and Pensions, who is the **respondent**.
2. The appellant and the respondent are both directed to inform the Upper Tribunal within one month of the date on which this notice is sent to them whether they have any objection to the decision of the First-tier Tribunal being set aside solely on the above ground(s), and to

the Upper Tribunal referring the case for re-determination by a differently constituted First-tier tribunal.

3. If the parties agree to this proposal, no further response to the appeal by either party will be required.
4. If there is any objection to the proposed decision of the Upper Tribunal, an explanation should be given. The other party may then be given an opportunity of making further submissions.
5. In his reply under paragraph 2 above the Secretary of State must additionally set out:
 - (i) the evidence of the work-related activity in the Liverpool area that Mr [REDACTED] may have been expected to undertake on the date or dates relevant to the date of the decision under appeal (paragraphs 100-109 and paragraph 110 of *IM*); and
 - (ii) the points that Mr [REDACTED] in fact scored under Schedule 2 to the ESA Regs as at 14 April 2014.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

11th March 2015