

**In the Upper Tribunal (Administrative Appeals Chamber)**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Applicant: A

Respondent: Secretary of State for Work and Pensions

FtT reference:

National Insurance Number:

Regarding: Employment and Support Allowance (ESA)

**Application for permission to appeal**

1. [A] was refused ESA by the Respondent on 24/11/16 on the basis that she was assessed as capable of work. She scored 6 points. She appealed. At a hearing in Newcastle on 09/05/17, the First-tier Tribunal (FtT) refused her appeal - also scoring her at 6 points. A written statement of reasons (SOR) was issued on 09/06/17. A decision refusing permission to appeal was then issued on 07/07/17. [A] now applies to the Upper Tribunal directly for permission to appeal on two grounds, set out here.

**Ground 1: Activity 10**

2. The Applicant was found to have a condition which causes 'dizzy spells' which sometimes led to blackouts (SOR p.6). It had been accepted by the Respondent that she satisfied descriptor 10(b) for 6 points in that:

"At least once a month, has an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration."

3. If the Applicant had these episodes on a weekly, rather than just monthly, basis, she would have scored 15 points under descriptor 10(a).
4. The FtT described the Applicant's dizzy spells (paragraph 6):

"When the appellant suffers a dizzy spell, she feels her vision altering. She is able to sit down or hold onto something while this subsides. The spells last anything from a few seconds to a minute. She does not lose consciousness during the dizzy spells. She recovers immediately after it has passed and is able to carry on. Approximately once a month, around November 2016, the dizzy spell resulted in a loss of consciousness which caused the appellant to fall to the floor. This would last up to two minutes. After the episode, the Appellant is disoriented briefly but is able to carry on thereafter. The dizzy spell prior to the blackout acts as a warning to the Appellant to remove herself from any danger."

5. In dealing with activity 10, the FtT states:

"At the time of the decision, the Appellant was suffering from one blackout per month on average. She stated this on her ESA50 claim form, confirmed in at the medical and stated it once again in oral evidence. Given the consistency in this evidence, the Tribunal took this to be accurate and the Appellant scored 6 points from descriptor 10b."

6. In submission, the FtT has erred in limiting its consideration only to the blackouts suffered by the Applicant and not also considering whether some or all of the 'dizzy spells' she experienced were capable of falling within the definition of 'altered' consciousness set out in the descriptor.
7. The Applicant was found to suffer from dizzy spells which were sufficiently severe as to sometimes cause her to entirely lose consciousness. It is not implausible that the FtT, properly directed, might have considered that some of these episodes which did not develop to the point of a loss of consciousness were still severe enough to amount to "altered consciousness" within the meaning of the activity. The SOR does not provide adequate reasons as to why the FtT did not include these episodes in determining the frequency of episodes of 'lost or altered consciousness'.

**Ground 2: Regulation 29**

8. The FtT at paragraph 14 recites the test applied in respect of Regulation 29(2)(b):

"The Tribunal considered Regulation 29 and whether, in the circumstances of this case, there was a substantial risk to the mental or physical health of any person if the Appellant was found to be capable for work."

9. The FtT goes on to state:

"Given the findings that the Appellant was not suffering from a significant mental health condition at the time of the hearing and that her physical conditions were not such that could be worsened by virtue of attending work, the Tribunal found that there was no risk to the Appellant's health if she were to be found capable for work."

10. In submission, the FtT has erred by considering only whether an existing condition might be worsened by work. Regulation 29 considers risks to health generally and is not confined purely to looking at whether an existing condition might be worsened.

11. The Applicant was suffering from dizziness and blackouts on a regular basis. This created a risk – perhaps a substantial risk – that she may have fallen or otherwise injured herself as a result of blacking out at work. This would still amount to a risk to health, even if it were not a worsening of an existing condition as envisaged by the FtT.
12. The FtT was required to consider these risks in line with the Court of Appeal's decision in *Charlton* having regard to the 'nature of the work a claimant might undertake'. The risk may have been greater in a factory or fast food restaurant and lesser in an office or call centre. There is little indication that an analysis of this sort was conducted.

### **Conclusion**

13. For these reasons, it is submitted that the FtT erred in law. The Tribunal is invited to grant permission to appeal to consider these grounds. Should permission be granted and the appeal succeed, the Tribunal is invited to set the FtT's decision aside and remit the appeal for re-hearing.

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