



DECISION

of Lady Poole

in the

APPEAL

by

Social Security Scotland

Appellant

- and -

GK

Respondent

FTS Case Reference: FTS/SSC/AE/24/00285

Representation

Appellant: Scottish Government Legal Directorate

Respondent: No appearance

10 December 2024

DECISION

The appeal is allowed in part. The decision of the First-tier Tribunal for Scotland (“FTS”) dated 13 August 2024 is quashed and remade as follows:

“The appellant is entitled to standard rate disability and mobility components of Adult Disability Payment. He scored points for descriptors 1b (needs an aid to prepare food), 4c (needs prompting to wash or bathe), 5b (needs to use an aid to manage toilet needs), 9b (needs prompting to engage socially), which amounted to 8 daily living points in total.



He also scored 10 mobility points for mobility descriptor 1d (cannot follow the route of an unfamiliar journey without another person). The award is for a period of two years, commencing on 13 January 2023 and ending on 12 January 2025.”

REASONS FOR DECISION

Introduction

1. This is an appeal about Adult Disability Payment (“ADP”), brought by Social Security Scotland (“SSS”). It is primarily about the date on which an award of ADP begins. The case decides that regulation 35 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 (the “ADP Regulations”) governs the beginning of entitlement to assistance. In this case, entitlement commenced on the date the claimant (“GK”) telephoned SSS to make a claim for ADP, and provided his name and date of birth, even though the full application was not completed at that time. The case also rejects a further ground of appeal without consideration of its merits, on the basis it is not material to the outcome.

Procedure

2. The appeal is brought by SSS on two grounds. The first ground is about the correct start date of the award, and the second ground about daily living activity 6 in paragraph 2 of Schedule 1 to the ADP Regulations (dressing and undressing). There has been no response to the appeal by GK, and no hearing requested by him. SSS requested a hearing if the Upper Tribunal for Scotland (“UTS”) was not minded to allow the appeal in respect of both matters it raised.
3. The UTS has decided to make its decision without a hearing under rule 22 of the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 (the “Rules”), even though it allows the appeal on the basis of only one of the two grounds raised. The UTS had regard to SSS’s request for a hearing, but has before it full written submissions and short supplementary submissions from SSS, as well as the FTS casefile, which are sufficient for determination of the appeal. On the facts of this case, the ground of appeal in relation to daily living descriptor 6 even if successful would make no difference to the level of the award, and so is not material for reasons explained below. The case concerns a two year award of ADP which terminates in a matter of weeks, so entitlement (including the application of daily living descriptor 6) falls to be reconsidered shortly by SSS in any event. The appeal in respect of the start date of the award is unopposed. In those circumstances, having regard to the overriding objective in rule 2 of the Rules, in particular proportionality (given the amounts at stake and expense to the public purse of having a hearing) and avoiding delay, it is fair and just to determine this appeal without an oral hearing.



The commencement date for an award of ADP

4. The first ground of appeal is about the start date for the award of ADP made in this case. The date of commencement of an award of ADP is worthy of clear statutory provision. It has implications not only for claimants but also for public funds. It is unfortunate that regulation 35 of the ADP Regulations, which governs the start of entitlement, is so difficult to understand and apply. Nevertheless, when regulation 35 is properly applied, an error of law is apparent in the decision of the FTS as to the date on which entitlement to ADP began. The FTS should have taken the starting date as 13 January 2023, the date when the claimant telephoned to make a claim for ADP and provided his full name and date of birth, even though his full application was not received by SSS until 22 February 2023. The appeal must be allowed on this ground.
5. To understand the correct application of regulation 35 to the facts of this case, it is necessary to start with the findings of the FTS. The FTS found that GK was entitled to ADP, and made an award from 29th March 2023 to 28th March 2025. It took the view that given GK's medical conditions, if he took reasonable steps towards getting better, he could be expected to have recovered to an extent that would justify reconsidering the award in two years. It selected the 19 March 2023 date as the beginning of this two year period in the following way:

“The tribunal chose the date 28th December 2022 being a date approximately halfway between Christmas and New Year 2022 when, it was understood, the appellant's relevant problems started following an assault. To this was added the qualifying 13 weeks – 29th March 2023”.
6. However, the FTS should have applied regulation 35 to identify the start date for the award. Regulation 35 is entitled “When an application is to be treated as made and beginning of entitlement to assistance” and provides (bold added):

“(1) An application for Adult Disability Payment is to be treated as made—
(a) on the day it is received by the Scottish Ministers, or
(b) if applicable, on the day identified by the Scottish Ministers in accordance with paragraph (2).
(2) If, before making a determination on the basis of an application, the Scottish Ministers consider that the individual in respect of whom the application is made—
(a) would not satisfy a requirement in—
(i) regulation 5 (daily living component),
(ii) regulation 6 (mobility component),
(iii) regulation 11 (required period condition: daily living component),



- (iv) regulation 12 (required period condition: mobility component),
- (v) Part 5 (residence and presence conditions), or
- (vi) regulation 22 (age criteria), if the application were treated as made on the day it was received, and

(b) would likely be entitled to receive Adult Disability Payment if those requirements were satisfied within a 13-week period beginning on the day it was received, the Scottish Ministers may choose the date within that 13 week period on which the application is to be treated as made.

(3) Where, on the basis of an application (other than where regulation 58(1) applies), a determination is made that an individual is entitled to Adult Disability Payment, the date on which entitlement begins is to be identified in accordance with paragraphs (4) to (6).

(4) Where an application is made within 8 weeks of the day on which the full name and date of birth of an individual ("the required data") is submitted by, or on behalf of, the individual to the Scottish Ministers for the purpose of an application for Adult Disability Payment, entitlement begins on whichever is the later of the day—

(a) on which the required data was submitted, or

(b) identified in accordance with paragraph (2).

(5) Subject to paragraph (6), where an application is made after the 8 week period described in paragraph (4), entitlement begins on the day on which the application is treated as made in accordance with paragraph (1).

(6) Where the Scottish Ministers are satisfied that there is a good reason why an application was made after the 8 week period described in paragraph (4), they may treat the application as having been made within that period.

(7) For the purposes of section 38(3) of the 2018 Act, the period covered by an application for Adult Disability Payment—

(a) under paragraph (1)(a)—

(i) begins on the day on which the application is treated as having been made, and

(ii) ends on the day on which the determination of entitlement is made, and

(b) under paragraph (1)(b)—

(i) is deemed to begin on the day before the determination of entitlement is made provided that the requirements are satisfied, and

(ii) ends on the day on which the determination of entitlement is made".

7. Because the award of ADP in this particular case was made following an application, the starting point is regulation 35(3). This says the date on which entitlement begins should be calculated in accordance with regulations 35(4)-(6). Those provisions should be applied



against the following factual background. A phone application was made on 13 January 2023, in which the full name and date of birth of GK was given. That was followed by submission of a lengthy form and some supporting medical information, date stamped as being received on 22 February 2023. The form and supporting information were submitted within an 8 week period of the initial telephone contact. As a result, regulations 35(5) and (6) have no application in this particular case, because they govern applications after the 8 week period. So the relevant sub paragraph for the commencement of the award in this case is regulation 35(4).

8. Regulation 35(4) gives a choice of two dates for the award of ADP to start, whichever is the later. Most commonly, it will be the day that the name and date of birth of the claimant was given (in this case 13 January 2023). However, it might be a later day if the Scottish Ministers had selected a different day for the application to be treated as having been made under regulation 35(2). It would be possible for the FTS to “stand in the shoes” of the Scottish Ministers on an appeal and choose such a date applying the conditions in regulation 35(2). But it would only need to do so if the case gave rise to a type of situation envisaged by regulation 35(2), for example, if an application was made but the conditions were only satisfied at some point later in a 13 week period after that. In this case, points appear to be awarded on the basis of conditions GK had suffered for some time, such as white finger and mental health conditions, so there is no need to enter regulation 35(2) territory.
9. It follows that the date the FTS should have selected for the award to start was 13 January 2023, not 29 March 2023. The FTS erred in law by failing to apply regulation 35 of the ADP regulations, and the appeal on this ground is allowed.

Daily living activity 6c

10. The second ground of appeal concerns daily living activity 6, dressing and undressing. SSS argues that the FTS erred in law in two different ways: it made insufficient findings in fact in relation to daily living activity 6; and failed to apply the ratio of *PE v SSWP* (PIP) [2015] UKUT 309, [2016] AACR 10. As a result, SSS submits the case should be remitted to the FTS for a re-hearing.
11. Even if the FTS had erred in relation to daily living activity 6, the decision would ordinarily only fall to be quashed and returned for redetermination if the alleged errors were material to the outcome. In this case, the alleged errors were not material. To explain that finding, the starting point is to note that there are two components of ADP, daily living and mobility. Daily living activity 6 is part of the daily living component. The amount of money a successful claimant will receive depends on whether they are entitled to one or both components, and whether the award is at the standard or the enhanced rate. If 12 points or more are scored for a component, then entitlement is at the enhanced rate. If 8 to



11 points are scored, entitlement is at the standard rate. Anything less than 8 points results in no award.

12. In this particular case, GK was found by the FTS to be entitled to both components at the standard rate. He scored 8 points for the daily living component. The only challenge by SSS to the decision of the FTS about points scored is under daily living activity 6. It is relevant to notice that SSS on initial determination decided on all of the evidence that GK needed prompting or assistance to select appropriate clothing, putting him within descriptor 6c, a score of 2 points. On redetermination, SSS decided that an aid would mitigate the problems putting on clothes (regulation 7(1)(b) of the ADP Regulations/descriptor 6b), and that GK needed prompting or assistance to select appropriate clothing (descriptor 6c). Applying regulation 10(1) of the ADP Regulations, GK's score for daily living activity 6 remained 2 points. The appeal by GK to the FTS was on the basis that SSS had erred in its decision about taking nutrition, and SSS's assessment of dressing and undressing was not directly challenged. The papers before the FTS give no adequate basis to suggest an award of 6e or 6f is warranted, which would be necessary to lift the award of the daily living component from the standard rate to the enhanced rate. The 2 points suggested by SSS to be appropriate for daily living activity 6, even if awarded, would take the daily living component points to a total of 10. The level of the award (for both components) would still be standard rate, which is what GK already receives. In those circumstances, there is no practical difference to the outcome. The second ground of appeal falls to be refused without consideration of its merits.

Conclusion

13. Given the rejection of the ground of appeal in relation to daily living activity 6 on the basis it is not material to the outcome, no further findings in fact are required. The only matter that needs to be corrected is the date of commencement of entitlement, and that requires no further evidence. It is therefore appropriate to quash the decision of the FTS and remake it in the terms set out at the beginning of this decision.

Lady Poole

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*