DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

CPIP/958/2017

Before: Upper Tribunal Judge Paula Gray

DECISION

This appeal by the claimant succeeds.

Having granted permission to appeal on 4 April 2017, in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Cardiff and made on 4 April 2017 under reference SC 188/16/03254. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

DIRECTIONS

1. These directions may be amended or supplemented by those of a District Tribunal Judge at the listing stage.
2. The Secretary of State will, within 28 days of the date of issue of this decision file with HMCTS at Cardiff any medical evidence, including evidence from a healthcare professional, which is available from the appellant's ESA claim in respect of either the most recent decision, or if that post-dated the decision under appeal in this case, that decision and the one preceding it.
3. Subject to the appellant's consenting the appellant's representative will during the same time period file copies of the GP computer records from 1/5/2015 (which is approximately one year prior to the decision under appeal) to date, and any medical letters which form part of the GP notes from the same period to date. I deal at paragraphs 20 and 21 with the position if consent is withheld or only partially given. The representative may, in addition, file any medical evidence from the appellant's treating clinicians from prior to that period which she deems useful,
4. The case will be listed before a differently constituted panel as an oral hearing.
5. The panel will take into account my observations in remitting the case set out below; it will, however, take a fresh view of the evidence and come to its own conclusions on the issue of eligibility for a Personal Independence Payment.
6. An interpreter will be required for the appellant's wife. The appellants' representative will notify HMCTS at Cardiff of the language within 14 days of the issue of this decision.

REASONS

Background

1. This matter concerns the question of the appellant's eligibility for a Personal Independence Payment. He had made a claim on 4 March 2016, and, following a face-to-face consultation a decision was made refusing the claim on the basis that no points were merited under the descriptors for either component.
2. The appellant he appealed to the FTT which confirmed the decision under appeal.

Proceedings before the First-Tier Tribunal

3. The appellant had sought advice about his appeal from Riverside Advice, and Ms Meyrick, a Welfare Benefits Supervisor there made a written submission on his behalf, but did not attend the hearing.
4. The key point in that the submission was that the appellant had, due to significant mental health problems including psychosis, difficulties in relation to a number of PIP activities. Those difficulties were said to be mainly from a combination of memory problems, tiredness and motivational issues. He was also said to have difficulties moving around due to physical problems.
5. Clear issues arose as to the quality of the assessment by the healthcare professional (described in that report as a Disability Assessor Nurse) and the conclusions drawn from the observations and examination. Certain points made repeatedly in the report, for example that the claimant had good short and long-term memory and that he communicated well with the healthcare professional were said to be erroneous, at least in part because it was acknowledged in the report that he spoke to his wife (in their own language) on a number of occasions, and it was submitted that his wife was assisting him in answering questions about his conditions and symptoms, and in relation to the communication itself.
6. The appellant attended the hearing together with his wife. There were, according to the statement of reasons issued subsequently, significant problems at the hearing, which was described in that document as "unsatisfactory". (At [9]. Further numbers in square brackets refer to paragraphs of the statement of reasons.) The appellant was thought to be unco-operative. He did not answer the questions put, preferring, perhaps insisting, on reading from notes that he had made previously, or perhaps his representative's submission [9]. I am not quite clear on that, but the precise details are not material. In any event the hearing was, in the words of the judge curtailed. [9].
7. The appellant's wife did not give evidence. She did not have the benefit of an interpreter, and, unlike the appellant did not speak English. I deal further with that matter below.
8. An application for permission to appeal was made, but refused by the District Tribunal Judge.

Proceedings before the Upper Tribunal

9. Ms Meyrick lodged grounds of appeal which put forward as errors of law the failure of the FTT to adjourn to seek evidence of either the previous DLA award or from his ESA claim, in particular given what happened during the hearing in connection with the appellant's presentation. This, it is said, was important because the tribunal did not make a finding as to whether the

appellant's behaviour was (as it was put in the statement of reasons) "a result of debilitating mental ill health problems or was simply histrionics"[10] . Given the failure to make that distinction further medical evidence should have been sought. In a similar context, it is said that the tribunal was wrong to disregard the potential and usefulness of oral evidence by the appellant's wife. In addition a number of points were made as to the applicability of the various descriptors, but they are evidential matters for the next tribunal.

10. I granted permission to appeal saying:

    The grounds of appeal are arguable. I would add only that, in the context of an inquisitorial tribunal, the sheer number of references in the statement of reasons to potential evidence which was not there, but which, if it had a bearing upon the case, would no doubt have been obtained by the representatives, is arguably indicative of a problem that such a tribunal should have attempted to address.

11. I directed submissions which are now to hand. Neither party has requested an oral hearing, and I am content that in this case I am able to do justice upon the basis of the written material.

The position of the Secretary of State

12. The Secretary of State supports the appeal on a limited basis. His representative Ms. Franckevic agrees that the tribunal failed adequately to consider obtaining medical evidence relating to the appellant's mental health. She disagrees, however, that the DLA/ESA evidence was the way forward. She points out that the most recent DLA award began in 2011. She says nothing about the ESA position. She cites a decision of the Upper Tribunal, CPIP/225/2016, to the effect that a failure to obtain previous evidence does not always result in an error of law.
13. She disagrees that the failure to adjourn to enable the appellant's wife to give evidence was in error. She makes the point that the claimant was able to give evidence to two different healthcare professionals on two separate occasions. She says that there was no evidence of significant deterioration in the appellant's mental health between the last of those assessments and the hearing, and it was therefore not clear why he could not give evidence on his own behalf.
14. She disagrees with the evidential points on the relevant descriptors, and I have already said that I do not need to deal with those.

The position of the appellant

15. Ms Meyrick accepts that the question of obtaining evidence from other claims depends upon its potential relevance, but argues that it was here of importance in view of the tribunal that the appellant was "not able or willing to give evidence about the issues the tribunal thought should be addressed" [9].

16. Her arguments as to the wife's evidence rest upon the disputed aspects of the report, as to the level of the appellant's mental issues, and his need for communication support.

17. The other matters which she deals with in her response to the Secretary of State's submission are the evidential ones.

My analysis

18. In view of the support for remission I can be brief, but there are a few matters with which I wish to deal.
19. As to the failure to obtain evidence from the Secretary of State regarding other medically based claims I accept Ms. Franckevic's submission that it is not always an error of law to fail to do so. There can be no general rule because the circumstances will differ from case to case and even during the currency of the case, as, it appears, occurred here. A tribunal might discuss the possibility of obtaining such evidence, or any further evidence, prior to the commencement of a case and feel it is unnecessary, but during the hearing matters may change. Here the unusual presentation of the appellant (described at some length in the statement of reasons) made it necessary for consideration to be given as to whether to adjourn for further evidence even if the tribunal had earlier decided not to do so
20. Such a decision is an exercise of discretion and as such will only be an error of law if it is legally irrational or insufficiently explained. I do not need to decide that here in view of the matter being remitted on other grounds: since there was an error of law in the general failure of the tribunal to seek further medical evidence it is immaterial. I would observe though, that given the failure of the appellant's representative to put forward sufficient relevant medical evidence and the view of the tribunal that this may have indicated there wasn't any [18], to use the Secretary of State as a source of further information may have been prudent if the matter was being adjourned, if only to avoid the next tribunal being no further forward at all. I direct the production of such evidence so on that basis. In light of what Ms. Franckevic says as to the age of the DLA material I am directing information from the most recent decision in his ESA claim, or if that post-dates the decision under appeal in this case, both that decision and the one preceding it. I would also draw attention to the views of Upper Tribunal Judge Hemingway, expressed in *AP-v-Secretary Of State for Work and Pensions [2016] UKUT 416 (AAC).* In *obiter* discussion about potential evidence from a DLA claim (and his remarks in my view apply also to an ESA claim) he says "*it would be good practice for his* [the Secretary of State's] *Officers, when preparing a submission to the First-tier Tribunal, or to give it its more correct title the appeal response (see rule 24(1)), to provide details of the more recent adjudication history concerning disability living allowance, confirmation of the terms of the most recent award and an indication as to whether there is any relatively recent medical evidence available to it which it has not disclosed. That is because that sort of information will assist a tribunal in considering whether there might be a need to adjourn (though again I think such would be rare) in order to obtain such evidence.*

21. I also make provision in my directions for the appellant, through his representative, to provide further medical evidence. Of course he has the right to refuse his consent to that course, and if he does so the tribunal will be assisted by the decision of Upper Tribunal Judge Wikeley, *AP-v-Secretary Of State for Work and Pensions [2017] UKUT 304 (AAC).* He says at paragraph 21:

21. The Appellant may well consider that the letters he has produced from his GP 'prove his case'. Plainly the previous FTT did not consider that to be so. While he has every right to decline to consent to the production of his medical records, or rather

the limited extracts directed by the FTT, he may be making it more difficult for himself evidentially to make out his case.

22. That observation would, in my judgment, also apply to consent limited to only particular, or redacted documents.
23. As to the issue of the appellant's wife's evidence, it seems to me that it was the lack of clarity as to why the appellant, in the view of the tribunal, was simply not giving the evidence to them that they required, and to which its questions were directed, which made it necessary to find some way of gleaning that information. The obtaining of medical evidence as discussed above was one solution; hearing from the appellant's wife would be another, and they are not mutually exclusive. At the fresh hearing both will be possible, and in my view it will assist the tribunal to hear from the appellant's wife. It will, of course, be entirely a matter for the tribunal what it makes of her evidence.
24. The point is made in the statement of reasons that it is for the tribunal to control its own procedure, and this is of course so, but that does not rule out procedural decisions taken being an error of law, and there is a difference between a tribunal limiting the number of witnesses that are to be called to limit the issues or the basis that further evidence would only be going over ground that had already been covered, and it refusing to hear the only evidence apparently available on the issues it needed to decide.

In conclusion

25. I set aside the decision on the ground supported by the Secretary of State, the failure of the tribunal in its inquisitorial role to seek further medical evidence. Above I have made directions as to the provision of further evidence from the appellant's treating clinicians, as well as from his ESA claim. I also provide for his wife to be able to give evidence through an interpreter. The other matters will be subsumed in the new appeal, which will consider the entitlement issues afresh. I am told that there has been no further claim; therefore the FTT is not considering a closed period in relation to any award it may deem legally appropriate.
26. Finally I must caution the appellant that his success here on issues of law is not a guarantee of success at the re-hearing, at which the fresh tribunal will make its decision based upon the facts as it determines them to be.

Upper Tribunal Judge Gray (Signed on the original on 25 August 2017)