GZ v SSWP (ESA) [2017] UKUT 447 (AAC)

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Fox Court First-tier Tribunal dated 9 December 2016 involved an error on a point of law and is set aside. The case is remitted to a differently constituted tribunal within the Social Entitlement Chamber of the First-tier Tribunal for reconsideration together in accordance with the directions given in paragraph 7 below and any further procedural directions given by a First-tier Tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

REASONS FOR DECISION

1. The claimant appeals against the decision of the First-tier Tribunal with the permission of Upper Tribunal Judge Marcus QC, granted on 6 June 2017. The written submission on behalf of the Secretary of State dated 3 August 2017 did not support the appeal. The claimant's representative, Mr Cooper of North Kensington Law Centre, replied on 8 September 2017.

2. For present purposes I do not need to go into the history of the case or deal with anything other than the tribunal's reasoning on the mobilising descriptors. That is because the tribunal, while disallowing the claimant's appeal against the decision that she was not entitled to employment and support allowance (ESA) from and including 27 July 2016, awarded her 6 points for descriptor 1(d) and 6 points for descriptor 2(c) (standing and sitting). Thus any potential increase in the points for mobilising would have brought the claimant to the necessary 15.

3. The tribunal said this in its statement of reasons about mobilising:

> "14. In her claim form [more accurately the ESA50 questionnaire], [the claimant] stated that on good days she was able to walk 50 metres and take a short (rest) before continuing on, but there were some days where walking 10 metres leaves her breathless and exhausted. In her appeal notice [the claimant] stated that she was unable to walk more than 50 metres on level ground without stopping due to severe exhaustion and discomfort and then cannot continue to walk for 20 minutes to let the pain subside, or repeat this more than a couple of times. In the letter of 8 December 2016, she stated that she can walk and has been advised to do so to lower cholesterol, but it varies from day to day. Some days are fine, but other days require a walking stick. Some days she can walk 50 metres (she wrote 100 metres but crossed this out and changed it to 50 metres) and then has to stop.
> 15. The information recorded by [the healthcare professional (doctor) who examined the claimant on 7 July 2016] was that she manages to walk 5 – 7 minutes and then has to stop and rest, and she does this every day. The evidence to the Tribunal was that in the summer, at the time around the decision date, she used her walking stick only [on] days she felt dizzy, which was once or twice a week. On days that she does not feel dizzy, she thought that she could walk for 100 metres, around her building, assuming the lifts are working, otherwise she walks around her flat. She walked because she needed to exercise as advised by her GP. In answer to our question of how long she would be out walking, she indicated

> that it would take her 30 – 40 minutes, but that includes stops. She also stated that she was unsure of how to measure distances and thought she stopped after about 2 bus lengths for about a minute, due to weakness in her leg. [The claimant] also indicated that she usually orders her food shopping on line but will walk to the local shop which takes around 10 minutes for her, although someone else would only take 4 – 5 minutes. She indicated that she would be able to walk to the local shop, if necessary, 5 days out of 7 days as it was next door almost, but would need to stop 2 – 3 times. She indicated that she also walks to the GP surgery which is 2 blocks away and takes 35 minutes, when it would take someone else 10 – 15 minutes. [The claimant] indicated that she went to Spain on holiday with her son in August 2016 and that she used a wheelchair at the airport.
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> 16. We noted the lack of consistency in [the claimant's] evidence within the [ESA50], appeal notice, letter of 8 December 2016 and to the assessor and at the hearing and found that this lack of consistency made it difficult to pick out one piece of information as a reliable indication of her limitations in mobility in order to base our conclusion. We did find however that based on the evidence given at the hearing, that she has more good days than bad days, as she only used the walking stick 2 out of 7 days when out walking, and this was when feeling dizzy.
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> 17. We base our decision on the weight of the evidence and our knowledge of the medical conditions. We do accept that the combination of the sciatica and heart condition and dizziness does restrict [the claimant's] mobility, as indeed her GP has confirmed, but find that for the majority of the time, [the claimant] is not as restricted as she claims. We find that she cannot unaided by another person mobilise more than 200 metres on level ground without stopping in order to avoid significant discomfort or exhaustion, or repeatedly mobilise 200 metres within a reasonable timescale because of significant discomfort or exhaustion. The finding is consistent [with] her walking 5 – 7 minutes without stopping, as related to the assessor shortly before the decision, which we [find] the most reliable piece of contemporaneous evidence. She is therefore entitled to 6 points for this activity."

4. When giving permission to appeal, Judge Markus suggested that it was not clear why the tribunal had picked out the claimant's recorded statement to the HCP as the most reliable element of the evidence, and that in any event that did not in itself demonstrate the distance that she thought she could cover in the 5 – 7 minutes. For the Secretary of State it was submitted that the tribunal had done its best to iron out the inconsistencies in the claimant's evidence and, in the light of her own recognition of difficulties in judging distances, was entitled to adopt her firm and clear statement to the HCP. That was especially as walking at the lowest end of "slow" (40 metres per minute), rather than "very slow", would take a person to 200 metres in five minutes. In his reply, Mr Cooper submitted that the tribunal's picking out of the statement to the HCP seemed arbitrary and that it might just as well have picked out the claimant's evidence about bus lengths or visits to local shops or GP (which got away from the problem of measurement in terms of metres).

5. Simply looking at those competing submissions I would find the matter very evenly balanced. I might just have come down on the claimant's side on the basis that, since the great majority of people are very poor judges of their own walking distances and timings unless using some measuring device (so that inconsistency is only to be expected), there was no more reason to expect even a "firm and clear" statement to the HCP to be more reliable than others, at least without further explanation. However, there is an additional issue that in my judgment clearly

indicates a material error of law.

6. That is in the form of the tribunal's finding of fact in the middle of paragraph 17 of the statement of reasons which adopted the terms of descriptor 1(d) without saying which of the two alternatives within the descriptor was satisfied. That in my judgment is not good enough as a finding of fact, because of the relationship of descriptor 1(d) with descriptors 1(a) and (c). If the tribunal considered that the claimant fell only within descriptor 1(d)(ii), because she could mobilise for more than 200 metres without stopping but could not achieve 200 metres repeatedly within a reasonable timescale, that would necessarily entail that she did not satisfy 1(c)(i) (because she could mobilise more than 100 metres) and would perhaps make it unlikely that she could satisfy descriptor 1(c)(ii) on the basis of not being able to mobilise 100 metres repeatedly. However, if the tribunal considered that the claimant fell within descriptor 1(d)(i), because she could not mobilise more than 200 metres without stopping, that would not as a matter of logical necessity exclude satisfaction of descriptor 1(c). Thus it might be necessary for a tribunal to explain why it chose descriptor 1(d)(i) rather than 1(c)(i). But more pertinently for the present case, if a claimant can only mobilise without stopping for some distance between 100 metres and 200 metres, that does not exclude the possibility that the claimant, while able to mobilise more than 100 metres without stopping, cannot achieve 100 metres repeatedly within a reasonable timescale and so satisfies descriptor 1(c)(ii). The same could potentially be said in relation to descriptor 1(a)(ii) and 50 metres. As a result, while it may not be necessary to the award of 6 points under descriptor 1(d) to specify which alternative is satisfied, in terms of the required underlying findings of fact on the whole activity of mobilising it is necessary in any statement of reasons to be more specific. It seems to me that there are two ways out where descriptor 1(d) is satisfied. The tribunal can identify the distance that it finds that the claimant can mobilise without stopping in order to avoid significant discomfort or exhaustion without considering the issue of repetition. There can then be a firm factual basis, allied to whatever explanation is appropriate, for not applying descriptor 1(c) or 1(a) and in particular for not applying descriptor 1(c)(ii). Alternatively, if the tribunal is unable to be so specific, it may be sufficient for it to explain that, while not sure precisely how far the claimant can mobilise beyond 100 metres without stopping, it has expressly considered descriptor 1(c)(ii) and is satisfied (and why) that the claimant can repeatedly mobilise 100 metres within a reasonable timescale. The question of what sort of range of estimates would be acceptable would very much depend on the circumstances of particular cases. What in my judgment is plainly not sufficient is to make a finding of fact simply in the terms used in the present case and then to say nothing at all in the statement of reasons about descriptor 1(c).

7. For that reason, the decision of the tribunal of 9 December 2016 must be set aside as involving an error of law. The claimant's appeal against the Secretary of State's decision of 27 July 2016 is remitted to a differently constituted First-tier Tribunal for reconsideration in accordance with the following directions. There must be a complete rehearing of the appeal on the evidence produced and submissions made to the new tribunal, which will not be bound in any way by any findings made or conclusions expressed by the tribunal of 9 December 2016. It would be helpful if before the rehearing the claimant's representative could indicate to the First-tier Tribunal which descriptors are being put in issue by the claimant (e.g. is activity 4 relied on or not?). I need give no other directions of law beyond the reminder to the new tribunal to bear in mind the points made in paragraph 6 above in its approach to seeking oral evidence from the claimant at the hearing and in working out its findings of fact. The evaluation of all the evidence will be entirely a matter for the

judgment of the members of the new tribunal. The decision on the facts in this case is still open.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 15 November 2017