

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. CE/1707/2017

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (13 February 2017, file reference SC 227/16/01403) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 and **REMITTED** to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

REASONS FOR DECISION

1. Mr G appeals against a decision of the First-tier Tribunal that he was not entitled to Employment and Support Allowance because he did not have limited capability for work. In other words, that he scored less than 15 points in the Work Capability Assessment (WCA) used to determine limited capability for work. The tribunal decided that Mr G's condition justified nine points only, due to his impaired ability to mobilise.

2. I granted Mr G permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision on the following grounds:

- (1) Arguably, the tribunal erred in law by failing to determine if it accepted Mr G's evidence of having stopped on a number of occasions while walking to the tribunal venue; and
- (2) Arguably, the tribunal failed to take into account the effects of Mr G's right arm problem when determining whether any ESA Work Capability Assessment (WCA) points were justified under the 'picking up and moving' activity area.

2. The Secretary of State does not support this appeal. Her representative argues:

- (1) In relation to ground 1, while the representative concedes that the tribunal did not determine whether it accepted Mr G's evidence of having stopped while walking to the venue, considering the tribunal's statement of reasons as a whole it made a defensible decision concerning his mobility that was properly reasoned;

- (2) In relation to ground 2, the representative draws attention to the *Training and Development ESA Handbook* said to be "issued to healthcare professionals by the DWP":

"This activity relates mainly to upper limb power, however joint movement and co-ordination may also have to be considered. It is intended to reflect the ability to pick up and transfer articles at waist level, i.e. at a level that requires neither bending down and lifting, nor reaching upwards. It does not include the ability to carry out any activity other than picking up and transferring, i.e. it does not include ability to pour from a carton or drug.

All the loads are light and are therefore unlikely to have much impact on spinal problems. However, due consideration should be given to neck pain and the associated problems arising from cervical disc prolapse and marked cervical spondylitis. These conditions may be aggravated by lifting weights in exceptional circumstances.

Within the descriptors, the concept of adaptation exists. There is no requirement to have two hands to achieve the tasks outlined in the descriptors".

The representative argues that, in the light of the contents of the *Handbook*, WCA descriptor 4(c) does not "consider the use of both arms;

- (3) The Secretary of State also relies on the Upper Tribunal's decision in *KH v Secretary of State* (ESA) [2014] UKUT 0455: "if it can be picked up and moved by the use of one arm and the upper body, presumably by wedging it under the arm, that will suffice";

- (4) Since Mr G gave evidence that his left arm was 'perfect', the Tribunal's approach to descriptor 4(c) cannot have involved an error on a point of law.

3. I shall deal with the mobility ground first. Having re-read the First-tier Tribunal appeal papers, I now appreciate that the written submission supplied to the First-tier Tribunal on Mr G's behalf did not dispute the Secretary of State's conclusion that 9 WCA mobilising points were justified. Taking that into account, I decide that the First-tier Tribunal did not err in law in awarding 9 mobilising points. In the light of Mr G's written submission, the tribunal's fact-finding and its reasoning were sufficient.

4. Now, the 'picking up and moving' WCA activity (activity 4, as set out in Schedule 2 to the Employment and Support Allowance Regulations 2008). The First-tier Tribunal found that "this activity relates to the ability to pick up an article at waist level without need for bending or reaching". The prescribed activity in issue is "picking up and moving or transferring by the use of the upper body and arms". The back, of course, is part of the upper body. The relevant descriptor in issue is 4(c): "cannot transfer a light but bulky object such as an empty cardboard box" (6 points).

5. In *KH*, Upper Tribunal Judge Mark said "If it can be picked up and moved by the use of one arm and the upper body, presumably by wedging it under the arm, that will suffice".

6. In my view, it is obvious that deploying the one arm 'wedging' technique described in *KH* involves some twisting of the spine and a degree of bending. In fact, I have tried it myself and that, admittedly un-scientific, test confirms what common-sense suggests. Even if one squats, some bending forward and spine rotation is necessary in order effectively to wedge a cardboard box between arm and upper body.

7. On my reading, the First-tier Tribunal either (a) excluded the effect, or possible effect, on Mr G's back of use of the 'one arm' technique, or (b) failed to take into account that consideration. Either way, the tribunal's decision involved an error on a point of law.

8. If reading (a) applies, the First-tier Tribunal misdirected itself in law. The upper body includes the back. Therefore, the effect on a back condition of picking up and moving a light, bulky object, using the one arm wedging technique, must be taken into account. In so far as the ESA Handbook suggests a different approach, I decline to follow it. It is not an authoritative guide to the interpretation of the ESA Regulations 2008.

9. If reading (b) applies, the First-tier Tribunal made an error on a point of law by failing to take into account a relevant consideration namely the effect of the one arm technique on Mr G's back condition.

10. The tribunal's error on a point of law cannot be considered immaterial since the tribunal found that Mr G experienced back pain "across the bottom of his back". I also note that, at the Healthcare Professional consultation, Mr G declined to attempt to bend forward or crouch down and stand up. The HCP did not remark that Mr G's actions were inconsistent with the other evidence.

11. The First-tier Tribunal's decision is set aside and Mr G's appeal against the Secretary of State's decision of 16 September 2016 is remitted to the First-tier Tribunal for re-determination. The next tribunal must address all issues arising on Mr G's appeal afresh. It follows that the next tribunal may not, in its reasoning, take into account the findings of fact and other conclusions of the tribunal panel whose decision I have set aside.

Directions

I direct as follows:

- (1) Mr G's appeal against the Secretary of State's decision of 16 September 2016 is remitted to the First-tier Tribunal for re-determination.
- (2) The Tribunal is to hold a hearing before re-determining Mr G's appeal.
- (3) The Tribunal panel that re-determines Mr G's appeal must not include any person who sat on the Tribunal panel that decided his appeal on 13 February 2017.
- (4) If Mr G wishes to rely on any further written evidence or arguments, they are to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued. Mr G is reminded that the law prevents the Tribunal from taking into account circumstances that did not exist at 16 September 2016, when the decision under appeal was taken, although the Tribunal may take into account post-decision evidence if it is relevant to the circumstances at 16 September 2016.

Apart from directions (1) and (3), the above directions are subject to any case management directions of the First-tier Tribunal.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
10 April 2018