IN THE UPPER TRIBUNAL **Case No.** CE/2821/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: As the decision of the First-tier Tribunal (which it made at Leeds on 19 May 2017 under reference SC007/16/102553) involved the making of an error of law it is set aside. Further, the case is remitted to the First-tier Tribunal for rehearing by a differently constituted tribunal panel.

This decision is made under section 12 of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS FOR THE REHEARING:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. The tribunal must not take account of circumstances that were not obtaining at the time of the decision appealed against: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, if it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

The issues

1. Most claimants who establish entitlement to employment and support allowance (ESA) do so by scoring at least 15 points under the activities and descriptors which are contained within Schedule 2 to the Employment and Support Allowance Regulations 2008 ("the 2008 Regulations"), thereby demonstrating limited capability for work. However, a claimant will be treated as having limited capability for work if that claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work (see regulation 29(2)(b) of the 2008 Regulations). It is only where a claimant fails to achieve a minimum of 15 points that a consideration of the possible applicability of regulation 29 is required. It was held in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ42, that a consideration of regulation 29 will encompass risk in the context of a hypothetical journey to or from a hypothetical workplace as well as in the workplace itself. In *PD v SSWP (ESA)* [2014] UKUT 148 (AAC) Upper Tribunal Judge Ward said he was finding it hard to imagine circumstances in which physical factors would cause the risk to arise during the journey in circumstances where it would not arise anyway within the workplace (see paragraph 15 of

that decision) though he did not rule it out. But he thought what was contemplated in this context in *Charlton* was "the person whose mental health problems caused difficulties with the journey to work". In this case though it is argued on behalf of the claimant by his representative Mr J Power of the Kirklees Law Centre that the First-tier Tribunal ("the tribunal") was required, in its regulation 29 assessment, to expressly consider and decide whether risk did arise in consequence of the claimant's physical difficulties.

Some relevant history

2. The claimant had been awarded ESA from 1 January 2016. According to the Secretary of State for Work and Pensions ("the Secretary of State") that was because "he was suffering from a musculoskeletal problem, sleep apnoea and a cardiovascular problem".

3. The claimant had completed a standard questionnaire (form ESA50) on 2 April 2016. In so doing he had set out, in quite a lot of detail, the difficulties he says he has with respect to mobility. He explained that he has deformities in both of his feet which has led to his having had surgery which was either unsuccessful or only partly successful. Further, he said that he has difficulties with his knees and his back. He indicated an inability to move around more than 50 metres and an inability to stand and sit in combination for more than 30 minutes. He did not, at that stage, indicate any other sorts of physical difficulty. He did not claim to have had any falls but nor did he say anything to indicate that he had not fallen. He did not claim to have any mental health problems.

4. On 22 July 2016 the claimant was examined by a health professional who went on to prepare a written report of the same date. According to that report the claimant had told the health professional that he had ceased his employment as a factory worker one year ago, that he would use a walking stick get about in his home, that the shopping would be done by his wife though he would accompany her at times and "walk round using the trolley", that he does not venture out-of-doors as often as he used to, that he could walk for 5-10 minutes before resting, that he is able to drive short distances albeit that he does not do so with the frequency he once did, and that when he goes to see his GP either his wife will drive him to the surgery or he will take a taxi. Under the heading "Description of functional ability" the health care professional has written "his legs give way at times due to pain but he has not had any falls". Presumably that information too came from the claimant.

5. On 30 August 2016 a decision-maker acting on behalf of the Secretary of State decided that the claimant did not have limited capability for work and could not be treated as having limited capability for work. So, there was no longer any entitlement to ESA. The claimant wrote seeking a mandatory reconsideration but that did not lead to any alteration to the decision. So the claimant appealed to the tribunal. On 23 January 2017 he wrote a lengthy letter to the tribunal setting out his arguments. He mentioned his mobility problems and said that whilst his performance was variable he would normally be able to walk about 50-70 yards before needing to stop. He said that he would experience pain which would increase with the distance he would walk. He commented "I have issues with balance and I have fallen a number of times, including the last time about 10 weeks ago". He explained that on that occasion he had fallen in the garage and had hurt his shoulder. He referred to an incident "about 3-4 months ago" when he said he had fallen when walking out-of-doors. He also claimed to have had "a number of stumbles and near misses". In addition to mobility difficulties the claimant also said he had problems relating to his mental health which was

said to impact upon his memory, ability to concentrate, his ability to cope with change, his ability to manage social contact and his ability to behave appropriately.

The Tribunal's consideration of the appeal

6. The tribunal considered the appeal at an oral hearing of 19 May 2017. It had before it in addition to the documents referred to above, various items of medical evidence and letters concerning the physical health difficulties which impact upon his mobility and also concerning the sleep apnoea.

7. The tribunal dismissed the appeal for reasons which it explained in a statement of reasons for decision ("statement of reasons"). As to the claimed mental health difficulties the tribunal expressed the view that the claimant "had significantly changed his account of the nature and extent of his health problems between completing his ESA50 and preparing his letter of appeal (which I take to be a reference to the letter of 23 January 2017). It found that, in fact, he did not have any significant mental health, cognitive or intellectual difficulties such as to enable him to score any points under the activities and descriptors contained within Schedule 2. Having made its position clear as to that, the tribunal then turned its attention to the mobility issues. It accepted that there were difficulties in that regard and it said this:

> " 26. The bulk of the medical letters and reports provided by [the claimant] dealt with the investigation and treatment and problems he has with his knees and feet. His knees were deemed to be so bad that replacement of both was a recommended medical treatment. This procedure had not yet taken place.
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> 27. The evidence about [the claimant's] ability to walk was inconsistent and unclear. Although he was reported as saying he could walk for 5-10 minutes at the WCA, his evidence at the hearing was that there were times when he might be able to walk for five minutes but there were other times, especially later in the day, when he would be unable to walk as far due to the stiffness in his knees and legs. We found [the claimant] to have a poor notion of time and distance. We concluded that there was considerable variability in the distance he could cover before stopping at any particular time.
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> 28. We also considered that the medical evidence, especially the letter from Mr MacEachern in May 2016, supported [the claimant's] description of having difficulty with walking any significant distance due to the pain in his knees. We accepted that he would need to stop and rest quite frequently. We found it unlikely that he would be able to walk for 10 minutes at any time before having to stop. We also accepted that there was some risk of falling as described by [the claimant] due to the problems with his feet which resulted in him walking more slowly and carefully rather than at a normal pace.
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> 29. We did not consider that the question of variability or the extent of the problems [the claimant] has with his knees and the soles of his feet were taken into account sufficiently at the WCA. We concluded, on the available evidence, that [the claimant] would have difficulty walking 200 metres repeatedly. There would be times when he could manage this distance but there would be other times when he would manage far less. There would be variability within each day.
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> 30. We therefore found descriptor 1d to apply and 6 points were awarded."

8. Insofar as it matters that wording would seem to suggest the tribunal was finding that mobility descriptor 1d(ii) rather than 1d(i) was applicable. But nothing turns on that.

9. Since the tribunal had only awarded 6 points (less than the 15 point threshold) it was necessary for it to go on to consider the possible applicability of regulation 29 of the 2008 Regulations. It did so and this is what it said:

> " 34. We also considered Reg 29 and Exceptional Circumstances. For this to be effective there would have to be a substantial risk to the mental or physical health of any person if [the claimant] was found to be capable of work. The advice from Mr Monkhouse, Consultant Orthopaedic Surgeon, in his letter of 1 June 2015, was that [the claimant] would be unlikely to be able to resume his previous job as a machine operator due to the demands on his feet. The requirements of ESA however are not job-specific and consideration has to be given to other types of employment that would be manageable despite the claimant's disablement.
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> 35. We concluded that if [the claimant] is working in a role that allows him to sit and does not require him to stand or to move around for any length of time then there will be no risk to his physical health. His mental health problems are mild and may in fact improve if he is able to resume working as the loss of his job and the physical difficulties in carrying it out seem to have been the main factors in his subsequent feelings of depression and anxiety.
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> 36. We found there was no substantial risk to [the claimant] or any other person and concluded that reg 29 did not apply."

10. Pausing there, it does not seem to me to be appropriate to factor into a consideration of the arising of risk in consequence of mental health problems, the possibility of improvement in consequence of any therapeutic effect a decision-maker or tribunal might think work has. The focus is simply on risk not on prospective improvement. But given the tribunal's findings that there were no significant mental health problems anyway, that does not matter in this case. It will be noted, though, that the tribunal did not actually say anything about the question of risk to the claimant arising in the context of the journey to and from a place of work.

The proceedings before the Upper Tribunal

11. The claimant through his representative sought permission to appeal on four different grounds. One of those grounds was a claimed failure on the part of the tribunal to address regulation 29 risk in the context of journeys to and from work in light of the mobility difficulties it had identified and, in particular as I understand it, the risk of falls. It was pointed out that the claimant did not drive regularly and that no findings had been made by the tribunal as to the availability of his wife to either walk with him or drive him to a place of work. I granted permission to appeal because I considered that ground to be arguable. But I expressed a preliminary view that the various other grounds relied upon were not. I explained why I did not think those grounds were arguable when I granted permission and they have not subsequently been revisited.

12. Since granting permission I have had the benefit of two submissions from each representative, Mr M Hampton for the Secretary of State and Mr Power.

13. Mr Hampton, in his submissions, struck a rather conciliatory note. His view was that the circumstances of the case were such that the tribunal was required to carry out "a full assessment" with respect to regulation 29 and that would involve a consideration as to whether risk would arise in consequence of the claimant's physical difficulties as found by the tribunal, during the journey to and from work. He accepted, on that basis, that the tribunal's decision ought to be set aside and that the case ought to be remitted for a rehearing. He did though point out the obvious practical difficulty that since what is being assessed is the safety of undertaking hypothetical journeys to and from a hypothetical place of work the ability of any third party assistance cannot be tested against specific circumstances or specific journeys. So, said Mr Hampton, the most useful evidence that could be obtained in that context would be evidence as to how the claimant gets about normally. Mr Power did not disagree with that,

or at least not expressly so, though he stressed the need for careful fact-finding, a need which he said had not been met in this particular case.

My reasoning

14. It is not at all controversial to say that an assessment of the risk envisaged in regulation 29(2)(b) will encompass a journey to and from a place of work. It is similarly uncontroversial to say that, in principle, any such risk that there might be may arise in consequence of physical difficulties as well as mental health difficulties. I do though respectfully agree with Upper Tribunal Judge Ward that it is likely that the Court of Appeal, in *Charlton*, had in mind mental health difficulties, perhaps such as severe anxiety or agoraphobia. But there is nothing in law which precludes a finding that risk has arisen purely on account of physical problems in the context of the journey. As to the assistance of third parties with the journey it was said in *PD,* in effect, that such could be taken into account so long as there was appropriate evidence about it. I do not understand Mr Power to be arguing anything different though he does criticise the tribunal for not making findings about such assistance.

15. A tribunal is not always required to address the possible applicability of regulation 29. That was pointed out in *NS v SSWP (ESA)* [2014] UKUT 115 (AAC) and some examples were given as to when it would or would not be necessary to address it. In this case the claimant had not expressly raised himself but he was, at the time he was lodging and then pursuing his appeal, unrepresented. The tribunal did decide to address regulation 29 and I accept Mr Power's argument that, its having so decided, it was obliged to do so in accordance with the requirements set out in *Charlton*. So it was obliged to consider not only risk in the workplace but also risk on the journey to and from the workplace.

16. As already noted, the tribunal did not address risk on the journey to and from the workplace. That might be because it thought, given its view as to the lack of mental health problems of significance, that there was no real question of any such risk arising. It might have been because there was evidence before it suggesting that the claimant did sometimes drive and that he would sometimes be driven to places by his wife. It might have been that it thought though there was some risk of falling it considered the steps he would take to mitigate that risk by "walking more slowly and carefully" prevented it arising (see paragraph 28 of the tribunal's statement of reasons as set out above). It might have been that it thought the lateness with which the concern had been raised suggested that it was a post-decision matter. But if it was relying upon one or more of those considerations it did not actually say so. On balance I prefer the view that it simply lost sight of any possible need to deal with risk during the journey. Although the claimant had raised concerns about falling only at a late stage he had raised them. So I have decided that, whilst I think it will be rare for the circumstances of any particular case to trigger a need for a tribunal to address risk during journeys due to physical factors or at least to say very much about it, there was just sufficient here for it to be properly concluded that it was obliged to do so even if only briefly.

17. So, I have concluded as indeed is accepted by Mr Hampton, that the tribunal did err in law. I have also asked myself whether that error can properly be regarded as a material one in the sense that it might have been capable of impacting upon the outcome. In that context there was little evidence of the claimant having suffered any falls until he had raised the matter for the very first time in his letter of 23 January 2017 but the tribunal had nevertheless

accepted that there was "some risk of falling". I have considered whether what it said in the final sentence of paragraph 28 of its statement of reasons for decision amounted to an actual finding that walking slowly and carefully would extinguish any risk from falling but the tribunal was not that explicit. So I cannot quite say that, had the tribunal not erred in the manner I have concluded it did, the outcome would nevertheless have been inevitable.

18 In light of the above I have decided to set aside the tribunal's decision and to remit. My having so decided, any other errors that the tribunal might have made will be subsumed by the rehearing which will now follow.

19. But I stress that, in general terms, I think it would be rare (though not impossible) for a claimant to succeed simply on the basis of risk on the journey to and from a workplace in consequence only of physical health difficulties in circumstances where those same difficulties do not lead to the risk arising in the workplace itself. So a failure to refer to the possibility of any such risk on the part of a tribunal is unlikely, absent unusual circumstances, to justify a finding that there has been an error of law of a material nature. Further, for the agoraphobic the facility of public transport will almost certainly not be a solution. But that cannot necessarily be said of a person who only has substantial physical health difficulties. There will thus be cases where, depending on the circumstances, all that will need to be assessed will be risk to and from a hypothetical bus stop at either end of the journey. Put another way there may depending on the facts only be a need to assess risk on the basis that a claimant will have to journey under his/her own steam on relatively short journeys. Following the reasoning in *PD*, cited above, the prospect of third party assistance on the journey will be a potentially relevant consideration though the availability of such cannot simply, without evidence, be assumed. Where the arguments as to risk relate to falling the use of such as walking sticks and walking frames will need to be considered.

The rehearing

20. The rehearing will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of all of the evidence before it including any further written or oral evidence it may receive.

21. If it concludes that the claimant does not score 15 points under Schedule 2 to the 2008 Regulations and does not otherwise satisfy any provisions enabling him to be treated as incapable of work, and if it concludes that the regulation 29 risk does not arise in the workplace or simply as a consequence of a finding of capability for work, then it will have to consider whether such risk arises during the journey. It will, as to that, and given the particular circumstances of this case and the assertions the claimant has made about the risk of falling, have to consider such in the context of physical factors. It will not of course, as Mr Hampton points out, be able to test the claimed difficulties against the actual demands of actual journeys to and from a specific workplace. But it will be able to take account, in general terms, of considerations such as a possible ability to access public transport. It will be able to take account of the facility of third party assistance where evidenced, perhaps in this case the ability and willingness or otherwise of the claimant's wife to drive him upon relevant journeys. It may wish to consider whether steps such as using a stick or walking frame or even just taking things more slowly and carefully as the previous tribunal had itself mentioned, might or might not extinguish risk that there might otherwise be. It may wish to

consider and make findings about the claimant's own ability or otherwise to drive regularly. It may wish to explore the reasons why the concern about falling was not raised earlier. As to that, of course, there are in general terms many possible reasons why specific concerns are not raised at the outset of the claiming process.

Conclusion

22. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated 15 May 2018